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## Willful Blindness as Mere Evidence

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# WILLFUL BLINDNESS AS MERE EVIDENCE

*Gregory M. Gilchrist\**

*The willful blindness doctrine at criminal law is well-established and generally fits with moral intuitions of guilt. It also stands in direct tension with the first principle of American criminal law: legality. This Article argues that courts could largely preserve the doctrine and entirely avoid the legality problem with a simple shift: willful blindness ought to be reconceptualized as a form of evidence.*

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## INTRODUCTION

The doctrine of willful blindness—that a person can be guilty of knowing criminality when she is merely aware of a high risk and avoids knowledge of a key fact<sup>1</sup>—is both harmful and unnecessary. American courts have consistently embraced the doctrine even as they struggle to explain it.<sup>2</sup> The result is that the version of willful blindness approved by most courts, including the Supreme Court, is contrary to fundamental principles of legality.

It never had to be this way. This Article offers a simple alternative. Willful blindness has thrived because, like most longstanding criminal law principles, it fits basic moral intuitions. And like many longstanding criminal law principles, it also serves more efficient law enforcement. The basic idea, that a person might be guilty of a knowing violation upon proof of awareness of a high likelihood of the guilty fact plus aversion from learning that fact, resonates. The person who carries a package across a known drug trafficking border for an exorbitant fee will not be immune because he took care to avoid learning with certainty about the contents of the package.

The problem with the doctrine, however, is that courts generally fail to explain *how* the willfully blind defendant could be culpable for a crime of knowledge. Moreover, when courts do endeavor to explain willful blindness, the dominant explanation amounts to boldly amending statutory codes by judicial fiat. In such cases, courts have recognized that willful blindness is something less than knowledge and concluded the willfully blind are equally culpable and ought to be punished by analogy. Few concepts are more odious to the rule of law than punishment by analogy,<sup>3</sup> and yet this common and important doctrine of American criminal law is predicated on nothing more.<sup>4</sup>

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1. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011).

2. Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1353 (1992).

3. Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 612 (1956) (describing many vagrancy prosecutions in these terms); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168–69 (1972) (crimes defined by analogy of harm, “though long common in Russia, are not compatible with our constitutional system” (footnote omitted)). *Nullem crimen sine lege, nulla poena sine lege*. *Nullem crimen sine lege*, BLACK’S LAW DICTIONARY (11th ed. 2019); *nulla poena sine lege*, BLACK’S LAW DICTIONARY (11th ed. 2019).

4. *Global-Tech Appliances, Inc.*, 563 U.S. at 756 (“The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge.”).

The irony is that this problem was entirely avoidable *and* the method for avoiding the problem has been specifically identified in dissents to the two most significant court cases considering the doctrine.<sup>5</sup> Each dissent, by Judge and later Justice Kennedy, has been all but ignored by courts. This Article offers reason to return to the mere evidence conception of willful blindness.

It is easy to see that the doctrine elucidated by Justice Kennedy avoids the legality problems generally associated with willful blindness.<sup>6</sup> Less obvious, but perhaps equally important, is the likelihood that Justice Kennedy's conception of willful blindness would generate more or less the same outcomes.<sup>7</sup> Fundamentally, this Article contends that willful blindness reflects the loose epistemology of criminal law coupled with the fact that common sense moral intuitions, more than any single analytic approach, undergird criminal law. Jurors will often punish the willfully blind, and they are likely to do so whether the doctrine is introduced as a substitute for knowledge or not. If, indeed, this is a doctrine without a difference, then there is no reason to hold onto it and its concomitant problems.

The Article proceeds in seven parts. Part I introduces the doctrine and its problems, concluding with three possible ways of conceptualizing willful blindness. Part II examines the most common and most problematic concept of willful blindness: the substitute account. Part III introduces the mere evidence approach, pursuant to which the evidence that amounts to willful blindness permits, but does not demand, an inference of actual knowledge. Part IV demonstrates that the mere evidence conception of willful blindness fits with criminal law's heuristic approach to epistemology. Part V demonstrates that the mere evidence account fits with the historical development of willful blindness. Part VI offers support for the contention that formally adopting and applying the mere evidence approach will lead to largely the same outcomes. That is, those who would be found guilty under a legally suspect substitution approach will likely also be found guilty under a mere evidence approach. This conclusion is, necessarily, offered as a hypothesis; only by adopting a mere evidence model could we conclusively know whether outcomes

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5. See *id.* at 772 (Kennedy, J., dissenting); *United States v. Jewell*, 532 F.2d 697, 706 (9th Cir. 1976) (Kennedy, J., dissenting).

6. See *infra* Part III.

7. See *infra* Part VI.

would be meaningfully affected. Recognizing this limit, the Article offers reason to believe the outcomes would likely not vary greatly, premised in the basic conception of criminal guilt as a reflection of moral intuition. Finally, Part VII acknowledges problems with the mere evidence account.

No one can maintain that the doctrine of willful blindness is undertheorized.<sup>8</sup> Shelves could be filled with the literature digging to great depths to place this important doctrine on firmer ground. There is, however, a chasm too rarely crossed between the scholarship and caselaw of willful blindness. This Article offers an admittedly simple bridge guiding courts to a spot on which this important doctrine can better rest.

And the doctrine is important. Introducing his recent book on willful blindness, Alexander Sarch asks: “Can bad epistemic habits make one more *culpable* in ways the criminal law should recognize?”<sup>9</sup> As the basic tools of knowledge shift from curated and edited books, journals, and papers to a universally accessible and amendable set of *ipse dixits*, everyone ought to share concern about bad epistemic habits. People can avoid knowledge even as they appear to be seeking or accumulating it. Such is a terror of the internet age, and it is reasonable to ask how, if at all, the criminal law ought to respond.

Additionally, ignorance has a special role within the corporate form.<sup>10</sup> People complain when a corporation engages in grievous wrongdoing, yet no high-level officials are held accountable.<sup>11</sup> The corporate form frequently renders individual prosecutions difficult.<sup>12</sup> Corporate hierarchies, by design, isolate functions and thus knowledge.<sup>13</sup> When one considers whether a corporate executive is

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8. Most recently, Alexander Sarch’s book, ALEXANDER SARCH, CRIMINALLY IGNORANT: WHY THE LAW PRETENDS THAT WE KNOW WHAT WE DON’T (2019), makes a significant contribution to the literature. Sarch offers a powerful account of willful blindness that could help address the accountability gap in corporate criminal prosecutions. Ultimately, as will be explored further below, Sarch’s theory is one that allows substitution of knowledge by something different, premised on comparable culpability. Rich as his approach is, absent legislative change, it does not avoid the legality concerns that have haunted the doctrine since its inception.

9. *Id.* at xi.

10. J.S. Nelson, *Disclosure-Driven Crime*, 52 U.C. DAVIS L. REV. 1487, 1487 (2019).

11. *Id.* at 1552 (“The very natural and immediate reaction that many observers have to revelations of large-scale corporate wrongdoing such as inside VW and other companies is to demand criminal prosecution of the top executives in charge.”).

12. Gregory M. Gilchrist, *Individual Accountability for Corporate Crime*, 34 GA. ST. U. L. REV. 335, 351 (2018).

13. *Id.* at 361–62.

culpable for wrongdoing that occurred on her watch, questions quickly turn to what she knew and when she knew it. Often, the answers will be that she simply did not know about the wrongdoing, but that she was aware of a culture or pattern of practices that, at least with the benefit of hindsight, led to the wrongdoing. In such cases, prosecutors will turn to theories of willful blindness.<sup>14</sup> The executive may be on the hook for knowing culpability even absent proof that she knew.<sup>15</sup>

Epistemic uncertainty, disregard for truth in the internet age, and corporate governance during a time in which corporations exert ever greater influence over people's lives on a global scale demand attention. Each will generate calls for applying, or even bolstering, doctrines of willful blindness.<sup>16</sup> To the extent these calls urge adoption of new statutes,<sup>17</sup> they introduce the normative question of whether—legality concerns aside—ignorant wrongdoing in some cases ought to be punished as knowing wrongdoing.<sup>18</sup> This Article sidesteps this question, in part because code-wide coherent statutory change to the relevant laws is so very unlikely. This Article addresses what Sarch labels the practitioner's problem: "Is there a sufficient legal basis for courts to apply the relevant imputation principle?"<sup>19</sup> This is contrasted with the lawmaker's problem: "Would it be normatively sound for the lawmaker . . . to adopt the relevant imputation principle?"<sup>20</sup>

Willful blindness is being applied by the courts now. It is being done in a manner deeply at odds with foundational legality principles. The problem is likely to get worse, not better, as prosecutors face greater demands to pursue theories of willful blindness. Courts need an approach that works immediately, and this Article offers one.

The simplicity of the approach, I believe, is its greatest benefit. The law, as described, defined, and applied by the courts, has never

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14. Nelson, *supra* note 10, at 1559 ("Judge Rakoff and others have suggested that prosecutors could ease their burden of proving intent in these white collar cases by relying on 'willful blindness' or 'conscious disregard.'").

15. *See id.*

16. *See* SARCH, *supra* note 8, at 212–30 (2019) (advocating for a new rule of motivated ignorance that would substitute for the mens rea of recklessness in certain cases whether the actor was actually unaware of the risk generated by her conduct).

17. *Id.* at 154; 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, 62.

18. SARCH, *supra* note 8, at 155 (offering a normative theory of equal culpability to support statutory change).

19. *Id.* at 147.

20. *Id.*

had great patience for nuanced epistemology. The mere evidence approach to willful blindness benefits from being simple, coherent, and consistent with moral intuitions.

### I. THE DOCTRINE OF WILLFUL BLINDNESS

Willful blindness is particularly important because of the preeminence of mens rea to criminal law.<sup>21</sup> Almost all crimes require mens rea, and knowledge is a particular mental state on which many crimes stand or fall. Was the defendant aware of a specified fact or result at the time she acted? If so, she acted knowingly. If not, she did not.

To knowingly cause the death of another is generally punishable as murder;<sup>22</sup> to do so recklessly is deemed less serious and generally punished as mere manslaughter.<sup>23</sup> Knowing possession of contraband,<sup>24</sup> failing to pay taxes in violation of a known legal duty,<sup>25</sup> laundering money known to be proceeds of illegal activity<sup>26</sup>—each of these crimes turns in significant part on what the defendant knew at the time of a particular act or omission.<sup>27</sup>

That the criminal law relies so heavily on subjective mental states to define crimes is both understandable and problematic. Understandable, because the concept that an actor's mental state is relevant to her culpability is so fundamental as to go largely unquestioned.<sup>28</sup> Problematic, because few concepts stymie philosophy

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21. See Francis Bowes Sayre, Note, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932) (“For hundreds of years the books have repeated with unbroken cadence that *Actus non facit reum nisi mens sit rea*. ‘There can be no crime, large or small, without an evil mind,’ says Bishop. ‘It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offence is the wrongful intent, without which it cannot exist.’”); see also Kimberly Kessler Ferzan, *Beyond Intention*, 29 CARDOZO L. REV. 1147, 1147 (2008) (“Intentions play a central role in our moral and legal discourse. As Justice Holmes famously remarked over one hundred years ago, the intention with which we act is fundamental to our attributions of blameworthiness. It is intention that distinguishes a stumble from a kick.”).

22. See, e.g., MODEL PENAL CODE § 210.2 (AM. L. INST. 1962).

23. See, e.g., MODEL PENAL CODE § 210.3 (AM. L. INST. 1980).

24. See, e.g., 21 U.S.C. § 841 (2018).

25. See, e.g., 26 U.S.C. § 7201 (2018).

26. See, e.g., 18 U.S.C. § 1956 (2011).

27. *Id.*; 21 U.S.C. § 841; 26 U.S.C. § 7201.

28. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 28 (Oxford 2d ed. 2009) (“It is characteristic of our own and all advanced legal systems that the individual’s liability to punishment, at any rate for serious crimes carrying severe penalties, is made by law to depend, among other things, on certain mental conditions.”).

more than cognition and the mind.<sup>29</sup> That said, the criminal law has developed and continues to function in a state of contented ignorance as to the epistemic and ontological challenges related to the human mind, relying instead on a folksy psychology that, in truth, we all recognize even where it lacks precision or accuracy.<sup>30</sup>

In this vein, where guilt is predicated on knowingly acting or causing a result, juries are instructed:

The term “knowingly”, as used in these instructions to describe the alleged state of mind of [the defendant], means that [he][she] was conscious and aware of [his][her][action][omission], realized what [he][she] was doing or what was happening around [him][her], and did not [act][fail to act] because of ignorance, mistake, or accident.<sup>31</sup>

That is, knowledge is basically described as awareness of a fact or set of facts.<sup>32</sup>

### A. *Why Willful Blindness?*

How can a prosecutor prove whether a defendant was actually aware of particular facts at some time in the past? There is no record of mental states. Indeed, the legal system has deftly side-stepped even the question of what it means to have a particular mental state—of what it is to be aware.<sup>33</sup> This critical issue is taken as a given.

Between the lack of analytic rigor defining mental states, and epistemic limits on our ability to study mental states, particularly past mental states, prosecutors necessarily rely on circumstantial evidence

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29. This problem is perhaps best illustrated by the fact that contemporary philosophy of mind is dominated by reductionist theories that are quite difficult to reconcile with free will. This does not mean no one tries, but more interesting is how little anyone cares. Day to day, we believe in free will and likely will continue to do so, whatever philosophy of mind tells us. See Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL'Y 51, 56 (2004) (“We have no convincing conceptual reason from the philosophy of mind, even when it is completely informed about the most recent neuroscience, to abandon our view of ourselves as creatures with causally efficacious mental states.”).

30. See *id.* at 51–53.

31. KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE & INSTRUCTIONS § 17:04, Westlaw (database updated Aug. 2020).

32. See *id.*

33. Keren Shapira-Ettinger, *The Conundrum of Mental States: Substantive Rules and Evidence Combined*, 28 CARDOZO L. REV. 2577, 2579–80 (2007) (“Although classical dualism is now almost unanimously philosophically discredited, quite remarkably it remains the dominant view in the legal literature.”).

to prove mens rea.<sup>34</sup> The defendant was a sane person who was sober and awake when he loaded the gun, aimed it at the victim, and pulled the trigger? Under these circumstances, absent some evidence to the contrary, common sense tells us that the defendant was aware that he would cause death or serious bodily injury to the victim. If death results, most people are comfortable concluding that the death was caused *knowingly*, and possibly purposely.

Sometimes, however, proving knowledge circumstantially is difficult, or maybe impossible. The defendant invested money in a venture to secure a government contract in Saudi Arabia. The defendant was aware that the business plan included a line item of \$400,000 described only, and opaquely, as an “agency fee.” The defendant was aware that agency fees are often legitimately paid to cover the costs of attorneys, notaries, and even line-waiters. And, there is a record of the defendant asking, “isn’t \$400,000 high for agency fees on this project?” and not following up when the response was, “don’t worry about how things are done in Saudi Arabia.” When it turns out that \$380,000 of that line item traveled through third parties to bribe a foreign official to secure the contract, would we say the defendant *knew* such bribe would occur? Plainly he was not actually aware of the particular bribe to the particular official; he was insulated from those facts. However, he was plainly aware of a risk that something like this would occur. In this case, can the investor be said to be an accomplice to the knowing bribery of a foreign official?

Cases like this call for application of the doctrine of willful blindness, or deliberate ignorance. This doctrine allows prosecutors to establish guilty knowledge by proving something other than actual awareness.<sup>35</sup> In most jurisdictions, where proof of guilt requires knowledge of *X*, the judge can instruct the jury it may convict if the prosecution proves (1) that the defendant was aware of a high probability that *X*; (2) that the defendant consciously took deliberate actions not to learn *X*; and (3) that the defendant did not actually

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34. Teneille Brown & Emily Murphy, *Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant’s Past Mental States*, 62 STAN. L. REV. 1119, 1130 (2010) (“Because we cannot presently read someone’s mind to determine her mens rea at the time of the crime, the jury is often told it can rely on the objective circumstances surrounding the criminal’s conduct to draw inferences about her state of mind.”).

35. Charlow, *supra* note 2, at 1353 (“Willful ignorance is employed in criminal law primarily, and most controversially, as a mental state that satisfies a required mens rea of knowledge.”).

believe  $X$  was untrue.<sup>36</sup> That is, the judge can instruct the jury that guilt requires knowledge of  $X$ , and then instruct the jury that it may convict without finding knowledge of  $X$ .<sup>37</sup>

People who pay bribes for foreign officials are blameworthy. People who invest money knowing it will be used to pay bribes to foreign officials are comparably blameworthy. The investor who recognized the risk of bribes, who expressed concern about an exorbitant agency fee, and who accepted as comfort the admonition not to worry about how things are done in another country seems comparably blameworthy. Yet, the last of these is different than the first two; she may not have actual awareness that the money will be used to pay bribes.

In the bribery hypothetical, the facts would support the conclusion that the defendant invested with an awareness of a high probability that the project involved paying bribes. Moreover, the investor's failure to inquire further upon receiving such a patently unsatisfactory answer to his reasonable question may be her conscious avoidance of the issue because she did not want to know. In such a case, most courts would issue a willful blindness instruction, allowing the jury to convict based on this proof of less than knowledge.<sup>38</sup>

"The doctrine of willful blindness is well established."<sup>39</sup> The basis for and nature of the doctrine, however, remains, at best, muddled, and the majority conception of willful blindness represents an affront to basic legality principles.<sup>40</sup> Exactly how this court-made doctrine functions is rarely clear. One possibility, the prevailing one,

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36. See, e.g., *United States v. Heredia*, 483 F.3d 913, 917 (9th Cir. 2007).

37. See *id.* (approving the Ninth Circuit Model Jury Instruction on the willful blindness).

38. As described by the Ninth Circuit:

When knowledge is at issue in a criminal case, the court must first determine whether the evidence of defendant's mental state, if viewed in the light most favorable to the government, will support a finding of actual knowledge. If so, the court must instruct the jury on this theory. Actual knowledge, of course, is inconsistent with willful blindness. The deliberate ignorance instruction only comes into play, therefore, if the jury rejects the government's case as to actual knowledge. In deciding whether to give a willful blindness instruction, in addition to an actual knowledge instruction, the district court must determine whether the jury could rationally find willful blindness even though it has rejected the government's evidence of actual knowledge. If so, the court may also give a [willful blindness] instruction.

*Id.* at 922.

39. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011); see *infra* Part V.

40. Charlow, *supra* note 2, at 1353 ("[D]espite the use of wilful ignorance as a criminal mens rea for over 100 years, there is tremendous confusion in this area of law and a lurking sense that something is fundamentally awry.")

is that willful blindness represents a mental state distinct from knowledge, but equally culpable.<sup>41</sup> Accordingly, the defendant who holds this mental state ought to be punished the same as the defendant who actually knew. Returning to the bribery example, were there another investor with the exact same circumstances, but who was told, “we need the money to bribe the official” in response to her reasonable inquiry about high agency fees, would we blame her more? Do we really blame the intentionally ignorant investor less because he avoided ever reaching actual awareness of the ultimate and critical fact?

This account, however, generates two fundamental problems. First, under this account willful blindness permits punishment by analogy. Second, it stems from courts crafting common law crimes. As such, this account of willful blindness is at odds with foundational legality principles.<sup>42</sup> These criticisms are not new, but they have not limited dominance of the willful blindness doctrine.

This Article offers an alternative. Rather than conceiving of willful blindness as distinct basis for convicting a defendant of a knowing violation, courts ought to construe willful blindness as mere evidence of knowledge. The facts of willful blindness come up often. And, they often suggest culpability equal to that of one who acts with actual knowledge. However, they also sometimes suggest something more: actual knowledge.

Knowledge, like any subjective mental state, is difficult to prove by direct evidence. Fact-finders are necessarily called upon to extrapolate from certain evidence whether a defendant had a particular mindset or not. Willful blindness is simply a condition from which jurors could infer actual knowledge. The condition described by willful blindness occurs with sufficient frequency that it has been recognized and named, but ought to be understood as nothing more than circumstantial evidence from which one might infer knowledge. Understood as mere evidence, willful blindness avoids the legality

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41. *Global-Tech Appliances, Inc.*, 563 U.S. at 766.

42. Willful blindness is not uniquely problematic in this regard. For example, the doctrine of voluntary intoxication, pursuant to which mens rea that is *not* present may, under certain circumstances, be imputed to one who lacks the mens rea by reason of her intoxication suffers from very similar legality problems. Likewise, entire substantive areas of law, like fraud, are so poorly defined as to render the concept of notice farcical. A better conception of willful blindness will, of course, do nothing to improve or remedy other failings of the American legal system. Hopefully, that is not reason to abandon the effort. *But see* SARCH, *supra* note 8, at 161.

problems generally associated with the doctrine, while maintaining relative adherence to intuitions about equal culpability that led to its creation. Moreover, the mere evidence account of willful blindness is a better fit historically, philosophically, and functionally, than the alternatives.

Anthony Kennedy wrote dissents in two seminal willful blindness cases. First, as a judge, he dissented from *United States v. Jewell*,<sup>43</sup> an en banc decision of the Ninth Circuit holding that willful blindness constitutes a mental state distinct from knowledge that may nonetheless be sufficient to establish a knowing violation.<sup>44</sup> Then-Judge Kennedy maintained that “[w]hen a statute specifically requires knowledge as an element of a crime . . . the substitution of some other state of mind cannot be justified even if the court deems that both are equally blameworthy.”<sup>45</sup> Thirty-five years later, when the U.S. Supreme Court described willful blindness as a well-established acceptable substitute for knowledge in criminal cases,<sup>46</sup> Justice Kennedy did not waiver. Dissenting alone, he maintained that a distinctive mental state cannot be a substitute for knowledge; it may, however, be *evidence* of knowledge.<sup>47</sup>

No court has ever accepted Justice Kennedy’s position, and it has received scant scholarly attention. This is surprising because he seems to have the better argument as a matter of theory, but also because the cost of adopting a mere evidence view of willful blindness is low, while the benefit of avoiding the basic legality problems is significant. Only by conceptualizing willful blindness as mere evidence can the legality problems be avoided. At the same time, doing so is unlikely to lead to significantly different results in individual cases: where the facts of willful blindness are compelling, knowledge will often be presumed anyway. As a substitute for knowledge, willful blindness is something of a black eye to criminal justice; this Article suggests it could just as easily be avoided, and therefore ought to be.

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43. 532 F.2d 697, 708 (9th Cir. 1976).

44. *Id.* at 704 (Kennedy, J., dissenting).

45. *Id.* at 706.

46. *Global-Tech Appliances, Inc.*, 563 U.S. at 766.

47. *Id.* at 774 (Kennedy, J., dissenting) (“Facts that support willful blindness are often probative of actual knowledge.”).

### B. Three Conceptions of Willful Blindness

Courts have not spent much time fussing over the analytic clarity of the willful blindness doctrine; scholars have. Douglas Husak and Craig Callender identified two different conceptions of willful blindness variously offered by courts and commentators.<sup>48</sup> First, under the “actual knowledge account,” willful blindness is described as a form of actual knowledge.<sup>49</sup> Alternatively, under the “substitute account,” willful blindness is described as a substitute for knowledge, which itself is lacking.<sup>50</sup> The latter introduces a distinct mental state that can suffice for knowledge; the former defines knowledge to include the conditions of willful blindness.

Too often this distinction is ignored: “Confusion about whether the wilfully ignorant defendant possesses genuine knowledge or a substitute for knowledge infects many of the hypotheticals and real cases commentators use to illustrate the phenomenon. This confusion is intolerable. An adequate understanding of wilful ignorance requires commitment to one view or the other.”<sup>51</sup> The confusion is intolerable, but it is also understandable. Indeed, the Model Penal Code (the “Code”) contributes to the confusion.

The Code provides that “[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence.”<sup>52</sup> By *defining* knowledge to include a condition generally associated with willful blindness, the Code seems to adopt the actual knowledge approach, thus eliminating some of the legality problems. The commentary specifies that this provision is meant to capture willful blindness.<sup>53</sup> Under this approach, substantive crimes that require a

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48. Husak & Callender, *supra* note 17, at 42.

49. *Id.* (“According to this interpretation, wilful ignorance is a species of genuine knowledge; thus the wilfully ignorant defendant does possess genuine knowledge after all.” (emphasis omitted)).

50. *Id.* (“According to this interpretation, wilful ignorance is not a species of genuine knowledge; although the wilfully ignorant defendant does not possess genuine knowledge, there is a reason to treat him as though he did.” (emphasis omitted)).

51. *Id.* at 43–44.

52. MODEL PENAL CODE § 2.02(7) (AM. L. INST. 1985).

53. *Id.* § 2.02 cmt. 9 (“Subsection (7) deals with the situation that 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 determine whether it exists or does not exist.”).

knowing violation are, in more traditional parlance, really requiring a violation committed with actual awareness *or* willful blindness.<sup>54</sup>

Yet, does the Code's definition really capture willful blindness? The commentary convolutes the issue with this statement: "The inference of 'knowledge' of an existing fact is usually drawn from proof of notice of high probability of its existence, unless the defendant establishes an honest, contrary belief."<sup>55</sup> By referring to an *inference* of knowledge from proof of awareness of a high probability, the Code evokes the mere evidence approach advocated by this Article. But that is at odds with the Code's definitional approach which would mandate a finding of knowledge, not merely allow its inference, upon a showing of awareness of a high probability.<sup>56</sup> Even under the Code, confusion about the very nature and function of willful blindness remains.<sup>57</sup>

Moreover, if the Code taking a pure definitional approach, and defining knowledge as traditional knowledge *or willful blindness*, it fails to properly capture willful blindness in the definition. Generally, although not always, willful blindness requires more than an awareness of a high probability; it also requires an active effort to avoid learning the truth of the matter.<sup>58</sup> The Code omits that.

Husak and Callender were right: there remains far too much confusion between the actual knowledge and the substitute accounts of willful blindness.<sup>59</sup> There is, however, a third account: the method of proof account. Considered as a method of proof, willful blindness is neither a substitute for, nor a form of, knowledge; rather, willful blindness is a set of relatively common conditions from which a factfinder might *infer* actual knowledge.<sup>60</sup> This is not itself a novel

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54. *Id.*

55. *Id.*

56. *See id.* § 2.02(7).

57. Some of the confusion likely stems from the imprecision of "high probability." The commentary explains that this language was adopted following concerns that the previously proposed "substantial probability" left too little gap between knowledge and recklessness. *Id.* § 2.02 n.42. However, this clarification only highlights that under the Code the distinction between recklessness and knowledge may be merely degree of certainty.

58. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011) ("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.").

59. Husak & Callender, *supra* note 17, at 43–44.

60. *See Charlow, supra* note 2, at 1388.

idea. Indeed, this is the very claim made deep in the commentary to the Code (albeit perhaps unintentionally).<sup>61</sup> And, it is that urged by Justice Kennedy.<sup>62</sup> It is, however, definitely not the prevailing account.

The evidentiary account is generally disclaimed as *different* than willful blindness.<sup>63</sup> Courts have come to understand willful blindness not merely as a method of proof, but rather as an alternative mental state that can itself satisfy the statutory requirement of knowledge.<sup>64</sup> By and large, courts have embraced the substitute approach.<sup>65</sup>

## II. THE SUBSTITUTE ACCOUNT IS THE MOST PROBLEMATIC AND MOST WIDELY ACCEPTED ACCOUNT OF WILLFUL BLINDNESS

One might fairly question whether this distinction has teeth: does it really make a difference whether we understand willful blindness as a substitute for actual knowledge, a form of actual knowledge, or as a method of proving actual knowledge? It does.

The substitute approach instructs juries that there is an alternative basis—other than knowledge—on which the defendant can be convicted.<sup>66</sup> Indeed, one of the clearer and less problematic model instructions on willful blindness directs jurors that “the government may prove that [the defendant] knew of that fact or circumstance if the evidence proves beyond a reasonable doubt that [the defendant] deliberately closed (his) (her) eyes to what would otherwise have been obvious to (him) (her).”<sup>67</sup> It continues:

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61. MODEL PENAL CODE § 2.02 cmt. 9.

62. See *Global-Tech Appliances, Inc.*, 563 U.S. at 774 (Kennedy, J., dissenting) (“Facts that support willful blindness are often probative of actual knowledge.”).

63. See, e.g., Alexander F. Sarch, *Beyond Willful Ignorance*, 88 U. COLO. L. REV. 97, 101 n.7 (2017) (“The willful ignorance doctrine should not be confused with the distinct evidentiary rule that evidence of willful ignorance can also constitute evidence from which a jury may infer actual knowledge.”).

64. *Id.* at 101.

65. *Id.* at 101 n.7.

66. And this is how most courts conceptualize willful blindness, as an accepted substitute for knowledge that the government may elect to prove in place of actual knowledge. See, e.g., *United States v. Poole*, 640 F.3d 114, 121 (4th Cir. 2011) (“Generally, in criminal prosecutions, the government elects to establish a defendant’s guilty knowledge by either of two different means. The government may show that a defendant actually was aware of a particular fact or circumstance, or that the defendant knew of a high probability that a fact or circumstance existed and deliberately sought to avoid confirming that suspicion.”).

67. See COMM. ON MODEL CRIM. JURY INSTRUCTIONS WITHIN THIRD CIR., MODEL CIVIL JURY INSTRUCTIONS 21 (2018), <https://www.ca3.uscourts.gov/model-civil-jury-table-contents-and-instructions>.

You must find that [the defendant] (himself) (herself) [actually,] subjectively believed there was a high probability of the existence of (state the fact or circumstance, knowledge of which is required for the offense charged), consciously took deliberate actions to avoid learning [used deliberate efforts to avoid knowing] about it, and did not actually believe that it did not exist.<sup>68</sup>

On this instruction, a juror would likely conclude that the knowledge element of the offense is established by proof that:

1. the defendant was aware of a high probability of the fact in question;
2. the defendant took deliberate action to avoid learning more about that fact; and
3. the defendant did not hold an actual belief the fact did not exist.<sup>69</sup>

As a substitute account, these conditions precedent appear, by themselves, to be sufficient to establish knowledge. As such, the substitute account expands the set of conditions that establish knowledge; it actually expands the definition of knowledge as the term used in statutes. This expansion introduces most, though not all, of the controversy surrounding willful blindness.

### A. *Willful Blindness and Legality*

There are three primary problems associated with willful blindness. First, judicial usurpation of the legislative function: when a judicially crafted doctrine expands the scope of liability, the judiciary has effectively legislated.<sup>70</sup>

Willful blindness is a common law doctrine by which courts allow conviction for a knowing violation based on something other than knowledge. Conviction by judicial caveat is a problem. Crimes

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68. *Id.* at 22.

69. This Third Circuit model instruction does contain language consistent with the method of proof approach advocated by this Article. In other parts of the instruction, the jurors would be told that they “may find” knowledge based on such evidence. *Id.* at 21. The permissive language is consistent with the method of proof approach. At best, however, this instruction is ambiguous between the approaches, and, because it concludes with language lacking the permissive modifier, *see supra* text accompanying note 8, it seems to favor the substitute approach.

70. Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 194–95 (1990) (“[I]f the judiciary substitutes a lesser mental state for statutorily prescribed knowledge, then it encroaches on the legislative prerogative of defining criminal conduct.”).

must be publicly defined *ex ante*, and there can be no punishment absent law. This is a first principle of legality, an axiom on which the rule of law is built.<sup>71</sup> In the United States, this principal generally means that an act cannot be punished absent a statute forbidding it. There ought to be no common law of crime,<sup>72</sup> because incremental rule development predicated on specific cases and controversies would necessarily entail—at certain points in history—punishment of acts not publicly defined *ex ante*.<sup>73</sup> Any punishment stemming from a case that advanced the common law would be punishment based on law not defined *ex ante*.

Robin Charlow argues that this is not actually a problem because “‘knowledge’ is an ambiguous term, not having one fixed or limited meaning . . . thus rendering the term open to judicial construction.”<sup>74</sup> As a legal term, “knowledge” is indeed ambiguous.<sup>75</sup> Therefore, courts must construct its meaning in order to instruct juries to apply the term. Yet, when courts conceive of “willful blindness” as something distinct from and substitutable for “knowledge,” they are not constructing;

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71. Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 337 (2005) (“The doctrines that make up the ‘legality principle’ include the modern abolition of common law penal doctrines, the modern prohibition of the judicial creation of penal rules, special rules for the construction of penal statutes, the constitutional prohibition of *ex post facto* penal laws, the due process bar of retroactive application of criminal rules, and the due process invalidation of vague criminal statutes.”).

72. Rhode Island maintains a code provision allowing for punishment of common law offenses not otherwise codified. “The possibility of significant punishment (here, up to five years’ incarceration) for an uncodified (indeed, unenacted) crime severely undercuts the usefulness of having a criminal code at all.” Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 25 (2000).

73. Of course, in the United Kingdom and United States there is a long and continuing tradition of common law crimes. The theft crimes have always been almost necessarily subject to common law definition, if only because “[t]he field of theft offenses displays a variety as rich as the imagination of those who seek dishonest gain.” GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 3 (1978); see also Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 520 (2011) (“If one attempts to key one’s definition of fraud to descriptions of behaviors, new behaviors will inevitably be invented, or will simply arise, that expose the definition as faulty and underinclusive.”). But it’s not just theft; most crimes were developed at common law. Moreover, although today, in the United States, most states expressly forbid punishment based on a crime not defined by statute, see, e.g., OHIO REV. CODE ANN. § 2901.03 (LexisNexis 2021) (“No conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code.”), the line between statutory interpretation and common law development is blurry. Courts continue to develop something that is probably most accurately described as the criminal common law. Or, as Dan Kahan describes it, “[F]ederal criminal law, as a whole, is best conceptualized as a regime of delegated common law-making.” Daniel M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 470 (1996).

74. See Charlow, *supra* note 2, at 1355 n.11.

75. See *infra* Part III.

they are legislating. If knowledge is defined to include willful blindness, or if willful blindness is accepted as a form of circumstantial evidence from which knowledge can be inferred, this problem is averted. However, so long as the substitute account dominates, this remains a real problem.

Second, punishment by analogy: the core justification courts give for adopting willful blindness *as a substitute for knowledge* is that a person who is willfully blind is equally culpable as one who actually knows. There are few graver offenses against basic legality principles than allowing the moral calculus of judges to substitute for ex ante promulgation of rules.<sup>76</sup> Alexander Sarch argues, to the contrary, that where a fact (e.g., willful blindness) is equally helpful to explaining why an action should be punished as another fact (e.g., knowledge), the former is an acceptable substitute for the latter.<sup>77</sup> He also makes a compelling case that willful blindness makes the same contribution to explaining why acting under that mental state is criminalized as knowledge, thus satisfying his condition.<sup>78</sup> However, this necessary step in the equation is itself the problem of punishment by analogy.<sup>79</sup> Perhaps acting with willful ignorance of a particular fact is equally as wrong as acting with knowledge of that fact,<sup>80</sup> but if willful blindness is understood as something distinct from knowledge, that is immaterial to the legality question. If the statute criminalizes the knowing action, then only knowing action will suffice.<sup>81</sup> To engage in the moral

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76. *United States v. Wiltberger*, 18 U.S. 76, 96 (1820) (“It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.”).

77. Sarch argues:

[I]f mental state M is required for crime C because the presence of M makes a particular kind of contribution to explaining why the conduct designated by C is criminalized in the first place, then if another mental state, M\*, makes exactly that same contribution (or a greater contribution of the same kind) to explaining why that conduct is criminalized, then M\* should be allowed to substitute for M.

Sarch, *Beyond Willful Ignorance*, *supra* note 63, at 134–35 (emphasis omitted).

78. *Id.* at 135.

79. Sarch argues to expand the analogy to punish merely reckless ignorance in some cases. “[T]aking the traditional rationale [for punishing willful ignorance] seriously requires us to also allow some forms of egregious non-willful ignorance—most importantly, reckless ignorance—to substitute for knowledge in conditions of equal culpability.” *Id.* at 110.

80. And this is the position taken by courts justifying the doctrine. *See, e.g.*, *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011).

81. The solution, of course, would be to amend the statute to forbid willfully blind conduct. This Article proceeds from the premise that this solution, however appealing, will not happen. *See supra* text accompanying notes 49–50.

calculus required to justify punishing something distinct from knowledge is to punish by analogy. Legislatures are free to adopt such reasoning *ex ante*, judges may not *ex post*.<sup>82</sup>

Finally, willful blindness generates some concern that defendants may be erroneously convicted for mere recklessness or negligence.<sup>83</sup> The substitute account is responsible for the first two problems, but not the third. Shifting away from the substitute account of willful blindness will eliminate core legality concerns, although it will not completely eliminate concerns about wrongful convictions surrounding willful blindness cases.<sup>84</sup>

### B. Statutory Solutions

There remains one suggestion so sound that it would seem to carry the day. If we mean to punish the willfully blind as we punish the knowing, let us simply amend the statutes to punish knowing *or* willfully blind behavior.<sup>85</sup> There is hardly any analytic objection to this alternative. One may object that the expansion of criminal liability is itself problematic.<sup>86</sup> Fine, but that is a different issue. If we accept that moral intuition supports punishing the willfully blind, and that the willfully blind ought to be punished, amending codes to punish this mental state would avoid all legality concerns. Model Penal Code section 2.02 could be amended to include a new subsection between its definitions of “knowingly” and “recklessly.”<sup>87</sup> Each statute punishing knowing conduct could be amended to either include, or

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82. Sarch acknowledges that only statutory reform can completely respond to these legality concerns if a robust, substitute version of willful blindness is to be retained. *See* SARCH, *supra* note 8, at 154–55.

83. *See, e.g.*, Harry L. Clark & Jonathan W. Ware, *Limits on International Business in the Petroleum Sector: CFIUS Investment Screening, Economic Sanctions, Anti-Bribery Rules, and Other Measures*, 6 TEX. J. OIL GAS & ENERGY L. 75, 115 (2011) (arguing that given the lack of clarity in the Foreign Corrupt Practices Act context, “in practice, the DOJ often seems to be guided by what is essentially the lower negligence standard”).

84. It may, however, provide a better perspective about these concerns. Willful blindness cases are really cases where the evidence of a core issue is limited. But when a core issue in a case is a person’s mental state at some time in the past, the evidence is always and necessarily limited. Willful blindness is a type of evidence—like contemporaneous recordings, surrounding circumstances, common sense inferences—from which a juror can make reasonable conclusions about a person’s mental state at particular time in the past. Judgments in willful blindness may be mistaken, but so too they could be mistaken in cases relying on more traditional evidence of mental state. *Global-Tech Appliances, Inc.*, 563 U.S. at 774. (Kennedy, J., dissenting).

85. *See, e.g.*, Husak & Callender, *supra* note 17, at 68–69.

86. Sarch argues that expanding criminal liability to cover systemic ignorance is normatively and instrumentally desirable. *See* SARCH, *supra* note 8, at 175–76.

87. *See* MODEL PENAL CODE § 2.02 (AM. L. INST. 1985).

exclude, willfully blind conduct. Or, Code definitions of knowledge could be amended to capture the disjunctive set of traditional knowledge or willful blindness. If the law seeks to punish willfully blind conduct as knowing conduct, then the positive law ought to say as much. Then, everyone would be on notice, the legislature, not the judiciary, would be defining the crime, and there would be little basis for complaint.

Sadly, this solution is as unlikely as it is perfect. Our legal system is comprised of (at least) fifty-one discrete systems, each with its own code. The American Law Institute's Model Penal Code is often heralded as a singular success in advancing our criminal codes, and yet, even for that remarkable success, the codes of each state remain as different as they are similar.<sup>88</sup> The prospect of a uniform and complete statutory fix to the problem of willful blindness is thus bleak.<sup>89</sup> Courts created this doctrine, and courts are best situated to improve it.

### III. THE MERE EVIDENCE ACCOUNT ALLOWS ACCOUNTABILITY WITHOUT LEGALITY PROBLEMS

Recognizing willful blindness merely as a method of proof empowers the jury to convict for actual knowledge based on proof of willful blindness, but it prevents conviction for mere willful blindness. The method of proof approach requires an additional cognitive leap: to convict for a knowing violation based on willful blindness, jurors would need to consider the facts of willful blindness in context and conclude that the defendant "actually knew." In this way, accepting willful blindness as merely a form of evidence is superior to defining knowledge to include willful blindness. While the definitional shift would remedy the core legality problems in the substitute approach, it would also necessarily broaden the scope of criminalized conduct, at least marginally. Absent a showing that more expansive

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88. See JOSHUA DRESSLER & STEPHEN P. GARVEY, *CRIMINAL LAW: CASES AND MATERIALS* 5 (8th ed. 2019).

89. For more on the difficulty of code reform, see Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, *supra* note 72, at 2 ("But the virtues of codification are not always, or even usually, central to legislatures when they address these issues. No politician runs for office on a platform to 'increase internal consistency within the criminal law.' Thus, while criminal law attracts much legislative attention, criminal codes attract little. As a result, the advantages of codification commonly are realized only imperfectly in American codes.").

criminalization is desirable,<sup>90</sup> the better course would be to maintain knowing violations as just that and allow juries to assess whether and when the circumstances of willful blindness are sufficient to infer knowledge.

Glanville Williams seems to have anticipated the method of proof approach in a hypothetical:

An example of willful blindness in the proper sense is where an employer knew that his business was being run in an illegal way, and absented himself without having altered the arrangements; he was held to “know” that the law was being broken in his absence even though he had no direct information about what was happening then.<sup>91</sup>

This particular example, however, has generated some criticism: “*Ex hypothesi*, the employer ‘knew that his business was being run in an illegal way.’ About what proposition, then, is he alleged to be wilfully ignorant?”<sup>92</sup>

The query is fair, and plainly teed up by a hypothetical that posits knowledge in an effort to establish knowledge. But the answer is also clear: the employer was wilfully ignorant as to the actual facts of criminal conduct. For example, the tavern owner might be aware that illegal gambling occurs on the premises in his absence, yet he might have no actual information about who gambles, how much, in which room, on what game, and at what time. In that case, he is wilfully ignorant of the acts constituting the offense, even if he actually knows that gambling is occurring. Moreover, he has a motive to not expand on this general knowledge: he benefits from the gambling by selling

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90. Indeed, this is Sarch’s argument: “Given the pressing worries about over-criminalization that other scholars have raised, one might wonder whether we really need yet another tool by which to secure more criminal convictions. I argue that, despite these worries, my proposed expansion is especially important in the white-collar context.” Sarch, *Beyond Willful Ignorance*, *supra* note 63, at 103. As I have argued elsewhere, efforts to expand criminal prosecutions of individuals in the corporate context are generally misguided if understandable. Gilchrist, *supra* note 12, at 335. Sarch’s substantive proposal differs from the procedural efforts I argued against; he urges expanding the scope of what constitutes criminal conduct in the corporate sphere. Accordingly, he avoids my objection that the burden of prosecutions would fall mostly on lower level employees. However, my concern about tension with the rule of law remains given the inherent vagueness of many white-collar criminal laws. Moreover, I worry that an expansion of criminal exposure such as that envisioned by Sarch would create such a significant chilling effect on socially desirable risk-taking in the corporate context that its full effects are difficult to imagine. Sarch’s suggestion, however, is compelling, and a full discussion of its impacts and merits is beyond the scope of this Article.

91. GLANVILLE WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 125 (2d ed. 1984).

92. Husak & Callender, *supra* note 17, at 43 n.58.

more drinks from added traffic, and he seeks to evade culpability by avoiding more specific knowledge. The fact of his knowledge is the ultimate question in a contested case; the function of willful blindness is to introduce a circumstantial means of proving knowledge based on other facts.

There is almost never<sup>93</sup> direct evidence of the relevant knowledge (i.e., that the employer knew his business was being run in an illegal way).<sup>94</sup> In many hypotheticals, such as that offered by Williams about an employer who “knew” about illegal conduct in his business, the description concentrates on the *fact* of knowledge. As such, the hypothetical aims to inform us about the defendant’s subjective mental state at a particular time. The law presumes that there is a definite answer to this question whether or not we have epistemic access to it.

In practice, however, the contentious issue is what set of facts, established by a prosecutor, will permit a jury to find knowledge. There is no direct evidence of a mental state, particularly one in the past. Accordingly, knowledge, like all other mental states, can only be proven circumstantially.<sup>95</sup> The jury will be asked to extrapolate from demonstrable facts to reach a conclusion about the defendant’s mental state at a past point in time. Direct evidence will be about other facts—for example, that revenues were always higher when a particular employee worked, that the increased revenues centered on a back bar in a private room, and that the employee had a history of running games. A prosecutor might introduce proof of each of these facts, and

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93. Exceptions may include confessions and contemporaneous documentation of the defendant’s mental state (although even these are subject to error and as such are at least one step removed from a type of truly direct evidence that never exists for mental states). Samuel W. Buell & Lisa Kern Griffin, *On the Mental State of Consciousness of Wrongdoing*, 75 DUKE L. & CONTEMP. PROBS., no. 2, 2012, at 133, 153.

94. As Justice Kennedy has observed:

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 inducer avoids further confirming what he already believes with good reason to be true.

Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 774 (2011) (Kennedy, J., dissenting).

95. There is considerable reason for skepticism about any clear line between direct evidence and circumstantial evidence. Indeed, there may be reason to question whether direct evidence does or could ever exist. See Richard K. Greenstein, *Determining Facts: The Myth of Direct Evidence*, 45 HOUS. L. REV. 1801, 1805 (2009). With past mental states, skepticism about direct evidence is stark. Some evidence is *more* direct than others, but even a video record of the defendant describing his awareness of facts at a point in time require some deductions or inferences before a conclusion about his state of mind can be reached.

no other proof that the employer knew his business was hosting illegal gaming. Posit that the objective truth of the matter is that the employer *did* know his business was hosting illegal gaming (as in Williams' hypothetical), but the question remains open as to whether that knowledge can be proven based on the available evidence. Willful blindness *as a method of proof* is merely the common-sense recognition that actual knowledge can be established by this particular kind of circumstantial evidence.

Some will object to limiting willful blindness to mere evidence (as opposed to an extension of, or substitute for, actual knowledge) on the basis that it is too limited: demonstrably culpable defendants will be acquitted. There are, of course, two responses to this objection. First, fundamental legality principles necessarily trump expediency or appeals to a vague principle of justice; otherwise, we will have shifted our discussion from law to mere power.<sup>96</sup> That a person *deserves* to be convicted, absent reference to public law, is simply not an argument the law can recognize.<sup>97</sup> Second, however, is a more pragmatic reply. While the mere evidence approach avoids the legality problems that accompany the substitute approach, it is less clear how many outcomes would actually differ. One of the conceptual problems with all willful blindness hypotheticals is that in the omniscient presentation of the facts, the scenarios offer a truth-certain about the defendant's ultimate knowledge.

In reality, there may or may not be such a truth-certain,<sup>98</sup> but trials lack an epistemic method to ascertain it in any event. Trials operate through evidence, which is necessarily akin to shadows on the wall of Plato's cave. In court, there is much talk of truth, but access to objective truth is at best indirect: there is evidence, and there are permissible inferences to be made from the evidence.

If arguments that the willfully blind are as blameworthy as the knowing are correct—and by correct, I mean consistent with the

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96. See Husak & Callender, *supra* note 17, 58–62. Husak and Callender would avoid the legality problems and answer the pragmatic demands for liability by expanding statutes to punish recklessness in some of these willful blindness scenarios. *Id.* While this proposal would work, there is no reason to expect that courts will hold off on applying the well-established willful blindness doctrine while awaiting legislative action on the matter, and little reason to expect legislative action itself.

97. *Id.* at 62.

98. For more on the uncertainty of knowledge as a condition, see Ira Robbins' discussion of Karl Popper's approach to the problem. Robbins, *supra* note 70, at 217–18.

societal norms that govern much of criminal law—then one would expect convictions for actual knowledge to be returned in many or most cases of willful blindness, simply as a matter of evidence. The jury would assess the evidence of willful blindness—evidence of actual awareness of a high probability coupled with an affirmative effort to avoid further knowledge—and from this infer knowledge. They would infer knowledge because this category of mens rea is as much a placeholder for a common-sense kind of culpability as it is an analytically cohesive mental state.<sup>99</sup>

Williams' hypothetical captures this mere evidence account of willful blindness.<sup>100</sup> There is no flaw or error in building knowledge into a hypothetical about willful blindness; indeed, this is the point of willful blindness under the method of proof account. The hypothetical would be incomplete without this clarity.

Willful blindness is a condition which, when proven, can support the conclusion that the defendant actually knew of the fact in question.<sup>101</sup> To evaluate whether this claim is justified, however, it is important to consider the nature of knowledge at criminal law.

#### IV. THE MERE EVIDENCE ACCOUNT FITS WITH THE LAW'S SIMPLE AND MORALLY-LOADED APPROACH TO KNOWLEDGE

Much of the difficulty surrounding willful blindness can be traced to confusion between knowledge as a philosophical concept and knowledge as a legal instrument. While the question of when a person can be said to know *X* is famously difficult (or impossible) for philosophy,<sup>102</sup> it is not and cannot be so for the law.<sup>103</sup> The law introduces “knowledge” as a functional concept, relying on fact finders' intuitions both about mental states and about justice.

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99. For an instrumentalist account of substantive criminal law incorporating societal norms to maximize its own legitimacy, see Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1840 (2000).

100. It is not clear that this was Williams' intent, as in other places his account of willful blindness more closely aligns with the substitute account. See, e.g., GLANVILLE WILLIAMS, CRIMINAL LAW 159 (2d ed. 1961) (“A court can properly find willful blindness only where it can almost be said that the defendant actually knew.” (emphasis added)). By introducing the possibility of allowing willful blindness to establish knowledge where it could only be said the defendant “almost knew,” Williams appears not to restrict willful blindness to a mere method of proof, but anticipates it serving as a substitute.

101. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011).

102. See, e.g., Peter Unger, *A Defense of Skepticism*, 80 PHIL. REV. 198, 198 (1971).

103. See SARCH, *supra* note 8, at 8.

Knowledge at criminal law is not an analytically pure concept; rather, it is an instrument of justice based on common intuitions, susceptible to change as normative intuitions about particular circumstances vary.<sup>104</sup> To understand the particular function of the willful blindness doctrine, one must consider this distinction between knowledge as a philosophical concept and knowledge as an instrument of criminal law.

Ira Robbins describes knowledge at criminal law as “an awareness of the existence of a particular fact or attendant circumstance.”<sup>105</sup> From this, he concludes that “one ‘knows’ something only if he or she is certain of it.”<sup>106</sup> This is probably too demanding a condition, as one struggles to conceive of certainty in a meaningful sense. An hour ago, I parked my car outside the building. I park here routinely and have no reason to believe my car has moved. I have not seen my car in that hour, but I believe my car is parked where I left it. I have a justified belief that my car remains where I left it. I cannot, however, say I have certainty about that belief; but most would conclude that, if my car remains where I parked it, I presently have knowledge as to its location. This objection, however, is minor and generally handled by reference to near certainty, a more realistic precondition for the state we call knowing.<sup>107</sup>

Most philosophical accounts limit knowledge to justified true beliefs. The criminal law does not. At criminal law, knowledge serves a function of identifying a culpable mental state. While the instrumental knowledge of law is plainly related to the philosophical concept, the two are distinct.

The Gettier problem—a classic challenge for philosophical accounts of knowledge—helps illustrate the differences between the philosophical and criminal law accounts of knowledge. Gettier posits that while justification, truth, and subjective belief may be necessary for actual knowledge, they are not sufficient.<sup>108</sup> The proof stems from a series of hypotheticals in which one holds a particular belief about *X*, that is true and justified, but it turns out that the believer’s

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104. “No single definition of knowledge is universally agreed upon or regularly employed, even within the limited context of criminal mens rea.” See Charlow, *supra* note 2.

105. Robbins, *supra* note 70, at 222.

106. *Id.*

107. See Charlow, *supra* note 2, at 1373.

108. Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 ANALYSIS 121, 121–23 (1963).

justification is false while another justification, unknown to the believer, supports the truth of the proposition.<sup>109</sup>

The use of knowledge in criminal law, however, is less epistemically pure and more instrumental. Knowledge at criminal law is a tool for identifying mens rea in the original sense: a guilty mind.<sup>110</sup> By limiting culpability to cases of knowing action, the law seeks to isolate a particular kind of culpability. Knowledge at criminal law is ultimately a tool to distinguish and target particular wrongful conduct.<sup>111</sup>

Classic examples of the Gettier problem simply do not pose a challenge to the legal standard of knowledge; they would almost certainly be sufficient to establish knowledge for purposes of criminal liability, even as they confound philosophers. Suppose Omar hopes to steal narcotics from a drug trafficker. He is told by a law enforcement contact that a blonde woman with a turquoise headband and plaid pants on a particular train will be carrying a suitcase with narcotics. Omar boards the correct train, approaches a woman matching the description as she sleeps, steals her bag and flees. It turns out that her bag contained narcotics, but not because she was transporting it. Law enforcement was entirely wrong about her involvement in the drug trade; by whimsical chance her bag was mixed up with someone else's when she sat for coffee before boarding the train. Her actual bag contained no narcotics, but the bag she came to possess of did contain narcotics.

In this example, the Gettier problem suggests that Omar lacked actual knowledge that he possessed narcotics, even though he had a justified, true belief that he possessed narcotics. Omar's belief happened to be true and justified, but the justification was unconnected to the truth of the proposition. He got lucky (so to speak).

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109. *Id.*

110. "[T]he very same mental events can be knowledge or not knowledge depending on the moral valence of the actions to which they are relevant and the pragmatic context in which the action takes place." James A. Macleod, *Belief States in Criminal Law*, 68 OKLA. L. REV. 497, 549 (2016).

111. The conventional account of modern criminal mental states is that they are descriptive. James Macleod takes issue with this account, but acknowledges a descriptive component. Ultimately he concludes that while there are descriptive elements of mental states in most modern criminal codes, those descriptions are incomplete, relying on jurors employing evaluative concepts to make their ultimate conclusions. "[C]urrent instructions employ concepts like 'knowledge' and descriptions like 'high probability' that, on their most natural lay-interpretation, turn out to be both descriptive and evaluative." *Id.* at 549–50.

There is little question, however, that Omar would be guilty of knowing possession of narcotics. The law cares about culpable mindset, not epistemic perfection.<sup>112</sup> In this hypothetical, Omar did possess narcotics and he believed he possessed narcotics. It seems that, at criminal law, mere true belief may be sufficient for knowledge. Justification may drop out altogether.

A more difficult case for criminal law might be imagined as a further step away from the Gettier problem: the case of *subjectively unjustified* true beliefs. Suppose Jiminy honestly believes that there is marijuana in his trunk, because he wished upon a star that it would be so. As it turns out, and entirely apart from his celestial requests, the person who rented the car before him accidentally left marijuana in the trunk. In this case, Jiminy has a true and honest belief, but not one that is justified. Whereas Omar's basis for his belief was sound but erroneous, Jiminy's basis is unsound. Would the law care? Barring a mental illness or capacity defense,<sup>113</sup> it seems not. Jiminy would be guilty of possessing marijuana with a true and honestly held, though unjustified, belief that he possessed marijuana.<sup>114</sup> In reaching this same conclusion, Glanville Williams offered a less fanciful example: "[S]uppose that the accused is charged with receiving stolen property: when he received it, he thought it had been stolen by X from Y in January, but actually it was stolen by X from Z in February. Here there is the *actus reus* of receiving, and also the *mens rea*; it cannot be said that the accused had no knowledge of the theft merely because he was essentially right only by accident."<sup>115</sup>

Recognizing knowledge as a gauge of culpability, distinct from the epistemic condition of the same name, simplifies the concept considerably. For purposes of criminal law, knowledge need not be justified.

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112. See Charlow, *supra* note 2, at 1374–75 (describing knowledge at criminal law as requiring only “belief, or subjective certainty, and the actual truth or existence of the thing known”).

113. These might be significant caveats. The criminal law evades much of the oddness of this example by mental capacity excuses and mitigation. That, however, does not directly affect the question of the nature of knowledge. Indeed, that limits on mental capacity can excuse otherwise knowing conduct fits well with my claim that knowledge at criminal law is best understood as a tool for gauging culpability.

114. See WILLIAMS, *supra* note 100, at 169 (“For legal purposes . . . to confine the word ‘knowledge’ to cases of rigorous scientific proof, or even to cases where reasonable steps have been taken to verify the belief, would unduly restrict it.”).

115. *Id.*

This is not to say, however, that justification does not matter. Recognizing willful blindness as an evidentiary tool illustrates the powerful role justification can play in establishing knowledge for purposes of a criminal conviction. Namely, willful blindness allows the fact finder to infer subjective awareness from the proof of truth and justification. *United States v. Jewell* illustrates this approach.<sup>116</sup> Jewell drove a car with 110 pounds of marijuana into the United States, and was convicted of knowingly importing a controlled substance.<sup>117</sup> That marijuana was in the car, “concealed in a secret compartment between the trunk and rear seat,”<sup>118</sup> was undisputed.<sup>119</sup> That Jewell had some reason to believe he was transporting an illegal substance was also undisputed.<sup>120</sup> The evidence thus suggests he would have been justified in actually believing there was marijuana<sup>121</sup> in the car. Accordingly, the evidence established justification to believe something true. The dispute hinged on Jewell’s subjective belief: he testified that he did not know there was marijuana in the trunk.<sup>122</sup> The justification allowed the jury to reject this contention and to conclude that he was actually aware he was transporting a controlled substance.

There are, however, two ways to describe this result. First, Jewell was punished for his willful blindness, distinct from actual knowledge, because his conduct was equally culpable.<sup>123</sup> This is the substitute

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116. See generally *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976).

117. *Id.* at 697–98.

118. *Id.* at 698.

119. *Id.*

120. *Id.* at 698–99.

121. Or some controlled substance; the law is clear that knowing possession does not require knowledge of the particular kind of controlled substance possessed. See *McFadden v. United States*, 576 U.S. 186, 192 (2015) (“That knowledge requirement may be met by showing that the defendant knew he possessed a substance listed on the schedules, even if he did not know which substance it was.”).

122. *Jewell*, 532 F.2d at 698.

123. The equal culpability of the defendant is generally recognized as the best justification for willful blindness as something more than a mere method of proof. See, e.g., *United States v. Poole*, 640 F.3d 114, 122 (4th Cir. 2011) (“The rationale supporting the principle of ‘willful blindness’ is that intentional ignorance and actual knowledge are equally culpable under the law.”). Alexander Sarch relies on this justification to prescribe narrower limits for willful blindness instructions: “courts should not give willful ignorance instructions in just *any* case of willful ignorance (as many courts allow), but only when it is plausible that the defendant acted with a form of willful ignorance that rendered her conduct as culpable as the analogous knowing misconduct.” See Alexander Sarch, *Equal Culpability and the Scope of Willful Ignorance Doctrine*, 22 LEGAL THEORY 276, 278 (2016). Sarch’s argument anticipates the central problem with all substantive willful blindness models: it is punishment by analogy.

approach, accepted in *Jewell* by the Ninth Circuit,<sup>124</sup> and today by all courts;<sup>125</sup> this approach introduces the problems of punishment by analogy and judicial extension of substantive criminal law.

Alternatively, *Jewell* could only be punished for knowingly importing a controlled substance, but the evidence about his justification for such alleged belief was deemed sufficient for the jury to infer actual belief.<sup>126</sup> Then-Judge Kennedy urged this approach in his dissent.<sup>127</sup> This alternative approach uses willful blindness only as a method of proof, and as such it is considerably less radical and problematic than the substitute approach. Barring the minority of cases involving confessions or contemporaneous documentation of a mental state, all contested mental states are proven indirectly,<sup>128</sup> willful blindness is but a common form of indirect proof.

#### V. THE MERE EVIDENCE ACCOUNT IS SUPPORTED BY THE HISTORY OF WILLFUL BLINDNESS DOCTRINE

While the substitute account is now widely accepted, a mere evidence account aligns better with the historic origins of the doctrine. Those origins can be found in and around the navel yards of Britain.

*Regina v. Sleep*<sup>129</sup> is generally identified as the earliest case in which judges accepted the possibility that proof of willful blindness might satisfy a statutory requirement of knowledge.<sup>130</sup> To appreciate

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124. *Jewell*, 532 F.2d at 698.

125. See Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 YALE L.J. 2231, 2232 (1993).

126. By actual belief, I am referring to Ira Robbins' formulation of knowledge: "an awareness of the existence of a particular fact or attendant circumstance." Robbins, *supra* note 70, at 222; see *supra* note 70 and accompanying text. This definition seems to me to be both simplistic from an analytic perspective and exactly correct from a legal perspective. The law, of necessity if not by design, simplifies complex questions of cognition. What is knowledge to a juror? It is whether the defendant was aware of something. Or, perhaps even more accurately, if more simplistically: it is whether the defendant knew it. In court, common sense and folk psychology generally prevail over philosophy of the mind and neuroscience.

127. Judge Kennedy dissented because the conviction was predicated on jury instructions that permitted the substitute approach. He nonetheless pointed out, correctly, that the evidence of willful blindness in the case would be sufficient to justify a conviction by a properly-instructed jury. See *Jewell*, 532 F.2d at 708 (Kennedy, J., dissenting) ("We do not question the sufficiency of the evidence in this case to support conviction by a properly-instructed jury.")

128. Buell & Griffin, *supra* note 93, at 133, 153.

129. (1861) 169 Eng. Rep. 1296.

130. J. Edwards, *The Criminal Degrees of Knowledge*, 17 MOD. L. REV. 294, 298 (1954) ("So far as can be discovered, the case of *R. v. Sleep* was the first occasion in which judicial approval was given to the notion that some lesser degree of knowledge than actual knowledge would be sufficient to establish *mens rea*."); Justin C. From, Note, *Avoiding Not-So-Harmless Errors: The*

the origins of this doctrine, however, it is worth examining the case and the context in which it arose.

In *Sleep*, the jury convicted the defendant of knowingly possessing copper belonging to the government.<sup>131</sup> Specifically, he delivered to a ship a cask marked for delivery to one “Richard Pascoe, Helston, Cornwall,” and when police searched the cask they discovered 324 pounds of copper bolts in 150 pieces.<sup>132</sup> Most of the bolts had been melted down and reformed, but a significant fraction retained the mark of a broad arrow,<sup>133</sup> indicating the material was property of the British government.<sup>134</sup>

As its empire expanded and its valuable government property spread more widely, the British government faced the problem of loss.<sup>135</sup> The government needed to distribute materials, military and administrative, across a widening empire.<sup>136</sup> The scope of the enterprise made keeping track of everything increasingly difficult. The significance of the problem was such that it gave rise to new forms of policing.<sup>137</sup>

People were taking England’s stuff. That necessitated police, and it required keeping track of property. A pile of copper bolts could be grabbed, pounded, melted, packed, and moved to a new location; the

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*Appropriate Standards for Appellate Review of Willful-Blindness Jury Instructions*, 97 IOWA L. REV. 275, 282 (2011) (“The willful-blindness doctrine first appeared in the English courts in 1861.”); Marcus, *supra* note 125, at 2233 (noting that “[w]illful blindness first appeared as a substitute for actual knowledge in English case law over a century ago” in *Regina v. Sleep*); Robbins, *supra* note 70, at 196; *see also* Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 GEO. J. LEGAL ETHICS 187, 192 (2011) (“Willful blindness, known at the time as connivance, first surfaced in the mid-nineteenth century in England.”).

131. *Sleep*, 169 Eng. Rep. at 1297.

132. *Id.* at 1296.

133. *Id.* at 1297.

134. *Id.*

135. *See* Seth W. Stoughton, *The Blurred Blue Line: Reform in an Era of Public & Private Policing*, 44 AM. J. CRIM. L. 117, 121–22 (2017) (“In 1797, thefts of cargo from boats on the Thames led a small group of distinguished citizens, including celebrated jurist Jeremy Bentham, to approach the West India Planters Committee and the West India Merchants Committees associations with a proposal to create a private police force. With the permission of the government, the Thames Police—officially the West India Merchants Company Marine Police Institute—began operations the next year. Parliament passed the appropriately titled *Act for the More Effectual Prevention of Depredations on the River Thames* to support England’s first preventative police force. The Thames Police did not last long, but it sparked a broader interest in private efforts to supplement the watch system. ‘By 1829[,] London had become a patchwork of public and private police forces.’ A contemporary record reflects private police units operating in forty-five different parishes within ten miles of London.” (alteration in original)).

136. *Id.*

137. *See id.*

government lost and no one would be held accountable. The broad arrow represented an important advance in inventory management, and one that could be used to punish those who interfered with the Crown's property, while deterring others who might do so.<sup>138</sup>

Enter Mr. Sleep with over 300 pounds of copper probably belonging to the British government, and the law began to develop. In *Regina v. Sleep*, the court found itself confronting the *difficulty* of proving knowledge.<sup>139</sup>

Knowledge began to appear in British anti-piracy statutes in the late seventeenth and early eighteenth centuries, originally as an alternative to wittingly or willfully.<sup>140</sup> Introducing a mental state as a condition of guilt created a significant challenge of proof. As Queen's Counsel argued, "[i]f it were necessary for the prosecution to prove knowledge, there would be great difficulty in obtaining a conviction. It was the meaning of the legislature that the onus of excusing the possession should be thrown on the prisoner."<sup>141</sup>

Earlier courts had accepted exactly this argument. For example, in refusing to import a mens rea requirement to a statute forbidding possessing a game on a common carrier: "If it were necessary to aver that the defendant had actual knowledge it would cast on the prosecutor a burden of proof which could not easily be satisfied . . . ."<sup>142</sup>

In *Regina v. Sleep*, however, the court rejected the argument, noting that every statute includes a mens rea element unless mens rea is expressly excluded.<sup>143</sup> Still, the court addressed the issue as one of proof: possessing material marked with a broad arrow may create a presumption that the possessor knows the item is government property, but the presumption can be rebutted and was in this case by

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138. See *Broad Arrow*, 1 JOHNSON'S UNIVERSAL CYCLOPAEDIA 599 (rev. ed. 1888) ("Broad Arrow, the British government mark placed upon all solid materials used in ships or dockyards, to prevent embezzlement of royal stores. The origin of the mark is obscure. Before 1698 the authorities prosecuted a dealer in marine-stores for having in his possession certain stores bearing the broad arrow of his majesty. The defendant, when asked what he had to say, replied that it was very curious that the king and he should both have the same private mark on their property. The man was acquitted, and this led to the passing of a law that persons in possessions of stores or goods of any kind marked with the broad arrow, shall forfeit all such goods, with £200 and costs.")

139. *Sleep*, 169 Eng. Rep. at 1296.

140. 8 J. LL. J. EDWARDS, *MENS REA IN STATUTORY OFFENSES* 55 (1955).

141. *Sleep*, 169 Eng. Rep. at 1300.

142. *The King v. Marsh* (1824) 107 Eng. Rep. 550.

143. *Sleep*, 169 Eng. Rep. at 1300.

the defendant's statement—accepted by the jury—that he was unaware of the markings.<sup>144</sup>

Willful blindness comes up only at the end of the case, where two justices comment on it as a viable alternative to more direct proof. First, Justice Crompton posited that it would be “a crime for an unauthorized person to have these stores in his possession, because the sight of the broad arrow should put him upon inquiry, and so knowledge that they are marked is essential.”<sup>145</sup> Yet he immediately then noted that this rule “would not apply where the prisoner's eyes are wilfully and deliberately shut to the truth.”<sup>146</sup> Justice Willes agreed, explaining that “[t]he jury have not found, either that the man knew that the stores were marked, or that he wilfully abstained from acquiring that knowledge.”<sup>147</sup>

The generally accepted historic account of willful blindness then leaps fourteen years forward, to cases in which courts affirmed convictions based on willful blindness.<sup>148</sup> To see the evidentiary origins of willful blindness, however, it is worth looking *back* from *Regina v. Sleep* where the doctrine was first described. The roots of the doctrine can be traced to the development of the law of theft from the very narrow common law crime of larceny to the broader category of wrongful takings.

Theft at common law was limited to larceny, the unlawful taking of property; it did not include the unlawful deprivation of property lawfully taken.<sup>149</sup> Thus, one who absconded with the property of another without permission and with intent to deprive the owner of possession was guilty of larceny, but one who unlawfully retained

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144. *Id.* at 1301 (“[I]t is a fair presumption, where a man is found in possession of marked articles, that he knew them to be marked; but that presumption may be rebutted by the circumstances of the case. Here it is manifest, if the prisoner's statement is to be believed, that he was ignorant of the fact that the copper was marked; and the ordinary presumption is rebutted.”).

145. *Id.* at 1301–02.

146. *Id.* at 1302.

147. *Id.*

148. See Edwards, *supra* note 130, at 299–300 (first describing *Bosley v. Davies* (1875) 1 Q.B. 84 (Eng.); then *Redgate v. Haynes* (1876) 1 Q.B. 89 (Eng.)).

149. Michael Tigar traces this ancient distinction back to early Roman Law distinguishing between the manifest thief, caught in the act of taking, and the non-manifest thief, caught merely in unlawful possession of another's property. Killing a manifest thief was justifiable homicide, while the penalty for a non-manifest thief was capped at two-fold restitution. Michael E. Tigar, *The Right of Property and the Law of Theft*, 62 TEX. L. REV. 1443, 1446–47 (1984); see also FLETCHER, *supra* note 73, at 31 n.9 (discussing the Ancient Roman statutory distinction between a thief caught in the act and one that was not caught in the act).

possession of property lawfully possessed was not guilty of larceny.<sup>150</sup> Moreover, for some time this latter example was simply not a crime, leaving a gap in the common law (at least as viewed from the modern perspective).<sup>151</sup>

The *actus reus* of larceny was in the *taking*; absent coincidence of taking with intent to wrongfully deprive, there could be no larceny.<sup>152</sup> This rule changed dramatically over time. “At the risk of some oversimplification we could say that the essential difference between the traditional and modern approaches is that the former was oriented toward the *actus reus*, while the latter is oriented toward the *mens rea*.”<sup>153</sup> Whereas traditionally only the taking was punished, now the intent to deprive is punished.

This shift to hinging guilt on the defendant’s mental state carried obvious evidentiary challenges.<sup>154</sup> If the difference between larceny and non-criminal wrongful possession turns on when, by whom, and under what circumstances an item was acquired, the methods of proof are relatively simple. However, “it is impossible to prove the state of another man’s mind with the result that the defendant’s knowledge is generally inferred from the nature of the act done.”<sup>155</sup> Shifting to questions of mental states clouds the evidentiary picture considerably.<sup>156</sup>

The statutes at issue in broad arrow cases reflect an effort to balance the need to criminalize wrongful takings of widespread military supplies against the challenges of proving *mens rea*. The

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150. See Tigar, *supra* note 149, at 1445–46.

151. George Fletcher suggests that this modern perspective, with its exponentially expansive approach to substantive criminal law, has lost the “distinction between a public sphere of criminal conduct and a private sphere subject at most to regulation by the rules of private law.” George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 472 (1976).

152. So a conviction for wrongful possession of a horse, absent proof of intent to deprive the owner of the horse at the time it was hired, could not stand. See *The King v. Pear* (1779) 168 Eng. Rep. 208.

153. Fletcher, *supra* 151, at 502. Tigar observed a different shift: from protecting possession to protecting ownership. Tigar, *supra* note 149, at 1455–56 (“The importance of possession was de-emphasized, while that of ownership—*dominium*—was elevated.”).

154. See Fletcher, *supra* 151, at 525–27.

155. EDWARDS, *supra* note 140, at 191.

156. See Fletcher, *supra* 151, at 525 (“When there is no close evidentiary link between the act and the proscribed intent, the prosecution is forced to rely on the prospects of securing a confession or testimony of the defendant’s incriminating admissions. When these forms of evidence are unavailable, proof of the defendant’s unmanifested intent is likely to turn on even more questionable forms of evidence.”).

statute at issue in *Regina v. Sleep* is plain that its purpose is simplify the proof required to convict for theft of government property.<sup>157</sup>

As the law was broadened to permit conviction not only for taking “in the *mainour*,” but also for being found in possession, mens rea assumed newfound significance. After all, if a person was found in possession of goods rightfully belonging to another, his culpability would depend entirely on his mindset. Had he bought them, or innocently found them after another left them there, he might have no culpability at all. This might also be true of one actually *taking* goods from their rightful owner—i.e., under circumstances where he did not know they belonged to another he would lack culpability—but these circumstances are both rarer and more difficult to claim when caught directly in the act of taking. Accordingly, mens rea gained new importance as the substantive law of theft broadened beyond common law larceny.

The proof component, nonetheless, loomed large. How to prove a person’s mental state? Absent confession or contemporaneous documentation, it can be done only circumstantially.<sup>158</sup> This left plenty of room for the defendant to falsify a story to counteract the circumstantial evidence of mens rea.<sup>159</sup> These evidence challenges gave rise to willful blindness, originally conceived as connivance.<sup>160</sup>

Connivance, from the Latin *connivere*, meaning “to close the eyes,” or to pretend ignorance,<sup>161</sup> can be traced back further than even willful blindness. Connivance was an element of the anti-bribery statute forbidding any payment to or agreement with a naval, customs, or excise official to “conceal or connive at” the breaking of Parliamentary law.<sup>162</sup>

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157. *Regina v. Sleep* (1861) 169 Eng. Rep. 1296, 1298 n.(a)1 (“Whereas notwithstanding divers good laws made and enacted for the preventing of the stealing and imbezlement of his Majesty’s stores of war and naval stores, those frauds, thefts, and imbezlements are frequently practised, and the convicting of such offenders is rendered difficult and impracticable by reason it rarely happens that direct proof can be made of such offender’s immediate taking, imbezling or carrying away any of his Majesty’s said stores . . .”).

158. EDWARDS, *supra* note 140, at 191.

159. *See id.* at 194.

160. *Id.* at 193–94.

161. *See* Charlow, *supra* note 2, at 1364 n.57.

162. *The King v. Hymen* (1798) 101 Eng. Rep. 1118, 1118–19 (“This was an information by the Attorney-General against the defendant for penalty of 500l. under the statute 24 Geo. 3, st. 2, c. 47, s. 32, which enacts that ‘If any person shall give offer or promise to give any bribe, recompence or reward to, or make any collusive agreement with any officer of the Navy, Customs or Excise, to do, conceal or connive at any Act whereby any of the provisions made by this, or any

This use of connivance, however, is entirely distinct from the substitution of connivance, or willful blindness, for knowledge. For, the agreement itself would satisfy actual knowledge on the part of the official, even if he were merely conniving about the specific incident that violated the law. So, for example, a merchant might bribe a customs official to ignore his shipments for a few days in order to avoid duties owed. The official accepting such a bribe is knowingly accepting payment to allow the laws under his authority to be broken even if he is merely blind to the specific items moved and duties unpaid.

The same cannot be said of the person who acquires property marked with a broad arrow, who recognizes the risk that it is so marked, but who remained intentionally unaware of that fact. In this hypothetical—like *Regina v. Sleep*—the defendant lacks knowledge of the marking. What remains at issue is whether he lacks knowledge that the material is government property. If he remains unaware of the marking because he suspects it is government material, hopes to profit from wrongfully possessing government material, and intentionally avoids learning more to avoid culpability,<sup>163</sup> a jury may conclude he knew it was government property. This is the evidentiary use of willful blindness.

## VI. THE MERE EVIDENCE ACCOUNT GENERATES SIMILAR OUTCOMES

The legality problems generated by willful blindness ought to be sufficient to inspire a change. Change, however, would be more palatable if it gelled with popular intuitions that the willfully blind are, sometimes, equally culpable as the knowing. The fewer outcomes that change by reconceptualizing willful blindness as mere evidence, the fewer objections to the shift. Willful blindness has gained widespread acceptance for a reason: it aligns with people's sense of justice. Any

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other Act of Parliament relative to His Majesty's Customs or Excise may be evaded or broken, every such person shall for each offence (whether the same offer, proposal, promise or agreement be accepted or performed or not) forfeit the sum of 500l.'").

163. Robin Charlow's willful blindness test is similar, but importantly different. Charlow would allow willful blindness to substitute for knowledge where a person: "(1) is aware of very good information indicating that the fact exists; (2) almost believes the fact exists; and (3) deliberately avoids learning whether the fact exists (4) with a conscious purpose to avoid the criminal liability that would result if he or she actually knew the fact." Charlow, *supra* note 2, at 1429. The critical difference, however, is that Charlow is still advocating for a substitute account of willful blindness, not an evidentiary account.

proposal that deviates too far from that is unlikely to be adopted by courts.<sup>164</sup>

Many of the conclusions predicated on claims of willful blindness could just as well be described as knowledge.<sup>165</sup> And, by describing the mental state as knowledge—limiting willful blindness to mere, but potentially significant, evidence of knowledge—courts would avoid the serious problems posed by the substitute account.<sup>166</sup> The results would generally be the same, and the collateral harm to core principals of legality would be significantly reduced.

Some outcomes would change. Husak and Callender describe the three-suitcase hypothetical in which a foreigner approaches three American tourists boarding return flights home.<sup>167</sup> He offers to pay each of them an unusually high fee if they each carry one suitcase back to the States.<sup>168</sup> He also assures them that two of the three suitcases are empty and he will not tell them what is in the third.<sup>169</sup> It is, of course, a reasonable conclusion that one of the three contains contraband. Indeed, were the hypothetical to involve but one suitcase, the hypothesis of the instant article is that on these facts a jury could rightly convict for *knowing* transport of contraband.<sup>170</sup> But with three suitcases, no one of the three tourists could be said to be aware she was carrying contraband.<sup>171</sup> To the contrary, more likely than not, each tourist is not carrying contraband.<sup>172</sup>

Husak and Callender use this hypothetical to argue that willful blindness that does not require awareness of even a high probability of the fact in question.<sup>173</sup> The authors' goal is to describe willful blindness in the manner most true to its purpose: to attach guilt to those

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164. See Robinson, *supra* note 99, at 1861 (“The criminal law cares about layperson’s intuitions of justice because their incorporation is essential to normative crime control.”).

165. Charlow, *supra* note 2, at 1360.

166. See Husak & Callender, *supra* note 17, at 48–49.

167. See *id.* at 37–38 (this is the authors’ modification of a previously posited two-suitcase hypothetical: “Suppose that the example is altered to involve three tourists, two of whose suitcases were known to be empty.”).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

cases that present “the moral equivalent of knowledge.”<sup>174</sup> By the three-suitcase hypothetical, the authors suggest that “[t]he agent’s estimation of the probability of the truth of a proposition does not seem to be essential to judgments about whether he is wilfully ignorant.”<sup>175</sup>

This seems right if we accept that willful blindness ought to be defined in alignment with the purpose of attaching guilt to cases that present the moral equivalent of knowledge. Why is the person any less blameworthy for accepting unusually high fees to knowingly engage in conduct that has a 33 percent chance of being illegal than one who does the same with a certainty of its illegality? The former is in a more enviable position—it is likely she is getting paid for doing something that poses no risk; but she’s demonstrated the same lack of respect for the law as the person who engaged in the known misconduct.<sup>176</sup> As Husak and Callender conclude, however, that purpose is so plainly at odds with legality principles—brashly introducing punishment by analogy as an acceptable function—that it ought to be rejected outright.<sup>177</sup>

A jury ought not convict a person of knowingly transporting contraband if it concludes, based on the circumstantial evidence, that she actually believed there was only a one in three chance she was transporting contraband. Is her moral culpability meaningfully different than someone like Jewell, who actually believed there was a 90 percent chance he was carrying contraband? Probably not. Under the hypothetical, the one-in-three tourist (1) has a warranted suspicion there is contraband in one of the suitcases, (2) could easily confirm whether or not hers contains contraband, and (3) is motivated not to confirm the truth by hopes of preserving a defense.<sup>178</sup> These, more than her degree of certainty, point to the moral equivalence of knowledge. On the moral equivalence standard, she would be willfully ignorant and thus guilty.

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174. See *id.* at 36–39; see also *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011) (“The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge.”).

175. Husak & Callender, *supra* note 17, at 39.

176. *Id.*

177. “Using the equal culpability thesis to justify punishing the wilfully ignorant defendant under a statute requiring that he act knowingly is to employ the very kind of analogical reasoning condemned by the principle of legality.” *Id.* at 56.

178. See *id.* at 40–41.

This, however, is not the standard adopted by courts, nor should it be.<sup>179</sup> Courts generally still require awareness of a high probability of the fact in question.<sup>180</sup> Each tourist in the three-suitcase hypothetical ought to be acquitted, moral equivalence notwithstanding. Because, moral equivalence is not a valid basis on which to impose criminal liability.<sup>181</sup>

So, some instances of morally equivalence must be acquitted; still, some significant number of willfully blind defendants could still be convicted.

In most cases, the (sincere) willfully ignorant defendant would admit that he believes *p*, but would deny that he knows *p*. On the assumption that knowledge consists of some kind of externally justified true belief, this denial can only be interpreted as an allegation that the quantum of justification possessed by the willfully ignorant defendant is insufficient to give rise to knowledge.<sup>182</sup>

Were knowledge at criminal law coextensive with the philosophical concept, this would be a compelling defense.

But put it to a jury. Let the jury assess whether the defendant with justified awareness of a high probability that a fact is true, who could have easily confirmed that fact, but who did not because he sought to avoid “guilty” knowledge, *knew* that fact or not. I would suggest more often than not, with these conditions satisfied, the jury will find the

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179. Sarch concludes otherwise, positing a duty to reasonably inform oneself before acting and advocating for criminal liability for breach of the duty. SARCH, *supra* note 8, at 112. The instant Article urges a simple remedy to a problematic doctrine that is likely to marginally contract the scope of liability from the status quo. Fulsome consideration of Sarch’s duty-based doctrine is well beyond the scope of my thesis. That said, I must admit real concern about the implications of an approach that expands criminal exposure in this manner, for communal functioning, business cultures, and the economy. That said, and in fairness to the proposal, it may be that there is a way to mitigate these concerns by limiting which “substantial and unjustified risks” give rise to a duty that could trigger criminal liability.

180. Charlow, *supra* note 2, at 1382 n.141.

181. The clarity of the three-suitcase hypothetical simultaneously obscures the question of whether expanding liability to mere risk cases is prudent. In real life, there are no three-suitcase scenarios. And there are no (or few) risks understood with anything like mathematical precision. There is known bad conduct. Conduct that is probably bad. Conduct that seems a bit hinky. Conduct that probably generates some risks but the engineer believes those risks are justified by anticipated benefits. A criminal code ought to provide clarity. It should be minimalistic. The consequences for criminal violations are severe, and people in an open society cannot be subject to the prospect of criminal sanctions every time they miscalculate, or differentially calculate, risks and benefits.

182. Husak & Callender, *supra* note 17, at 46–47 (emphasis omitted).

defendant guilty, not for being willfully blind, but rather for actually *knowing*.<sup>183</sup>

Remember the hypothetical about an investor with concerns about an unreasonably high agency fee in Saudi Arabia?<sup>184</sup> I think she knew the money would be used for bribes. Of course, it depends what the meaning of know is, but we've been through that. Maybe you agree, maybe you don't. But put it to a jury, and I expect she would be convicted. She knew enough to ask about the fee. She received an absurdly unhelpful answer. What else could she possibly have thought but that she was investing in a venture that would function in part through paying bribes? That's enough for a juror to conclude she actually knew.<sup>185</sup>

Indeed, the Ninth Circuit appears to have adopted this view in the seminal case, *United States v. Jewell*.<sup>186</sup> “[I]n common understanding one ‘knows’ facts of which he is less than absolutely certain. To act ‘knowingly,’ therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question.”<sup>187</sup> This is quite correct. It reflects the common view about knowledge that juries are likely to employ in any event.<sup>188</sup> And, it is the reason that a shift to conceptualizing willful blindness as but a form of evidence of knowledge—as opposed to a substitute for knowledge—would have only a limited impact on the outcomes of real-world cases. Generally, cases presenting difficult questions of willful blindness are cases in which juries are likely to conclude that the defendant had knowledge—as they understand that term.

Courts have consistently rejected defense arguments that it is error to instruct a jury as to willful blindness where there is evidence from which the jury could find actual knowledge.<sup>189</sup> “[A]ssuming there to be sufficient evidence as to both theories, it is not inconsistent for a court to give a charge on both willful blindness and actual

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183. “Often this evidence will be enough to conclude that the defendant knows p, even if he has not considered all the evidence that honest people would ordinarily consider.” *Id.* at 50.

184. See *supra* text accompanying note 35.

185. Assuming, as courts do sometimes instruct, that the jury did not conclude the defendant had an affirmative belief that bribes would not be paid.

186. See *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976).

187. *Id.* at 700.

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

189. See Charlow, *supra* note 2, at 1353–54 n.7.

knowledge.”<sup>190</sup> Were willful blindness conceptualized as a method of proving knowledge, rather than a substitute for knowledge, this rule would be as obvious as it would be unnecessary. A jury could find knowledge based on any kind of circumstantial evidence, and evidence that the defendant was actually aware of a high probability of the material fact and deliberately sought to avoid confirming that probability could be accepted by a jury in making the cognitive leap from objective facts about the world to the subjective state of the defendant at some earlier time.<sup>191</sup>

And very often one would expect the jury to make precisely this leap. Consider the case of Sandra Wert-Ruiz, convicted of conspiracy to launder drug money through her money remitting business.<sup>192</sup> On appeal, Wert-Ruiz contended it was error to instruct on willful blindness, because the only evidence was of actual knowledge.<sup>193</sup> She argued that “each piece of the government’s evidence can be interpreted in only one of two ways: either she was a knowing participant in the conspiracy (if the government’s evidence is believed) or she was an unknowing innocent who became ensnared in it (if the government’s evidence is not believed).”<sup>194</sup>

This binary division between knowing and not knowing ought to be the standard approach to any case where the relevant statute requires knowledge for a conviction. The introduction of a grey area—a not-quite-knowing-but-just-as-reprehensible kind of ignorance—is the original sin of the substitute account. Eliminating this third category between knowing and not knowing, however, would not eliminate the facts upon which it is predicated. In Ms. Wert-Ruiz’s case, there was evidence from which a jury could conclude she had knowledge of the source of the moneys she remitted: the use of coded language, the elimination of a zero when discussing denominations, the creation of false receipts.<sup>195</sup>

In defending the provision of a willful blindness instruction, the appellate court referred to Ms. Wert-Ruiz’s own statements as evidence from which a jury might conclude she was merely willfully

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190. *United States v. Wert-Ruiz*, 228 F.3d 250, 252 (3d Cir. 2000).

191. Charlow, *supra* note 2, at 1360.

192. *Wert-Ruiz*, 228 F.3d at 252.

193. *Id.* at 256.

194. *Id.*

195. *Id.* at 254.

blind.<sup>196</sup> When asked by an investigating agent whether she “thought the money came from the sale of narcotics, [Wert-Ruiz] replied that she was an educated woman, and where else would money come from in that amount.”<sup>197</sup> The court then describes this critical evidence as follows:

This statement, if credited by the jury, would indeed suggest actual knowledge and not willful blindness. Still, in juxtaposition with Wert-Ruiz’s claims at trial not to have known the source of the funds, it could arguably be viewed as an example of willful blindness—in other words, she never asked questions while participating in the conspiracy, but when the truth was revealed she was not at all surprised about what really had happened.<sup>198</sup>

Query: what is the difference between these possibilities? Perhaps there is a difference of degree. An educated woman receiving large quantities of cash in gym bags for remittance, from people who spoke in code and consistently described numbers as one-tenth their actual value, would certainly *suspect* that she was receiving proceeds from an illegal activity. But more than that, might we not conclude that she actually *knew* this fact? On the other hand, there are plenty of facts we would conclude she did not know. Who sold drugs to whom? There is no reason to believe she would or could have known the details of individual transactions. But that is immaterial: money laundering requires only knowledge “that the property involved in a financial transaction represents the proceeds of some form of unlawful activity.”<sup>199</sup> Indeed, the government need not even prove that she was aware that the money was from the illegal sale of narcotics; awareness that the money was derived from “some form of unlawful activity” would be sufficient.<sup>200</sup>

So, how to describe Ms. Wert-Ruiz’s mental state regarding the source of moneys? She must have had at a minimum strong suspicion that the money stemmed from an illegal activity. It might have been any number of illegal activities: fraud, extortion, embezzlement, or the sale of non-narcotic contraband like certain firearms or child

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196. *Id.* at 257.

197. *Id.* (alteration in original).

198. *Id.*

199. 18 U.S.C. § 1956 (2011).

200. *See id.*

pornography. These, however, are significantly less likely, if only because each represents a smaller, more rarified market with fewer proceeds than the drug dealing. So, Ms. Wert-Ruiz would have significant suspicion that this was money from an illegal activity, probably drug dealing. Really, we—or more consequentially, a jury—might describe her as Glanville Williams described the employer who knew his business was being run in an illegal way but avoided learning the details.<sup>201</sup> We can call this condition willful blindness—as did Williams<sup>202</sup>—but we are simply describing a form of knowledge. The evidence—some of which might look like willful blindness—was sufficient for the jury to conclude that Ms. Wert-Ruiz was actually aware the money she was remitting was derived from illegal activity.<sup>203</sup> There is really no need for anything more.

Defendants frequently appeal convictions where willful blindness instructions were given on the basis that there was insufficient evidence to merit the willful blindness instruction.<sup>204</sup> Courts generally rule that “[a]s long as separate and distinct evidence supports a defendant’s deliberate avoidance of knowledge and the possibility exists that the jury does not credit the evidence of direct knowledge, a willful blindness instruction may be appropriate.”<sup>205</sup> This rule is predicated on the substitute account of willful blindness, and as formulated, it clarifies how flawed that account is.

Here again we see that epistemic confusion undergirds most courts’ descriptions of willful blindness. *What is “evidence of direct knowledge?”* Or, perhaps more simply, *what is direct knowledge?* There is no such thing. Knowledge, at law, is the subjective awareness of a sufficiently high probability—maybe a near certainty—that a particular fact does or will be true.<sup>206</sup> When Bob pulls the trigger on a loaded gun aimed at William’s head, barring facts allowing for an alternate explanation, we will readily conclude that Bob was subjectively aware he was about to cause William’s death or serious bodily harm. Perhaps the First Circuit is using the phrase “direct knowledge” to refer to subjective awareness of facts predicated on the defendant’s own senses. Used this way, one could say that Mr. Jewell

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201. See *supra* note 34 and accompanying text.

202. WILLIAMS, *supra* note 91, at 125.

203. *Wert-Ruiz*, 228 F.3d at 257.

204. See *United States v. Bilis*, 170 F.3d 88, 92–93 (1st Cir. 1999).

205. *Id.* at 93.

206. Charlow, *supra* note 2, at 1373.

lacked direct knowledge of the 110 pounds of marijuana in his trunk, because he never saw it with his own eyes.

This, however, introduces a curious—if understandable—segmentation and prioritization of justifications. “I saw it with my own eyes,” is as flawed a justification as it is popular. Our own eye—our sensory perceptions—are not necessarily the best justification for beliefs. Senses can be mistaken; senses can be tricked. Direct knowledge—if by that the court means knowledge justified by reliance on one’s own sensory perception—is not uniformly better than indirect knowledge (i.e., knowledge justified by reasonable deductions or inferences from other known facts).

The phrase, “evidence of direct knowledge,” whether intentionally or not, suggests a different phrase: direct evidence of knowledge. Of course, this is what is always and necessarily lacking when the law seeks information about a person’s subjective mental state at an earlier time.<sup>207</sup> There is only indirect, circumstantial evidence of knowledge.<sup>208</sup> Some circumstantial evidence of knowledge is relatively direct: for example, a clear video showing Mr. Jewell open the trunk, look at over 100 pounds of marijuana, and hurriedly close the trunk. Some circumstantial evidence of knowledge is less direct: for example, accepting large bags of cash for remittance from people who speak in code. But to be clear, neither case involves direct evidence; there is and could be no such thing when referring to past mental states.<sup>209</sup> Inferences are required even in the Jewell-video hypothetical: that he saw the marijuana; that he understood it to be narcotics; that his vision and brain were functioning normally at the time.

On this spectrum between certain knowledge and certain recklessness, with only circumstantial evidence to rely on, many willful blindness cases could just as easily be knowledge cases in which willful blindness serves as the relevant circumstantial evidence. That is, convictions secured through the substitute of willful blindness generally could be secured through a mere evidence approach.

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207. *Id.* at 1359.

208. *Id.* at 1359–60.

209. *See supra* note 34 and accompanying text.

The case of *United States v. Anthony*<sup>210</sup> is instructive. The defendant mounted a *Cheek*<sup>211</sup> defense to allegations of tax evasion, contending that his good faith belief that he had no duty to pay taxes negated the required element of a “voluntary, intentional violation of a known legal duty.”<sup>212</sup> On appeal he argued in part that the court erred by instructing on willful blindness because there was no independent evidence of willful blindness (as opposed to actual knowledge).<sup>213</sup> The First Circuit rejected this argument noting that the defendant presented evidence of personally researching old Supreme Court cases and tax codes, but conceded on cross examination that he had not read new Supreme Court cases or the current tax code and regulations.<sup>214</sup> “Based on this, the jury could reasonably infer that, even if Anthony’s claim that he did not know of his duty was credible, his lack of knowledge depended on his deliberate refusal to extend his research to more current, authoritative sources.”<sup>215</sup> That is one way to describe the defendant’s mental state. Another would be that he knew—as much as anyone ever knows anything—that he had a duty to pay taxes, and he conducted selective research to rebut this position. How could a jury conclude that he knew of his duty? The same way they ever make conclusions about mental states. The defendant’s credibility, the reasonableness of his claimed belief,<sup>216</sup> the explanation for his claimed belief—these would help the jury conclude what a defendant truly believed at some past point in time about his duty to pay taxes or about whether there were drugs in the trunk.

Adding willful blindness as a substitute does not—and ought not—significantly expand the scope of criminal conduct. But it will expand it somewhat, as demonstrated by the three-suitcase hypothetical. On a substitute approach bounded only by moral equivalence, the defendant would be guilty; on a mere evidence

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210. 545 F.3d 60 (1st Cir. 2008).

211. See *Cheek v. United States*, 498 U.S. 192, 196 (1991).

212. *Anthony*, 545 F.3d at 64 (quoting *Cheek*, 498 U.S. at 200).

213. *Id.* at 65.

214. *Id.* at 66.

215. *Id.*

216. The Supreme Court held in *Cheek* that reasonableness is not necessary for a good faith defense against a claim of a willful violation, however, reasonableness plays a significant and recognized role in such cases. “Of course, the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.” *Cheek*, 498 U.S. at 203–04.

approach, the jury may conclude he lacked knowledge of the contents and acquit him.

Today, the three-suitcase hypothetical is no longer really about suitcases; today, it is more likely to be considered in relation to corporate misconduct. The relative dearth of prosecutions of individuals following high-profile cases of corporate malfeasance has led to scholarly,<sup>217</sup> judicial,<sup>218</sup> and political<sup>219</sup> criticism, as well as to policy shifts.<sup>220</sup> The nature of the corporate hierarchy renders individual corporate prosecutions difficult and thus relatively rare.<sup>221</sup> Basically, most corporate crimes are crimes of knowledge, and higher level executives frequently lack actual knowledge of the specific actus reus.<sup>222</sup> Willful blindness is thus a critical tool in white collar prosecutions,<sup>223</sup> and a tempting hook for those who would expand criminal liability throughout corporate organizations.<sup>224</sup>

Full inquiry into this topic is well beyond the scope of this Article. However, it is worth first acknowledging that a potential weakness of the mere evidence account of willful blindness is that it is *restrictive*, rather than *expansive*.<sup>225</sup> If the goal of studying willful blindness is to capture more conduct within the bounds of criminality, the substitute account will serve that goal and the mere evidence account will not.

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217. See generally MARY KREINER RAMIREZ & STEVEN A. RAMIREZ, *THE CASE FOR THE CORPORATE DEATH PENALTY: RESTORING LAW AND ORDER ON WALL STREET 1* (2017); David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235, 1277 (2016).

218. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. (Jan. 9, 2014), <https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/>.

219. John Lanchester, *After the Fall*, LONDON REV. BOOKS (July 5, 2018), <https://www.lrb.co.uk/v40/n13/john-lanchester/after-the-fall>.

220. See Memorandum from Sally Quillian Yates, Deputy Att’y Gen., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <https://www.justice.gov/dag/file/769036/download>.

221. See Gilchrist, *supra* note 12, at 361.

222. *Id.*

223. Famously, Frederick Bourke was convicted of conspiracy to violate the Foreign Corrupt Practices Act based on a government theory that when the wealthy designer of handbags invested in the oil venture of another businessman, he was willfully blind to the likelihood that illegal bribes would be paid. *United States v. Kozeny*, 664 F. Supp. 2d 369, 372, 385, 389 (S.D.N.Y. 2009), *aff’d*, 667 F.3d 122 (2d Cir. 2011) (“[T]he Second Circuit has held that conscious avoidance may satisfy the knowledge component of the intent to participate in the conspiracy.”).

224. See SARCH, *supra* note 8, at 231.

225. For reasons I have argued elsewhere, see generally Gilchrist, *supra* note 12. I believe this is more likely a benefit. See also Husak & Callender, *supra* note 17, at 49 (noting that “[o]ne can reason and reflect upon all one’s available evidence in the most scrupulous possible fashion and still lack knowledge”).

My contention is that in the mine run of cases, the mere evidence approach is likely to generate the same outcome as the substitute approach. But not all cases. So, the three-suitcase hypothetical, and maybe more to the point, a twenty-three-suitcases hypothetical, may be resolved with guilty verdicts under a substitute-equal-culpability account and by acquittals under the mere evidence account. Plainly, this will affect corporate criminal prosecutions, where higher level executives frequently have only awareness of risks, rather than knowledge.<sup>226</sup>

Second, having acknowledged this potential weakness, I would argue it is not a weakness at all. It is a limitation of the power of law. The law frequently fails to reach popular or even desirable results; that, itself, however, is no reason to alter the result.<sup>227</sup>

#### VII. THE MERE EVIDENCE ACCOUNT CANNOT COMPLETELY RESOLVE CONCERNS ABOUT WRONGFUL CONVICTIONS

The first two evils associated with the substitute account of willful blindness—judicial usurpation of legislative function<sup>228</sup> and punishment by analogy<sup>229</sup>—would be eliminated by the mere evidence approach. However, the third evil associated with willful blindness—allowing conviction for knowing violations based on mere recklessness<sup>230</sup>—would only be curtailed to a lesser degree, if at all.

This objection is fundamentally about the risk of wrongful conviction, and it has less to do with willful blindness—whether as evidence or a substitute account—than it does with the inherent imprecision of the legal definition of knowledge.

As described above, the law's conception of knowledge is importantly different, more simplistic, and more morally contingent than that aspired to by philosophy. To some degree, this stems from the necessary concession that knowledge of a future event or result can

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226. Gilchrist, *supra* note 12, at 382.

227. It may be, however, a reason to alter the law. Indeed, for those who would use willful blindness to expand criminal accountability within the corporate hierarchy, statutorily amending the relevant codes to punish certain kinds of risk-taking is worth exploring. For more, see Peter J. Henning, *A New Crime for Corporate Misconduct?*, 84 *MISS. L.J.* 43, 50 (2014) (exploring “possible approaches to adopting a statute that would permit federal prosecutors to pursue cases against corporate executives for their managerial decisions—decisions that result in significant economic harms, like those seen in the 2008 financial crisis”); SARCH, *supra* note 8, at 231.

228. See *supra* Part II.A.

229. See *supra* Part II.A.

230. See *supra* text accompanying notes 83–84.

only be awareness that the event or result is practically certain to occur.<sup>231</sup> There is no certainty. Bob points a loaded gun at William's head and pulls the trigger. Should William be killed by the gunshot, a jury will no doubt conclude that Bob knowingly caused William's death. But Bob, upon pulling the trigger, could have possessed certainty as to that outcome only through ignorance. He may or may not have been cognizant at the time of the alternative results, but they included at a minimum that the gun would jam, that the bullet would miss, and that the bullet would hit its target but inflict less-than-expected damage. Allowing awareness of these contingencies would render knowing crimes impossible—it would eliminate the category altogether. Accordingly, awareness of a practically certain result is sufficient for knowledge.<sup>232</sup> Permitting knowledge with contingencies, however, renders knowledge a question of risk—like recklessness.

Acting with awareness of a substantial and unjustified risk that a particular result might occur is merely reckless.<sup>233</sup> The line between knowledge and recklessness, therefore, is only one of degree admitting of limited precision. When Bob points a gun at William's head and pulls the trigger, the chance of William's death is great enough that the jury is comfortable assigning knowledge of this result to Bob. Yet, when Sally agrees to drive drunk, only to hit and kill Amy as a result of her intoxication, no jury will find this a knowing killing. Sally was aware of a substantial and unjustified risk of death to another by her driving while intoxicated; she acted anyway and caused a death. This is textbook recklessness, and the jury will have little difficulty discerning it from knowledge.

Between these poles, however, lie necessarily harder cases. The tavern owner who collects triple revenue on Thursday nights, who knows his bartender has a history of running illegal games, who makes a point of taking Thursdays off. The man who accepts an unusual fee to drive a car across a border, no questions asked. The woman who remits bags of cash in a legitimate business established to move money between countries. These are the willful blindness cases, and they are

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231. MODEL PENAL CODE § 2.02 cmt. 9 (AM. L. INST. 1985) (“The inference of ‘knowledge’ of an existing fact is usually drawn from proof of notice of high probability of its existence, unless the defendant establishes an honest, contrary belief.”).

232. *Id.*

233. *Id.* § 2.02.

difficult whether willful blindness remains a substitute for knowledge or whether it is reconceptualized as a form of evidence from which one might infer knowledge. In either event, there is a chance juries will get it “wrong.”<sup>234</sup> Because the line between knowledge and recklessness is one of degree, there is always the chance that a jury will find knowledge where a more accurate account would identify mere recklessness. This risk stems not from willful blindness, but from the imprecise delineation between the category of knowledge and that of recklessness, and from the impossibility of an error-free system.

Moreover, limiting the categories represented on the spectrum between plain knowledge and plain recklessness might actually mitigate the problem. Instructing a jury that they must find knowledge *or willful blindness*, as happens with a substitute account of willful blindness, generates a heuristic of three categories along what is truly a fluid spectrum.<sup>235</sup> First, knowledge, followed by willful blindness, followed by recklessness. This model may generate more convictions than a binary knowledge/recklessness model if only because it asks the trier of fact to imagine three segments of the spectrum, and designates two of them as sufficient for conviction.

Of course, this need not be true; there is nothing inherent in a greater raw number of convictable categories that will necessarily expand the scope of liability; however, the greater number of categories sufficient for guilt is unlikely to *decrease* the number of convictions and may, as a simple matter of confirmation bias, lead to more convictions. That is, as many critics have suggested, it may lead jurors to assign guilty knowledge to what—absent the willful blindness substitute category—would otherwise be mere recklessness.<sup>236</sup>

In any event, while it is not clear that the mere evidence approach adequately responds to the wrongful conviction/mere recklessness objection, it at least does not aggravate the problem.

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234. Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 76 (1999) (“[E]rrors cannot be entirely eliminated from the process of criminal adjudication and that mistakes will inevitably occur.”); *Speiser v. Randall*, 357 U.S. 513, 525 (1958) (“There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account.”).

235. See, e.g., *United States v. Anthony*, 545 F.3d 60, 66 (1st Cir. 2008).

236. See Charlow, *supra* note 2, at 1355–56.

## CONCLUSION

Does theory matter? Many ask whether legal scholarship is too concerned with castles in the sky while practitioners toil in the dirt. The premise is unfair in both directions.<sup>237</sup> Lawyers must embrace theory if they are to craft fulsome and compelling arguments; scholars must embrace practical implications if they are to earn an audience. The theory of willful blindness serves as an exemplar of just how important theory is, and how intertwined with practice it must be.

The dominant account of willful blindness offered by courts is deeply problematic. However, it is clear. Willful blindness is an acceptable substitute for knowledge because those who act in a willfully blind manner are equally culpable as those who act knowingly. Willful blindness is therefore an acceptable substitute for knowledge.

To describe the account is to recognize its deeply flawed nature. Courts lack authority to legislate alternative categories of crime, and to do so by way of moral analogies evidences a complete disregard for rule of law. This theoretical problem threatens the perceived legitimacy of the legal system; and yet it is so easy to avoid. A conceptual shift, from a theory of substitution to a theory of evidence, avoids the legality problems entirely. And, the shift would likely change relatively few outcomes.

The history and theory of the willful blindness doctrine fit with the mere evidence account. The mere evidence account avoids the legality pitfalls. And, the mere evidence account works in the sense that it generates similar outcomes. When it comes to willful blindness, the practice is not particularly problematic, but the theory is. That ought to change.

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237. See Heather K. Gerken, *Resisting the Theory/Practice Divide: Why the “Theory School” Is Ambitious About Practice*, 132 HARV. L. REV. F. 134, 135 (2019).

