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WILLFUL IGNORANCE, CULPABILITY, AND THE CRIMINAL LAW

ALEXANDER F. SARCH[†]

INTRODUCTION

When a defendant is charged with a crime requiring knowledge of some fact, but the defendant deliberately avoided learning whether the fact in question obtained, it is common practice among federal courts to give so-called willful ignorance jury instructions.¹ Such instructions tell the jury that it may find the knowledge element for the crime to be satisfied by the defendant's willful ignorance of the relevant fact (also called the inculpatory proposition).² For example, since federal law makes it a crime to "knowingly . . . possess with intent to . . . distribute . . . a controlled substance,"³ a willful ignorance instruction in a drug possession case might permit the jury to find that the required knowledge is present if, say, the defendant was willfully ignorant of the fact that the substance he or she possessed was a narcotic. As used here, "the willful ignorance

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¹ See *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011) ("While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on [its] basic requirements.").

² See, e.g., *United States v. Heredia*, 483 F.3d 913, 917 (9th Cir. 2007) (en banc) (considering a challenge to willful ignorance jury instructions that 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." (internal quotation marks omitted)).

³ 21 U.S.C. § 841(a)(1) (2012).

doctrine" refers to the rule that juries may find a defendant to have possessed the requisite knowledge for a given crime merely on the ground that he was willfully ignorant of the relevant fact.⁴

The Supreme Court⁵ and all the federal courts of appeals⁶ have endorsed some version of the willful ignorance doctrine.

⁴ The doctrine this Article is concerned with thus 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. *See infra* notes 19–20 and accompanying text.

⁵ *See Global-Tech*, 131 S. Ct. at 2070–71.

⁶ *See* Jonathan L. Marcus, Note, *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. Pérez-Meléndez*, 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) ("The 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 (3d Cir. 2010); *United States v. Schnabel*, 939 F.2d 197, 204 (4th Cir. 1991) (holding "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 a "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) ("['T]he 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" (citations omitted)); *Heredia*, 483 F.3d at 917, 920 (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) (concluding "that an instruction on deliberate avoidance was appropriate"); *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000) ("[T]he 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.*, 594 F.3d 1360, 1377–78 (Fed. Cir. 2010) (finding the Federal Circuit's test for willful blindness to be improper but that in the case presented, the error was harmless), *aff'd sub nom. Global-Tech*, 131 S. Ct. 2060; *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, 340–41 (D.C. Cir. 2006).

However, a circuit split exists as to precisely what the mental state of willful ignorance *is* that would suffice for satisfying the knowledge element of the crime. The split has been noted by at least three courts.⁷

On the one hand, the Eighth, Tenth, and Eleventh Circuits take the position that in addition to (1) having suspicions about the fact of which knowledge is required and (2) deliberately refraining from investigating the matter, the defendant also must (3) have had a particular motive for remaining in ignorance: namely, to preserve a defense in the event of prosecution.⁸ According to what I call the *restricted motive approach*, all three of these elements must be present in order for a willfully ignorant defendant to be deemed to have possessed the requisite knowledge.

⁷ The Ninth Circuit addressed the split at length in *Heredia*, 483 F.3d at 919–20 (discussing “[w]hether the jury must be instructed that defendant’s motive in deliberately failing to learn the truth was to give himself a defense in case he should be charged with the crime,” and observing that several other circuits have adopted this motive prong; proceeding to reject motive prong). Further, the D.C. Circuit discussed it in *Alston-Graves*, 435 F.3d at 341 (noting that “[s]ome courts hold that a willful blindness instruction should not be given unless there is evidence that the defendant ‘purposely contrived to avoid learning all the facts in order to have a defense in the event of a subsequent prosecution,’” while “[o]ther circuits hold that there must be evidence ‘that [the defendant] was aware of a high probability [of the fact in dispute] and consciously avoided confirming that fact’ ” (alteration in original) (citations omitted)). In addition, the U.S. Tax Court also discussed the split in depth. See *Fiore v. Comm’r*, 105 T.C.M. (CCH) 1141, at *9–10 (2013) (noting that some courts require “the deliberate avoidance be motivated by a desire to avoid criminal responsibility,” but others do not).

⁸ *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) (internal quotation marks omitted)); *United States v. Delreal-Ordonez*, 213 F.3d 1263, 1268 (10th Cir. 2000) (“[T]he 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.” (internal quotation marks omitted)); *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)).

By contrast, most other circuits do not insist on this third "motive prong."⁹ Indeed, the motive prong was explicitly rejected by a recent en banc decision of the Ninth Circuit. In *United States v. Heredia*,¹⁰ 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.¹¹ Instead, the en banc court determined that "the requirement that [the] defendant have *deliberately* avoided learning the truth" was sufficient.¹² In so holding, the Ninth Circuit expressly rejected the approach of the Eighth, Tenth, and Eleventh Circuits.¹³ Rather, according to this *unrestricted approach*, to find that the defendant possessed the requisite knowledge, all that must be found is that the defendant had suspicions of the relevant fact and deliberately refrained from obtaining full knowledge.

This Article argues that both of these approaches are in tension with the courts' traditional rationale for the willful ignorance doctrine. As the Supreme Court observed in *Global-Tech Appliances, Inc. v. SEB S.A.*,¹⁴ "[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."¹⁵ Similarly, in *United States v. Jewell*, arguably the leading case on willful ignorance, the Ninth Circuit stated that "[t]he substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable."¹⁶ Thus, the normative justification that courts traditionally offer in favor of the willful ignorance doctrine is a claim about how culpable acting in willful ignorance is compared to acting knowingly—a claim that has been dubbed the *equal culpability thesis*.¹⁷ If this traditional rationale, premised on the equal culpability thesis, is

⁹ See, e.g., *Heredia*, 483 F.3d at 919–20 (discussing what the court calls the "motive prong" as a requirement for willful ignorance); see also *infra* notes 59–69 and accompanying text.

¹⁰ 483 F.3d 913.

¹¹ *Id.* at 919–20.

¹² *Id.* at 920.

¹³ *Id.*

¹⁴ 131 S. Ct. 2060 (2011).

¹⁵ *Id.* at 2069.

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

¹⁷ See Douglas N. Husak & 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, 53–58 (1994).

to be taken seriously, willful ignorance should be allowed to satisfy the knowledge element of the crime in *all but only* those cases where acting in willful ignorance really is at least as culpable as performing the same misconduct with knowledge.

However, this Article argues that neither side to the circuit split fully respects the traditional rationale because neither accurately reflects the true scope of the equal culpability thesis. The defect in the Ninth Circuit's unrestricted approach is that it is overinclusive. As I argue, it sometimes allows willful ignorance to satisfy the knowledge element of the crime even when the defendant is not as culpable as the analogous knowing wrongdoer. Therefore, this approach extends further than the equal culpability thesis supports. By contrast, the problem with the Eighth, Tenth, and Eleventh Circuits' restricted motive approach is that it is underinclusive. As I argue, it sometimes precludes willful ignorance from satisfying the knowledge element of the crime even though the willfully ignorant defendant *is* as culpable as the analogous wrongdoer. Therefore, it fails to respect the traditional rationale by arbitrarily stopping short of the full extent of liability that the internal logic of that rationale supports. This, in turn, gives those convicted on a willful ignorance theory grounds to complain that they are arbitrarily being punished more harshly than others who could have been convicted on a willful ignorance theory, but were not.

To arrive at a more normatively justified approach to the willful ignorance doctrine, a systematic account is needed of the conditions in which the equal culpability thesis holds. The task is yet more important because the equal culpability thesis is rarely defended explicitly.¹⁸ This Article attempts to fill this gap by defending a version of the thesis that more accurately captures the conditions under which acting in willful ignorance is as culpable as acting knowingly. This appropriately restricted version of the thesis is then used as the basis for offering a more normatively justified approach to the willful ignorance doctrine—one that avoids the overinclusiveness of the unrestricted approach and the underinclusiveness of the restricted motive approach, while also remaining practically implementable by courts.

¹⁸ *Id.* at 54 (noting that “the judgment that wilful ignorance and knowledge are equivalent in culpability, though frequently asserted, is seldom defended”).

The order of business is as follows. Part I explains the notion of willful ignorance, the equal culpability thesis, and the circuit split in more detail. After that, the Article proceeds to consider three natural strategies for defending the equal culpability thesis. Each strategy would provide the basis for a different approach to the willful ignorance doctrine, and seeing how these strategies fail reveals the normative flaws in both sides of the circuit split. It also paves the way for a better alternative.

Part II considers the first strategy for defending the equal culpability thesis, namely to claim that willful ignorance is just a species of knowledge. This approach has been tried, for instance, by the Model Penal Code ("MPC"). However, Part II explains why the general consensus among commentators is that this approach fails. There is widespread agreement that willful ignorance does not fall under the legal definition of knowledge.

Part III considers arguments for the claim that willful ignorance, although not identical to knowledge, nonetheless always is at least as culpable as knowledge. Part III shows that several existing arguments for this claim fail, and then offers a positive argument that there are some cases in which willful ignorance is not as culpable as knowledge. This shows the overinclusiveness of the Ninth Circuit's unrestricted approach: It permits conviction on a willful ignorance theory even in some cases in which the equal culpability thesis does not hold.

Part IV considers a third and final strategy for defending the equal culpability thesis. The idea is to restrict its scope to cover the cases of willful ignorance that, in fact, are as culpable as knowledge. The Eighth, Tenth, and Eleventh Circuits' restricted motive approach is an example of this strategy. While this Article contends that defending a restricted version of the equal culpability thesis is the best strategy for placing the willful ignorance doctrine on a secure normative footing, the restricted motive approach does not provide what is needed. It is underinclusive because the equal culpability thesis holds in a broader range of cases than those in which willful ignorance may substitute for knowledge on the restricted motive approach. An expanded version of the restricted motive approach might fare better, but to know what its contours should be, we need an account of exactly when the equal culpability thesis holds.

Part V, therefore, undertakes the task of formulating an account of when acting in willful ignorance really is as culpable as acting knowingly. This amounts to a defense of a suitably restricted version of the equal culpability thesis. 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 before performing the actus reus of the crime. The seriousness of one's breach of the duty of reasonable investigation, in turn, depends on a range of factors, including how easily the defendant might have investigated and his reasons for not investigating. When restricted to these conditions, the equal culpability thesis, it is argued, is true.

Finally, Part VI asks how to implement this suitably restricted equal culpability thesis to yield an approach to the willful ignorance doctrine that more fully respects the courts' traditional rationale. The aim, in other words, is to formulate a version of the doctrine that does a better job of allowing the mental state of willful ignorance to satisfy the knowledge element of the crime in all and only those cases in which the defendant's willful ignorance really is at least as culpable as the analogous knowing wrongdoer. Part VI considers the morally ideal approach, which is difficult to implement, and then settles on a more implementable approximation of the moral ideal. This proposal, it is argued, does a better job of respecting the courts' traditional rationale for the willful ignorance doctrine than either side to the current circuit split. Even if the proposal ultimately might be tweaked further for practicality reasons, the overriding aim of this Article is to shore up the normative basis for the willful ignorance doctrine and to clarify what is needed to arrive at a version of this doctrine that adequately respects its normative foundations.

I. WILLFUL IGNORANCE AND THE CIRCUIT SPLIT

In what follows, the phrase "the willful ignorance doctrine" is used to refer to the rule that juries may find the defendant to possess the requisite knowledge for a crime merely on the ground that he was willfully ignorant of the relevant fact. The willful ignorance doctrine thus should not be confused with the distinct evidentiary rule that facts tending to show willful ignorance can also be evidence from which a jury might infer actual

knowledge.¹⁹ Instead, the doctrine with which this Article is concerned provides that willful ignorance can by itself be sufficient to satisfy the knowledge element of a crime.²⁰

This Part gives the necessary background for investigating the normative foundations of the willful ignorance doctrine, which is the main focus of the Article. We need to know what willful ignorance is and how it relates to other familiar mental states, such as knowledge and recklessness. Moreover, we need an overview of the law on willful ignorance, as well as an understanding of the circuit split that this Article aims to adjudicate. Accordingly, Section A introduces some terminology and explains the backdrop of mental states against which willful ignorance is to be understood. Section B discusses the basic features of willful ignorance on which there is general agreement, and lays out the circuit split concerning one controversial element of willful ignorance. Section C sketches the normative foundations for the willful ignorance doctrine by formulating the equal culpability thesis and discussing the ways in which it might be defended. Finally, Section D seeks to explain the persistence of the circuit split by pointing out that each side has one apparent advantage over the other. This sets the stage for investing the true scope of the equal culpability thesis, and the resulting critique of both sides to the circuit split.

A. *Background: Knowledge and Recklessness*

To say that a crime, C, requires the mental state (or *mens rea*) of knowledge—in other words, is a *knowledge crime*—is to say that to be guilty of C, the defendant must have performed some action (the *actus reus*) while knowing some *inculpatory*

¹⁹ 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.”).

²⁰ 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.” *Id.*

proposition.²¹ For example, consider a hypothetical statute that defines second-degree arson as the act of intentionally damaging a building by setting fire to it while knowing that another person is inside at the time.²² Thus, the *actus reus* would be setting fire to a building, and the inculpatory proposition (or one of them) that must be known to be guilty of this crime would be that there is a person in the building. Similarly, as noted above, 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. As a general matter, the inculpatory proposition often will be a factual circumstance such that the defendant's knowledge of it makes the *actus reus* wrongful—or at least more so.

As the caveat in the previous sentence indicates, we can distinguish at least two kinds of crimes involving inculpatory propositions: (1) those where the underlying action is independently bad and the defendant's knowledge of the inculpatory proposition merely serves as an aggravating factor, and (2) those where the underlying action would not be independently bad without the defendant's knowledge of the inculpatory proposition.²³ The previously referenced crime of second-degree arson would be an example of the first category. For such crimes, knowing the inculpatory proposition merely makes the defendant's already bad conduct worse. By contrast, crimes involving the possession, receipt, or transportation of controlled substances or contraband belong to the second category. Possessing, receiving, and transporting substances is

²¹ MODEL PENAL CODE § 2.02(1)–(2) (2001).

²² In fact, arson statutes tend to state that it is sufficient that the defendant know or *reasonably should know* that a person was in the building at the time. *Cf.* N.Y. PENAL LAW § 150.15 (McKinney 1979) (“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 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)). However, because second-degree arson is otherwise such a vivid example, I set this complication aside in what follows. Other statutes could be used just as well. For example, first-degree burglary in New York requires, among other things, that the defendant “knowingly enters or remains unlawfully in a dwelling with intent to commit a crime therein.” *Id.* § 140.30.

²³ These are the two main types of cases one encounters in considering *malum in se* crimes. Matters are more complicated for *malum prohibitum* crimes. But the latter are not obviously in the core of the criminal law and will therefore be set aside for purposes of this Article.

not bad in its own right, but intuitively becomes so if it is done knowing that the substance in question is of a prohibited nature (and one has no justification or excuse). Any account of willful ignorance should accommodate both types of case.

To see how willful ignorance relates to other mental states in the criminal law, the contrast between knowledge and recklessness is particularly important. Although the MPC has been the subject of much critical discussion,²⁴ it captures the traditional understanding of these mental states well enough for present purposes. According to the basic MPC definition, "[a] person acts knowingly with respect to a material element of an offense" when he is "aware" or "practically certain" that the element obtains, depending on what sort of element it is.²⁵ The MPC proceeds to qualify this basic definition,²⁶ but since the qualification is an attempt to capture the phenomenon of willful ignorance,²⁷ it is discussed separately in Part II. This Article generally uses the MPC's basic definition of knowledge. By contrast, the MPC defines the mental state of recklessness such that "[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."²⁸

²⁴ See, e.g., Dannye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 253-57 (1997); Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 706-19 (1983).

²⁵ MODEL PENAL CODE § 2.02(2)(b) ("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." (emphasis added)).

²⁶ MODEL PENAL CODE § 2.02(7).

²⁷ As the comments to section 2.02(7) of the Model Penal Code explain, "Paragraph (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 § 2.02 cmt. 9 (Tentative Draft No. 4, 1955); see also Marcus, *supra* note 6, at 2231-32. However, it is argued below that this attempt to define knowledge so as to encompass cases of willful blindness does not succeed. See *infra* Part II.

²⁸ MODEL PENAL CODE § 2.02(2)(c); 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

From these definitions, it is clear that the MPC employs a picture on which one's confidence in a proposition comes in degrees. On this picture, one's confidence in the truth of a proposition may be assigned a number between 0 and 1, where 0 represents absolute confidence that the proposition is false and 1 represents absolute confidence that it is true. If one's confidence (or credence, as it is also called in epistemology²⁹) in the proposition is 0.5, say, this would correspond to a belief that the proposition is as 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 the risk that one is aware of becomes "substantial."³⁰ 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.³¹ After all, in the criminal law, "knowledge requires both belief, or subjective certainty, and the actual truth or existence of the thing known."³² Call the level of confidence required to have knowledge of *P* the "knowledge threshold." We

unjustifiable risk, or 'conscious risk creation.' . . . [It is] a willingness to act in the face of a perceived probability of the existence or creation of a particular fact, circumstance, or result." (footnotes omitted)).

²⁹ See, e.g., David Lewis, *A Subjectivist's Guide to Objective Chance*, in 2 STUDIES IN INDUCTIVE LOGIC AND PROBABILITY 263, 263–93 (Richard C. Jeffery ed., 1980); Jacob Ross & Mark Schroeder, *Belief, Credence, and Pragmatic Encroachment*, 88 PHIL. & PHENOMENOLOGICAL RES. 259, 259, 281 (2014) (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 DEGREES OF BELIEF 37, 37 (Franz Huber & Christoph Schmidt-Petri eds., 2009) (discussing the "Lockean thesis" and 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").

³⁰ MODEL PENAL CODE § 2.02(2)(c).

³¹ *Id.* § 2.02(2)(b); 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).").

³² Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1375 (1992); see also Simons, *supra* note 31, at 474.

need not specify exactly what likelihood one must believe *P* has of being true in order to count as knowing it—perhaps it is ninety percent certainty, ninety-five percent certainty, etc. The required level might also vary depending on the context.³³

Note that this concept of knowledge is not the one found in the philosophical literature, where knowledge is typically taken to require justified true belief, plus some additional condition designed to get around so-called “Gettier counterexamples.”³⁴ By contrast, the criminal law notion of knowledge 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.³⁵ Indeed, it is not surprising 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. It is plausible that someone who sets fire to a building while subjectively certain that someone else is inside, but whose evidence does not objectively justify that belief, is just as culpable (all else equal) as someone who lights the fire with the same subjective certainty but whose evidence *does* objectively justify the belief. Thus, the differences between the criminal law and philosophical concepts of knowledge may not seem to matter much when it comes to culpability assessments. In any case, it is not necessary here to fully critique the legal conception of knowledge. Simply bear in mind that this Article uses the term in its legal sense.³⁶

³³ Cf. Ross & Schroeder, *supra* note 29, at 275.

³⁴ See Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 ANALYSIS 121, 121 (1963); Jonathan Jenkins Ichikawa & Matthias Steup, *The Analysis of Knowledge*, STAN. ENCYCLOPEDIA OF PHIL. (2012), available at <http://plato.stanford.edu/entries/knowledge-analysis/> (“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.’”).

³⁵ See Charlow, *supra* note 32, 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. . . . [C]riminal knowledge is correct belief.”).

³⁶ One other bit of background is helpful to bear in mind. It is a familiar observation that the MPC establishes a “culpability hierarchy.” See, e.g., Danyne

B. *The Willful Ignorance Doctrine*

When it comes to the law concerning willful ignorance, begin by noting that there are a number of procedural rules that courts tend to apply in connection with giving willful ignorance jury instructions. For example, some circuits have held that willful ignorance instructions are not permitted unless (1) the defendant himself asserts his own ignorance,³⁷ or (2) the defendant took some affirmative actions to avoid obtaining knowledge.³⁸ Some circuits require both.³⁹ Some courts also caution that a willful

Holley, *Culpability Evaluations in the State Supreme Courts from 1977 to 1999: A "Model" Assessment*, 34 AKRON L. REV. 401, 409–10 (2001) (assessing how far states have gone in adopting the "Model Penal Code culpability definitions and hierarchical interrelationship"); Simons, *supra* note 31, at 464 (discussing "the hierarchical ordering of states of mind in contemporary law"). In other words, 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, this hierarchy appears to hold only if the object of these mental states is held fixed across the examples one considers. 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 (say, the death of 1,000 people) than to purposefully cause a small harm (say, 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 of this Article are constructed with this point in mind.

³⁷ 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.'" (quoting *United States v. Gabriel*, 125 F.3d 89, 98 (2d Cir. 1997))); *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) (internal quotation marks omitted)); *United States v. George*, 347 F. App'x 941, 943 (4th Cir. 2009).

³⁸ See, e.g., *United States v. Freeman*, 434 F.3d 369, 378 (5th Cir. 2005) (permitting willful ignorance instruction only if, among other things, "the defendant purposely contrived to avoid learning of the illegal conduct" (internal quotation mark omitted)).

³⁹ 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 . . ." (internal quotation marks omitted)); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1411 (10th Cir. 1991) ("[T]he deliberate ignorance instruction must not be tendered to the

ignorance instruction should not be given if the evidence supports actual knowledge rather than willful ignorance.⁴⁰

At a minimum, there is broad agreement on the rule 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, however that mental state is to be understood.⁴¹ But how, exactly, is the mental state of willful ignorance to be understood? That is the question addressed in the rest of this Section. The circuit split discussed below deals with one important aspect of this question.⁴²

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." (emphasis added) (citing *United States v. Picciandra*, 788 F.2d 39, 46, 47 (1st Cir. 1986))).

⁴⁰ *Anthony*, 545 F.3d at 64 (stating that willful blindness instruction not appropriate unless "the instruction, taken as a whole, cannot be misunderstood as mandating an inference of knowledge" (internal quotation marks omitted)); *United States v. Perez-Tosta*, 36 F.3d 1552, 1564–65 (11th Cir. 1994) ("[D]istrict court[s] should not instruct the jury on 'deliberate ignorance' when the relevant evidence points only to *actual knowledge*, rather than deliberate avoidance." (internal quotation marks omitted)).

⁴¹ 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. (internal quotation mark omitted)); *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 "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'" (quoting *United States v. Scott*, 159 F.3d 916, 922 (5th Cir. 1998))); *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 (stating that a willful blindness instruction is appropriate only if "the evidence supports an inference of deliberate ignorance" (internal quotation mark omitted)); *de Francisco-Lopez*, 939 F.2d at 1411 ("[T]he 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." (citing *Picciandra*, 788 F.2d at 46, 47)).

⁴² There are other circuit splits in this area as well. One concerns the appropriate standard of review for willful blindness jury instructions. Justin C. From, Note, *Avoiding Not-So-Harmless Errors: The Appropriate Standards for Appellate Review of Willful-Blindness Jury Instructions*, 97 IOWA L. REV. 275, 287–92 (2011). Another concerns what elements of the crime of conspiracy a willful ignorance instruction may be used for. See Jessica A. Kozlov-Davis, Note, *A Hybrid Approach to the Use of Deliberate Ignorance in Conspiracy Cases*, 100 MICH. L. REV. 473, 474, 477, 482–83 (2011).

1. Willful Ignorance Generally

The basic contours of the notion of willful ignorance are agreed on by both sides of the circuit split. As the Supreme Court observed:

While 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.⁴³

Glanville Williams put the point more succinctly in terms of suspicions: A person is willfully ignorant when he “has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance.”⁴⁴ In light of the broad agreement on these “basic requirements,” we can formulate the following *basic account* of willful ignorance:

Basic Willful Ignorance: To be willfully ignorant of an inculpatory proposition, *P* (which let us suppose happens to be true⁴⁵), one must at a minimum:

- (1) have sufficiently serious suspicions that *P* is true (that is, believe that there is a sufficiently high probability of the truth of *P*⁴⁶),—and
- (2) deliberately (as opposed to, say, negligently or recklessly) fail to take reasonably available steps to learn with greater certainty whether *P* actually is true.

The circuit split concerns whether this basic account should be supplemented with an additional requirement regarding the

⁴³ *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011) (emphasis added).

⁴⁴ GLANVILLE WILLIAMS, *CRIMINAL LAW* 157 (2d ed. 1961).

⁴⁵ It is not clear whether it makes sense to say that a person can be willfully ignorant of a proposition that is false. However, this need not concern us here, since, barring abuses of the legal system, one likely would not be charged with a knowledge crime unless the inculpatory proposition were true.

⁴⁶ The Supreme Court used the term “high probability,” adopting the language from the MPC section 2.07. But this reflects the MPC’s somewhat idiosyncratic approach to willful ignorance, which will be criticized in a moment. Moreover, to have a suspicion that *P*, it does not seem one must think *P* highly likely—the mere belief that it is *somewhat* likely seems to suffice. Hence my use of the term “substantial probability” here.

particular reason for which one opted not to investigate one's suspicions.

Before proceeding, a few points of clarification are in order. To begin with, the second prong is essential in order to distinguish willful ignorance from ignorance more generally. Ignorance, after all, need not be willful or deliberate—it might be merely negligent or reckless or the like. Suppose, for example, there is some question about which one is uncertain, and while one meant to investigate the matter, one simply forgot or was distracted from investigating. In such a case, it is clear that one would count as ignorant, but one's ignorance would not be *willful*—just inadvertent (perhaps negligent). For ignorance of some fact or question to be truly willful, it seems one must consciously decline to acquire additional information about the matter. The concept of willful ignorance aims to capture scenarios in which a defendant is aware there is a substantial likelihood that some relevant factual circumstance obtains, but then consciously decides not to take available steps to ascertain whether that circumstance really does obtain.⁴⁷ The second prong in the basic account captures this point.

Next, note that in the first prong of the basic account, the notion of suspicion was used, following Glanville Williams. By contrast, when the Supreme Court formulated the first requirement in the passage quoted above, it used the notion of belief in a sufficiently “high probability” in the inculpatory proposition.⁴⁸ In this, the Court apparently adopted the language of MPC § 2.02(7). However, as discussed below, this provision reflects the MPC's distinctive approach to willful ignorance,⁴⁹ which is criticized in Part II. Accordingly, Williams's more general formulation in terms of suspicions seems preferable. In any case, the two formulations are connected, since a suspicion

⁴⁷ See WILLIAMS, *supra* note 44, at 159.

⁴⁸ *Global-Tech*, 131 S. Ct. at 2070.

⁴⁹ As Marcus explains:

According to the Model Penal Code (the Code), knowledge of a fact is satisfied by finding an “awareness of a high probability” that it existed. The drafters of the Code explain that they defined knowledge of a fact this way in order to address “the situation British commentators have denominated ‘willful blindness’ or ‘connivance,’ the case of the actor who is aware of the probable existence of a material fact but does not determine whether the fact exists or does not exist.”

Marcus, *supra* note 6, at 2231–32 (footnotes omitted).

that *P* can be understood, roughly, as a sufficiently high confidence in *P* that is less than practical certainty. It is not necessary here to determine exactly how great a likelihood one must believe *P* has of being true in order to count as having a suspicion of *P*.⁵⁰ (Here, too, it is plausible that the degree of confidence needed to count as having a suspicion that *P* can vary depending on what is at stake.⁵¹) Offering a complete account of the notion of a suspicion is beyond the scope of this Article, however.⁵²

2. The Circuit Split

The circuit split this Article focuses on concerns whether a third requirement should be added to the basic account of willful ignorance.⁵³ In particular, the question is whether willful ignorance also requires that

- (3) one's specific reason for not investigating the suspicions one had about *P* is that one wanted to preserve an ignorance defense in the event of prosecution.

The *restricted motive approach* of the Eighth, Tenth, and Eleventh Circuits answers this question in the affirmative. These circuits hold that for a defendant to be convicted of a

⁵⁰ I think it is plausible that having a suspicion that *P* does not require that one thinks *P* highly likely—the mere belief that it is somewhat likely seems to suffice. But not much turns on this point for present purposes.

⁵¹ 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.

⁵² 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”—for example, 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.

⁵³ For cases discussing this split, see *supra* note 7.

knowledge crime on a willful ignorance theory, the defendant must not only have had suspicions about the inculpatory proposition and deliberately refrained from investigating the matter, but also had to have been motivated to do so by the desire to avoid liability.⁵⁴ For example, as the Eighth Circuit explains the approach:

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.⁵⁵

These circuits have all recently reaffirmed their commitment to the motive prong.⁵⁶ Some commentators—most notably Douglas N. Husak and Craig A. Callender—also construe willful ignorance to include the motive prong.⁵⁷

On the other hand, other circuits do not insist on this motive condition. The primary case to explicitly reject it is the en banc

⁵⁴ *United States v. Willis*, 277 F.3d 1026, 1032 (8th Cir. 2002); *United States v. Delreal-Ordonez*, 213 F.3d 1263, 1268 (10th Cir. 2000); *United States v. Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003).

⁵⁵ *Willis*, 277 F.3d at 1032 (emphasis added) (quoting *United States v. Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992)).

⁵⁶ See *United States v. Fernandez*, 553 F. App'x 927, 936–37 (11th Cir. 2014) (“A deliberate ignorance instruction is warranted ‘when the facts 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 in the event of a subsequent prosecution*.’” (emphasis added) (citing *United States v. Garcia-Bercovich*, 582 F.3d 1234, 1237 (11th Cir. 2009))); *United States v. Hillman*, 642 F.3d 929, 939 (10th Cir. 2011) (citing with approval the Tenth Circuit’s pattern jury instructions, which state that such instructions are permitted “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*.” (emphasis added) (internal quotation marks omitted)); *United States v. Aleman*, 548 F.3d 1158, 1166 (8th Cir. 2008) (“A willful blindness instruction is proper if the evidence ‘support[s] 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 in the event of a subsequent prosecution*.’” (alteration in original) (second emphasis added) (citing *Barnhart*, 979 F.2d at 651)).

⁵⁷ Husak & Callender, *supra* note 17, at 41 (“In summary, a defendant is wilfully ignorant of an incriminating proposition *p* when he is suspicious that *p* is 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 blame or liability in the event that he is detected*.” (emphasis added)).

decision of the Ninth Circuit in *Heredia*.⁵⁸ The court noted that its cases had not been entirely consistent as to “[w]hether the jury must be instructed that defendant’s motive in deliberately failing to learn the truth was to give himself a defense in case he should be charged with the crime.”⁵⁹ However, the court proceeded to overrule its earlier cases suggesting that such a motive was required,⁶⁰ and expressly rejected the Eighth, Tenth, and Eleventh Circuits’ approach as well.⁶¹ Instead, the court held that a “two-pronged instruction”—requiring only that the defendant suspected “drugs were in the vehicle . . . and deliberately avoided learning the truth”⁶²—was adequate.⁶³

Other circuits resemble the Ninth Circuit in not insisting on this motive requirement. These include the Second,⁶⁴ Third,⁶⁵ Fifth,⁶⁶ Sixth,⁶⁷ and Seventh Circuits.⁶⁸ At least two circuits—the

⁵⁸ *United States v. Heredia*, 483 F.3d 913, 924 (9th Cir. 2007) (en banc).

⁵⁹ *Id.* at 919.

⁶⁰ *Id.* at 920 (“We conclude, therefore, that the two-pronged instruction given at defendant’s trial met the requirements of *Jewell* and, to the extent some of our cases have suggested more is required, they are overruled.” (citation omitted)).

⁶¹ *Id.*

⁶² *Id.* at 917 (internal quotation marks omitted).

⁶³ *Id.* at 920–21.

⁶⁴ *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003) (“A conscious avoidance instruction ‘may only be given if . . . the evidence is such that a rational juror may reach [the] conclusion beyond a reasonable doubt . . . that [the defendant] was aware of a high probability [of the fact in dispute] and consciously avoided confirming that fact[.]’” (alteration in original) (internal quotation mark omitted) (quoting *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000))).

⁶⁵ *United States v. Stadtmauer*, 620 F.3d 238, 257 (3d Cir. 2010) (discussing the Third Circuit’s “precedent requiring that such an instruction make clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability” (internal quotation marks omitted)); *United States v. Flores*, 454 F.3d 149, 155 (3d Cir. 2006) (noting that the “Government establishes willful blindness by proving that a defendant ‘was [subjectively] aware of the high probability of the fact in question,’ and ‘could have recognized the likelihood of [illicit acts] yet deliberately avoided learning the true facts’” (second alteration in original) (citations omitted)).

⁶⁶ *United States v. Mendoza-Medina*, 346 F.3d 121, 132–33 (5th Cir. 2003) (“We have established a two-pronged test for determining when the evidence supports a deliberate ignorance instruction The evidence at trial must raise two inferences: (1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct.”); see also *United States v. Brooks*, 681 F.3d 678, 702 (5th Cir. 2012) (quoting *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011)).

⁶⁷ *United States v. Mitchell*, 681 F.3d 867, 876 (6th Cir. 2012) (“Before giving the instruction, the district court therefore must determine that there is evidence to support an inference that the defendant acted with reckless disregard of [the high probability of illegality] or with a conscious purpose to avoid learning the truth.”

First and Fourth—have issued conflicting decisions on this point, and it is unclear which side of the split they fall on.⁶⁹

Moreover, it is plausible that the Supreme Court favors the Ninth Circuit's unrestricted approach. In its recent *Global-Tech* decision, when sketching the willful ignorance doctrine, the Court mentioned only the two prongs of the basic account of willful ignorance, and did not add the motive prong.⁷⁰ Indeed, *Global-Tech* has been cited by some circuits in support of the claim that the Supreme Court does not favor the restricted

(alteration in original) (internal quotation marks omitted)); *United States v. Geisen*, 612 F.3d 471, 485–86 (6th Cir. 2010) (“[A] deliberate ignorance instruction is warranted to ‘prevent[] a criminal defendant from escaping conviction merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct.’” (alteration in original) (quoting *United States v. Gullett*, 713 F.2d 1203, 1212 (6th Cir. 1983))).

⁶⁸ *United States v. Tanner*, 628 F.3d 890, 904 (7th Cir. 2010) (“[A]n ostrich instruction is appropriate only when (1) a defendant claims a lack of guilty knowledge and (2) the government presents evidence that suggests that the defendant deliberately avoided the truth.” (internal quotation marks omitted)); *United States v. Ramsey*, 785 F.2d 184, 190 (7th Cir. 1986) (Easterbrook, J.) (rejecting the motive-to-avoid-criminal-prosecution element and holding that a “simple, but sufficient, instruction would be: ‘You may infer knowledge *from a combination of suspicion and indifference to the truth*. If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly, as I have used that word.’” (emphasis added)).

⁶⁹ Compare *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, (2) the facts suggest a conscious course of deliberate ignorance . . .” (internal quotation marks omitted)), with *United States v. Brandon*, 17 F.3d 409, 452 (1st Cir. 1994) (stating that “the instruction is proper 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 in the event of a subsequent prosecution*’” (emphasis added) (quoting *United States v. Rivera*, 944 F.2d 1563, 1571 (11th Cir. 1991))); compare *United States v. Jinwright*, 683 F.3d 471, 479 (4th Cir. 2012) (requiring that “the evidence supports an inference that a defendant was subjectively aware of a high probability of the existence of a tax liability, and purposefully avoided learning the facts pointing to such liability” (internal quotation marks omitted)), with *United States v. Ebert*, 178 F.3d 1287, 1999 WL 261590, at *11 (4th Cir. 1999) (unpublished table decision) (requiring that “the evidence support[s] the inference that the defendant was aware of the 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 in the event of a subsequent prosecution* [sic]” (alteration in original) (emphasis added) (internal quotation marks omitted)).

⁷⁰ See *supra* note 43 and accompanying text.

motive approach of the Eighth, Tenth, and Eleventh Circuits.⁷¹ However, it is not clear how much to make of this point, since *Global-Tech* did not expressly address or seek to resolve this circuit split.

C. *The Equal Culpability Thesis*

The equal culpability thesis is the centerpiece of the normative justification for the willful ignorance doctrine. Courts⁷² and commentators⁷³ who try to justify the willful ignorance doctrine usually 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 claims that “wilful ignorance is the ‘moral equivalent’ of knowledge; it involves a degree of culpability that is equal to genuine knowledge.”⁷⁴ Indeed, as they point out, “[u]nless these two distinct mental states were equally culpable, it would be outrageous to hold a

⁷¹ *United States v. Yi*, 704 F.3d 800, 804–05 (9th Cir. 2013) (observing that “[d]eliberate ignorance contains [only] two prongs: (1) a subjective belief that there is a high probability a fact exists; and (2) deliberate actions taken to avoid learning the truth” (citing *Global-Tech*, 131 S. Ct. at 2070)); *Brooks*, 681 F.3d at 702 (holding that “[t]he Fifth Circuit Pattern Instruction meets the standard set forth by the Supreme Court in *Global-Tech*”).

⁷² 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* *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 (internal quotation marks omitted)); *United States v. Heredia*, 483 F.3d 913, 926 (9th Cir. 2007) (en banc) (Kleinfeld, J., concurring) (“‘Wilfulness’ requires a ‘purpose of violating a known legal duty,’ or, at the very least, ‘a bad purpose.’ That is why wilful blindness is ‘equally culpable’ to, and may be substituted for, positive knowledge.” (footnotes omitted)); *United States v. Jewell*, 532 F.2d 697, 700, 704 (9th Cir. 1976) (en banc) (stating that “[t]he substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable” and that “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); *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 808 (3d Cir. 1994) (describing “the mainstream conception of wilful blindness as a state of mind of much greater culpability than simple negligence or recklessness, and more akin to knowledge”); *Rivera*, 944 F.2d at 1570 (noting that the willful ignorance doctrine “is premised on the belief that acts conducted under the guise of deliberate ignorance and acts committed with positive knowledge are equally culpable”).

⁷³ *See* Husak & Callender, *supra* note 17, at 53–57; *infra* notes 106–41 and accompanying text.

⁷⁴ Husak & Callender, *supra* note 17, at 53.

defendant with the first mental state liable for violating a statute that required the second mental state."⁷⁵ For ease of exposition, the 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 is aware of a sufficiently high likelihood that *P* is true, has access to a reasonable method of determining whether *P* in fact is true, but deliberately refrains from making use of it. On these suppositions, A2 is (at least) as culpable for her action as A1 is for his.

Note that this formulation of the equal culpability thesis is general in the sense that it makes a claim about *all* cases of willful ignorance in its basic form (that is, as construed by the basic account). However, one might not endorse the equal culpability thesis as a general claim about willful ignorance in its basic form. 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. As seen in Part IV, there are two more or less equivalent ways to formulate such a restricted version of the thesis. First, one might build the restrictions directly into the thesis. Second, one might build the restrictions into the concept of willful ignorance that is then used to formulate the thesis. For instance, one might adopt some technical conception that covers only a subset of cases of basic willful ignorance (as do Husak and Callender⁷⁶ and the Eighth, Tenth, and Eleventh Circuits, arguably). If one then uses this technical concept to formulate the equal culpability thesis, this would incorporate one's preferred restrictions. It makes little theoretical difference which way of restricting the thesis one uses, though it could make a practical

⁷⁵ *Id.*

⁷⁶ *Id.* at 41.

difference to, say, the transparency of the law or its justification.⁷⁷

There are three main ways of defending the equal culpability thesis. The first is to argue that willful ignorance is just a subspecies of knowledge (as the law construes it).⁷⁸ If this were true, performing the actus reus of a crime in willful ignorance would always be as culpable as performing it with knowledge because to do it in willful ignorance would literally be to do it knowingly. Second, one might accept that willful ignorance is not a form of knowledge, but nonetheless try to argue that acting in willful ignorance is always as culpable as acting with knowledge.⁷⁹ This would be to defend the general version of the thesis, namely, ECT (stated above). Third, one might defend a restricted version of the thesis.⁸⁰ Each of these strategies for defending the equal culpability thesis is considered in depth in subsequent Parts: the first in Part II, the second in Part III, and the third in Part IV. This Article argues that only the third strategy remains viable.

D. Explaining the Circuit Split

Before considering how ECT is to be defended and evaluating whether the approaches on either side of the circuit split can be made to fit with a plausible version of ECT, we should pause to ask what explains the persistence of the circuit split in the first place. The answer is that each side of the split has one advantage over the other.

To appreciate the rationale for each side of the split, distinguish between two conceptions of willful ignorance. First, we might be interested in the commonsense notion of willful ignorance that we encounter not just in the law, but in moral discourse in general. Although it might not be given the name “willful ignorance” outside the law, we nonetheless encounter the concept in everyday life—as evidenced by familiar phrases like “sticking your head in the sand,” “closing your eyes to the truth,” and “not knowing only because you don’t want to know.” On the other hand, we might be interested in a technical legal concept of willful ignorance. Such a technical concept might depart from

⁷⁷ For more on this transparency point, see *infra* Part IV.

⁷⁸ See *infra* Part II.

⁷⁹ See *infra* Part III.

⁸⁰ See *infra* Parts IV–V.

the contours of the commonsense concept in order to serve a particular legal purpose.

The argument in favor of the unrestricted approach is that it better captures the commonsense notion of willful ignorance than the Eighth, Tenth, and Eleventh Circuits' restricted motive approach. On the latter approach, one's specific reason for remaining in ignorance has to be that one wanted to preserve a defense against liability.⁸¹ Construed as an account of the commonsense notion of willful ignorance, though, this approach does not fare very well. The reason is that, intuitively, the willfully ignorant actor's decision not to investigate his or her suspicions can be made *for a variety of reasons*, and the desire to avoid liability is just one of many possibilities.

While the sort of reason singled out by the restricted motive approach—namely, wanting to avoid liability—is one *possible* reason for deciding to remain ignorant, one might make this decision for *other* reasons as well. Moreover, some of these reasons for opting not to investigate plausibly can render one's ignorance—and thus the actions performed from that mental state—more or less culpable than other such reasons. Perhaps one might decide not to investigate a suspicion that an important figure in one's life (say, a loyal friend or mentor) is engaged in illegal activity because one naïvely hopes to preserve the high esteem in which one holds that person. Alternatively, one's reasons for remaining ignorant might stem from wishful thinking—for example, when choosing not to dig deeper into evidence that one's spouse is having an affair or that one's child is stealing. Or perhaps 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 simply feels overworked.

Husak and Callender contend that the motive prong is needed because to be willfully ignorant, one's "failure to gain more information cannot be due to mere laziness, stupidity, or the absence of curiosity."⁸² They maintain that "if the motivational condition is not posited, then a person who does not act on his suspicion about p, merely because of laziness or a lack

⁸¹ See *supra* note 8 and accompanying text.

⁸² Husak & Callender, *supra* note 17, at 40.

of curiosity, may be held to be wilfully ignorant of p.”⁸³ However, at least on conceptual grounds, this view seems mistaken. After all, it seems possible to *consciously* decide not to investigate out of laziness or a lack of curiosity. This would be the case, for instance, if one considers the matter, but then thinks to oneself, “I should really investigate, but it just doesn’t seem worth it.” Husak and Callender are correct, of course, that one’s ignorance would not be *willful* if laziness, stupidity, or lack of curiosity simply *caused* one not to investigate, but not via a conscious decision.⁸⁴ This would merely amount to inadvertent or negligent (perhaps reckless) ignorance. For the failure to investigate some relevant factual circumstance to give rise to truly *willful* ignorance, there must be a conscious or knowing decision not to investigate. Husak and Callender are right to want our account of willful ignorance to rule out cases of non-willful, merely inadvertent or negligent ignorance.⁸⁵ But this does not require adopting the motive prong, i.e. making the desire to preserve a defense a precondition for willful ignorance. Instead, it is enough that one merely made a conscious decision not to investigate *for some reason or other*.

As a result, the Ninth Circuit’s unrestricted approach—which does not require any particular motive for remaining in ignorance—reflects the commonsense notion of willful ignorance better than the restricted motive approach. Accordingly, if one wants the law to employ the commonsense meanings of concepts, the unrestricted approach seems preferable.

If the unrestricted approach is preferable on abstract conceptual grounds, the restricted motive approach seems attractive for different reasons. In particular, the restricted motive approach can be seen as an attempt to craft a technical legal conception of willful ignorance that encompasses only a particularly culpable subset of cases of willful ignorance. The aim in doing so would be to restrict the legal notion of willful ignorance to cases where the equal culpability thesis plausibly holds. After all, the desire to avoid liability seems an especially culpable reason for not investigating one’s suspicions about the inculpatory proposition. Accordingly, the restricted motive approach is at least a plausible attempt to ensure that willful

⁸³ *Id.* at 41.

⁸⁴ *Id.*

⁸⁵ *Id.*

ignorance can satisfy the knowledge element only in cases where the equal culpability thesis holds. Whether the restricted motive approach actually *succeeds* in this aim is questioned below (in Part IV), but this line of thought is likely what gives the Eighth, Tenth, and Eleventh Circuits' approach its distinctive attractiveness.

By contrast, the unrestricted approach favored by the Ninth Circuit does not come with any similar ready-made normative justification. The unrestricted approach is neutral as to the defendant's reasons for choosing not to investigate her suspicions. This approach appeals to willful ignorance in its basic form and does not attempt to define willful ignorance so that only some especially bad cases of willful ignorance fall within its ambit.⁸⁶ What this means is that for any defendant who is willfully ignorant in the basic or commonsense meaning, it is an open question whether she is at least as culpable as the analogous knowing wrongdoer.⁸⁷ Thus, the unrestricted approach must be supplemented by some independent argument for thinking that acting in willful ignorance is as culpable as acting with knowledge. As a result, the reason one might be attracted to the restricted motive approach over the unrestricted approach is that the former comes ready-made with a story about why it is normatively justified, while the latter does not.

II. WILLFUL IGNORANCE IS NOT A FORM OF KNOWLEDGE

The simplest way to defend ECT is to argue that willful ignorance just is a subspecies of knowledge as the law construes it. If it were, then it would be trivially true that performing the *actus reus* of a crime in willful ignorance would be as culpable as doing so with knowledge. For in that case, to act in willful ignorance would literally be to act knowingly.

⁸⁶ *United States v. Heredia*, 483 F.3d 913, 920 (9th Cir. 2007) (en banc).

⁸⁷ Deborah Hellman makes a similar point. See Deborah Hellman, *Willfully Blind for Good Reason*, 3 CRIM. L. & PHIL. 301, 302 (2009). 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. *Id.* 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.* (internal quotation marks omitted).

Nonetheless, this strategy does not withstand scrutiny. There is widespread agreement among both commentators⁸⁸ and courts⁸⁹ that willful ignorance (on either conception noted in the last Part) is not identical to or a species of knowledge as understood in the criminal law.

To begin with, it is clear that a willfully ignorant defendant will not always meet the basic definition of knowledge embodied in MPC § 2.02(b). This provision states that to have knowledge of a material element, one must be “aware” or “practically certain” that the element obtains, depending on what kind of element it is.⁹⁰ However, since willful ignorance requires only suspicions of the inculpatory proposition (as indicated in prong (1) of the basic account), it is clear that a defendant can be willfully ignorant without possessing the sort of subjective

⁸⁸ See Charlow, *supra* note 32, at 1390 (“[M]ost definitions of wilful ignorance delineate a mens rea that is the equivalent neither of knowledge nor recklessness.”); Hellman, *supra* note 87, at 303 (endorsing the “view that contrived ignorance itself is not a form of knowledge”); Husak & Callender, *supra* note 17, at 51 (arguing that “many (but not all) willfully ignorant defendants do not possess knowledge of the incriminating proposition p in either the philosophical or the more colloquial senses”); Kozlov-Davis, *supra* note 42, at 482–83 (noting that “[i]t 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); Robbins, *supra* note 28, at 226 (noting that “limitations imposed on the [willful ignorance] doctrine by the courts also indicate that deliberate ignorance is not knowledge”); Frans J. von Kaenel, Note, *Willful Blindness: A Permissible Substitute for Actual Knowledge Under the Money Laundering Control Act?*, 71 WASH. U. L. Q. 1189, 1212–13 (1993) (“[W]illful blindness is simply not the equivalent of recklessness or actual knowledge.”).

⁸⁹ Courts also widely recognize that willful blindness is not the same as the mental state of knowledge. See, e.g., *United States v. Freeman*, 434 F.3d 369, 378 (5th Cir. 2005) (“The deliberate indifference charge permits ‘the jury to convict without finding that the defendant was aware of the existence of illegal conduct.’” (quoting *United States v. Moreno*, 185 F.3d 465, 476 (5th Cir. 1999))); *United States v. Svoboda*, 347 F.3d 471, 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)). 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 Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2072 (2011) (Kennedy, J., dissenting) (citing *United States v. Jewell*, 532 F.2d 697, 706 (9th Cir. 1976) (en banc) (Kennedy, J., dissenting)).

⁹⁰ MODEL PENAL CODE § 2.02(2)(b) (2001) (“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.” (emphasis added)).

certainty that counts as knowledge under § 2.02(b). Indeed, if the defendant possessed the requisite subjective certainty (and there was adequate evidence to this effect), it would not be necessary to prosecute the defendant under a willful ignorance theory in the first place.

This much is fairly uncontroversial. The reason it might come as something of a surprise that willful ignorance is not a form of knowledge is that the modification made by § 2.02(7) to the basic definition of knowledge (i.e. § 2.02(b)) was intended by the drafters of the MPC to accommodate cases of willful blindness.⁹¹ Section 2.02(7) states that "knowledge is established if a person is aware of a high probability of [the relevant fact's] existence, unless he actually believes that it does not exist."⁹² The comments to the MPC note that "[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."⁹³

The reason many cases of willful ignorance will fall outside even MPC § 2.02(7)'s expanded 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 (whatever the relevant level of probability might be here). After all, it is plausible that one can be willfully blind toward *P* even in cases where one merely has *suspicions* that *P* (that is, only believes it has some substantial, but certainly not a "high," chance of being true), and then deliberately avoids learning with certainty whether *P* obtains.⁹⁴ For example, to use a case offered by Husak and Callender, if a drug dealer asks three tourists to each carry a suitcase into the United States, but credibly promises to only put drugs in one of the three suitcases, then each tourist will know that there is a thirty-three percent chance that his suitcase

⁹¹ Marcus, *supra* note 6, at 2231–32 ("The drafters of the Code explain that they defined knowledge . . . this way [i.e. so that it could be satisfied by "awareness of a high probability" of a fact] in order to address 'the situation British commentators have denominated "willful blindness" or "connivance." '").

⁹² MODEL PENAL CODE § 2.02(7).

⁹³ MODEL PENAL CODE § 2.02 cmt. 9 (Tentative Draft No. 4, 1955).

⁹⁴ See *United States v. Heredia*, 483 F.3d 913, 918 n.4 (9th Cir. 2007) (en banc) (noting that a "willfully blind defendant is one who took *deliberate* actions to avoid confirming suspicions of criminality").

contains drugs.⁹⁵ 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 intuitively be willfully ignorant. Thus, some paradigm cases of willful ignorance will fall outside of the MPC's definition of knowledge as expanded by § 2.02(7), even though it was intended to capture the phenomenon of willful ignorance.⁹⁶

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 likely depart even further from the criminal law's traditional understanding of knowledge, but there are independent reasons to think that this strategy will not succeed.

Husak and Callender offer an elegant example showing that the willfully ignorant actor is not necessarily a knowing actor regardless of how knowledge is understood.⁹⁷ Their example involves 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's lack of knowledge is non-willful. 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

⁹⁵ See Husak & Callender, *supra* note 17, at 37–38.

⁹⁶ Marcus argues that the best response to “the problems the various willful blindness doctrines create is simply to abolish them,” and he instead argues that MPC “Section 2.02(7), which provides a less rigid definition of knowledge, offers a more desirable alternative.” Marcus, *supra* note 6, at 2254. However, his proposal does not get around the 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.

⁹⁷ Husak & Callender, *supra* note 17, at 51.

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.⁹⁸

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. Thus, if we are to defend the equal culpability thesis and thereby place the willful ignorance doctrine on a secure normative footing, some other strategy for doing so must be pursued.

III. THE EQUAL CULPABILITY THESIS IS NOT GENERALLY TRUE: PROBLEMS FOR THE UNRESTRICTED APPROACH

The next strategy for justifying the willful ignorance doctrine is to argue that willful ignorance, though distinct from knowledge, nonetheless is as culpable as knowledge. This would amount to a defense of ECT as a general claim about all cases of willful ignorance in its basic form. The unrestricted approach, adopted by the Ninth and other circuits,⁹⁹ requires some such defense of ECT as a general claim. After all, the unrestricted approach allows willful ignorance instructions to be given whenever the defendant meets the basic definition of willful ignorance.¹⁰⁰ This approach would be fully supported by the courts' traditional rationale only if acting in willful ignorance in its basic form were always as culpable as acting knowingly.

However, this Part argues that ECT as a general claim about willful ignorance in its basic form is false. Therefore, the unrestricted approach turns out to be overinclusive. Section A argues that several existing attempts to defend something like ECT as a general claim do not fully succeed. Section B goes further by arguing affirmatively that ECT as a general claim about willful ignorance in its basic form is false. The reason is that there can be cases in which a person meets the basic definition of willful ignorance but nonetheless is less culpable than the analogous knowing wrongdoer. Section C shows that

⁹⁸ *Id.*

⁹⁹ See *supra* notes 58–71 and accompanying text.

¹⁰⁰ *United States v. Heredia*, 483 F.3d 913, 920–21 (9th Cir. 2007) (en banc). See generally *supra* notes 58–68.

these considerations reveal the flaw in the Ninth Circuit's unrestricted approach, which permits willful ignorance jury instructions in any case in which the defendant meets the basic definition of willful ignorance.

A. *Existing Defenses of ECT as a General Claim*

ECT as a general claim (as opposed to a restricted version) holds that any action performed with a mental state that satisfies the basic account of willful ignorance, sketched above,¹⁰¹ is at least as culpable as the analogous knowing action would be.¹⁰² Courts usually rely on this general version of ECT as the basis for giving willful ignorance instructions.¹⁰³ But despite being frequently cited, it is rarely defended explicitly.

This is perhaps unsurprising since offering a compelling argument for ECT is no easy task. As Husak and Callender explain, it is difficult to evaluate ECT:

[I]n 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.¹⁰⁴

Almost twenty years after that passage was written, the evaluation of the state of play in philosophy of the criminal law remains largely unchanged.¹⁰⁵ Nonetheless, a few commentators

¹⁰¹ See *supra* Part I.B.

¹⁰² See *supra* Part I.C.

¹⁰³ See *supra* note 72.

¹⁰⁴ Husak & Callender, *supra* note 17, at 54–55 (footnotes omitted).

¹⁰⁵ 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 generally LARRY ALEXANDER & KIMBERLY KESSLER 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 generally, e.g., STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* 17 (2006); Peter Strawson, *Freedom and Resentment*, in 48 *PROCEEDINGS OF THE BRITISH ACADEMY* (1962); Jules Coleman & Alexander Sarch, *Blameworthiness and Time*, 18 *LEGAL THEORY* 1, 1–6 (2012); Leonard Kahn, *Moral Blameworthiness and the Reactive Attitudes*, 14 *ETHICAL THEORY & MORAL PRAC.* 131 (2011). The same is true of the “corrupt reasons theory” of blameworthiness that

have taken the bull by the horns and attempted to offer overt arguments in favor of ECT as a general claim—or something close. However, the remainder of this Section argues that these attempts do not succeed in justifying ECT as a general claim.

1. Charlow's Defense of ECT

Robin Charlow offers a brief argument for something like ECT, which is premised on the idea that willfully ignorant actors generally are likely to have decided to avoid knowledge out of some sort of "corrupt motive."¹⁰⁶ 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.¹⁰⁷

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.¹⁰⁸

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."¹⁰⁹

figures centrally into, for example, Gideon Yaffe's work. See GIDEON YAFFE, *ATTEMPTS: IN THE PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* 38 (2010).

¹⁰⁶ Charlow, *supra* note 32, at 1417.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* One might also read Charlow as offering a defense of something like the restricted motive approach, discussed *infra* in Part IV. As Part V shows, I would be sympathetic to Charlow's view, thus construed.

¹⁰⁹ *Id.* at 1418.

At first glance, one might be tempted to question Charlow's claim that someone who decides to remain ignorant of an inculpatory proposition, and does so for a corrupt motive, likely is "as insensitive and indifferent to the criminality of his act as" the knowing actor.¹¹⁰ There is nothing in principle preventing a criminal from being highly sensitive to the criminality of his act, as well as sympathetic to the foreseeable victims of his crime. We can imagine a sensitive criminal whose overly-developed capacity for empathy makes it difficult for him to tune out thoughts of the negative impact his actions might have on others. Such an individual might decide to remain in ignorance precisely to spare himself from the powerful guilt he would feel if he acted with knowledge that his conduct would harm others.¹¹¹ Such a motive for remaining ignorant appears culpable, but does not stem from a lack of sympathy or indifference. Thus, Charlow's argument might seem not to account for other ways in which a willfully ignorant person's motives can be corrupt besides insensitivity or indifference.

To this, Charlow might respond that her claim was not about the defendant's *feelings* of insensitivity, but rather the *lack of regard* for the interests of others that the defendant's actions manifested. Insofar as culpability ascriptions track such lack of due regard,¹¹² then Charlow might well be correct in claiming that someone whose willful ignorance stems from a corrupt motive might display as much lack of regard for the interests of others, and so be just as culpable as the analogous knowing wrongdoer.¹¹³

The trouble is that we cannot be sure. The main difficulty for Charlow is the speculative nature of her argument. It is essentially an appeal to intuition in assessing the relative culpability of willful ignorance and knowledge generally. This is perhaps what accounts for the hedged language in which she couches her conclusions. She asserts the willfully ignorant are

¹¹⁰ *Id.* at 1417.

¹¹¹ Others describe 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. . . . The Ostrich hopes . . . she has the strength to resist temptation—only she doesn't want to find out yet." David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957, 968 (1999).

¹¹² Cf. Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CALIF. L. REV. 931, 938–39 (2000).

¹¹³ Charlow, *supra* note 32, at 1417–18.

"probably as insensitive and indifferent"¹¹⁴ as knowing actors, and that the former "will *usually* be about as malevolent"¹¹⁵ as the latter.

However, one might legitimately want some guarantee that the willfully ignorant actor Charlow describes will always be at least as malevolent or lacking in due regard for others as the analogous knowing wrongdoer. Can there not be some motives for remaining in ignorance that are corrupt, but not sufficiently corrupt to render the actor as culpable as a knowing wrongdoer?

What is more, one might wonder what *explains* the truth of this culpability equivalence when it holds. What is it that makes one's motive for remaining in ignorance *sufficiently* corrupt for the required culpability equivalence to hold? Where do we set the cut-off point? It will not do to simply assert that the kind of corrupt motive required is one that renders the defendant at least as culpable as the analogous knowing wrongdoer. That, after all, would be unilluminating. Thus, more is needed to adequately explain why willful ignorance of the sort Charlow has in mind is as culpable as the analogous knowing misconduct. Still, as noted below, her emphasis on a corrupt motive for remaining ignorant captures an important insight.

2. Luban's Defense of the ECT

David Luban offers a different sort of defense of something akin to ECT. He suggests that the concept of willful ignorance in fact comprises three distinct prototypical cases, each of which corresponds to a different level of culpability.¹¹⁶ He dubs them the "[f]ox," the "unrighteous [o]strich" and the "half-righteous [o]strich."¹¹⁷ 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.¹¹⁸ This character "aims to do wrong and structures his own ignorance merely to prepare a defense."¹¹⁹ Luban then describes two ostrich characters that bury their

¹¹⁴ *Id.* at 1417 (emphasis added).

¹¹⁵ *Id.* at 1418 (emphasis added).

¹¹⁶ Luban, *supra* note 111, at 968–69.

¹¹⁷ *Id.* at 969.

¹¹⁸ *Id.* at 968–69.

¹¹⁹ *Id.* at 969.

heads in the sand, but not for reasons as malicious as the fox.¹²⁰ First, there is the *unrighteous ostrich* who "doesn't want to know she is doing wrong, but would do it even if she knew."¹²¹ By contrast, the *half-righteous ostrich* "shields herself from guilty knowledge, but would actually do the right thing if the shield were to fail."¹²² In other words, she too does not want to know that what she is doing is wrong, but if given knowledge of the ways in which her action is wrong, she would not proceed to do 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.¹²³ Luban argues that at the moment the fox acts to prevent himself from acquiring full knowledge, i.e. performs the so-called "*screening* actions,"¹²⁴ he effectively has the mens rea of purpose.¹²⁵ Since he would do the act even if given knowledge of its true nature, and merely is engaged in a clever attempt to set up a defense, the fox seems to act from a desire to perform the action.¹²⁶ By contrast, the unrighteous ostrich does not affirmatively want to do the crime, but would do it even if given knowledge.¹²⁷ Thus, Luban claims the unrighteous ostrich is "precisely fitted for the common-law equation of willful ignorance with knowledge," since "[b]y definition, her guilt is unchanged whether she knows or not, because her behavior would be unchanged."¹²⁸ 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."¹²⁹ Accordingly, Luban

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* (using the term "*screening* actions" to denote "the actions or omissions by which an actor shields herself from unwanted knowledge").

¹²⁵ *Id.*

¹²⁶ *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.").

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

endorses a version of ECT: He thinks the thesis true of any defendant who fits the pattern of either the fox or the unrighteous ostrich.¹³⁰

Luban seems correct about the half-righteous ostrich: This character does meet the traditional definition of recklessness. This is 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.¹³¹

However, the trouble with Luban's argument concerns his evaluation of the unrighteous ostrich.¹³² To see why, notice that Luban's justificatory strategy is to look at the mental state the unrighteous ostrich possesses when performing the "screening actions" designed to preserve her actual ignorance.¹³³ His approach thus "amounts to broadening the time-frame in which we consider the unwitting misdeed [that is, the actus reus of the crime in question], by regarding it as a unitary action *that begins when the actor commits the screening actions*."¹³⁴ 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?'"¹³⁵ He contends that "the earlier self's attitude toward the unwitting misdeed" can in effect be imputed to the later self who actually performs the actus reus of the crime in question.¹³⁶

This view is flawed, however. Luban 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.¹³⁷ The trouble is that the unrighteous ostrich, when

¹³⁰ *Id.*

¹³¹ Husak & Callender, *supra* note 17, at 42 (noting that "all wilfully ignorant defendants are reckless").

¹³² I think the prospects for Luban's argument are better when it comes to the fox. However, if all Luban manages to secure is a version of ECT saying that only willfully ignorant actors who fit the pattern of the fox are at least as culpable as knowing wrongdoers, then his version of ECT would be overly narrow. This would be for the same reasons as Part IV argues that the restricted motive approach is too narrow. The fox is stipulated to remain in ignorance in order to preserve a defense, but Part IV argues that there are other ways for a willfully ignorant actor to be at least as culpable as a knowing wrongdoer than just this one.

¹³³ See Luban, *supra* note 111, at 973-75.

¹³⁴ *Id.* at 973.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

she performs her screening actions, *does not actually have the mental state of knowledge*. Instead, Luban assumes that the unrighteous ostrich can be treated *as if* she were a knowing actor because she *would* go on to perform the actus reus even if given full knowledge of its nature and effects.¹³⁸

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 the individual *actually* acted with that mental state.¹³⁹ 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.¹⁴⁰ At first glance, one might be tempted to agree because the ostrich is herself responsible for the fact that she does not possess full knowledge (i.e. that the relevant counterfactual circumstances do not obtain). However, the argument still fails because the mental state one *would* have had 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 determinative of how culpable one is for the actual action.

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

Culpability for Counterfactual Mental States ("CMS"): Consider A and her counterfactual self, A*, who are as similar as can be except for one difference noted below. Both A and A* perform a certain type of action, X. A is in circumstances C and does X with mental state, M. A* is in C* (not C) and does X with a more

¹³⁸ See *id.* at 975.

¹³⁹ It seems deeply problematic—a violation of the ideas of fairness that underlie our due process norms—to blame (let alone convict) people for acting with a mental state they do not actually possess, merely because they would have acted with that mental state under certain non-actual circumstances.

¹⁴⁰ See *id.* at 974–75 (“[W]e answer our question about the Ostrich's mental state toward the misdeed by answering a counterfactual question about her disposition to commit it: ‘What would the Ostrich have done had she not contrived her own ignorance?’”).

culpable mental state, M^* . However, *were* A in C^* , she *would* do X with M^* (just like A^* does). Moreover, suppose that A herself is responsible for the fact that she is in C, not C^* . 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 people in bear costumes as a child.) One day, he heads to the park to 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 will lead to a forest fire (which, let us stipulate, it would). In fact, however, Joe *knows* he tends to get into 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 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, but the most obvious

proposals fare no better.¹⁴¹) Accordingly, since Luban's argument relies on CMS to establish that the unrighteous ostrich is just as bad as a knowing criminal actor, his argument fails.

B. *A Positive Argument Against ECT as a General Claim*

Having seen several existing defenses of something like ECT that leave something to be desired, this Section offers a positive argument that ECT as a general claim about willful ignorance in its basic form is false. The argument proceeds in several steps. First, a general principle about culpability, which figures prominently in the criminal law, is introduced. This principle raises a general question about how willful ignorance possibly could be as culpable as the analogous knowing misconduct. Next, it is argued that the only apparent answer to this question is

¹⁴¹ The most obvious proposal is to replace the phrase "A herself is responsible for the fact that she is in C, not C*" in CMS with "A herself is *culpable* for the fact that she is in C, not C*." 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 also refute 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.

Another possibility is to 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 realizes that they do not know whether they are carrying drugs, but when they entertain the hypothesis 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 willfully ignorant actors to actually entertain the hypothesis that they have knowledge about the inculpatory proposition and then form a plan about what they would do if they 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 he or 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.

seen to fail once it is recalled that willful ignorance in its basic form allows for many different kinds of reasons for deliberately failing to investigate. This, then, makes it plausible that there can be cases in which willfully ignorant individuals seem to be less culpable than their knowing counterparts.

1. A Principle About Culpability

The criminal law is often thought to embody the assumption (roughly) that the more confidence one has in the truth of an inculpatory proposition, the more culpable one is when one proceeds to perform the actus reus of the relevant crime with that mental state.¹⁴² Consider again the hypothetical statute defining second-degree arson as lighting a building on fire while knowing that there is a person inside.¹⁴³ If the arsonist believes only that this proposition has a substantial likelihood of being true (say, a twenty percent or thirty percent chance), then he would be reckless with respect to it when he proceeds to set the building alight. By contrast, if he is practically certain that the proposition is true—however much confidence that requires (say, ninety-five percent)—then he acts with knowledge. It is intuitively plausible that, all else equal, the more certain the arsonist is of this inculpatory proposition while acting, the more culpable he is for the crime.¹⁴⁴ More precisely, these considerations suggest the following principle:

Comparative Culpability Principle (“CCP”): For any two people who commit the actus reus of a crime, if they are identical in all respects except that one is more

¹⁴² Charlow, for instance, 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.” Charlow, *supra* note 32, at 1394–95.

¹⁴³ Cf. N.Y. PENAL LAW § 150.15 (McKinney 1979).

¹⁴⁴ Ken Simons appears to endorse essentially the same principle being put forward here. See 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, 251 (2002) (“As the degree of risk that the actor subjectively appreciates increases, his decision to act notwithstanding those risks becomes increasingly culpable.”).

confident in the truth of the inculpatory proposition, *P*, than the other, then—assuming there are no relevant excuses or justifications, and all else is equal—the person with the greater degree of confidence¹⁴⁵ in *P* is more culpable than the one with the lesser degree of confidence.¹⁴⁶

If CCP is correct, it would account for the intuition that lighting a building on fire while aware of a substantial risk that a person is inside (that is, while reckless) is somewhat less culpable—even if just a bit—than lighting it on fire while practically certain (knowing) that a person is inside. The latter, after all, appears to manifest greater disregard or disrespect for others than the former.¹⁴⁷ Although I find it plausible that something like CCP is true, my aim is not to offer a full-blown defense of it here. Rather, since it appears to underlie certain features of our criminal law—perhaps most importantly, the tendency to punish knowledge gradations of a crime (e.g. homicide) more severely than recklessness gradations of that same crime¹⁴⁸—I will take CCP on board in what follows.

¹⁴⁵ To be clear, CCP is meant to involve one's subjective credence in the proposition.

¹⁴⁶ One might think this principle holds only if the one person is substantially, or at least noticeably, more confident in *P* than the other person. For example, if A is 65% confident in *P* and B is 65.001% confident in *P*, one might think our intuitive culpability attributions are not fine-grained enough to allow this slight difference in confidence to have any impact on A's and B's relative culpability. (Thanks to Andrei Marmor for pressing me on this point.) Either CCP or this slightly amended version of it will suffice for the present argument.

¹⁴⁷ Perhaps one could derive CCP from the assumption that all culpability is at bottom a matter of insufficient regard for the interests of others. For example, Larry Alexander has 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.” Alexander, *supra* note 112, at 931. 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 seem to support CCP.

¹⁴⁸ Compare MODEL PENAL CODE § 210.2(1)(a) (2001) (stating that “criminal homicide constitutes murder when it is committed . . . knowingly”), *with id.* § 210.3(1)(a) (stating that “[c]riminal homicide constitutes manslaughter when it is committed recklessly”). This supports the claim that in general knowing homicide is thought to be worse than reckless homicide. There are two exceptions, of course. First, recklessness so severe that it “manifest[s] extreme indifference to the value of human life” can also suffice for murder. *Id.* § 210.2(1)(b). Second, knowing homicide

2. A Question

If CCP is right, it raises a question about how willful ignorance could possibly be as culpable as knowing misconduct. Any defendant for whom a willful ignorance jury instruction would actually be needed will fall short of having knowledge of the relevant inculpatory proposition, *P*.¹⁴⁹ After all, were the defendant certain enough of *P* to qualify as having knowledge (and the evidence showed it), it would not be necessary to convict the defendant on a willful ignorance theory. Accordingly, wherever a willful ignorance jury instruction is in fact called for (as opposed to just being desired by the prosecution), the defendant will have a lower credence in *P* than a similarly situated person with knowledge. Thus, by CCP, such a willfully ignorant defendant would be less culpable than his or her knowing counterpart—at least assuming all else is equal. The upshot is that ECT—the claim that willfully ignorant actors generally are just as culpable as their knowing counterparts—would be false, *unless* we can show that all else is generally *not* equal when it comes to willful ignorance.

But what could the general feature of willful ignorance be that would always make up for the difference in culpability that CCP says normally obtains between actors with a sub-knowledge degree of belief in *P* and actors with knowledge that *P*? Unless we can find something present *in all cases* of willful ignorance in its basic form which could get the actor from a sub-knowledge culpability level up to the culpability level of a knowing wrongdoer, we will not be able to maintain, as ECT does, that the willfully ignorant are *always* as culpable as knowing wrongdoers.

can still count as mere manslaughter provided the killing "is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." *Id.* § 210.3(1)(b). Despite these two exceptions, however, one still finds support in the MPC's homicide provisions for the view that a knowing killing is generally more culpable than a merely reckless killing (assuming there are no relevant excuses).

¹⁴⁹ Note that I do not formulate the argument by saying that *any willfully ignorant actor* will have a lesser degree of belief in the inculpatory proposition, *P*, than is required for knowledge. The reason is that on some accounts, it is possible to be willfully ignorant despite actually having a high enough degree of belief in *P* to count as knowing that *P* is true. See Husak & Callender, *supra* note 17, at 47–48. Although I doubt that such individuals are aptly described as "ignorant" of *P*, I do not want to beg the question against accounts that do not regard willful ignorance and knowledge as mutually exclusive.

3. The Only Obvious Answer to the Question Does Not Succeed

I submit that the only plausible answer to this question—the only feature common to all cases of willful ignorance that might plausibly explain how willful ignorance could always be as bad as knowing misconduct—is the fact that willfully ignorant individuals all deliberately preserve their ignorance about the inculpatory proposition, *P*. As seen above, to be willfully ignorant, it must be the case that, despite having suspicions that *P* is true (that is, believing it has a substantial chance of being true) and knowing that one could feasibly learn with greater certainty whether *P* is true, one nonetheless deliberately refrains from doing so.¹⁵⁰

So could the fact that the willfully ignorant deliberately opt to preserve their ignorance about *P* be sufficient to secure the result that such actors are always as culpable as wrongdoers who know that *P* is true? The answer, as I now argue, is no. The key to seeing this is that the willfully ignorant actor's decision not to investigate whether *P* is true can be made *for a variety of reasons*, some of which can render one more culpable than others. In theory, one might deny this, and attempt to restrict the concept of willful ignorance to cover only a certain subset of motives for deliberately not investigating one's suspicions. However, as noted in Part I.C, this would yield a restricted version of ECT—not a version that makes a claim about all instances of willful ignorance in its basic form. That strategy is considered in depth in the next Part, so it is set aside for the time being.

While the sort of reason that the Eighth, Tenth, and Eleventh Circuits single out—namely, the aim of preserving a defense in the event of prosecution¹⁵¹—is clearly one *possible* reason for deciding to remain ignorant of some inculpatory fact, one might make this decision for *other* reasons as well. Perhaps one wants to prevent the criminal conspiracy one suspects is afoot from being discovered, or perhaps one wants to keep getting paid from the proceeds of the suspected criminal conduct. Perhaps one's reasons for not investigating stem from wishful thinking, naïve loyalty, fear, or laziness. Given the tremendous

¹⁵⁰ See *supra* Part I.B.1; *supra* notes 43–47 and accompanying text.

¹⁵¹ See *supra* note 56.

variety of human motivation, it is impossible to enumerate all the possible reasons one might have for the decision not to investigate in apparently available ways.

The recognition that one can be willfully ignorant for different reasons raises the possibility of cases in which the willfully ignorant seem less culpable than analogous knowing wrongdoers. These cases, then, are what demonstrate the falsity of ECT as a general claim about willful ignorance in its basic form. In particular, two hypothetical cases will be used to drive the point home. (Structurally similar cases appear elsewhere in the literature, but they are likely to be more controversial.¹⁵²)

Consider, first, the following case:

Overly Trusting Parent. Patty and her adult child, Charles, had gone through a long period of estrangement due to Charles's trouble with the law, and they were only recently reconciled. Thus, Patty is very concerned to rebuild trust with her child. When Charles one day asks Patty to drive a sealed crate across town to a friend of his, Patty decides not to look inside. She considers the risk that the crate might contain some kind of contraband (whether drugs, weapons, or stolen property), and she strongly desires not to take part in any illegal activity. But after much agonizing, she chooses not to open the crate or ask Charles to do so because this sign of mistrust would irrevocably damage their recently repaired

¹⁵² Consider, for example, Hellman's "limiting cases" of criminal defense lawyers and doctors who treat patients claiming to suffer from chronic pain. See Hellman, *supra* note 87, at 305–12. She notes that these individuals may be willfully ignorant in not investigating suspicions about the veracity of their clients' or patients' statements, but nonetheless are not necessarily culpable for it. A doctor, for instance, might suspect that his patient is reselling his medication, while a defense lawyer might suspect that his client is not telling the truth, thus making the lawyer's arguments potentially perjurious. *Id.* These doctors and lawyers might have good confidentiality and duty of loyalty reasons to preserve some degree of ignorance about these matters. Thus, they might not seem as culpable as their knowing counterparts who prescribe medication while aware that it will be illegally resold or who make perjurious arguments to a court. Nonetheless, it seems open to further debate whether these reasons actually do justify the decision to remain ignorant, and so I take no official stand on how culpable these instances of willful ignorance really are.

relationship. And so she sets off across town with the crate in the trunk. On the way, she is pulled over by the police and it turns out the crate contains drugs.

Patty thus counts as willfully ignorant toward the proposition that the crate she was transporting contained drugs, and it is likely she could be convicted of possession of drugs on a willful ignorance theory. Nonetheless, because Patty has understandable and seemingly decent reasons for not investigating whether the crate contained contraband, she intuitively seems less culpable than someone who performs the same conduct with knowledge that the crate contained drugs. The person who is told in advance and thus *knows* that the crate contains drugs, but decides to deliver the package nonetheless, would seem to display a greater degree of disregard than Patty did for society's legitimate interest in combating the proliferation of drugs. After all, Patty desired not to take part in any criminal activity and she only reluctantly decided not to investigate her suspicions about the contents of the crate for reasons that themselves seem somewhat excusable. She does not seem to have acted with *as much* disregard for the legitimate interests of others as the person who performs the same misconduct knowingly. Accordingly, although willfully ignorant and very likely somewhat culpable, I submit that Patty intuitively is *less* culpable than her knowing counterpart.

Consider next a case involving something akin to duress:

Need the Medicine. John lives in a poor neighborhood, and his daughter is sick and needs a certain expensive medicine. John, like everyone in the neighborhood, is on somewhat friendly terms with the local tough guys. When they hear of his daughter's condition, they offer him the needed medicine, which they happen to have some quantity of. John is aware of the risk that the medicine is stolen, since it is common knowledge that the local tough guys do not always stay within the boundaries of the law. However, John also knows that if he asks the tough guys whether the medicine is stolen, he and his family would get into trouble. In the past, people who asked too many nosy questions of this sort were labeled "troublemakers" and harassed—or worse. John desires not to accept any

stolen property, and he would not accept the medicine if he were certain that it was obtained by theft. Although he realizes he could simply refuse the tough guys' generosity (which they would simply shrug off with a casual "your loss"), he also knows that he would have to wait many months to acquire the medicine himself through the mismanaged local hospital system. These extra months would be painful for his daughter. Accordingly, he decides not to ask the tough guys whether the medicine was stolen, and proceeds to accept it. It turns out that the medicine is stolen, and he is subsequently charged with receipt of stolen property.

John is willfully ignorant with respect to the fact that the medicine is stolen property. He consciously decides not to take certain available steps to determine whether or not it was stolen. Nonetheless, although his accepting the medicine appears to be somewhat culpable, it intuitively is *less* culpable than the corresponding act of accepting the medicine knowing that it is stolen. After all, John has an understandable reason not to investigate in this case, namely the harm that likely would befall him and his family were he to ask nosy questions about the source of the medicine. A reasonable, law-abiding person perhaps would not have accepted the medicine in the first place (he was after all under no duress to take the goods). Indeed, we can assume that he would not have accepted the gift if he knew to a practical certainty that it was stolen. He only accepted it because he was not sure it was stolen, and he had understandable safety-related reasons for not investigating (although in principle he could have). Thus, I submit that John's act of receiving the medicine with the mental state of willful ignorance seems less culpable than acts of the same type performed knowingly would be. John actually appears to have acted with less disregard for the legitimate interests of the medicine's rightful owner than the similarly situated person who accepts the medicine knowing that it is stolen.

In light of cases like *Overly Trusting Parent* and *Need the Medicine*, it is clear that ECT as a general claim about willful ignorance in its basic form is false. Not every case in which the actus reus of a crime is performed with the mental state of willful ignorance will be just as culpable as performing the same actus

reus with the mental state of knowledge. Because the decision not to acquire full-on knowledge of the inculpatory proposition can be made for different reasons, some of which will render one's ignorance less culpable than others, there is no guarantee that every crime performed in willful ignorance will rise to the level of culpability associated with the knowing performance of that crime.

C. The Problem with the Ninth Circuit's Unrestricted Approach

The conclusion of the previous Section demonstrates the normative problem for the unrestricted approach to willful ignorance championed by the Ninth Circuit and employed by the majority of other circuits.¹⁵³ After all, that approach allows a jury to conclude that the knowledge element of the crime is satisfied as long as the basic definition of willful ignorance is met (provided the other procedural requirements are also met).¹⁵⁴ But as we just saw, someone can satisfy this basic definition of willful ignorance without being as culpable as the analogous knowing wrongdoer. This means that on the unrestricted approach, willful ignorance can be allowed to satisfy the knowledge element even in cases where ECT does not hold. Thus, the unrestricted approach endorsed by most circuits is not fully supported by what the Supreme Court described as the traditional rationale for the willful ignorance doctrine.¹⁵⁵ Since the unrestricted approach allows willful ignorance to satisfy the knowledge element in some cases where there is no normative justification for doing so, that approach is overly broad.

The Ninth Circuit seems to have been somewhat sensitive to this sort of concern in *Heredia*, and it attempted to sidestep the problem at least as far as the facts of that case were concerned. The defendant in *Heredia*, who was charged with possession of drugs, "claim[ed] that she had a motive *other* than avoiding criminal culpability for failing to discover the contraband concealed in the trunk"—namely, that it was unsafe or impractical for her to pull over on the highway and investigate the contents of her trunk.¹⁵⁶ Accordingly, she argued that it was improper to convict her on a willful ignorance theory because her

¹⁵³ See *supra* notes 58–71 and accompanying text.

¹⁵⁴ See *supra* note 100 and accompanying text.

¹⁵⁵ See *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2069 (2011).

¹⁵⁶ *United States v. Heredia*, 483 F.3d 913, 920 (9th Cir. 2007) (en banc).

motive for not investigating was not to avoid liability.¹⁵⁷ The implicit argument here is that opting not to investigate for *this* reason rendered her less culpable than the analogous knowing wrongdoer, and so a willful ignorance instruction in her case would not be supported by the requisite considerations of equal culpability.

However, the Ninth Circuit remained unconvinced:

We believe, however, that the second prong of the instruction, the requirement that defendant have *deliberately* avoided learning the truth, provides sufficient protections for defendants in these situations. A deliberate action is one that is "[i]ntentional; premeditated; fully considered." A decision influenced by coercion, exigent circumstances or lack of meaningful choice is, perforce, not deliberate. A defendant who fails to investigate for these reasons has not deliberately chosen to avoid learning the truth.¹⁵⁸

Thus, the Ninth Circuit's response to the problem was to insist that if no methods of reasonable investigation were available (e.g. because investigating would be unsafe), then the failure to investigate cannot truly be deemed deliberate, and so the defendant would not satisfy the basic definition of willful ignorance.¹⁵⁹

However, even if the Ninth Circuit is correct about this particular motive (so that we need not worry that declining to investigate for safety reasons and proceeding to do the actus reus might be less culpable than doing the actus reus knowingly), there still is a range of other motives that one might have for failing to investigate. And many of these might still render the willfully ignorant defendant less culpable than the analogous knowing wrongdoer. For example, the defendants' reasons for not investigating in *Overly Trusting Parent* and *Need the Medicine* cannot be handled in the same way that *Heredia* dealt with not investigating for safety reasons. After all, the defendants in these two hypothetical cases really did deliberately avoid learning the truth about their suspicions. On the facts stipulated about those cases, neither Patty nor John was *fully*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (alteration in original) (citation omitted).

¹⁵⁹ *Id.*

precluded from investigating solely due to safety concerns or duress or any other condition that could make their failure to investigate count as not deliberate.¹⁶⁰

Accordingly, the Ninth Circuit's strategy in *Heredia* cannot be used across the board to save the unrestricted approach from the possibility of defendants who do not investigate for reasons that do not render them as culpable as the analogous knowing wrongdoer. Because such cases are possible, the unrestricted approach is *overinclusive*: It allows willful ignorance to satisfy the knowledge element of the crime even in cases where the defendant's mental state does not make him or her as culpable as a similarly situated knowing wrongdoer. In these cases, the unrestricted approach is unsupported by the courts' traditional rationale.

IV. RESTRICTING THE EQUAL CULPABILITY THESIS: PROBLEMS FOR THE RESTRICTED MOTIVE APPROACH

Given that ECT as a general claim about willful ignorance in its basic form is false, a third strategy for defending ECT is to seek to preserve only a restricted version of it. Rather than arguing that acting with willful ignorance in its basic form is *always* as culpable as acting knowingly, the idea is to maintain that this is only *sometimes* the case.

Restrictions to ECT can be incorporated in either of two ways. First, we could restrict the scope of ECT itself. This would amount to claiming that, provided certain conditions obtain, acting with willful ignorance in its basic form is at least as culpable as acting with knowledge. Second, we might formulate a technical notion of willful ignorance—we might call it *willful ignorance**—that is satisfied in a narrower set of cases than the basic account, and then claim that acting with willful ignorance* is always as culpable as acting with knowledge. Husak and Callender, for instance, would seem to have us proceed in the

¹⁶⁰ One might object that John decided not to investigate because he deemed it unsafe to ask the tough guys if the medicine was stolen. However, the danger for him in doing so does not seem as imminent as it was in *Heredia* for the defendant to stop on the highway to look in her trunk. Thus, even if the decision of the defendant in *Heredia* is not deliberate, if *John's* decision not to investigate in *Need the Medicine* does not count as deliberate, then *virtually no decision* to refrain from investigating would count as deliberate. After all, whenever one decides not to investigate, there will always appear to be reasons that put pressure on one not to investigate. But this cannot mean every such decision is not deliberate.

second way, since they define being "wilfully ignorant of an incriminating proposition p" so as to require that one "ha[ve] a conscious desire to remain ignorant of p in order to avoid blame or liability in the event that he is detected."¹⁶¹

For purposes of theory construction, it matters little which method of restriction we employ, since the same substantive results can be secured in either case. However, the first method still seems somewhat preferable for reasons of transparency. This method uses the basic concept of willful ignorance, which seems to better map onto the commonsense notion of the phenomenon (as argued in Part I.D). Thus, it is more perspicuous to continue using the familiar concept of willful ignorance and restrict the equal culpability thesis in a normatively plausible way than to accomplish the same aim by altering the concept of willful ignorance for reasons that do not show up on the face of the equal culpability thesis itself. Understanding the normative considerations behind the latter method requires more effort for readers than is required if the relevant restrictions are built directly into the equal culpability thesis. Accordingly, in what follows, this Article builds the scope restrictions directly into the equal culpability thesis, rather than using a technical concept of willful ignorance that might accomplish the same aim in a more roundabout fashion.

While this Article ultimately defends a restricted version of ECT, the particular focus of this Part is the restricted version of ECT that goes hand-in-hand with the restricted motive approach of the Eighth, Tenth, and Eleventh Circuits. According to this version of the thesis, acting in willful ignorance is at least as culpable as acting with knowledge *provided* one's motive for not investigating one's suspicions is to preserve a defense against liability.¹⁶² Nonetheless, this Part argues that the equal culpability thesis actually extends more broadly than this, thus leaving the restricted motive approach of the Eighth, Tenth, and Eleventh Circuits looking arbitrarily narrow. This approach, in other words, is underinclusive in a troubling way.

¹⁶¹ Husak & Callender, *supra* note 17, at 41.

¹⁶² See *supra* note 8 and accompanying text.

A. *ECT Extends Further than the Restricted Motive Approach*

As seen above, the rationale for the restricted motive approach of the Eighth, Tenth, and Eleventh Circuits is that willful ignorance motivated by the desire to avoid liability is plausibly just as culpable as knowing misconduct.¹⁶³ If this were right, then there would be a normative basis for giving willful ignorance instructions when this particular motive for remaining in ignorance is present. Accordingly, the restricted version of the equal culpability thesis that the Eighth, Tenth, and Eleventh Circuits' approach is most naturally seen as being premised on is this:

Restricted Equal Culpability Thesis 1 ("RECT1"):

Suppose A1 and A2 each perform the actus reus of a crime requiring knowledge of an inculpatory proposition, *P*. 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 a state of willful ignorance *the motive for which was to avoid liability in the event of prosecution*. On these suppositions, A2 is (at least) as culpable for her action as A1 is for his.

While RECT1 seems plausible enough as far as it goes, the trouble is that it does not go far enough. RECT1 does not capture the full range of cases in which acting in willful ignorance is as culpable as acting knowingly.

The sort of case that most clearly shows RECT1 to be overly narrow builds on the fact that one can have other highly culpable reasons for failing to investigate one's suspicions *besides* wanting to avoid liability. One especially egregious type of motive for remaining in ignorance is the desire to perpetuate, protect, or continue to receive the benefits of a conspiracy with others, or some other criminal conduct of one's own, that one suspects is being perpetrated. Consider the following hypothetical:

Don't Rock the Boat. Fred works the night shift at a warehouse, and he has heard rumors that the boxes he spends his nights loading and unloading for the boss

¹⁶³ See *supra* Part I.B.2.

contain drugs and other contraband. His suspicions are strengthened when the boss starts giving him a weekly bonus—mostly in the form of goods (like watches, clothing, appliances, etc.) for “doing a good job and minding your own business.” Fred realizes he could check whether the contents of the boxes are improper by lifting up the box flaps, but not so much that the packing tape rips. However, this would still stretch the packing tape, and Fred thinks there is a chance that investigating in this way might tip off the boss to his snooping. If the boss thinks Fred knows too much, the bonuses will stop and Fred might lose his job. Fred wants the bonuses, though, and so he does not investigate. As it happens, Fred’s suspicions are correct: The boss is engaged in transporting drugs and stolen goods, and the weekly bonuses stem from the fruits of this operation.

On these suppositions, Fred would count as willfully ignorant both with respect to the fact that he is aiding in the transportation of contraband and that he is receiving stolen goods. However, his reason for not investigating is not that he wants to avoid liability in the event of prosecution, but rather that he wants to continue receiving the benefits from doing his part in the operation. Intuitively, Fred’s reason for not investigating is at least as bad as the desire to avoid liability. Moreover, it is plausible that remaining in ignorance for this reason renders Fred at least as culpable as a similarly situated person who did Fred’s job knowing the goods were stolen. After all, choosing not to investigate for fear that it will get one kicked out of the conspiracy seems to demonstrate at least as much disregard for the relevant interests of others as knowingly taking part in the conspiracy.

This case is not a far-fetched hypothetical. Some courts have discussed instances of willful ignorance that involve similar motives for remaining ignorant. For example, the Sixth Circuit confronted a case “in which the employer [was] virtually certain that harm [was] about to occur but cho[se] to ‘look the other way’ in the interest of continuing the job,” and the court noted that “[o]ne might describe this scenario as one in which the employer takes a stance of ‘active ignorance’ or even ‘willful blindness’ in

the face of an assured danger.”¹⁶⁴ In a similar vein, the United States Tax Court confronted a case of alleged tax fraud in which the defendant “admitted to willful blindness . . . ‘for the purpose of getting and keeping clients.’”¹⁶⁵ The court noted that “[a]t the very least, this is an admission that he believed his time was better spent on getting clients than confirming whether he reported all his income—even when he suspected that at least some taxable income wasn’t being properly reported.”¹⁶⁶ The court therefore found that the defendant “was willfully blind, weighing in favor of finding fraud.”¹⁶⁷ Both of these cases provide examples of defendants who decide to remain in ignorance not in order to preserve a defense against liability, but rather in order to continue to get the benefit of some suspected illegal course of conduct.¹⁶⁸

Of course, the argument of this Section relies on intuitions about the relative culpability of willfully ignorant defendants and

¹⁶⁴ *Jandro v. Ohio Edison Co.*, 167 F.3d 309, 316 (6th Cir. 1999).

¹⁶⁵ *Fiore v. Comm’r*, 105 T.C.M. (CCH) 1141, at *11 (2013) (internal quotation marks omitted).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Here is a second sort of consideration that shows RECT1 to be overly narrow. Even in cases where the defendant’s motive for remaining in ignorance does not seem especially egregious, it still seems that the defendant’s willful ignorance can be quite culpable if the available steps to investigating were *extremely easy to take*, and the defendant simply could not be bothered to do so. Consider the following revised version of *Overly Trusting Parent*:

Overly Trusting Parent—Open Crate. Matters are just like the original version, except that when Charles asks his mother Patty to drive across town to a friend, Charles puts the crate in the trunk and leaves the lid off, thus revealing the drugs and guns it contains. Charles mentions that he forgot to close the crate and asks Patty not to look in the back of the car as she is leaving. Determined to believe the best about her child, she complies. As she gets in the car, she sees in the rear view mirror that the crate lid is off, but simply shrugs and proceeds to drive the open crate across town to make the delivery.

Although Patty’s motive for not investigating may not appear especially culpable in itself, this instance of willful ignorance nonetheless appears quite culpable given the ease with which Patty could have investigated. The fact that the evidence was staring her in the face, and she nonetheless decided not to investigate, even though she could do so without being detected by Charles, seems to demonstrate a high degree of disregard for the interests that are protected by the criminal law in this case. Accordingly, it is not implausible that Patty’s willful ignorance in this case renders her at least as culpable as someone who performed the same action knowingly.

their analogous counterparts. Accordingly, one might doubt that it conclusively establishes that RECT1 is overly narrow. Nonetheless, the considerations presented here should at least show that it is quite easy to come up with examples of willful ignorance not motivated by the desire to avoid liability that still seem highly culpable. Accordingly, the cases offered here should at least show it to be highly likely that RECT1 does not completely capture the full range of cases in which acting in willful ignorance is at least as culpable as the analogous knowing misconduct. The more systematic account of the conditions of equal culpability offered in the next Part further cement this conclusion.

B. The Problem with the Eighth, Tenth, and Eleventh Circuits' Restricted Motive Approach

If the previous Section succeeded in sowing doubts about RECT1, this causes problems for the restricted motive approach favored by the Eighth, Tenth, and Eleventh Circuits. In particular, it shows the restricted motive approach to be underinclusive. That is, this approach sometimes precludes the defendant's willful ignorance from satisfying the knowledge element of the crime even though the defendant in question is just as culpable as the analogous knowing wrongdoer would be. This means that the restricted motive approach arbitrarily stops short of the full extent of liability that would be supported by the traditional rationale—i.e. the true scope of the equal culpability thesis.

To this, one might object that there is no normative problem for an approach to willful ignorance that is merely underinclusive. Granted, it would be problematic to allow willful ignorance to satisfy the knowledge element in cases in which the defendant is not as culpable as his analogous knowing counterpart. Such an approach would be overinclusive, and would be unsupported by the traditional rationale. But that is not what we have here. Instead, we seem to have an approach that displays an unobjectionable form of leniency in declining to impose willful ignorance liability in some cases where it might have been warranted to do so. How is this unfair, one might wonder?

The reason it is unfair is that it gives defendants who were convicted on a willful ignorance theory, having possessed the

particular motive of wanting to avoid liability, a *complaint of arbitrariness* against the state. In particular, these defendants can legitimately ask why *they* were singled out for conviction, while other willfully ignorant defendants who were just as culpable, but happened to have had other motives for remaining in ignorance, were exempted from conviction. On the restricted motive approach of the Eighth, Tenth, and Eleventh Circuits, remaining in ignorance for reasons *other* than wanting to avoid liability is not a permissible basis for conviction on a willful ignorance theory, even if the defendant in question is just as culpable as an analogous knowing wrongdoer. In such a case, the internal logic of the traditional rationale would support giving a willful ignorance jury instruction. Consequently, it would be arbitrary for courts to decline to give willful ignorance instructions in such cases. Moreover, it would be unfair to the few defendants who *were* convicted on a willful ignorance theory, since no convincing rationale is in the offing for why their particular motive for remaining in ignorance should be singled out for harsher treatment than other equally culpable motives.

The theoretical shortcomings of the restricted motive approach favored by the Eighth, Tenth, and Eleventh Circuits thus grounds a legitimate complaint of arbitrariness against the state. This state of affairs can be avoided by developing an approach to willful ignorance that more accurately reflects the true scope of the equal culpability thesis, and that consequently more fully respects the internal logic of the courts' traditional rationale. The final two Parts of this Article take on precisely this challenge.

V. THE EQUAL CULPABILITY THESIS, SUITABLY RESTRICTED

The previous two Parts argue that the unrestricted approach championed by the Ninth and other Circuits is overinclusive relative to the true scope of ECT, while the restricted motive approach favored by the Eighth, Tenth, and Eleventh Circuits is underinclusive relative to the true scope of ECT. In order to formulate an approach to the willful ignorance doctrine that avoids these problems, we need an account of what, precisely, the true scope of ECT is—i.e. the conditions under which acting in willful ignorance really is as culpable as performing the same misconduct knowingly. It is this task to which the present Part is devoted. The next Part asks how this account of the true scope

of ECT can be implemented practically in order to come up with a rule regarding willful ignorance that is both more normatively justified than the unrestricted approach and less arbitrary than the restricted motive approach.

A. Overview

In Part III, we saw that ECT as a general claim about willful ignorance in its basic form did not hold. This was because the willfully ignorant person's decision not to learn with greater certainty whether the inculpatory proposition, *P*, is true can be made for a variety of reasons, some of which do not entail enough extra culpability to get one up from a sub-knowledge level of culpability to the level of a knowing wrongdoer.¹⁶⁹ Conversely, the account developed in this Part draws on the idea that sometimes one's reasons for not acquiring greater certainty about *P* can fill this gap. But the account allows that this can happen in a broader range of circumstances than just the special case that the Eighth, Tenth, and Eleventh Circuits' restricted motive approach singles out (i.e. when the defendant remained in ignorance to preserve a defense against liability).

More specifically, on the account developed 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. Thus, this Part aims to defend the following restricted version of ECT:

Restricted Equal Culpability Thesis 2 ("RECT2"):

Suppose A1 and A2 each perform the actus reus of a crime requiring knowledge of an inculpatory proposition, *P*. 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 *with a form of willful ignorance toward P that involves a sufficiently culpable breach of the duty of investigation*. On these suppositions, A2 is (at least) as culpable for her action as A1 is for his.

¹⁶⁹ See *supra* Part III.B.3.

Deciding not to investigate because one wants to preserve a defense against liability would often be likely to constitute a sufficiently culpable breach of the duty of investigation to satisfy RECT2. But, as seen below, this is not the only situation in which equal culpability holds. In general, this Part defends RECT2 by explaining why there are some circumstances in which we can be quite sure that the willfully ignorant defendant is at least as culpable as a knowing wrongdoer.

Before proceeding, one clarification is needed. The account below is primarily concerned to explain what makes willfully ignorant defendants with a *sub-knowledge* level of confidence in the inculpatory proposition, *P*, at least as culpable as a knowing wrongdoer. Although some have suggested that one can be willfully ignorant despite knowing *P* (a claim I find dubious),¹⁷⁰ a defendant who also possesses knowledge can be straightforwardly convicted of the knowledge crime in question—provided there is evidence of this fact.¹⁷¹ If it could be shown that the defendant in question possessed enough confidence in *P* to count as knowing *P*, there would be no need to instruct the jury on a willful ignorance theory in that case. Accordingly, the account offered below works under the assumption that the willfully ignorant defendant possesses only a sub-knowledge level of confidence in *P*. After all, it is only in such cases that any puzzle arises about how to explain why the willfully ignorant defendant is at least as culpable as a knowing wrongdoer.

B. The Duty of Reasonable Investigation

The account defended here rests on the idea that, in addition to the culpability acquired by virtue of acting with a sub-knowledge degree of belief in the inculpatory proposition (that is, recklessly), the willfully ignorant defendant may incur some additional culpability from breaching a duty of reasonable investigation. The first order of business is to explain what this duty involves.

¹⁷⁰ See Husak & Callender, *supra* note 17, at 48. I am not persuaded by this view, however, because if one has enough certainty in the inculpatory proposition to count as knowing it, then it seems implausible to describe one as *ignorant* of that proposition.

¹⁷¹ See MODEL PENAL CODE § 2.02(2)(b) (2001).

The basic idea is that being aware that one's conduct would create a risk of harm or illegality can at times give rise to a 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 (say, by causing them physical or emotional harm) or more generally would threaten certain interests that are legitimately protected by the law (say, if the action, while not overtly harmful, is still illegal).¹⁷² 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.¹⁷³ 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, I suggest, is likewise a secondary duty that arises in anticipation of subsequent wrongdoing.

More specifically, it is suggested that the duty of reasonable investigation generally arises under conditions like the following. Suppose one is aware that some future action one could perform

¹⁷² 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 PHIL. 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's situation).

¹⁷³ See, e.g., Erik Encarnacion, *Corrective Justice as Making Amends*, 62 BUFF. L. REV. 451, 490–503 (2014) (analyzing secondary duties to make amends); John Gardner, *What Is Tort Law for? Part 1: The Place of Corrective Justice*, 30 LAW & PHIL. 1, 33–35 (2011); Gregory C. Keating, *The Priority of Respect over Repair*, 18 LEGAL THEORY 293, 309 (2012) (observing that "[r]emedial responsibilities arise out of the breach of antecedent primary duties" and criticizing the corrective justice theory of tort for failing to capture the priority of primary duties over the secondary duties of repair they generate); 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").

would pose a substantial and unjustified risk of harm to interests of others that are legitimately protected by the law (as would be the case whenever one has suspicions about the inculpatory proposition of a crime and there are no relevant justifications or excuses).¹⁷⁴ Moreover, suppose one is planning or intending to perform the act in question.¹⁷⁵ In such a case, I submit, 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 underlying 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 feasible methods of ascertaining whether A really would cause the harm or illegality that one suspects it might—at least provided such feasible methods of investigation apparently exist.¹⁷⁶

In discussing willful ignorance in particular, it is important to formulate this duty in a way that mentions inculpatory propositions. Thus, the official formulation adopted here is this:

Duty of Reasonable Investigation (“DRI”): If one is intending or planning¹⁷⁷ to perform the actus reus of a

¹⁷⁴ This assumes that the law is *just*. This moral duty to reasonably investigate obviously would not be triggered if the criminal statute in question were substantively immoral or unjust.

¹⁷⁵ 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. I take no stand on that question here.

¹⁷⁶ 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 of, or reflecting 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.

¹⁷⁷ The term “planning” is included here because, as noted above, *supra* note 175, 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

crime and one possesses substantial confidence (short of knowledge) that the associated inculpatory proposition, *P*, is true (but lacks reason to think the risk of *P*'s being true is somehow justified), then one has a duty—conditional on continuing to hold the relevant intention—to investigate in reasonable and available ways, if any, before performing that actus reus.¹⁷⁸

Thus, suppose John is planning to set fire to a particular building despite being aware that there is a substantial possibility that a person is in the building at the time. (It may well be the case that—as with suspicions generally—the more grievous the harm risked, the less likelihood one needs to believe it has of materializing in order for the risk to count as “substantial,” such that DRI is triggered.) When John has settled on this less-than-ideal course of action, by virtue of DRI, he has a conditional secondary duty to stop and investigate in reasonably feasible ways before proceeding—for example, by looking inside the building.

Several clarifications are needed here. First, in what sense is this duty conditional? Because the duty described in DRI 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.¹⁷⁹

(e.g. that one does not get bored first), then this may well be enough to trigger the duty.

¹⁷⁸ 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 PHIL. PERSP. 337, 337 (2004).

¹⁷⁹ 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 in a way that involves a generous helping of self-deception. Accordingly, the intention that triggers the duty to investigate would remain in place.

Second, 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, DRI can accommodate exigencies that intuitively prevent the duty to investigate from arising in the first place. For example, suppose 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 little time to check if a person is inside. It is not impossible to do so, but it would leave less time for other important precautions (for example, warning the town authorities). One might think that the best way to describe this situation is not to say that one would be justified or excused in *breaching* DRI, but rather that the duty to investigate does not arise at all. It is to account for this possibility that DRI says that the duty to investigate arises only if the substantial risk one is aware of is unjustified.¹⁸⁰

Next, what happens when one *complies* with this duty to reasonably investigate? There are three possibilities. Suppose John in the original example learns that there is a greater chance than he first believed that someone is in the building he plans to burn down. This, I suggest, would strengthen his primary duty not to set fire to the building. Second, suppose John learns upon investigating that there is a smaller chance than he first believed that someone is in the building. This, in turn, would somewhat weaken his duty not to set the building on fire—although that duty would of course still remain in force thanks to the independent reasons not to light a fire even in an unoccupied building. Third, the strength of his primary duty not to start the fire 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.

¹⁸⁰ 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. See Hellman, *supra* note 87, at 305–12. 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.

By far the most important point for present purposes, however, is that *breaching* the duty of reasonable investigation can itself be an independent source of culpability.¹⁸¹ That is, someone to whom DRI applies and who violates it (provided he has no relevant excuse or justification) acquires some *additional* amount of culpability in virtue of this breach when he goes on to perform the underlying risky action that it is his primary duty not to do—that is, an amount beyond what he would have just in virtue of performing that risky action when investigating is not an option. More precisely, what is needed for the argument of this Section to go through is the following claim about the culpability of breaching DRI:

Culpability for Breaching DRI (“CDRI”): For any person, A, to whom DRI applies, if A breaches DRI and proceeds to perform the underlying actus reus that DRI required A to investigate the risks of, then in virtue of this breach A is at least a little *more culpable* for his conduct (provided he has no justification or excuse) than a similarly situated person, B, who performs the same actus reus, but had no reasonable way to investigate the risks thereof, would be in virtue of *his* conduct.

I think it is intuitive that this claim is true. What is more, one might offer an argument of the following sort in its favor. Specifically, CDRI seems to derive support from the recognition that performing the underlying risky action (the actus reus) having breached the duty to investigate involves *two* missed chances to assure oneself that conduct one intends will not be wrongful, while performing the reckless action when investigating is not an option involves only *one*. Suppose I intend to perform an action at *t1* that I am aware will be risky. Suppose I realize it is feasible for me to investigate at *t0* whether this risk really will materialize. My first chance to assure myself that my intended conduct will not be wrongful comes at *t0*. As things seem to me then, if I investigate, I might learn that the risk in question will not materialize. If I fail to investigate, while retaining my intention to perform the risky action (and have no

¹⁸¹ Cf. Smith, *supra* note 172 (discussing whether culpable ignorance is an excuse).

justification or excuse), I seem to manifest a lack of due regard for others that makes me culpable. However, my total culpability level is not yet fixed at $t0$ because I have a second chance to assure myself that my intended conduct will not be wrongful—that is, during the period up to $t1$. After all, up until $t1$, I can simply abandon my intention to perform the underlying risky action at $t1$. Going ahead with that action is another manifestation of my lack of due regard for others. Thus, breaching DRI and carrying out the risky action involves two missed chances (one epistemic and the other practical) to rule out the possibility that conduct that I intend is wrongful. By contrast, when I have no feasible way to investigate, performing the underlying risky action only involves one such missed opportunity, and thus only the one manifestation of my insufficient regard for others. Accordingly, breaching DRI and doing the risky action appears worse than merely doing that action when investigating is not an option—precisely as CDRI claims.

One might object to CDRI in the following way.¹⁸² Consider the person—dubbed B above—who performs the actus reus with suspicions that the inculpatory proposition, P , is true, but lacked an opportunity to investigate whether P was true. Suppose this person is so indifferent to the potentially bad nature and consequences of his conduct that he would not have investigated whether P is true even if he had the opportunity to do so. (Indeed, we might even suppose that this person's indifference is so great that he would perform the actus reus even if he knew P was true.) It might seem that the person—dubbed A above—who breaches the duty of investigation before performing the actus reus is not any more culpable than B in this scenario. If so, this would be a counterexample to CDRI.

However, CDRI is not threatened by this example because all it claims is that A is at least slightly more culpable *for his conduct* than B is for *his* conduct—not that A is a worse person or has a worse overall character than B does. What is of primary importance to the criminal law is one's culpability *for a course of action*, not the overall badness of one's character.¹⁸³ Although B

¹⁸² Thanks to Gideon Yaffe for raising this objection to an earlier formulation of CDRI.

¹⁸³ For example, Justice Rutledge observed that “[o]ur whole tradition is that a man can be punished by criminal sanctions only for specific acts defined beforehand

might have a character that is as bad or worse than A's, B had no occasion on which to manifest this additional badness in action because he lacked the opportunity to investigate and so he could not breach the duty of investigation. In this regard, he was admittedly lucky. Although it was assumed that B *would have* breached the duty of investigation were he given the chance, he did not *actually* have occasion to do so. Similarly, although B would have performed the actus reus even were he given knowledge of *P*, he did not actually possess the mental state of knowledge when he did the actus reus.¹⁸⁴ It would be improper to hold him accountable for a mental state that he would have expressed, but did not *actually* express, in action.¹⁸⁵ Thus, the culpability manifested in B's conduct is only that which accrues in virtue of his doing the actus reus with suspicions that *P* is true. Because A incurred not only this quantum of culpability, but *also* that which stems from his breach of the duty to investigate, A seems at least somewhat more culpable *in virtue of his conduct* than B is in virtue of *his* conduct—just as CDRI claims.

Now, I am not in a position to say exactly *how much* additional culpability one acquires in virtue of breaching DRI since I have no comprehensive theory about how to calculate the precise amount of culpability an individual acquires from a given bad act. Nonetheless, I can offer a few general remarks about some factors that seem to affect how much extra culpability one incurs from breaching DRI.

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

to be criminal, not for general misconduct or bearing a reputation for such misconduct." *Michelson v. United States*, 335 U.S. 469, 489 (1948) (Rutledge, J., dissenting). More recently, Ken Simons noted that our criminal law aims to "avoid punishing individuals simply because they display a 'bad character.'" See Simons, *supra* note 144, at 234. 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.*

¹⁸⁴ The present point is thus closely related to the problems seen above for Luban's view concerning the unrighteous ostrich. See *supra* notes 139–41 and accompanying text.

¹⁸⁵ See Simons, *supra* note 144, at 261 (noting that for punishment for a mental state to be warranted, that "mental state or culpability requirement[] must be appropriately expressed in, or connected to, action").

it requires little effort to find out whether one is transporting drugs (for example, 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).

Second, DRI 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 not be as culpable for the breach as 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 is required for true willfulness. Thus, willful ignorance will involve a more culpable breach of DRI, all else equal, than merely negligent breaches thereof, since one must *deliberately* or *consciously* opt not to investigate in order to count as willfully ignorant.

Third, when one breaches this duty through a conscious decision not to investigate (as is required for willfully, not merely negligently failing to investigate), 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 to think that deciding not to investigate in reasonably available ways in order to set up an ignorance defense is more culpable than, say, deciding not to investigate out of a naïve sense of loyalty, or from a misplaced desire to foster a trusting relationship with one's child. In general, the decision not to investigate likely will be more culpable the greater the extent to which it is made for reasons that manifest disregard or disrespect for others.

To prevent confusion, note finally that although one's culpability for breaching DRI might also vary depending on how grievous the harm or illegality is that one's contemplated action would risk, this factor is not important for present purposes. After all, the truth of the equal culpability thesis (both its general and restricted forms) depends on whether willfully

ignorant defendants are as culpable as *similarly situated* knowing wrongdoers. The reason for this is that comparing the culpability of actors who not only have different mental states, but also engage in very different types of conduct or cause different kinds of harm, is much more difficult than making such comparisons when the conduct and harms in question are held fixed. Is it worse to commit arson while recklessly disregarding the risk that someone is inside than to knowingly transport a large shipment of cocaine? The incommensurability-related difficulties surrounding such questions are best avoided by holding the conduct and harm in question fixed across the cases one compares. Therefore, I am only concerned with whether a given willfully ignorant defendant is as culpable as a *similarly situated* knowing defendant.

C. *How We Know Equal Culpability Sometimes Holds*

Supposing there is a duty of reasonable investigation of the sort I have been describing, we can be quite sure that there are some circumstances under which acting in willful ignorance is at least as culpable as performing the same conduct knowingly. In this way, we can be sure RECT2 holds.

Start by noticing that willful ignorance involves a violation of DRI. Given the basic account of willful ignorance offered above,¹⁸⁶ we know several things about the actor who does the actus reus of a crime in willful ignorance: (1) he has at least enough confidence in the inculpatory proposition, *P*, to count as reckless with respect to it; (2) he is aware that there are available methods for learning with more certainty whether *P* is true; (3) he consciously decides not to make use of those methods; and (4) he performs the actus reus anyway. Because of (1), the duty of investigation is triggered (assuming no justifications or excuses are available). Moreover, given (2) and (3), we know the actor deliberately fails to investigate in reasonably available ways. Because he proceeds with the underlying action anyway, as noted in (4), we know that he breaches DRI.

Given CDRI, the willfully ignorant individual acquires some additional culpability in virtue of this breach. As noted, I cannot specify *exactly how much* additional culpability the willfully ignorant actor incurs in any given case as a result of his breach of

¹⁸⁶ See *supra* notes 43–46 and accompanying text.

DRI. I submit only that it is some positive amount. This is all the argument requires. Let " C_{DRI} " represent this amount, whatever it is.

Now, supposing the willfully ignorant actor does not have genuine knowledge of the inculpatory proposition, P ,¹⁸⁷ 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 P . C_R is assumed to be less than C_K . Given the principal CCP introduced 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_{DRI} , 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 were done with knowledge that P . In all such cases where C_{DRI} 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 a knowing actor. Accordingly, if the equal culpability thesis is restricted to this subset of cases—as RECT2 asserts—we can be sure it holds. RECT2, therefore, is true.

What guarantee is there that there will be *any* such cases of the sort just identified? Given the plenitude of actors in the real world, we can be confident that some defendants will have a degree of belief in the inculpatory proposition that is just shy of

¹⁸⁷ See *supra* note 170 and accompanying text.

the knowledge threshold. By CCP, these individuals would not require much additional culpability to make them as culpable as a similarly situated knowing wrongdoer. I cannot say how much additional culpability one acquires in virtue of a given breach of DRI. But however much it is, since defendants can decide not to investigate for different reasons, and some of these reasons will be more culpable than others, sometimes a defendant's deliberate breach of DRI will entail enough additional culpability to get him or her up to the level that a similarly situated knowing criminal would have. In this way, we can be quite sure that the class of cases for which RECT2 holds is not merely an empty set.

D. Possible Objections

In closing, two particularly pressing objections should be addressed. First, one might wonder why it is legitimate to add the culpability one incurs from recklessly performing the actus reus of a crime to the extra culpability incurred from breaching DRI. After all, if these two quantities of culpability can be added together, why can the reckless wrongdoer's culpability not be supplemented by adding the culpability she incurs from breaking a promise to a friend, mistreating her dog, or cheating on her taxes? In general, the worry is that from the fact that (1) one's conduct was as culpable as crime C, it does not generally follow that (2) one may legitimately be convicted of C.¹⁸⁸

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 given course of action*—not how defective one's character is in general, or one's culpability for other, unrelated bad acts one might have performed.¹⁸⁹ In cases of willful ignorance, therefore, it is legitimate to add one's culpability for (a) recklessly performing the actus reus to one's culpability for (b) breaching the duty of investigation because (b) is an integral part of the deliberative process that gave rise to (a), and so is fairly considered together with it, as part of the same course of action.¹⁹⁰ After all, the motivational origins of the willfully ignorant defendant's actus reus essentially involves the

¹⁸⁸ Thanks to Jake Ross, Steven Schaus, and Gideon Yaffe for pressing me on this point.

¹⁸⁹ See *supra* note 183.

¹⁹⁰ Cf. Luban, *supra* note 111, at 973 (discussing the approach of "broadening the time-frame in which we consider the unwitting misdeed").

information and apparent reasons she had while deliberating about how to act, and this, in turn, is a function of her failure to investigate the attendant risks of the *actus reus*—i.e. whether the inculpatory proposition was true. Thus, the failure to investigate is a part of the genesis of the willfully ignorant defendant's performance of the *actus reus*. Of course, there will be line-drawing problems when it comes to determining where the processes that generate a particular action begin. But in general, the motivational and deliberative processes that issue in some course of conduct are a proper basis for deciding what punishment one deserves for that conduct—as is clear from the fact that we decide, for example, whether a homicide constitutes first-degree murder by looking at whether the killing was premeditated.¹⁹¹ Therefore, one's culpability for failing to investigate can fairly be considered together with one's culpability for recklessly performing the *actus reus*.

More broadly, while the inference from (1) to (2) is not generally valid, there seem to be conditions under which it does go through. I suggest this inference typically holds when there is a sufficient degree of *similarity* between the action(s) mentioned in (1) and the crime mentioned in (2). I cannot give a full account of this similarity relation here, but at a minimum the inference from (1) to (2) appears *invalid* when the conduct mentioned in (1) consists of multiple unrelated actions, while that in (2) comprises a single, unified course of conduct—for example, the execution of one coherent plan. By contrast, if the difference between (1) and (2) only involves features of the motivational and deliberative processes that gave rise to otherwise identical conduct, there seems to be enough similarity to allow the inference from (1) to (2) to go through. And that is precisely what we have when it comes to (1) performing the *actus reus* of a knowledge crime in willful ignorance of a sufficiently culpable form, and (2) performing that *actus reus* knowingly. The only difference between the two, in other words, concerns features of the motivational origins of the *actus reus* in question. There is surely more to be said about what this similarity relation consists in, but this should hopefully give enough explanation for

¹⁹¹ See, e.g., Matthew A. Pauley, *Murder by Premeditation*, 36 AM. CRIM. L. REV. 145, 146–47 (1999) (“[I]n most American states, there are degrees of murder, and premeditation remains a very common dividing line between murders of the first and second degree.” (footnote omitted)).

present purposes of why courts, which, after all, routinely make such judgments of similarity, fairly assume that willful ignorance can support conviction of a knowledge crime.

A second important objection is that if one really should not do the underlying actus reus and one is determined to do it regardless, then it makes little difference whether one actually investigates before doing so.¹⁹² Assuming one could not be deterred even by learning that the inculpatory proposition is true, why would it be independently good for one to investigate before doing the actus reus? Consider a structurally similar *prudential* duty: If one is intent on crossing a busy street, one should look both ways before crossing. Supposing one intends to cross the street, at a certain time and place and in a certain manner, and nothing one learns about the traffic situation would change one's mind, or get one to change the time, place, or manner of one's crossing, then it seems nothing is gained by looking both ways.

While it must be conceded that investigating does not always make things go better than not investigating, this does not threaten the basic argument of this Article. I agree, in other words, that breaching the duty of investigation before doing the actus reus does not necessarily make one more culpable than *someone who complies with this duty*. After all, the person who investigates might discover that the inculpatory proposition, *P*, is *true* and proceed to do the actus reus anyway (in which case he would be a knowing wrongdoer). Nonetheless, this Article does not need to defend that claim. That is, the account offered here does not require the claim that failing to investigate always makes one more culpable than if one had investigated. Instead, this Article merely argues that breaching the duty to investigate (without justification or excuse) and then doing the actus reus is at least slightly more culpable than performing the actus reus while suspecting that *P* but *without having had the opportunity to investigate*—i.e. the claim in CDRI. Moreover, this additional culpability from breaching the duty to investigate can *sometimes* raise the culpability of one's conduct up from the level that attaches to doing the actus reus with mere suspicions that *P*—plain recklessness—to the level that attaches to performing the actus reus with knowledge that *P*.

¹⁹² Thanks to Gideon Yaffe for pressing me on this objection.

Thus, although complying with the duty of investigation does not necessarily make things go better—for example, if nothing one learns would change one’s mind about whether and how to perform the *actus reus*—it still seems that *breaching* the duty of investigation *can* make one’s actual course of conduct more culpable than mere recklessness. As argued above,¹⁹³ such a breach can be a separate manifestation of insufficient regard for the interests of others that comes in addition to the insufficient regard displayed by performing the *actus reus* recklessly, and the former manifestation is one that is not *actually present* in the merely reckless conduct of someone with no opportunity to investigate. In this way, if the breach of the duty to investigate is sufficiently serious, it can make the defendant’s actual conduct as culpable as the analogous knowing misconduct.¹⁹⁴

¹⁹³ See *supra* Part V.B.

¹⁹⁴ A third, related objection is that the conditional duty, DRI, does not fit with the standard account of conditional obligation. According to that account, *P* has an obligation to *A* conditional on *C* if and only if all of the best possible worlds where *C* is true are also ones in which *P* does *A*. See, e.g., Frank Jackson, *On the Semantics and Logic of Obligation*, 94 MIND 177, 177–79, 190–91 (1985) (discussing the “standard” approach to the semantics of ought claims in general, as well as conditional ought claims in particular). However, this may not hold for DRI. After all, some of the best worlds in which the defendant intends the *actus reus* of the crime are not ones in which he investigates. For example, the defendant might intend the *actus reus* of the crime, fail to investigate, and then abandon the intention to perform the *actus reus*. That would seem to be a better world than the one in which the person investigates but then performs the *actus reus* anyway. Thus, investigating does not guarantee being in one of the best possible worlds in which the actor intends the *actus reus*.

However, this objection can be answered in three ways. First, we might emphasize that the duty to investigate is conditional on not abandoning the intention to perform the *actus reus*. Thus, it does seem to be the case that of all the worlds in which one does not abandon the intention to perform the *actus reus*, the best worlds really are ones in which one investigates. In particular, the best worlds would be ones in which one investigates and learns that the inculpatory proposition is false before proceeding to perform the *actus reus*. Second, we might simply reject the standard account of conditional obligation. See *id.* at 179–80 (raising a related objection to the standard semantics for conditional ought claims). Third, we might prefer to back off the claim that there is a conditional *duty* to investigate, and instead say only that one has a weighty moral *reason* to investigate in virtue of intending the *actus reus*. This removes the trouble because one does not have to understand reasons according to the standard picture of conditional obligation. And we are still free to maintain that failing to comply with this weighty moral reason is a source of culpability. This, after all, is all we need for the argument of this Part.

VI. TOWARD A BETTER RULE CONCERNING WILLFUL IGNORANCE

The last Section aimed to clarify the conditions under which the equal culpability thesis holds. It was argued that when the defendant's breach of the duty of investigation is sufficiently serious, then the culpability the defendant incurs from that breach, together with his or her culpability for performing the underlying actus reus recklessly, will sometimes add up to an amount at least as great as that which is possessed by a similarly situated knowing wrongdoer. When this is the case, the conditions of equal culpability posited in RECT2 will be satisfied.

However, this still leaves the practical question of how to formulate an implementable rule concerning willful ignorance that better reflects the true scope of the equal culpability thesis. This is the question addressed in this Part. The goal is to come up with an implementable rule that avoids the overinclusiveness of the unrestricted approach and the underinclusiveness of the restricted motive approach, and that instead more accurately reflects the conditions under which the equal culpability thesis holds. Such a rule would enjoy a more complete and coherent normative justification—i.e. more fully respect the traditional rationale—than the existing approaches.

This Part first considers what the morally ideal approach would look like, but concludes that it would not be implementable. After that, the next Section considers a more implementable rule that approximates the morally ideal approach. This approach, despite involving simplifications and normative compromises, is nonetheless endorsed as striking the best available balance between implementability and normative justifiability. My conclusion is that this rule is normatively superior to both the unrestricted approach, championed by the Ninth Circuit, and the restricted motive approach, favored by the Eighth, Tenth, and Eleventh Circuits, and is nearly as easy to implement as those rules.

A. *The Morally Ideal Approach*

The normatively best approach would be one that allows willful ignorance to satisfy the knowledge element of the crime in all and only those cases in which the defendant's willful ignorance renders him at least as culpable as the similarly

situated knowing wrongdoer would be.¹⁹⁵ If the last Part is right that RECT2 correctly captures the conditions in which willful ignorance is at least as culpable as knowledge, then the morally ideal approach would be this:

Morally Ideal Rule: D's willful ignorance—of the basic variety—satisfies the knowledge element of a crime, C, if and only if it involved a breach of the duty of reasonable investigation that was sufficiently serious to make D's subsequent performance of the actus reus at least as culpable as the analogous conduct of a similarly situated knowing criminal who is guilty of C.

Were this rule adopted, a willful ignorance jury instruction could only be given if it could reasonably be inferred from the evidence introduced at trial that the defendant satisfied this rule.¹⁹⁶

Although this rule will be difficult to implement (as discussed below), note that this does not make it entirely unilluminating. After all, the argument of the previous Part—in particular the description of the duty of investigation—provides concrete guidance for deciding whether a defendant's willful ignorance is at least as culpable as the analogous knowing misconduct, such that a willful ignorance jury instruction would be appropriate. In particular, the relevant decision-maker, whether judge or jury, would have to consider two questions.

The first question to ask is 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. In virtue of the principle CCP (presented in Part III.B), the willfully ignorant defendant's confidence in the inculpatory proposition is one factor that determines his 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 a similarly situated knowing actor.

¹⁹⁵ See *supra* notes 15–16 and accompanying text.

¹⁹⁶ See *supra* note 41 and accompanying text.

The second question 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 several different factors. One is *why* the defendant breached this duty to investigate. For what reasons did he consciously decide not to make the investigations he knew would let him obtain greater certainty about the inculpatory proposition? How good or bad were these reasons? Was the defendant trying to set up a defense against liability, perhaps, or to continue getting the benefit of a criminal course of conduct? Or did he refrain from investigating for more excusable reasons like wishful thinking or naïve loyalty? Second, how easy would it have been for him to investigate the facts in question? All else equal, the less burdensome it would have been, the more culpable his decision not to investigate seems.

Answering these two types of question provides the raw material from which to form a view about whether a particular willfully ignorant defendant can be seen as at least as culpable as a similarly situated knowing defendant. Accordingly, the morally ideal rule does come with some concrete guidance on how to make the sort of culpability judgments that determine whether a willful ignorance instruction is appropriate in a given case.

While the morally ideal rule thus is not entirely unilluminating, it still appears unimplementable. After all, courts would understandably be loath to engage in the very difficult, fact-intensive and nebulous task of determining how culpable a particular willfully ignorant defendant is as compared to the defendant's similarly situated knowing counterpart. The arbitrariness of outcomes that would result from the difficult-to-apply morally ideal rule would likely outstrip any normative advantages it might have in terms of avoiding the over- or underinclusiveness of existing approaches.

Accordingly, what is needed is a more implementable *approximation* of the morally ideal rule. In other words, we must find a rule that does a better job than the existing approaches of tracking the conditions under which willfully ignorant defendants are at least as culpable as their knowing counterparts, which nonetheless can feasibly be applied by decision-makers.

B. A Second-Best Approximation of the Ideal

One might think that the restricted motive approach of the Eighth, Tenth, and Eleventh Circuits is on the right track here—even though, as argued above, it is too underinclusive to be adequate by itself. Rather than only taking the knowledge element of the crime to be satisfied by willful ignorance that was motivated by the desire to preserve a defense against liability, we want our rule to more accurately track the conditions under which breaching the duty of investigation makes one at least as culpable as the analogous knowing wrongdoer.

To accomplish this, we should expand the list of reasons for not investigating that can be the basis for conviction on a willful ignorance theory beyond simply the motive of wanting to avoid liability. Other especially egregious motives for remaining in ignorance would be the desire (1) to perpetuate some suspected course of criminal conduct (undertaken either on one's own or in conjunction with others), (2) to protect it from discovery, or (3) to continue receiving benefits from its commission.

Of course, it is going to be difficult *ex ante* to provide a complete list of sufficiently culpable motives for not investigating one's suspicions. Accordingly, it is recommended that our rule concerning willful ignorance include a *catch-all* clause to the effect that other *equally* culpable motives for failing to investigate would also suffice to satisfy the knowledge element of the crime. Now, one might doubt that judicial decision-makers are well placed to apply a philosophical concept like culpability.¹⁹⁷ Therefore, it might be preferable to use a more familiar term like "unjustified." We might say that the decision not to investigate is *highly unjustified* if one's motive was, say, to preserve a defense against liability or to protect a suspected conspiracy. The decision not to investigate would be unjustified, but *somewhat less so*, if one's motive was to protect one's child, for example. By contrast, such a decision would likely count as *justified* if one's motive was to avoid angering a violently abusive spouse. Thus, a good way to formulate the catch-all clause would be to say that other motives for not investigating that are as highly unjustified as the others already on the list—i.e. wanting to preserve a defense, etc.—would also suffice to satisfy the knowledge element

¹⁹⁷ Thanks to Scott Hershovitz for pressing me on this point.

of the crime.¹⁹⁸ However it is to be formulated exactly, adding a catch-all clause of this sort would help avoid the problem of underinclusiveness that afflicts the Eighth, Tenth, and Eleventh Circuits' restricted motive approach without having to come up with a comprehensive list of sufficiently bad motives for not investigating.

Next, recall that the converse problem afflicts the unrestricted approach adopted by the Ninth Circuit: namely, the overinclusiveness involved in allowing just any motive for remaining in ignorance to serve as the basis for conviction on a willful ignorance theory. To avoid this problem, our rule should also include a *limiting clause*. In particular, it should state that the defendant's deliberate refusal to investigate her suspicions can satisfy the knowledge element *only if* her motive for not investigating is of a comparable degree of culpability to—or better, as highly unjustified as—the other motives on the list. Including such a limiting clause will help reduce the danger of a willfully ignorant defendant's being deemed to have knowledge even though he or she is not as culpable as an analogous knowing wrongdoer.

Although this gives some indication of how we might formulate a rule concerning willful ignorance that better tracks the true scope of the equal culpability thesis, it is still not the best we can do. An additional difficulty with the Eighth, Tenth, and Eleventh Circuits' restricted motive approach is that it seeks to capture the conditions of equal culpability by focusing *only* on the defendant's reasons for not investigating.¹⁹⁹ But as Part V shows, this is not the only factor that affects the culpability of willful ignorance. In fact, it depends on *two* main factors: the defendant's level of confidence in the inculpatory proposition and the defendant's culpability for breaching the duty of investigation.²⁰⁰ The latter, in turn, depends on further sub-factors, including one's reasons for not investigating and the ease

¹⁹⁸ Another option might be to use the notion of unreasonableness here. However, I am hesitant to do so because it is natural to see merely inadvertent or careless failures to investigate as unreasonable, while willful ignorance requires a *deliberate* failure to investigate. Accordingly, I think confusion can be avoided by talking simply about unjustified motives for the decision not to investigate.

¹⁹⁹ See *supra* Part IV.B.

²⁰⁰ See *supra* Part V.

with which one could have investigated.²⁰¹ We want our rule concerning willful ignorance to capture as many of these moving parts as possible while still remaining implementable.

Thus, in addition to the defendant's motives for remaining in ignorance, we also want our rule to take account of two additional factors: (a) whether the defendant was nearly certain that the inculpatory proposition was true or whether he only had slight suspicions thereof, and (b) the ease with which the defendant could have investigated. Factor (a) matters to culpability in virtue of principle CCP from Part III.B. As for factor (b), we saw in Part V that the willfully ignorant defendant seems less culpable the more difficult or burdensome investigating his suspicions appeared to be. At some point, the burdens of investigating become so great that the decision not to investigate might cease to qualify as deliberate—as the Ninth Circuit suggested in *Heredia*.²⁰² But even before we reach that point, it seems possible that greater burdens in investigating might mitigate the defendant's culpability for deciding not to investigate.

Putting all these pieces together, we get the following rule for when willful ignorance can satisfy the knowledge element of the crime:

Second-Best Rule: Subject to the exception in (4), a defendant, D, who believes there is a substantial likelihood that the inculpatory proposition, *P*, required for a crime, *C*, is true, but does not possess knowledge that *P* is true, may nonetheless be *deemed* to possess knowledge of *P* if and only if:

(1) D satisfies the basic definition of willful ignorance—that is:

(a) D has suspicions that *P* is true, and

(b) D deliberately fails to investigate in the apparently available ways whether *P* is true;

(2) The available methods of investigating *P* are not so burdensome as to be unreasonable to expect of a law-abiding person under the circumstances;

(3) D's motive for not investigating whether *P* was either:

²⁰¹ See *supra* Part V.B.

²⁰² *United States v. Heredia*, 483 F.3d 913, 920 (9th Cir. 2007) (en banc); see also *supra* note 158 and accompanying text.

- (a) to preserve a defense against liability,
 - (b) to perpetuate, protect, or continue to receive the benefits of a suspected conspiracy or other criminal conduct, or
 - (c) some other motive that is as highly unjustified as the motives in (a) and (b);
 - (d) but *otherwise* (i.e. if D's motive for not investigating was not as unjustified as those in (a)-(c)), D's willful ignorance will *not* satisfy the knowledge element of C.
- (4) *However*, if D is *almost certain* that *P* is true, then any even slightly unjustified motive for not investigating will suffice for D's willful ignorance to satisfy the knowledge element of C, provided (1) and (2) also obtain.

This rule encapsulates the various insights about the factors that determine the willfully ignorant defendant's culpability discussed earlier. Prong (2) reflects the fact that greater burdens in investigating can reduce one's culpability for deciding not to investigate. Prong (3) provides a partial list of the especially culpable motives for not investigating that might render one at least as culpable as the analogous knowing wrongdoer. Prong (3)(c) explicitly recognizes that the list is incomplete, while (3)(d) recognizes that, in the typical case, motives for not investigating that are less culpable than the others on the list will not suffice. Finally, prong (4) is meant to reflect the fact that the defendant's level of subjective confidence in *P* can affect his culpability—as CCP states. Thus, if the defendant's subjective confidence in *P* is only slightly below the knowledge threshold (in other words, a bit less than practical certainty), then there will be just a small culpability gap to fill before the willfully ignorant defendant is just as culpable as his or her knowing counterpart. In such a case, an especially egregious motive for not investigating will *not* be required for the defendant to be as culpable as the analogous knowing wrongdoer; instead, a merely somewhat culpable motive for not investigating would suffice. If one doubts CCP, however, then prong (4) can be excised from the rule without too much loss.

This second-best rule does a better job of reflecting the actual range of circumstances in which the willfully ignorant defendant is as culpable as the analogous knowing wrongdoer—in other

words, the true scope of the equal culpability thesis. Accordingly, this rule has a more coherent normative justification than either side to the existing circuit split. It goes quite a ways toward avoiding the overinclusiveness of the unrestricted approach endorsed by the Ninth Circuit, and it helps avoid the underinclusiveness of the restricted motive approach favored by the Eighth, Tenth, and Eleventh Circuits.

Moreover, unlike the morally ideal rule discussed above, this second-best rule is implementable. In particular, it can be expressed in the form of jury instructions as follows:²⁰³

Proposed jury instructions: You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant suspected that [the inculpatory proposition was true], but deliberately refrained from investigating those suspicions because the defendant hoped to avoid liability, wanted to continue receiving the benefits of a suspected crime, or had some other highly unjustified motive. In addition, if you find that the defendant did not merely suspect, but was almost practically certain that [the inculpatory proposition was true], then you may find such knowledge even if the defendant's motive in deciding not to investigate was only slightly unjustified. However, you may *not* find such knowledge if you find that the defendant was simply careless in not investigating his or her suspicions. Nor may you find such knowledge if the only available ways to investigate the defendant's suspicions were unreasonably difficult or dangerous.

Accordingly, courts would do well to reject both the approaches to willful ignorance that the circuit split currently encompasses and instead adopt the second-best rule described here. Doing so is a practically feasible way to place the willful ignorance doctrine on a more secure normative footing than the existing approaches.

²⁰³ This proposed instruction is modeled on the one discussed in *Heredia*, 483 F.3d at 917.