ARTICLES

WILFUL IGNORANCE, KNOWLEDGE, AND THE "EQUAL CULPABILITY" THESIS: A STUDY OF THE DEEPER SIGNIFICANCE OF THE PRINCIPLE OF LEGALITY

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This Article challenges the traditional understanding of the principle of legality—nulla poena sine lege. Conventional wisdom concerning the principle fails to express the full range of values at stake in preserving the rule of law. In order to appreciate the deeper significance of these values, this Article considers an application of the principle of legality to a dispute about mens rea rather than to a controversy about actus reus. This discussion helps to reveal some of the larger issues that are involved in protecting the principle of legality. In addition, a focus on mens rea indicates the limitations of statutory solutions to some of the problems raised by the principle. Finally, this perspective demonstrates how the rule of law serves to protect law-abiding persons, and not only scoundrels. The most general conclusion drawn is that fidelity to law cannot be construed merely as fidelity to statutory law, but must be understood as fidelity to the principles of justice that underlie statutory law.

The deeper significance of the principle of legality is revealed in the context of a discussion of the problem of wilful ignorance. The discussion begins by clearly characterizing the culpable mental state associated with wilful ignorance. The unsatisfactory treatment of wilful ignorance by both courts and commentators is then reviewed. This Article shows that some (but not all) wilfully ignorant defendants are held liable despite their failure to satisfy the mens rea requirement of the statutes under which they are convicted. After considering whether the culpability of such defendants is equal to that of defendants who actually satisfy the mens rea of these statutes, this Article argues that the problem of wilful ignorance should not be assessed apart from the larger political significance of drug policy. Finally, this Article discusses the limitations of proposed statutory solutions to the problem of wilful ignorance, and defends a preferable alternative.

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I. THE PRINCIPLE OF LEGALITY: CONVENTIONAL WISDOM

The principle of legality—*nulla poena sine lege*[1]—is fundamental in Anglo-American criminal law. Like other fundamental principles, legality protects the moral rights of persons by limiting the coercive power of the state to create and enforce criminal legislation.[2] Every theorist pays homage to the importance of these rights, and acknowledges the injustice if they are violated. Hitler and Stalin were notorious for achieving terror partly by flouting the principle of legality. The infamous Nazi "principle of analogy" provided that:

> Whoever commits an act which the law declares to be punishable or which is deserving of punishment according to the fundamental idea of a penal law and sound perception of the people, shall be punished. If no determinate penal law is directly applicable to the action, it shall be punished according to the law, the basic ideal of which fits it best.[3]

There is a broad consensus about the injustice of this provision. Analogical reasoning in the enforcement of the criminal law is clearly incompatible with the principle of legality.

Despite the centrality of the principle of legality, most Anglo-American theorists have become complacent about it.[4] The wide spectrum of rights protected by the rule of law has received insufficient attention from contemporary commentators. As Francis Allen has observed, it is much easier to interest students in the rights conferred by the First Amendment than in those protected by the principle of legality.[5] He speculates that the principle has been slighted because its truth seems

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1. *The principle of legality has no single formulation. Other common formulations include "nullum crimin sine lege"* and *"nullum crimen, nulla poena, sine lege."*

2. *See* DOUGLAS N. HUSAK, PHILOSOPHY OF CRIMINAL LAW 30-49 (1987).

3. *Lawrence Preuss, Punishment By Analogy in National Socialist Penal Law*, 26 J. CRIM. L. & CRIMINOLOGY 847, 847 (1936) (discussing principles of analogy). The comparable provision (Article 16) of the Soviet Code provided that "if any socially dangerous act is not provided for by the present Code, the basis and limits of responsibility for it shall be determined by application of those articles of the Code which provide for crimes most similar to it in nature." HAROLD BERMAN, SOVIET CRIMINAL LAW AND PROCEDURE 22 (2d ed. 1972).

4. *"The very fact of widespread acceptance has worked to inhibit full exploration of the legality concept." CRIMINAL LAW 34 (Peter Low et al. eds., 1986).*

5. *Francis Allen, The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the* Nulla Poena *Principle*, 29 ARIZ. L. REV. 385 (1987).

so obvious that there appears to be little to say about it.[6] Surely the monstrous violations of the rule of law perpetrated by totalitarian regimes could never occur in our legal system, and more subtle evasions of legality are rarely noticed. Many of the cases included in current textbooks are English, suggesting that the American legal system has a nearly unblemished record in preserving the principle of legality.[7]

Moreover, the cases that find their way into textbooks conform to a familiar pattern. Typically, the state prosecutes a person for an actus reus that appears wrongful, but has not clearly been defined as criminal by the legislature in advance. Paradigm examples are as follows. Does a defendant "unlawfully effect a public mischief" by making false allegations to the police?[8] Does a defendant "conspire to corrupt public morals" by publishing either a directory of prostitutes[9] or classified advertisements by male homosexuals?[10] Does a defendant commit a homicide by killing a human fetus without the mother's consent?[11] Such examples, of course, could be multiplied.[12]

The use of such examples serves to reinforce the following three propositions, which have come to express conventional wisdom about the principle of legality. First, whatever may be true in theory, in practice the principle serves mainly to protect scoundrels bent on mischief.[13] Noting that "it is hard for the legislature in advance to conceive of all possible anti-social behavior that ought to be criminal," Wayne LaFave and Austin Scott contend that "[t]he question in the criminal law field is whether judges can create (or discover) new crimes for which to punish the ingenious fellow who conceives and carries out a new form of anti-social conduct not covered by the criminal code."[14] They conclude with a query, designed to indicate why the judiciary is frequently tempted to

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6. *Id.* at 387.

7. *But see* Commonwealth v. Mochan, 110 A.2d 788, 790 (Pa. Super. 1955) (holding that the defendant's act of making obscene phone calls is a misdemeanor because "from its nature [it] scandalously affects the morals or health of the community") (internal citation omitted); Commonwealth v. Donoghue, 63 S.W.2d 3, 8 (Ky. Ct. App. 1933) (holding that "a nefarious plan for the habitual exaction of gross usury" was punishable despite the absence of an explicit legislative enactment).

8. *Rex v. Manley, 1 K.B. 529 (1933).*

9. *Shaw v. Director of Pub. Prosecutions, [1961] 2 All E.R. 446.*

10. Knuller v. Director of Pub. Prosecutions, [1972] 2 All E.R. 898.

11. Keeler v. Superior Court, 470 P.2d 617 (Cal. 1970).

12. Additional examples can be found in 1 FRANCIS WHARTON, CRIMINAL LAW §§ 18-24 (12th ed. 1932).

13. "The malicious ingenuity of mankind is constantly producing new inventions in the art of disturbing their neighbors." Commonwealth v. Taylor, 5 Binn. 277, 281 (Pa. 1812).

14. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW 89 (1986).

infringe the rule of law: "If someone intentionally or by chance finds a loophole, may the courts create a new crime to plug that gap?"[15] According to this account, the principle of legality constitutes a "loophole" through which clever criminals manage to escape. After all, even the Nazi principle of analogy applied only to persons "deserving of punishment."[16] Rarely is legality understood to protect persons whose behavior is not "anti-social."

Second, any problem raised by the principle of legality is amenable to a straightforward statutory solution. Presumably, the foregoing difficulties could be overcome simply by redefining the statutes in question to explicitly prohibit making false allegations to the police, publishing a directory of prostitutes or classified advertisements by male homosexuals, or killing a human fetus. The issue is not whether persons who perform these acts are deserving of punishment, but which branch of government has the proper authority to impose it. No deeper questions are at stake than the division of power between the legislature and the judiciary.

Third, controversy about the principle of legality invariably involves disagreement about the scope and boundaries of the actus reus of an offense. Indeed, some commentators apparently are unable to distinguish the demands of legality from those raised by the principle that criminal liability requires an actus reus. If the defendant's conduct clearly satisfies the actus reus of an existing criminal offense, narrowly defined to avoid vagueness, no further question about legality remains to be resolved.

This Article will challenge the conventional wisdom conveyed by these three propositions. The traditional understanding of legality fails to express the full range of values at stake in preserving the rule of law.[17] In order to appreciate the deeper significance of these values, it will be necessary to consider an application of the principle of legality to a dispute about mens rea rather than to a controversy about actus reus. Apart from enlarging the focus of the rule of law, this discussion will help to reveal some of the larger issues that may be involved in protecting the principle of legality. In addition, a focus on mens rea will indicate the limitations of statutory solutions to some of the problems raised by the principle of legality. Finally, this focus on mens rea will demonstrate how the rule of law serves to protect law-abiding persons, and not only scoundrels. The most general conclusion to be drawn is that fidelity to

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15. *Id.* at 89-90.

16. Preuss claims that legality had become regarded by the Nazis as "the Magna Carta of the criminal." Preuss, *supra* note 3, at 847.

17. "The generality with which the legality principle is usually stated . . . tends to obscure the variety of concerns comprehended by this label and to ignore its dynamic character." CRIMINAL LAW, *supra* note 4, at 34.

law cannot be construed merely as fidelity to statutory law, but must be understood as fidelity to the principles of justice that underlie statutory law.[18]

The deeper significance of the principle of legality will be revealed in the context of a discussion of the problem of wilful ignorance. Part II of this Article will raise this problem, and clarify the concept of wilful ignorance. Part III will argue that some (but not all) wilfully ignorant defendants are held liable despite their failure to satisfy the mens rea requirement of the statutes under which they are convicted. Part IV will consider but ultimately dismiss the relevance of inquiring whether the culpability of such defendants is equal to that of defendants who do satisfy the mens rea requirement of these statutes. Part V will show why the infringement of legality involved in the conviction of these defendants is politically significant. Part VI will indicate the limitations of proposed statutory solutions to the problem of wilful ignorance and will defend a preferable alternative.

This challenge to the conventional wisdom about the principle of legality should help to rekindle interest in the rule of law. Against the background of conventional wisdom, it is not surprising that contemporary commentators have tended to display little enthusiasm for the principle of legality. No one is especially interested in creating legal loopholes through which clever wrongdoers escape their just deserts. The importance of the principle of legality would become more evident if it sometimes protected persons who are innocent—not innocent in some technical, legal sense, to which scoundrels can appeal—but innocent in a deeper, moral sense that is important to life in a free society.

II. THE CONCEPT OF WILFUL IGNORANCE

Suppose that criminal liability under a particular statute requires that a defendant act with the mens rea of knowledge. For example, consider the offense of knowing possession of a controlled substance with the intent to distribute.[19] Virtually all courts and commentators agree that a mental state they alternatively describe as "wilful ignorance" or "wilful

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18. This suggestion is developed more fully in LON L. FULLER, THE MORALITY OF LAW (1969). The importance of "fidelity not just to rules but to the theories of fairness and justice that these rules presuppose by way of justification" is also emphasized in RONALD DWORKIN, LAW'S EMPIRE 185 (1986).

19. 21 U.S.C. § 841(a)(1) (1988) ("[I]t shall be unlawful for any porson knowingly or intentionally—to manufacture, distribute, or disponse, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."). Possession is a necessary element in the substantive charge of either distribution or sale of narcotics. *See* United States v. Jackson, 526 F.2d 1236, 1237-38 (5th Cir. 1976).

blindness"[20] is sufficient to satisfy the requirement of knowledge.[21] Whether and under what circumstances defendants with this mental state should be held liable for acting knowingly constitutes "the problem of wilful ignorance."[22]

United States v. Jewell[23] is probably the leading case in which the concept of wilful ignorance was invoked to uphold a conviction. The defendant was arrested after driving an automobile in which 110 pounds of marijuana had been concealed in a secret compartment between the trunk and rear seat. The defendant testified that he had been paid $100 by a stranger to drive the car into the country, and that he was not actually aware that it contained contraband. Liability under one count required that the defendant knowingly brought the drugs into the country.[24] The court affirmed the defendant's conviction, and upheld the following instruction:

> The Government can complete their burden of proof by proving, beyond a reasonable doubt, that if the defendant was not actually aware that there was marijuana in the vehicle he was driving when he entered the United States his ignorance in that regard was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth.[25]

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20. Other terms include "connivance," "conscious avoidance," "wilful shutting of the eyes," "deliberate ignorance," "studied ignorance," "purposely abstaining from all inquiry as to the facts," "avoidance of any endeavor to know," "a conscious purpose to avoid learning the truth," and "deliberately chose not to learn." *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 867-68 (3d ed. 1982).

21. "For well-nigh a hundred years, it has been clear from the authorities that a person who deliberately shuts his eyes to an obvious means of knowledge has sufficient *mens rea* for an offenee based on such words as . . . 'knowingly.'" J. Edwards, Comment, *The Criminal Degrees of Knowledge*, 17 MOD. L. REV. 294, 298 (1954).

22. Of course, sevcral other "problems of wilful ignorance" could be identified. For example, one might examine whether and under what circumstances wilfully ignorant defendants should be held liable for satisfying culpable states of mind other than those included in the Model Pcnal Code. *See* Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1360-61 (1992).

23. 532 F.2d 697 (9th Cir. 1976).

24. Jewell was charged with a violation of 21 U.S.C. § 841(a)(1) (1988), as well as 21 U.S.C. § 952(a) (1988) ("It shall be unlawful to . . . import . . . into the United States . . . any controlled substance."). Possession is not an element of this latter offense. United States v. Valencia, 492 F.2d 1071, 1074 (9th Cir. 1974).

25. *Jewell*, 532 F.2d at 700.

The Court added that "knowingly" should not be equated with "positive knowledge" because such an interpretation "would make deliberate ignorance a defense."[26]

What exactly is the mental state of wilful ignorance possessed by the defendant in *Jewell*? Commentators[27] and courts[28] differ not only in the names they give to this state, but also in the details of the descriptions they provide—if, indeed, they provide any details at all. An immediate methodological problem is to identify the criteria that should be used to decide between competing conceptions of wilful ignorance. Legal terms with familiar non-legal usages should probably be construed according to their meanings in ordinary language.[29] But unlike other mental states commonly employed in criminal statutes, such as knowledge and belief, the concept of wilful ignorance is more of a technical, stipulative term of legal art with no precise analogue in everyday speech. This concept has not been borrowed from ordinary language; attributions of wilful ignorance are extremely rare outside of legal contexts. Consequently, semantic considerations would seem to have little bearing on how to identify the mental state involved in *Jewell*.

How, then, should an explication of wilful ignorance proceed? A good start is to allow the purpose of the term to guide deliberations about competing conceptions of wilful ignorance.[30] Legal theorists have invented the term to serve a given objective. Once this purpose is identified, a particular conception of wilful ignorance may be defended as superior to its rivals. Simply, the conception of wilful ignorance that serves this objective most effectively is best among its competitors.

The purpose of having the concept of wilful ignorance is relatively clear. This concept has been created by courts to describe the culpable mental state found in cases like *Jewell*. The objective of the courts is to convict a defendant who may lack genuine knowledge (and who otherwise might have been acquitted) for acting knowingly. This purpose can be

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26. *Id.* at 703.

27. One commentator juxtaposes one three-part distinction upon another to generate nine different "forms" of definitions of wilful ignorance. Charlow, *supra* note 22, at 1366-72.

28. Courts of appeals in each circuit have adopted some form of wilful ignorance instruction. These different formulations are contrasted in Kristen L. Chestnut, United States v. Alvarado: *Reflections on a Jewell*, 19 GOLDEN GATE U. L. REV. 47, 49 (1989). Thus "the cases . . . are at sixes and sevens on what wilful blindness means." GLANVILLE L. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 125 (1983).

29. For a defense of this claim, see ALAN R. WHITE, MISLEADING CASES (1991).

30. Here the analysis follows the recent advice of some philosophers regarding attempts to analyze and to clarify concepts. Many philosophers believe that accounts of concepts should stress the *role* concepts play in the realm of interest. *See* Michael A. Bishop, *The Possibility of Conceptual Clarity in Philosophy*, 29 AM. PHIL. Q. 267 (1992).

accomplished either by describing a mental state that is a kind of knowledge or by describing a mental state that is not a kind of knowledge but can plausibly be construed to be the moral equivalent of knowledge. Of course, it is doubtful that *any* conception of wilful ignorance which adequately describes the culpable mental state found in cases like *Jewell* can accomplish this objective unproblematically.[31] Still, the particular conception of wilful ignorance is best that encounters the fewest difficulties in satisfying this objective. The aim of this section is to develop a conception of wilful ignorance that is less objectionable than its competitors in enabling courts to convict such defendants for acting knowingly.

The draftsmen of the Model Penal Code sought to achieve this purpose in the following way. The Code generally defines "knowledge" of the "nature of [a defendant's] conduct" to require that "he is aware that his conduct is of that nature."[32] But a subsection of the Code provides that "knowledge of the existence of a particular fact" is established "if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."[33] The commentaries explain that this subsection is designed to deal with the phenomenon of "wilful blindness," in which the defendant "is aware of the probable existence of a material fact but does not determine whether it exists or does not exist."[34] The explanatory note describes this subsection as an "elabora[tion] on the definition of 'knowledge.'"[35] Yet this "elaboration" apparently applies only to wilful ignorance; a defendant who only believed a fact to be highly probable would not be said to know it unless his lack of genuine knowledge were due to wilful ignorance.[36]

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31. *See infra* part IV.

32. MODEL PENAL CODE § 2.02(2)(b)(i) (Official Draft, review and commmentaries, 1985).

33. *Id.* § 2.02(7).

34. *Id.* commentary at 248.

35. *Id.* explanatory note at 228.

36. If § 2.02(7) were intended as a universal definition of knowledge, the earlier definition in § 2.02(2)(b)(i) would serve no purpose. If both "definitions" had the same scope, the drafters would not have included two distinct versions. When this observation is coupled with the explanation in the commentaries that § 2.02(7) is designed to deal with wilful ignorance, it is natural to suppose that this "elaboration" is intended only for cases of wilful ignorance.

One commentator who maintains that § 2.02(7) is meant as a general definition of knowledge proposes to solve the problem of wilful ignorance by consistently applying this "elaboration." *See* Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 YALE L.J. 2231 (1993). If § 2.02(7) is taken as a general definition of knowledge, anyone who believes a fact to be highly probable would be said to know that fact. This proposal would solve the problem of wilful ignorance, according to the commentator, because all wilfully ignorant defendants presumably believe the fact to be

If intended as a definition of wilful ignorance, the foregoing provision of the Model Penal Code is defective on a number of grounds. First, not all cases in which a defendant would seem to be wilfully ignorant involve "aware[ness] of a high probability" of the "existence of a particular fact."[37] Consider the following example. Suppose that a foreigner approaches two American tourists who are about to return home. He offers to pay either of them one hundred dollars to deliver a suitcase to a contact in America. When the tourists inquire about the contents of the suitcase, the foreigner replies: "You have no need to know." Both tourists are tempted, but decline because they are apprehensive that the act would be illegal. So the foreigner modifies his offer in order to persuade them. He proposes to pay *each* of them one hundred dollars to deliver *two* suitcases, and assures them that one of the suitcases (he will not identify which one) is empty. Both of the tourists accept this modified offer. Suppose that the tourists are stopped by customs officers, who open the suitcases and discover that one contains illegal drugs. Can the tourist whose suitcase contained the drugs be convicted under a statute that forbids knowingly possessing a controlled substance?

If either tourist had accepted the foreigner's original offer, his mental state would be a paradigm case of wilful ignorance. But what is to be said about the state of mind of the arrested tourist who accepts the modified proposal?[38] This question must be answered by inquiring whether categorizing his mental state as wilful ignorance helps to achieve the purpose for which that concept was invented. By this standard, it seems the question should be answered affirmatively. Anyone who proposes that the tourist in the original hypothetical should be convicted for violating a statute that requires that he act knowingly is unlikely to change his opinion when the example is modified. It seems more

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highly probable. However, the present investigation demonstrates that this proposal is both too strong and too weak to solve the problem of wilful ignorance. This proposal is too strong inasmuch as a defendant who believes a fact to be highly probable may still not be wilfully ignorant. *See infra* notes 162-64 and accompanying text. In addition, this proposal is too weak inasmuch as a defendant who is wilfully ignorant may still not believe a fact to be highly probable. *See infra* text accompanying notes 40-43.

37. This aspect of the Model Penal Code account has been endorsed by many commentators. "The best view is that [wilful blindness] applies only when a porson is virtually certain that the fact exists." WILLIAMS, *supra* note 28, at 125.

38. It may be interesting to speculate about whether each tourist in this hypothetical could be convicted of a conspiracy. Liability for conspiracies also requires knowledge. Moreover, such speculation does not resolve the question of whether the arrested tourist is wilfully ignorant. *See* Christine L. Chinni, *Whose Head Is in the Sand? Problems With the Use of the Ostrich Instruction in Conspiracy Cases*, 13 W. NEW ENG. L. REV. 35 (1991).

plausible to conclude that the tourists are wilfully ignorant in both the original and the modified hypotheticals,[39] even though the tourist in the latter example does not believe that it is highly probable that he is carrying a controlled substance.[40] Thus the "highly probable" component of the Model Penal Code account of wilful ignorance must be rejected.

Moreover, it is not even clear that the Model Penal Code account is correct in specifying that a defendant cannot be wilfully ignorant of a material fact that "he actually believes . . . does not exist."[41] As further modifications of the foregoing example indicate, some defendants who seem to be wilfully ignorant would estimate the probability of the truth of a given proposition p (such as "my suitcase contains illegal drugs") as less than fifty percent. Suppose that the example is altered to involve three tourists, two of whose suitcases were known to be empty. Then, each tourist would actually *dis*believe that his suitcase contained illegal drugs.[42] But this fact does not seem to entail that none of these defendants could be wilfully ignorant.[43]

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39. One commentator claims that "where there is direct evidence of a deliberate plan to avoid knowing the truth, the degree of probability is unimportant." Rollin M. Perkins, *"Knowledge" as a Mens Rea Requirement*, 29 HASTINGS L.J. 953, 964 (1978). But Perkins' claim may be overstated. Presumably there is *some* lower limit to the probability of a proposition about which a defendant can be wilfully ignorant. If the probability is sufficiently low, the defendant's suspicion will not be warranted.

40. One commentator's proposal that § 2.02(7) of the Model Penal Code function as a general definition of knowledge is therefore deficient. *See* Marcus, *supra* note 36. The agent in this hypothetical, though wilfully ignorant, does not believe it is highly probable that he possesses a controlled substance.

41. MODEL PENAL CODE, § 2.02(7) (Official Draft, review and commentaries, 1985).

42. Some epistemologists have thought it preferable to abandon attempts to answer the question whether or not a person believes a proposition p. Instead of constructing an epistemology of belief, these philosophers (sometimes called 'probabilists') have opted to construct an epistemology of degrees of belief. These epistemologists refuse to answer the further question whether this degree of confidence is sufficient to give rise to belief *simpliciter*. In the present example, the wilfully ignorant defendant has a given degree of confidence in proposition p. Whether this low degree of confidence counts as disbelief or not for some epistemologists is irrelevant for present purposes. The reason for the irrelevance is that the Model Penal Code uses the concept of belief, and the example can be modified (by adding more tourists with empty suitcases) to create mental states which would certainly warrant attributions of disbelief to the defendant. Additionally, if belief *simpliciter* is to be entirely shunned, then the belief requirement in the Model Penal Code must be expressed in terms of degrees of belief; and again, the example can be modified so that the wilfully ignorant defendant's degree of belief falls well below that mentioned by the Model Penal Code. *See* RICHARD FOLEY, WORKING WITHOUT A NET § 4 (1993).

43. Of course, this example requires commitment to a position about the connection between probability and belief. How high must an agent estimate the

The 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. Even a belief in the material fact's existence is not an essential component of the phenomenon of wilful ignorance.[44] Reconsider the foregoing hypotheticals. If a defendant need not actually believe p in order to be willfully ignorant of p—and might actually *dis*believe p—what mental state must he have? In the last example, all three defendants would appear to be wilfully ignorant because they are (and have good reason to be) *suspicious* of the illegal contents of the suitcase.[45] This conclusion indicates that the potentially complex relationship between belief and probability is somewhat tangential to the analysis of wilful ignorance.

The requirement of suspicion explains why otherwise troublesome cases qualify as examples of wilful ignorance. Judge (now Justice) Kennedy's example of a child who is "given a gift-wrapped package by his mother while on vacation in Mexico" and has "a conscious purpose to take it home without learning what is inside"[46] is not wilfully ignorant (in the event that the package contains drugs), not because he lacks the relevant belief—since belief is not required—but because he lacks the relevant suspicion. Kennedy, however, draws the wrong conclusion from his example. He mistakenly infers that the "state of mind" of this child "is totally innocent unless he is aware of a high probability that the package contains a controlled substance."[47] However, the state of mind of the defendant who does not believe with a high probability that his conduct is criminal need not be "totally innocent." Instead, the defendant's state of mind is culpable rather than innocent if he is (and has good reason to be) suspicious that his conduct is illegal. His culpability decreases as he becomes less and less suspicious, but does not reach total innocence until he lacks suspicion altogether.

Wilful ignorance cannot be equated with suspicion alone, however. At least three nonmental conditions differentiate the wilfully ignorant defendant from the suspicious defendant. The first, which qualifies the

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likelihood of a proposition before he can be said to believe it? No general answer seems possible. The foregoing examples, however, assume only that a necessary condition for believing a proposition is that the agent believes that proposition to be true. Clearly this requirement, known as "Moore's paradox," is plausible. G.E. Moore noticed that it would be absurd to believe a proposition p and at the same time believe it to be false. *See* PAUL A. SCHILPP, THE PHILOSOPHY OF G.E. MOORE 386 (2d ed. 1952).

44. For a discussion of the nature of belief, see WILLIAM LYCAN, JUDGEMENT AND JUSTIFICATION (1988) (especially chapters 3 and 4).

45. Suspicion need not be a kind of belief. *See* WHITE, *supra* note 29, at 134.

46. This example is described by Judge Kennedy in his dissent in United States v. Jewell, 532 F.2d 697, 707 (9th Cir. 1976) (Kennedy, J., dissenting).

47. *Id.* (Kennedy, J., dissenting).

suspicion requirement, might be called the *warranted suspicion* condition. Because wilful ignorance should not be extended to those with unfounded suspicions, that is, to persons suffering from paranoia or other delusions, the suspicion must be restricted to those who have good, objective, reasons for their suspicion. Ideally, wilfully ignorant agents are suspicious because the evidence demands it.

The second condition to differentiate the wilfully ignorant defendant from the suspicious defendant might be called the *availability* condition. In many (but not all) potential cases of wilful ignorance, there exists information highly relevant to a defendant's determination of the truth of the proposition about which he is wilfully ignorant. If a defendant has the means to learn the truth (or to gather more evidence) about the significance of his actions, and is aware of these means, his failure to act on these suspicions is a plain sign of wilful ignorance. In most cases, the wilfully ignorant defendant will not have considered (or evaluated) all of the evidence that honest persons in those circumstances would have considered. Typically, these defendants fail to pursue reliable, quick, and ordinary measures to discover the facts. Each of these three factors is important. The wilfully ignorant defendant cannot simply fail to pursue unreliable, time-consuming, or extraordinary means to learn the truth. The facts must be readily available to anyone disposed to discover them.[48]

The third condition to differentiate the wilfully ignorant defendant from the suspicious defendant might be called the *motivational* condition. The wilfully ignorant defendant must have a given motive for remaining unaware of the truth—he must consciously desire to preserve a possible defense from blame or liability in the event that he is apprehended. His failure to gain more information cannot be due to mere laziness, stupidity, or the absence of curiosity.

Alternative conceptions of wilful ignorance that do not include these three conditions appear to be inferior to the present characterization. Each condition eliminates consequences seemingly incompatible with the phenomenon of wilful ignorance. If the warranted suspicion requirement is not posited, then a person with an extremely low degree of confidence in p—or a deluded person—may be held to be wilfully ignorant of p. Additionally, if the availability condition is not posited, a person who

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48. In some cases, the means to learn the truth may not exist. Suppose, for example, the defendant has no key to a locked suitcase. Perhaps the availability requirement should be conditional upon the existence of these means. In such cases, however, it should be recognized that the means to learn the truth would have been available to a wilfully ignorant defendant at an earlier time. In the locked suitcase example, the wilfully ignorant defendant would not have made reasonable inquiries to the person who gave him the suitcase.

lacks the means to learn the truth of p may be held to be wilfully ignorant of p. Finally, if the motivational condition is not posited, then a person who does not act on his suspicion about p, merely because of laziness or a lack of curiosity, may be held to be wilfully ignorant of p. Thus each of these three conditions is important to an adequate conception of wilful ignorance.

In summary, a defendant is wilfully ignorant of an incriminating proposition p when he is suspicious that p is true, has good reason to think p true, fails to pursue reliable, quick, and ordinary measures that would enable him to learn the truth of p, and, finally, has a conscious desire to remain ignorant of p in order to avoid blame or liability in the event that he is detected. In a paradigm case of wilful ignorance, the defendant will have a warranted suspicion regarding the illegal contents of the trunk of a car, and have readily available means to learn the truth, but will remain ignorant in order to retain a possible defense if he is arrested. This characterization of wilful ignorance is defensible in light of the purpose for inventing the concept: to identify the culpable mental state found in cases such as *Jewell*. Arguably, this mental state either is a kind of knowledge[49] or is the moral equivalent of knowledge.[50] Thus, it seems plausible to hold such a defendant liable for violating a statute that requires that he act knowingly.

III. Two Views of the Relationship Between Wilful Ignorance and Knowledge

The aim of this section is to refine further the concept of wilful ignorance by comparing and contrasting it with other culpable mental states with which it might be confused. The most difficult part of this task will be to clarify the relationship between wilful ignorance and knowledge. This section will contrast two competing views about this relationship, and will give reasons to conclude that the second provides a better account of the elusive connection between wilful ignorance and knowledge.

Wilful ignorance is easily contrasted with what is sometimes called culpable ignorance.[51] The culpably ignorant defendant is simply negligent or reckless in failing to learn the facts that a reasonable person would have discovered. But unlike the negligent defendant, who is unaware of a proposition that a reasonable person would have known to be true, the wilfully ignorant defendant is not totally oblivious to the truth

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49. *See infra* part III.
50. *See infra* part IV.
51. *See* Holly Smith, *Culpable Ignorance*, 92 PHIL. REV. 543 (1983).

of a proposition; he must believe or at least be suspicious of it. And unlike the reckless defendant, the wilfully ignorant defendant satisfies the motivational condition; he has a particular incentive to fail to learn the facts. Moreover, many culpably ignorant defendants will not satisfy the availability condition. These differences, however, should not obscure the similarity between the reckless and the wilfully ignorant defendant. Both defendants consciously entertain the risk that an incriminating proposition is true. Thus all wilfully ignorant defendants are reckless, but—largely because not all reckless defendants satisfy the motivational condition—not all reckless defendants are wilfully ignorant.[52]

The relationship between wilful ignorance and knowledge is more complicated and requires a more detailed discussion. Two views about this relationship must be contrasted. Elaboration of both views requires that a name be given to the mental state that is unquestionably knowledge. Call such a state *genuine* knowledge. The first view about the relationship between wilful ignorance and genuine knowledge might be called the "actual knowledge" account. According to this interpretation, wilful ignorance is a species of genuine knowledge; thus the wilfully ignorant defendant *does* possess genuine knowledge after all. The second view might be called the "substitute for knowledge" account. 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. Either of these two views provides a basis to allow the wilfully ignorant defendant to be held liable for violating a statute that requires that he act knowingly, although only those who embrace the "substitute for knowledge" interpretation need provide a further reason to defend the justice of this result.[53] Obviously, there is no difficulty in holding a wilfully ignorant defendant liable for acting knowingly if wilful ignorance is a species of genuine knowledge.

Unfortunately, courts are seldom clear about which of these competing views they endorse.[54] Commentators have not been especially helpful in resolving this dispute. Some conceal the difference between the "actual knowledge" and "substitute for knowledge" views by

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52. Contrast this account of the relationship with Ira Robbins' statement that "deliberate ignorance constitutes recklessness, rather than knowledge." Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 195 (1990).

53. *See infra* part IV.

54. "Those American courts that have accepted the concept of willful blindness are themselves divided on the question whether such blindness constitutes actual knowledge or instead some lesser degree of knowledge." Comment, *Willful Blindness as a Substitute for Criminal Knowledge*, 63 IOWA L. REV. 466, 472 (1977).

expressing their position in terms of what the wilfully ignorant defendant is "deemed" to know.[55] The claim that a wilfully ignorant defendant is "deemed" to know a proposition is ambiguous between saying that wilful ignorance *is* a species of genuine knowledge and saying that wilful ignorance is *not* a species of genuine knowledge, although it can and should be treated as though it were. Other theorists have changed their minds about these competing views over time, without acknowledging their shift in position.[56] Still others seemingly embrace both interpretations simultaneously, even though they are incompatible.[57] Confusion about whether the wilfully ignorant defendant possesses genuine knowledge or a substitute for knowledge infects many of the hypotheticals[58] and real cases commentators use[59] to illustrate the

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55. Perkins and Boyce write: "Circumstances sometimes cause a person to realize that what he plans to do may bring about a result which the law seeks to prevent. If he wilfully goes ahead with his plan, while deliberately refusing to find out about this, he is deemed at common law to have knowledge of what he would have known had he not made it a point not to know." PERKINS & BOYCE, *supra* note 20, at 867.

56. In his first treatise, Glanville Williams defended the "substitute for knowledge" view, writing that wilful ignorance should be regarded as an "exception" to the requirement of actual knowledge. GLANVILLE L. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 157 (2d ed. 1961). In his subsequent textbook, however, Williams came to endorse the "actual knowledge" view, holding that wilful ignorance "can reasonably be said to be an explanation of what is meant by knowledge as a matter of common sense, rather than an illegitimate extension of the meaning of the term." WILLIAMS, *supra* note 28, at 125. Williams fails to explain, or even to acknowledge, his shift in position.

57. Andrew Ashworth writes: "Although, strictly speaking, [the wilfully ignorant defendant] does not *know*, since he has refrained from finding out, he has an overwhelmingly strong belief (he believes it is virtually certain) that the prohibited circumstance exists. Thus, wilful blindness may be treated not as reckless knowledge, but as a form of actual knowledge." ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 167-68 (1991). This passage contains support for both the actual knowledge and the substitute for knowledge conceptions of wilful ignorance. The "thus" in this quotation is especially mysterious. Ashworth appears to infer that the mental state of the wilfully ignorant defendant "may be treated . . . as a form of actual knowledge" from a number of premises, one of which is that he "does not *know*."

58. The example of wilful ignorance provided by Williams seems to involve genuine knowledge. He writes: "An example of wilful 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." WILLIAMS, *supra* note 28, at 125. *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?

59. *See* Robbins, *supra* note 52, at 192 n.5. The first case cited in his comprehensive discussion may not exemplify wilful ignorance at all. In United States v. Batencort, 592 F.2d 916 (5th Cir. 1979), the defendant admitted that he knew there was "something illegal" in the suitcase a stranger had paid him to carry from Colombia to

phenomenon. This confusion is intolerable. An adequate understanding of wilful ignorance requires commitment to one view or the other.[60]

Problems in deciding between these competing views of the relationship between wilful ignorance and knowledge are partly due to the enormous theoretical difficulties in understanding and applying the concept of knowledge. Epistemologists have sought to elucidate the concept of knowledge and have found this project no small task. A brief examination of what recent philosophy has had to say about knowledge is therefore required.[61] This investigation will assist a determination of whether wilful ignorance is a kind of genuine knowledge. The conclusion of this inquiry is that the wilfully ignorant defendant need not have knowledge of the incriminating proposition p. This conclusion is not reached simply by applying an overly stringent, philosophically demanding analysis of knowledge. A less rigorous, more colloquial understanding of knowledge may be more useful for purposes of imposing criminal liability. But the conclusion is not altered even when such an understanding of knowledge is applied. Some wilfully ignorant defendants lack knowledge.

Contemporary epistemology began in 1963 with Edmund Gettier's well-known challenge to the then-received understanding of knowledge.[62] Prior to 1963, the consensus was that knowledge of a proposition p consisted of three distinct components: justified true belief.[63] Exactly how justification was to be defined was (and is) a subject of much dispute. However, the intuitive idea was that an agent's belief be based

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Texas, although he did not investigate what that illegal something might be. If such a case really involves wilful ignorance, as Robbins alleges, it must be because a defendant can be wilfully ignorant when he does not know what law he is breaking, even though he knows that he is breaking some law or another. But according to the conception of wilful ignorance endorsed here, a defendant need not have genuine knowledge that he is breaking any law at all.

60. "[T]here is tremendous confusion in this area of law and a lurking sense that something is fundamentally awry." Charlow, *supra* note 22, at 1353.

61. Though some philosophers question whether humans can ever really *know* anything, or more than very few things, their concerns do not touch upon the present inquiry. Knowledge skeptics are generally concerned with only a very strict understanding of "knowledge," and not the legal sense of knowledge used here. The positions of skeptics vary widely, but it is safe to say that they would not hesitate in claiming knowledge possible, in the sense needed here. *See* BARRY STROUD, THE SIGNIFICANCE OF PHILOSOPHICAL SCEPTICISM (1984).

62. Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 ANALYSIS 121 (1963). The kinds of counterexamples that Gettier proposes to this analysis of knowledge involve what might be called coincidences: cases in which a proposition p happens to be true for reasons other than those that justify the agent's belief that p.

63. *See, e.g.*, RODERICK M. CHISHOLM, *Theory of Knowledge in America*, *in* THE FOUNDATIONS OF KNOWING (1982).

on good evidence for the proposition in question. Roughly, to be justified was to have reasoned in the appropriate fashion from the available data. The mental state of knowledge was hence identified with an agent correctly believing a proposition for which he possessed good evidence. Exactly what form good evidence would take was again controversial, but for present purposes an intuitive understanding of "evidence" is more than sufficient. Gettier challenged this analysis by describing cases in which an agent lacked what would be called knowledge while still having a justified true belief. The subjects in his cases correctly believe a proposition which resulted from scrupulous reasoning from all of the available data, yet they do not have what most would call "knowledge." The result is that even if one's doxastic house is perfectly in order, even if one reasons flawlessly from the available evidence, one still cannot be guaranteed to possess genuine knowledge of any particular proposition. Consequently, subsequent analyses of knowledge have sought to delineate those features external to one's subjective state that are required for knowledge.[64]

Despite the preceding difficulty for understanding knowledge as justified true belief, for ease of exposition let *any* third condition added to the truth and belief conditions be called "justification."[65] Philosophical analyses of this elusive third condition may be divided into two kinds: internalist and externalist. Internal justification for a belief p is a relation that obtains exclusively between p and some of a subject's other noetic states.[66] The relation is usually thought to provide evidence for p; further, the noetic states are thought to be cognitively accessible to the subject. External justification is non-internal justification; that is, (broadly) it maintains that justifiedness is, in part, a function of external

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64. This interpretation of contemporary epistemology may be verified by examining any recent textbook. *See, e.g.*, JONATHAN DANCY, INTRODUCTION TO CONTEMPORARY EPISTEMOLOGY (1985); JOHN L. POLLOCK, CONTEMPORARY THEORIES OF KNOWLEDGE (1986).

65. Having noted that Gettier and subsequent philosophers take justified true belief to be insufficient for knowledge, it will be easier simply to call all recent (post-Gettier) accounts of what elevates true belief to knowledge "justification" than to describe each proposal in detail. Many epistemologists object to calling the proposed further conditions "justification," since this description may have the wrong connotations. *See* William P. Alston, *An Internalist Externalism*, 74 SYNTHESE 265 (1988). Despite this worry, it is easier for the sake of presentation to place all further conditions for knowledge under the umbrella of justification. Nothing more is implied by "justification" than "that condition which elevates true belief to genuine knowledge."

66. For a recent example of internalism, see LAURENCE BONJOUR, THE STRUCTURE OF EMPIRICAL KNOWLEDGE (1985). For an example of traditional internalism, the reader can do no better than RODERICK M. CHISHOLM, THEORY OF KNOWLEDGE (3d ed. 1989).

factors to which the agent lacks cognitive access.[67] Gettier is commonly taken to have refuted internalism, and to have demonstrated that genuine knowledge consists of true belief that is to some extent externally justified.[68]

Return now to the issue of whether wilful ignorance is a kind of genuine knowledge. To begin, in any case in which a defendant is prosecuted and convicted for illegal possession, the incriminating proposition p about which he is wilfully ignorant is true.[69] Thus, the wilfully ignorant agent satisfies the first condition of knowledge. Must he believe p? Not necessarily; he may be wilfully ignorant of p merely by suspecting that p is true.[70] Yet genuine knowledge requires belief, not mere suspicion. Hence some cases of wilful ignorance are straightforwardly *not* cases of genuine knowledge. In many cases, however, the wilfully ignorant defendant *does* believe p.[71] If forced to report sincerely about his belief, he would almost certainly admit that he believes p. Moreover, it is likely that the relevant behavior of most wilfully ignorant defendants—their attempts to avoid detection, their lack of surprise when illegal substances are found—would warrant third parties attributing a belief in p to them.

In most cases, the (sincere) wilfully ignorant defendant would admit that he *believes* p, but would deny that he *knows* p. On the assumption

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67. Externalists are numerous; a good sample would include: WILLIAM P. ALSTON, EPISTEMIC JUSTIFICATION: ESSAYS IN THE THEORY OF KNOWLEDGE (1989); DAVID M. ARMSTRONG, BELIEF, TRUTH AND KNOWLEDGE (1973); FRED I. DRETSKE, KNOWLEDGE & THE FLOW OF INFORMATION (1982); ALVIN I. GOLDMAN, EPISTEMOLOGY AND COGNITION (1986); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS (1981); MARSHALL SWAIN, REASONS AND KNOWLEDGE (1981).

68. *See* DANCY, *supra* note 64; RICHARD FOLEY, THE THEORY OF EPISTEMIC RATIONALITY 174-208 (1987); POLLOCK, *supra* note 64.

69. It may be interesting to speculate about whether a defendant who is wilfully ignorant of the truth of the incriminating proposition p can be held liable in the event that p happens to be false. Perhaps he can be held liable for some offense other than illegal possession. *See infra* text accompanying note 167. Or perhaps he can be held liable for attempted possession. The resolution of this issue depends, inter alia, on what degree of mens rea is required to give rise to liability for an attempt. If (at least) knowledge is required, the problem of wilful ignorance resurfaces. *But see* Glanville L. Williams, *The Problem of Reckless Attempts*, 1983 CRIM. L. REV. 365.

70. *See supra* text accompanying note 42.

71. Some commentators, however, apparently define wilful ignorance to preclude belief. According to one commentator, a wilfully ignorant defendant "suspects that the fact exists (although the strength of his conviction is insufficient to constitute a 'belief') and he purposely avoids learning that his suspicions are accurate." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 106 (1987). There is a great deal of controversy about exactly what conditions need to be met for a mental state to constitute a belief. *See* LYCAN, *supra* note 44. Nonetheless, it is clear that on any definition not inordinately strict, some wilfully ignorant defendants will meet its conditions and hence believe p.

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 wilfully ignorant defendant is insufficient to give rise to knowledge. The foremost question in deciding between the two views about the relationship between wilful ignorance and knowledge, and thus in deciding whether the wilfully ignorant defendant possesses genuine knowledge, is whether his belief in the incriminating proposition is justified.[72]

Is the wilfully ignorant defendant justified in his true belief that p? There is no reason to believe that a single answer will suffice for all cases in which the issue of wilful ignorance has been raised and litigated. In many such cases, defendants may well have sufficient justification for p to know p. After all, wilfully ignorant defendants typically possess a wealth of evidence in favor of the proposition that, for example, "my suitcase contains illegal drugs," and frequently occupy situations favorable to the acquisition of external justification. Justification for p is often provided by the very same facts that discourage these defendants from making further inquiries.[73] For instance, the defendant may overhear discussions about the truth of p. This incident at once makes a defendant apprehensive about what he might find if he investigates further, and gives him an incentive not to look. On many theories of external justification, these factors provide *some* justification for his belief in p. In some such cases, this quantum of evidence may well be sufficient to conclude that the defendant is externally justified in believing p, and thus that he knows p.

Of course, these defendants will have failed to conform to a standard of how honest persons in their circumstances would have behaved. They

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72. If justification is crucial to the question of whether wilful ignorance is a kind of genuine knowledge, then one commentator is seriously mistaken in claiming that "criminal knowledge is correct belief." Robin Charlow contends that true belief is sufficient for knowledge. She mistakenly infers from the philosophical controversy about the nature of justification that justification is not essential for knowledge. By contrast, the present examination notes the controversial status of any particular justificatory condition, but retains the common opinion that *some* such condition is required. Some kind of justificatory condition is necessary for both the legal and philosophical senses of knowledge. Indeed, it is especially crucial to the legal sense. As Charlow is aware, criminal knowledge is a culpable state of mind. For a state of mind to be culpable, one must be to some extent responsible for it. But that an agent has a belief, and that the belief is correct, are not usually thought to be states for which an agent is responsible. By and large, persons have little voluntary control over what they believe, and, of course, no control over what propositions are true. Thus correct belief is inadequate for the legal sense of knowledge. Its adequacy for the philosophical sense of knowledge is discussed below, *infra* note 79.

73. Evidence of wilful ignorance has frequently been used to provide proof of genuine knowledge. *See, e.g.*, People v. Brown, 16 P. 1, 2 (Cal. 1887).

will not, for example, have opened their suitcases to look inside. But this failure does not always entail a lack of sufficient justification for p to know p. Why suppose that they cannot know p in the absence of all the conditions that people in their circumstances would ordinarily satisfy? The additional evidence they would have gained by opening the suitcase may only provide further confirmation for what they know already. To insist that a defendant cannot have sufficient justification to know p without actually *looking* inside the suitcase creates an unwarranted bias in favor of visual means of obtaining knowledge.[74] Hence, the wilfully ignorant defendant may have genuine knowledge of the incriminating proposition; or put differently, a subject displaying all those characteristics of genuine knowledge may still manifest wilful ignorance.

In many, if not most, cases, however, the wilfully ignorant defendant will have *in*sufficient external justification for his belief that p. Many philosophers would conclude that these defendants do *not* possess genuine knowledge, and should not be convicted under statutes that require that they act knowingly. But this conclusion may be too hasty; perhaps the mental state of these defendants can qualify as knowledge in the relevant sense after all. The conception of justification typically employed by philosophers is idealized, and may be unsuitable for purposes of imposing criminal liability.

The futility of using external justification for legal purposes can be illustrated with a troublesome example. Consider a defendant suffering from a hearing loss who uses a generally unreliable hearing aid. If he manages to hear a discussion affirming the truth of the incriminating proposition p, it seems plausible to judge that he gains knowledge of p. His mental state can qualify as knowledge despite the fact that his hearing aid is often unreliable. But many philosophers resist this judgment. Since they claim that knowledge is true belief produced from a reliable process, many philosophers conclude that no belief formed from an unreliable process can qualify as an instance of knowledge.[75] Consequently, even if a defendant overheard that a bag of heroin had been placed in his suitcase, and believed (accurately) that he was carrying heroin, he may still not know p according to many philosophical conceptions of knowledge. He may lack knowledge for the simple reason

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74. *See* United States v. Jewell, 532 F.2d 697, 705 (9th Cir. 1976) (Kennedy, J., dissenting).

75. These epistemologists are called "reliabilists." Reliabilism is a kind of externalism with respect to knowledge. While many varieties exist, the core idea is that if a belief is produced from a mechanism, e.g., one's auditory apparatus or an intelligent person, which generally supplies one with beliefs that are true, then a belief so produced is, if true, an instance of knowledge. Many of the externalists cited in *supra* note 67 are reliabilists.

that his belief might not have been produced by a reliable process, e.g. his hearing aid may be unreliable. Clearly many wilfully ignorant defendants will not possess genuine knowledge in this sense.

This kind of example points to an important problem with adopting such an idealized conception of knowledge for present purposes. The state of external justification is seemingly irrelevant to determinations of culpability. As Gettier has shown, one can have justified true belief without having knowledge. A proposition p might accidently be true for reasons other than those that justify (in the internalist sense) the belief of the agent. Thus Gettier is commonly understood to have demonstrated that some factors external to a subject's cognitive access are required in order for him to have knowledge. One can reason and reflect upon all one's available evidence in the most scrupulous possible fashion and still lack knowledge. As a consequence, it is clear that one is to some extent lucky to be knowledgeable. Yet it is perverse to fault someone for being unlucky. Criminal culpability cannot be thought to be in part a function of whether an agent is epistemically fortunate or not. What matters for culpability is how a defendant performs with respect to factors accessible to him; whether his cognizing has been *responsible* is important, for irresponsible cognizing may well count as culpable behavior. The fact that external environmental factors prevent him from gaining knowledge in this idealized sense seems irrelevant to his culpability. Thus, whether or not the wilfully ignorant defendant possesses what a contemporary epistemologist would call knowledge may be unhelpful to the attempt to describe a culpable mental state.[76]

Perhaps a less idealized conception of knowledge would include the state of wilful ignorance in its extension. A more familiar, intuitive understanding of knowledge is found in the pre-Gettier sense of knowledge, and in a few recent formulations of knowledge. Here

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76. Contrast this result with Robbins, *supra* note 52. Robbins surveys the philosophical literature to see whether the philosophical sense of knowledge conflicts with the Model Penal Code's definition of knowledge in terms of a person's awareness of a high probability of the existence of a particular fact. Since he examines only epistemology prior to 1960, however, he rightly concludes that the two definitions conflict—but for the wrong reasons. Robbins presupposes an extreme form of internalism and concludes that "subjective certainty" is needed for philosophical knowledge. This conflicts with the mere high probability aspect of the Model Penal Code's definition. As noted, however, epistemology in the latter half of this century has been unkind to extreme internalism, and so philosophical knowledge does not conflict with the high probability aspect. However, knowledge that is externally justified does conflict with the requirement that a subject must be *aware* of a high probability of the material fact's existence. On many epistemological theories, all that is required is that a true belief be acquired in the correct manner. Ironically, the philosophical sense of knowledge conflicts with that of the Model Penal Code not by being too strict, as Robbins believes, but by being too loose.

knowledge is justified true belief, where justification is understood as some kind of internal justification. In other words, justification is a function of the evidence cognitively accessible to a subject. On this conception, justification is a result of one's own efforts; it is a matter of being intellectually responsible. Consequently, if a subject is not justified on this view, he has not been an entirely careful cognizer.[77] Contrary to the situation with external justification, a person may indeed be faulted for lacking this notion of justification.[78]

The question now to be answered is whether the wilfully ignorant defendant is justified, in this internalist sense, in his true belief that p. For the same reasons described above, many defendants will have sufficient justification for p to know p. Evidence for p is often provided by the very same facts that discourage these defendants from making further inquiries. 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. Consider the additional evidence that would have been gained if the defendant had looked inside the suitcase. Suppose the defendant would have seen a white powder wrapped in a plastic bag. He still would not have obtained the *best* evidence to justify his suspicion that the suitcase contains an illegal drug, since he would not have ingested the substance or submitted it to a chemical analysis. Perhaps the defendant may not know the incriminating proposition on an idealized conception of knowledge, but on the more ordinary sense of knowledge, no one would insist that he could not know that what he sees is an illegal drug because he failed to collect the best evidence to justify his belief. Sufficient justification to know p does not require considering the *best* evidence for p—it simply requires considering *enough* evidence for p. How much evidence is enough? That is a question about which epistemologists have disagreed. Fortunately, it need not be resolved here. Suffice it to say that many wilfully ignorant

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77. Epistemologists recognize this as a classical deontological form of internal justification. It is espoused, for example, by John Locke: he who has justification "may have this satisfaction in doing his duty as a rational creature, that, though he should miss truth, he will not miss the reward of it [i.e., of having done his duty, being justified]." 2 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, bk. 4.17.24, at 413 (Alexander C. Fraser ed., Dover Pub. 1959) (1690).

78. "[O]ne's cognitive endeavors are epistemically justified only if and to the extent that they are aimed at this goal [truth], which means very roughly that one aecepts all and only those beliefs which one has good reason to think are true. To accept a belief in the absence of such a reason . . . is to neglect the pursuit of truth; such acceptance is, one might say, *epistemically irresponsible*. My contention here is that the idea of avoiding such irresponsibility, of being epistemically responsible in one's believings, is the core of the notion of epistemic justification." BONJOUR, *supra* note 66, at 8.

defendants will have considered enough evidence for p to justify their belief that p, and thus to know p.

Nonetheless, for whatever reason, many wilfully ignorant defendants will lack sufficient justification for p, and thus will not know p. The remainder of this section will present two reasons to conclude that such cases exist. The "substitute for knowledge" rather than the "actual knowledge" view of the relationship between wilful ignorance and knowledge offers a better account of such cases. Thus many (but not all) wilfully ignorant defendants do not possess knowledge of the incriminating proposition p in either the philosophical or the more colloquial senses.[79]

Conceptual analysis provides the first argument in favor of concluding that some wilfully ignorant defendants do not have genuine knowledge. Consider the example of Smith, who is not wilfully ignorant and possesses a true belief about a proposition p, but lacks sufficient justification to know p. He believes, for example, that a gem he found is a real diamond. The gem looks and feels like a real diamond to him, but, despite his efforts, he is unable to gather sufficient evidence to justify his true belief. He asks his friends, most of whom concur that the gem looks and feels like a diamond. But he does not know how to justify his belief without consulting a jeweler, and no jeweler is available. Smith lacks knowledge; it might be said that he is nonwilfully ignorant. Contrast his case with that of Jones, who possesses the exact quantum of evidence about the nature of the diamond as Smith. Jones has the same beliefs about the gem as Jones, and for precisely the same reasons. Unlike Smith, however, Jones knows that real diamonds can be identified by performing a simple and reliable test—only diamonds scratch rubies. As luck would have it, Jones has a ruby readily available. However, Jones fails to perform this test precisely because he does not want to know the truth about the gem. Jones' ignorance, unlike Smith's, is wilful.[80]

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79. Indeed, the conclusion can be put even stronger. Perhaps the loosest conception of knowledge sanctioned by ordinary language is knowledge as merely true belief. *See* Crispin Sartwell, *Knowledge is Merely True Belief*, 28 AM. PHIL. Q. 157 (1991); Crispin Sartwell, *Why Knowledge is Merely True Belief*, 89 J. PHIL. 167 (1992). Since a wilfully ignorant defendant need not believe an incriminating proposition, but must merely be suspicious of it (*see supra* part II), in some cases he will fail to know p on even this extremely weak sense of knowledge. Consequently, the foregoing considerations show that the wilfully ignorant subject may not have knowledge in *any* remotely plausible understanding of that term.

80. According to the definition in *supra* part II, Jones would not be wilfully ignorant unless he satisfied the motivational condition; his motive for remaining ignorant must be to avoid blame or liability. For the present example to involve wilful ignorance, Jones must have this motive for failing to perform the test to identify the diamond.

Despite this important difference between Smith and Jones, there is no reason to conclude that the latter, unlike the former, has genuine knowledge that the gem is a real diamond. *Ex hypothesi*, both Jones and Smith have a true belief about the gem, as well as the same quantum of evidence in favor of their belief. If knowledge consists in justified true belief, either both Jones and Smith have knowledge, or neither does. Since Smith lacks knowledge, so does Jones. The fact that Jones' ignorance is wilful does not by itself provide him with *more* of a justification for believing a proposition than that possessed by Smith, whose ignorance is nonwilful. Surely the fact that Jones fails to perform the relevant test cannot be used to demonstrate that he *already has* the knowledge that he *would* have gained by performing the test.

The same conclusion can be applied to many cases of wilful ignorance. Wilfully ignorant defendants frequently have no more evidence of p than nonwilfully ignorant defendants. Although the wilfully ignorant defendant would know p if he looked inside the suitcase, for example, it does not follow that he already knows p *without* looking inside the suitcase, just because his failure to look is wilful. Tests would be superfluous if persons already knew the information that would be revealed by performing these tests. Thus, many wilfully ignorant defendants lack even the more intuitive sense of justification defined above. Consequently, many of these defendants do not possess knowledge of the incriminating proposition p in either the philosophical or more colloquial senses of "knowledge."

A second reason can be given to conclude that some wilfully ignorant defendants do not have genuine knowledge. Many of the cases that illustrate the phenomenon of wilful ignorance do not appear to involve knowledge. Consider again the jury instructions in *Jewell*. The court instructed the jury that guilt could be established if the "ignorance" of the defendant "was solely and entirely a result of his having made a conscious purpose . . . to avoid learning the truth."[81] Liability was not predicated on a finding of knowledge, but rather on a particular explanation of *why* the defendant remained ignorant. But it is hard to see how ignorance, from whatever cause, can *be* knowledge.[82] A particular explanation of why a defendant remains ignorant might justify treating him *as though* he had knowledge, but it cannot, through some mysterious alchemy, convert ignorance *into* knowledge.

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81. United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976). Other instructions lead to comparable results. One instruction said that the defendant's "self-imposed ignorance cannot protect him from criminal responsibility." United States v. Murrieta-Bejarano, 552 F.2d 1323, 1324 n.1 (9th Cir. 1977).

82. "It is implicit in the definition of willful blindness that the defendant does not have knowledge." Comment, *supra* note 54, at 476.

Many of these cases contrast the mental state of the defendant with something else he lacks, called "genuine knowledge" here.[83] Some commentators describe wilful ignorance as an "exception" to the requirement of genuine knowledge.[84] Of course, no "exception" to this requirement would be needed if wilful ignorance *were* genuine knowledge. It seems safe to conclude that the mental state of many (but not all) defendants who allege wilful ignorance does not amount to genuine knowledge, even though, in Glanville Williams' words, it is "almost" knowledge.[85]

Again, however, it is important to emphasize that many wilfully ignorant defendants might possess genuine knowledge despite their failure to evaluate all the evidence for p that honest persons in their circumstances would ordinarily consider. A jury might well conclude that, despite his failure to look inside his suitcase, a wilfully ignorant defendant still has enough justification for p to know p. But not all cases are comparable. In some cases, the wilfully ignorant defendant will lack knowledge, and will possess, at best, only a substitute for knowledge.

IV. THE "EQUAL CULPABILITY" THESIS

If some wilfully ignorant defendants do *not* possess genuine knowledge—as the "substitute for knowledge" view entails—what reason can be given for treating them as though they did? The only plausible answer to this question is that wilful ignorance is the "moral equivalent" of knowledge; it involves a degree of culpability that is equal to genuine knowledge.[86] Unless these two distinct mental states were equally culpable, it would be outrageous to hold a defendant with the first mental state liable for violating a statute that required the second mental state.[87] Many commentators apparently regard this supposed equivalence as

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83. In *Jewell*, the mental state of wilful ignorance is contrasted with "positive" knowledge (and called "genuine" knowledge here), although the concept of positive knowledge is never analyzed. *Jewell*, 532 F.2d at 700.

84. *See* 1 LAFAVE & SCOTT, *supra* note 14, at 307.

85. "A court can proporly find wilful blindness only where it can almost be said that the defendant actually knew." WILLIAMS, *supra* note 56, at 157. Of course, "almost" knowledge is recklessness, it is not genuine knowledge.

86. "The notion that [wilful blindness] is properly classified as knowledge in the hierarchy of mental states is grounded in the conclusion 'that deliberate ignorance and positive knowledge are equally culpable.'" 1 LAFAVE & SCOTT, *supra* note 14, at 302 (quoting *Jewell*, 532 F.2d at 700).

87. "We want to punish wilful ignorance as knowledge only if and when the two are comparably morally reprehensible." Charlow, *supra* note 22, at 1357.

beyond dispute,[88] and most courts concur with this assessment.[89] Yet the judgment that wilful ignorance and knowledge are equivalent in culpability, though frequently asserted, is seldom defended.

Rollin Perkins and Ronald Boyce are perhaps the only theorists to have made an explicit attempt to argue in favor of the "equal culpability" thesis. Their defense refers to what an "honest person" would have done under the circumstances. They write: "No honest person would *deliberately fail* to find out the truth *for fear of learning* that what he was thinking of doing would violate the law."[90] Perkins and Boyce are clearly correct in their generalization about honest people. Their argument shows that the wilfully ignorant defendant is indeed culpable; his behavior hardly conforms to an ideal of honesty.[91] Nonetheless, their argument does not show that the culpability of the wilfully ignorant defendant is *equal* to that of the defendant who possesses genuine knowledge. How can the *degree* of culpability of a particular defendant be ascertained by reference to the objective standard of an honest person? Not all dishonest persons are equally culpable.

The "equal culpability" thesis may or may not be true, depending on the criteria by which two distinct mental states are held to be equally culpable. Controversy about the equal culpability thesis cannot be resolved in the absence of a theory to identify what makes one mental state more or less culpable than another. Unfortunately, no adequate theory to measure degrees of culpability has yet been proposed.[92] In the absence of such a theory, commentators are left with only their unsupported (and frequently conflicting) intuitions about whether one

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88. "Up to the present day, no real doubt has been cast on the proposition that connivance is as culpable as actual knowledge." Edwards, *supra* note 21, at 302.

89. The *Jewell* court referred to wilful ignorance as a "calculated effort to avoid the sanctions of the statute while violating its substance." 532 F.2d at 704. Another charaeterized the phenomenon as a "loophole" for "circumventing criminal sanctions." United States v. Sarantos, 455 F.2d 877, 881 (2d Cir. 1972).

90. PERKINS & BOYCE, *supra* note 20, at 873.

91. "Wilful blindness has about it an invitation to punishment. A person who is wilfully blind appears to court criminal liability." David Lanham, *Wilful Blindness and the Criminal Law*, 9 CRIM. L.J. 261, 267 (1985).

92. Some of the available theories are discussed and critiqued in Jeremy Horder, *Criminal Culpability: The Possibility of a General Theory*, 12 LAW & PHIL. 193 (1993).

Perhaps the inability to measure degrees of culpability is partly due to the oversimplified structure of culpability in modern criminal codes such as the Model Penal Code. One reeent proposal would measure culpability along two independent dimensions: belief-states and desire-states. A wilfully ignorant defendant may be quite culpable with respect to his desire—he may be eallously indifferent to whether a harm occurs—but less culpable with respect to his belief. *See* Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992).

mental state is more or less culpable than another.[93] Thus it is prudent to suspend judgment about the equal culpability thesis until arguments supporting its truth or falsity are produced. Still, it may be helpful to speculate about what any such arguments are likely to reveal. The most probable result of these arguments is that the culpability of wilfully ignorant defendants is highly sensitive to the facts of their particular circumstances. Some wilfully ignorant defendants may be just as culpable as defendants who act knowingly, while others may be less culpable.[94] Still others may even be *more* culpable than defendants who act knowingly.[95] No general conclusion about the culpability of wilfully ignorant defendants, relative to defendants who act knowingly, is likely to prove defensible.

At least one reason can be given to suspect that a great many wilfully ignorant defendants are *not* as culpable as defendants who possess genuine knowledge. Notice that only persons who play very limited roles in a criminal scheme involving several participants have the realistic opportunity to remain wilfully ignorant. Consider the role played by the typical wilfully ignorant defendant. He is almost always the carrier or "mule" who transports illegal drugs for the benefit and profit of others. He is neither the drug producer, the ultimate user, nor the "kingpin" who organizes and reaps great profits from a scheme to distribute drugs. Indeed, it is barely possible to imagine how those who produce or organize the distribution of drugs—and thus are more centrally involved in the criminal scheme—*could* be wilfully ignorant. The intermediary role of the "mule," however, is very different. With a little ingenuity, such a person may well succeed in remaining ignorant of what he is doing.

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93. One commentator's intuition is as follows: "By engaging in conduct while aware of a high probability that such conduct is criminal, the [wilfully blind] actor has manifested his *indifference* to the values underlying the criminal prohibition in much the same way as the actor who is certain his conduct is criminal. Consequently, the criminal law should not differentiate between them." Marcus, *supra* note 36, at 2236 (emphasis added). But why assume that relative culpability is solely a function of the degree to which the defendant manifests indifference to the values underlying the law? A more complete account of the factors that affect culpability is provided in Simons, *supra* note 92, at 463.

94. One commentator describes a number of inculpating factors that are typically present in cases of wilful ignorance. *See* Charlow, *supra* note 22, at 1400. Presumably a wilfully ignorant defendant who lacks one or more of these inculpating factors is less culpable than a defendant who possesses them.

95. One commentator has gone so far as to suggest that "[r]ecklessness/deliberate ignorance may indicate greater culpability [than genuine knowledge] in some situations." *See* Robbins, *supra* note 52, at 234.

Anglo-American law has been reluctant to recognize that persons who play distinct roles in a criminal plan involving several participants may be culpable to different degrees. As a general rule, Anglo-American law treats all parties in a criminal scheme as equally culpable.[96] But there is no reason why the criminal law should disregard ordinary judgments of culpability and recognize that the contribution of the typical wilfully ignorant defendant renders him less culpable than other, more central participants in the scheme.[97] Paul Robinson has proposed the rudiments of a theory to incorporate these ordinary judgments of culpability into the criminal law. He distinguishes between four kinds of involvement in a criminal enterprise: organizers, managers, participants, and supporters.[98] He suggests punishing participants half or two-thirds as severely as organizers and managers.[99] Implementing these suggestions would result in more lenient treatment for most wilfully ignorant defendants.[100]

Suppose, however, that the "equal culpability" thesis is true, and that all wilfully ignorant defendants *are* as culpable as defendants who act knowingly. Even so, it is crucial to realize that invoking the equal culpability thesis to punish a wilfully ignorant defendant for violating a statute requiring knowledge is incompatible with the principle of legality. The rule of law should not be construed to allow liability to be imposed when the particular mens rea required by the statute *or its equivalent in culpability* is present. Instead, the rule of law should be construed to allow liability to be imposed only when the particular mens rea required by the statute is present *simpliciter*. 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.[101]

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96. *See* K.J.M. SMITH, A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY 73 (1991). Prosecutors may ehoose not to prosecute persons whose role in the criminal scheme is relatively minor, and authorities with sentencing discretion may punish such persons less severely. These facts only serve to demonstrate that the substantive law is morally troublesome. *See* DRESSLER, *supra* note 71, at 420.

97. *See* Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91 (1985).

98. Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 49 (1987).

99. *Id.*

100. According to Robinson's proposal, wilfully ignorant defendants would typically be classified as mere supporters rather than as participants, since they generally are compensated by a fixed amount rather than by a percentage of the profits of the criminal scheme. *Id.*

101. *See supra* part I.

Appeals to the supposed equal culpability of defendants as a justification for imposing criminal liability would seem outrageous in other contexts; the judgment that two defendants are equally culpable is not accepted as a good reason to violate the principle of legality.[102] Consider contexts in which allegations of equal culpability are frequently expressed. For example, many theorists contend that defendants who fail in their attempts are equally culpable as those who succeed.[103] After all, these theorists reason, it is simply a matter of luck whether the bullet of an attempted assassin happens to be fatal, and luck should play no part in assessments of culpability. Suppose that these theorists are correct,[104] and that the murderer and the attempted murderer are equally culpable. Even so, no one would conclude that the principle of legality allows holding these two defendants liable for the same offense. As long as existing homicide statutes require an actual killing, and not the "moral equivalent" of a killing, the principle of legality allows only a real killer, and not a defendant whose culpability is identical to that of a killer, to be punished for a homicide.[105] And so with wilful ignorance. As long as existing possessory statutes require knowledge, and not the "moral equivalent" of knowledge, the principle of legality allows only a knower, and not a defendant whose culpability is identical to that of a knower, to be punished for possession. All commentators agree that statutory reform would be needed if attempts are to be punished under homicide statutes.[106] On parallel grounds, statutory reform is needed if wilfully

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102. Perhaps Paul Robinson is correct to maintain that the doctrine of transferred intent relies upon a theory of equivalent culpability: "The best explanation of why the intent to shoot the desired victim should be 'transferred' to the actual victim is that both intentions are equally culpable." *See* Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 620 (1984). But it is arguable that the mens rea of intentional homicide is the intention to kill *some* human being. If the precise identity of the victim is irrelevant, no theory of equivalent culpability may be required to explain the doctrine of transferred intent. See the treatment of transferred intent in Michael Moore, *Intentions and Mens Rea, in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 245, 267-68 (Ruth Ganison ed., 1987).

103. *See* Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725 (1988).

104. *But see* R.A. Duff, *Actions, Lotteries, and the Punishment of Attempts*, 9 LAW & PHIL. 1 (1990).

105. Punishing attempted killers under homicide statutes would be a clear violation of the principle of legality because the actus reus of the offense has not been committed. It is the hypothesis of this Article that the principle of legality should be construed to oppose the punishment of persons who lack the mens rea of an offense as well.

106. The reform recommended most frequently is to rewrite existing statutes to delete reference to actual results. *See* Stephen Schulhoffer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974). But in the absence of such statutory reform, the principle of legality clearly

ignorant defendants (who possess only a substitute for knowledge) are to be punished under possessory statutes.[107] In short, fidelity to the principle of legality requires resistance to analogical reasoning in the enforcement of the criminal law.

V. THE DEEPER SIGNIFICANCE OF THE PRINCIPLE OF LEGALITY

It is highly unlikely that redescriptions of the phenomenon of wilful ignorance can help to resolve the incompatibility between the rule of law and the practice of holding such defendants liable for statutes requiring that they act knowingly. Short of the "actual knowledge" account, *any* conception of wilful ignorance that serves its purpose *must* infringe the principle of legality.[108] The whole point of inventing this concept is to describe a mental state that is alleged to be the moral equivalent of knowledge, thereby providing courts with a basis to convict a defendant (who otherwise might have been acquitted) for acting knowingly.[109] Attempts to reconcile the principle of legality with the punishment of wilfully ignorant defendants are almost certain to be unsuccessful, since the concept has been created for the sole purpose of circumventing the principle of legality.

It is easy to miss the significance of the inconsistency between the principle of legality and the practice of holding all wilfully ignorant defendants liable under a statute requiring that they act knowingly. Theorists who emphasize the importance of fair notice to the exclusion of other values promoted by the rule of law[110] will not be especially impressed by the threat that wilful ignorance poses to the legality principle. The wilfully ignorant defendant who is held to have acted knowingly can hardly complain that he has not received fair notice of the offense charged. After all, wilfully ignorant defendants satisfy the motivational condition; their ignorance is wilful precisely because they are all too aware of the existence of the offense.[111] Fair notice is not the

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precludes holding defendants whose attempts are unsuccessful liable for the completed offense, regardless of their relative culpability.

107. The limitations of statutory reforms are discussed *infra* part VI.

108. "[A]ny definition of wilful ignorance in which the construct is used for a purpose other than as evidence from which to infer actual knowledge, or as pretended ignorance, implies true ignorance." *See* Charlow, *supra* note 22, at 1388.

109. *See supra* part II.

110. "The basis [of the maxim *nullum crimen sine lege*] is that the criminal law ought to be certain, so that people can know in advance whether the conduct on which they are about to embark is criminal or not." 1 LAFAVE & SCOTT, *supra* note 14, at 101.

111. Thus wilfully ignorant defendants are even more likely to be aware that their conduct is illegal than defendants who act knowingly—since knowledge that conduct is illegal is not part of the mens rea of knowledge. *See* MODEL PENAL CODE, § 2.02(9)

problem here.

But values other than fair notice to defendants are protected by the principle of legality as well. Some commentators have noted that an additional value achieved by adherence to the rule of law is the check on arbitrary and selective law enforcement. According to Herbert Packer, "[t]he real importance of the principle of legality . . . [is] to control the discretion of the police and of prosecutors rather than of judges."[112] Legality helps to promote this objective by ensuring "[t]hat the police and prosecutors confine their attention to the catalogue of what has already been defined as criminal."[113]

This goal is obviously valuable. But the need to ensure that police and prosecutors are concerned only with matters that are in "the catalogue of what has already been defined as criminal" is important only when defendants are punished for what is not clearly the actus reus of an offense.[114] Applications of the principle of legality to issues of mens rea raise a somewhat different set of concerns. Clearly, the state has determined that the arrest and prosecution of a defendant found in possession of a controlled substance is the proper business of police and prosecutors.[115] Packer's account of the importance of legality offers no explanation of why this principle should be preserved in cases in which a defendant unquestionably commits the actus reus of an existing offense, although he lacks the requisite mens rea.

A more compelling reason to uphold the rule of law in the context of mens rea begins by placing the equal culpability thesis in its broader political context. Whether the wilfully ignorant defendant is likely to be found guilty of having acted knowingly may depend on the particular offense charged.[116] Although this hypothesis may be impossible to test directly, conformity to the demands of legality should undermine any suspicion that the meaning of mens rea terms might vary with the offense in question. There is some basis for doubting that these demands of legality have been satisfied. It cannot be accidental that the overwhelming majority of the recent convictions of wilfully ignorant defendants involve drug offenses that include possession as an element.[117] Although wilful

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(Official Draft, review and commentaries, 1985).

112. HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 88 (1968).

113. *Id.* at 90.

114. *See supra* text accompanying notes 8-12.

115. *But see* DOUGLAS N. HUSAK, DRUGS AND RIGHTS (1992).

116. "The courts are greatly influenced in their construction of the statute by the degree of social danger which they believe to be involved in the offence in question." J.C. SMITH & BRIAN HOGAN, CRIMINAL LAW 92 (1983).

117. According to one commentator, the doctrine of wilful blindness originated in England but was given a somewhat cooler reception in the United States until it

ignorance instructions are given for a broad range of statutes that require a mens rea of knowledge,[118] drug offenses are by far the most common crimes for which wilfully ignorant defendants are punished.[119] It seems naive to assess the problem of wilful ignorance apart from the larger political significance of drug policy.

Many commentators have called attention to the fact that precious civil liberties have been sacrificed in the ongoing "war on drugs."[120] In this highly-charged atmosphere, police, prosecutors, and jurors are unlikely to sympathize with persons found with drugs in their possession. Political pressures have distorted the meaning of possession itself in the context of drug offenses,[121] and there is no reason to believe that the criteria for what constitutes knowing possession should be immune from these same pressures.[122] Allowing the conviction of defendants whose culpability is *different* from what is required by the statute—because their *degree* of culpability is alleged to be comparable to what is required by the statute—gives the State an opportunity to bend the law in order to more successfully wage war on drugs.

Ample evidence exists that these very political pressures were operative in *Jewell*. The court did not defend the equal culpability thesis

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"[r]eemerged during the 1960s, coinciding with a dramatic increase in drug abuse and a resultant increase in prosecutions for the possession, transportation and use of drugs." Comment, *supra* note 54, at 471.

118. *See* Chestnut, *supra* note 28, at 48 n.12.

119. "Federal narcotics violations are the most common source of current deliberate-ignorance case law." Robbins, *supra* note 52, at 192 n.6. "Because the [wilful ignorance] instruction seems to lend itself particularly to those cases involving illegal contraband, the conscious ignorance doctrine and *Jewell* instruction have become increasingly important as the federal government expands the prosecution of cases involving smuggled drugs." Chestnut, *supra* note 28, at 49. "The increased application of willful blindness can be correlated with the rise in federal narcotics prosecutions." Marcus, *supra* note 36, at 2234 n.24. For a discussion of the many drug offenses utilizing a wilful ignorance instruction, see Charlow, *supra* note 22, at 1418 n.276; *see also* Marcus, *supra* note 36, at 2241-53.

120. Commentators have been especially concerned with how the war on drugs has eroded Fourth Amendment rights. *See, e.g.*, Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camera *and* Terry, 72 MINN. L. REV. 383 (1988); Silas J. Wasserstrom, *The Incredibly Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984); Steven Wisotsky, *Crackdown: The Emerging 'Drug Exception' to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

121. *See* Charles Whitebread & Ronald Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 VA. L. REV. 751 (1972); Seth Davidson, Note, *Criminal Liability for Possession of Nonuseable Amounts of Controlled Substances*, 77 COLUM. L. REV. 596 (1977).

122. In England, Lord Guest alleged that requiring any degree of mens rea for the offense of drug possession was "a drug peddlar's charter." Warner v. Metropolitan Police Comm'r, [1968] 2 All E.R. 356.

directly, but noted that the acquittal of the wilfully ignorant defendant would be "inconsistent with the Drug Control Act's general purpose to deal more effectively 'with the growing menace of drug abuse in the United States.'"[123] The conviction of a wilfully ignorant defendant was explicitly tied to the urgency of the war on drugs. The court offered no reason to convict a wilfully ignorant defendant for acting knowingly except for its allegations that the "menace" of "drug abuse" was "growing," and that "those who traffic in drugs would make the most of" a statutory interpretation that required genuine knowledge.[124]

It is disappointing that commentators apparently approve of this tendency to distort or to stretch the application of mens rea terms in order to wage war on drugs more effectively.[125] Robin Charlow writes:

> Even if the suggested definition of wilful ignorance is not adopted as a wholesale knowledge equivalent, it nevertheless might be advisable to lower the mens rea for the crime of drug importation to a level that would include less culpable forms of wilful ignorance, such as those commonly in use.[126]

Why does Charlow propose singling out drug offenses for special treatment? Her answer does not explore why legislatures included a knowledge requirement in offenses of drug possession. Instead, she writes:

> One possible reason for Congress to distinguish drug importation . . . may be the devastating effect that drugs are currently thought to have on our society . . . . If the gravity of the problem posed by a particular crime, in this case drug importation, is perceived as more serious than in the case of other crimes, it may be advisable to consider a broader level of culpability.[127]

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123. United States v. Jewell, 532 F.2d 697, 703 (9th Cir. 1976) (quoting H.R. Rep. No. 1444, 91st Cong., 2d Sess. 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566-67)).

124. *Id.*

125. One commentator cites the "severity of the drug problem currently afflicting our society" as a reason to hold defendants outside the country liable for a conspiracy to import drugs into the United States even though they did not know where the drugs would be exported. *See* Jennifer E. Raiola, Comment, *Crossing the Border Line: Interpreting Federal Drug Trafficking Statutes in* United States v. Londono-Villa, 66 ST. JOHN'S L. REV. 487, 503 (1992).

126. Charlow, *supra* note 22, at 1426.

127. *Id.* at 1427 n.306 (citation omitted).

The reasoning in *Jewell*, apparently endorsed by Charlow, should be resisted. *Any* criminal statute is designed to deal effectively with a perceived menace, and whatever mens rea requirement is used in the statute inevitably restricts the authority of the state to punish defendants who commit the actus reus of that offense.[128] Such a restriction is likely to prove especially burdensome to law enforcement officials as the severity or incidence of a particular crime increases. Yet the fact that a given offense is committed frequently hardly provides a compelling reason to erode the meaning of the mens rea requirement of that offense. Would anyone seriously propose that wilfully ignorant defendants should not be convicted once the "menace" of "drug abuse" stops "growing"?[129] The meaning of "knowingly" should not vary with the actus reus of the offense modified by this adverb, and should not be affected by fluctuations in crime rates.[130] Part of the function of the rule of law should be to insulate findings of criminal liability from these very sorts of political pressures. The above reasoning of courts and commentators cannot be reconciled with the demands of the rule of law, when the scope of this rule is expanded beyond the conventional wisdom that surrounds it to encompass mens rea as well as actus reus.

VI. Statutory Reforms and Their Limitations

Many commentators have sought a statutory solution to the problem of wilful ignorance. To be successful, any such reform must enable the state to impose criminal liability on the wilfully ignorant defendant "without manipulating the definition of knowledge to achieve a desired but unwarranted result."[131]

The statutory reform proposed most frequently would encourage legislatures to substitute recklessness for knowledge as the level of culpability required for liability.[132] A radical version of this proposal

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128. *See* Morissette v. United States, 342 U.S. 246 (1952).

129. According to most surveys, marijuana use peaked in 1979, and cocaine use peaked in 1985. *See, e.g.*, HUSAK, *supra* note 115, at 11.

130. Allen reports that compromises of the principle of legality have been most frequent during periods of "high anxiety about crime." *See* Allen, *supra* note 5, at 400. This remark surely characterizes contemporary attitudes about the drug menace.

131. Robbins, *supra* note 52, at 233.

132. *See, e.g., id.* A second possible statutory solution to the problem of wilful ignorance would alter the mens rea required for liability under a given statute from "knows p" to "knows p or is wilfully ignorant of p." A few existing offenses already incorporate such language. The Anti-Drug Abuse Act of 1988, Pub. L. No.100-690, 102 Stat. 4181 (1988) (codified as amended at 21 U.S.C. §§ 1501-08 (1988 & Supp. 1991)), provides for forfeiture of vehicles used in drug-related offenses unless the offense is "established by that owner to have been committed or omitted without the knowledge,

would modify *all* existing criminal statutes so that no offense required knowledge. A more moderate version would continue to require knowledge as the mens rea of some offenses, while modifying others so that recklessness would suffice for liability. Statutes proscribing drug possession, of course, are the prime candidates for modification.[133] Most wilfully ignorant defendants would be acquitted under those statutes that continued to require knowledge.

This reform would achieve the objective of convicting wilfully ignorant defendants under the modified statutes, since all such defendants are at least reckless.[134] However, not all reckless defendants are wilfully ignorant.[135] Lowering the degree of culpability required for liability under some or all statutes from knowledge to recklessness would succeed in convicting not only wilfully ignorant defendants, but also a great many nonwilfully ignorant (but reckless) defendants who otherwise would have been acquitted. Nonwilfully ignorant defendants would be punished if they consciously disregarded a substantial and unjustifiable risk about which they lacked knowledge.

Superficially, this reform appears to solve the problem of wilful ignorance,[136] since no defendant would be punished without having the degree of mens rea expressly provided by statute. The legislature would accomplish what the judiciary could not—a change in the level of mens rea required for conviction from knowledge to recklessness. If fidelity to the rule of law means mere conformity to statutory law, as conventional

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consent, or willful blindness of the owner." *See also* DRESSLER, *supra* note 71, at 106 n.30.

This proposal would be an improvement over the proposed reform that substitutes recklessness for knowledge as the mens rea of possessory offenses. Since the wilfully ignorant defendant is not innocent, this proposal seemingly avoids the punishment of innocent activity. However, it is not without costs of its own. It seemingly accepts the controversial thesis that the wilfully ignorant defendant is equally culpable as the defendant who possesses genuine knowledge, since it results in convicting wilfully ignorant defendants of the same offense as defendants who act knowingly. Thus the recommendation defended in the text accompaning notes 135-36, *infra*, appears to improve on this proposal.

133. Significantly, the examples of statutory reforms proposed by both Robbins and Dressler to solve the problem of wilful ignorance involve drug offenses. *See* Robbins, *supra* note 52, at 233; DRESSLER, *supra* note 71, at 106 n.30.

134. *See supra* note 52.

135. *See supra* text accompanying note 52.

136. This solution, however, would not climinate all the problems associated with wilful ignorance. If the severity of the punishmcnt for acting knowingly were greater than that for acting recklessly, and a wilfully ignorant defendant were punished more severely, the question of whether the defendant had acted knowingly would still have to be determined.

wisdom would indicate,[137] the problem of wilful ignorance is indeed amenable to this statutory solution. But this Article hypothesizes that the rule of law raises more fundamental concerns, requiring fidelity to the principles that underlie statutory law. The merits of this proposal cannot be evaluated without examining the reasons why legislatures require a mens rea of knowledge for many offenses, including possessory offenses, in the first place.[138] If sound principles explain why possessory offenses should require genuine knowledge, fidelity to law is not achieved by disregarding them and by redefining statutes so that reckless defendants are convicted of illegal possession. Such a proposal "solves" the problem by ignoring the principles that persuaded legislatures to define such offenses as they did.[139] A more defensible approach would ensure that these principles are respected.

Why do legislators require knowledge as the mens rea of possessory offenses? Should it be legally possible to commit a possessory offense recklessly? After all, recklessness suffices for liability for the majority of crimes. Why should possessory offenses be an exception to this general rule? To propose simply that knowledge should not be required for liability for possessory offenses is to advocate a return to an earlier era without inquiring why courts and commentators found that era so dissatisfying.[140] Criminal liability for possession of narcotics was first imposed by the Harrison Act of 1914.[141] In *Balint v. United States*,[142] the Supreme Court held that liability under this Act could be imposed despite the lack of knowledge that the substance possessed was a narcotic. Most state statutes based on the Harrison Act failed to include an explicit knowledge requirement.[143] Soon, however, the situation changed dramatically. The Uniform Controlled Substances Act of 1970, which provides that "a person may not knowingly or intentionally . . . possess

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137. *See supra* part I.

138. Robbins proposes "the addition of recklessness or specific deliberate-ignorance provisions as a basis for conviction for particular crimes" without inquiring why the legislature employed a knowledge standard in the first place. *See* Robbins, *supra* note 52, at 233.

139. One commentator admits that "there may be reasons to punish wilfully ignorant behavior in situations in which we would not want to punish reckless behavior," but declines to mention what these reasons are. *See* Charlow, *supra* note 22, at 1386.

140. For a historical discussion, see Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 387-88 (1989).

141. Harrison Act, ch. 1, 38 Stat. 785 (1914) (repealed 1970).

142. 258 U.S. 250 (1922).

143. *See* Singer, *supra* note 140, at 388.

a controlled substance,"[144] was adopted by almost every state.[145] Knowledge came to be the standard mens rea for drug offenses that include possession as an element. Even Washington, one of the only states not to have enacted the Uniform Act, does not make ignorance irrelevant, since it allows the lack of knowledge to function as an affirmative defense to liability.[146]

What accounts for this trend? The most plausible reason to require knowledge as the mens rea of possessory offenses is to avoid punishing persons whose activity is innocent. A concern that innocent activity might be punished arises with all anticipatory offenses. Possessory offenses are anticipatory;[147] their objective is not to punish possession itself—which is harmless—but to punish the harmful conduct that is facilitated and evidenced by possession.[148] A legal system committed to preserving personal freedom must be cautious in creating anticipatory offenses; such crimes expand state power exponentially. The central difficulty facing the legislature is to define carefully and narrowly the conduct prohibited by an anticipatory offense so that behavior that does not threaten harm is not proscribed.

Consider, for example, a statute prohibiting the possession of burglar's tools. The point of this statute, of course, is to prevent the illegal use of these tools. But even those persons whose purpose in possessing such tools is innocent are guilty of this anticipatory offense.[149] Thus, this statute clearly gives rise to anxiety that innocent activity will be punished.[150] However, the concern that innocent activity will be punished may seem less worrisome in the context of statutes proscribing the possession of various drugs. Schedule 1 narcotics

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144. UNIF. CONTROLLED SUBSTANCES ACT § 401(a), 9 U.L.A. 36 (Supp. 1992). For the text of the federal controlled substances prohibition, see *supra* note 19.

145. *But see* State v. Ripley, 319 N.W.2d 129 (N.D. 1982) (noting that North Dakota's adaptation of the Uniform Act contains no culpability requirement).

146. *See* State v. Cleppe, 635 P.2d 435, 439-40 (Wash. 1981).

147. A few possessory offenses might not be anticipatory. Sometimes possession itself, as with the possession of radioactive materials, may be harmful.

148. *See* DRESSLER, *supra* note 71, at 72 ("Crimes of possession are 'inchoate' or incomplete offenses . . . . Their real purpose is to provide law enforcement officials with a legal mechanism by which to stop a person from performing some later, more dangerous, act."); Robinson, *supra* note 102, at 629 ("It is extremely difficult to argue that possession alone is really the harm or evil prohibited and punished by possession offenses."); Whitebread & Stevens, *supra* note 121, at 753 ("Possession of an object in and of itself is not the law's real concern."). *See also* Davidson, *supra* note 121, at 616-17.

149. *See* GEORGE FLETCHER, RETHINKING CRIMINAL LAW 198-99 (1978).

150. *See* Benton v. United States, 232 F.2d 341 (D.C. Cir. 1956).

have no legitimate medical use;[151] how can it be innocent to possess them? The key to answering this question is to understand the connection between possession and the requirement of an actus reus.

A fundamental principle of criminal liability is that all offenses require an actus reus.[152] This requirement is designed to insure that criminal liability is imposed only for what persons *do*. Like other fundamental principles of criminal liability, the requirement of an actus reus protects the moral rights of citizens by limiting the coercive power of the state to create and enforce criminal legislation. This requirement, however, is difficult to reconcile with the existence of anticipatory offenses in general, and of possessory offenses in particular. Possession itself does not seem to be an act.[153] What act(s) could such offenses proscribe? According to the Model Penal Code, possession *is* an act "if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession."[154] Otherwise, possession is *not* an act and may not be subjected to criminal liability.

Notice that this description of the actus reus of a possessory offense makes the concept of reckless possession incoherent: it is logically impossible to commit the actus reus of a possessory offense without knowingly procuring or receiving the thing possessed. Surely, however, the story does not end here. The issue of whether a possessory offense should require a mens rea of knowledge cannot be resolved by definitional stipulation. In the law of property, possession does not entail knowledge.[155] Why define crimes of possession so that their actus reus entails knowledge? The concept of reckless possession does not seem to be incoherent; it is easy to imagine that a person might procure or receive something without being aware that he has done so.

The relevant provisions of the Model Penal Code should be construed to express a normative rather than a conceptual point. In other words, the difficulty is not that the idea of reckless possession is logically incoherent, but that proscribing reckless possession would be morally objectionable.[156] Notice that the Model Penal Code does not characterize procurement or receipt (knowingly or otherwise) as the

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151. *See* 21 U.S.C. § 812(b)(1)(B) (1988).

152. This requirement is critically examined in HUSAK, *supra* note 2, at 78-121.

153. "Possession is not, strictly speaking, an act." 1 LAFAVE & SCOTT, *supra* note 14, at 279.

154. MODEL PENAL CODE § 2.01(4) (Official Draft, review and commentaries, 1985).

155. *See, e.g.*, South Staffordshire Water Co. v. Sharman, 2 Q.B. 44 (1896).

156. Even though legislating an offense of reckless possession might be morally objectionable, it does not follow that such an offense need be unconstitutional.

complete description of the actus reus of a possessory offense. Clearly, a statute proscribing the immediate procurement or receipt of a prohibited item would sweep too broadly, punishing much behavior that is innocent. A person should not be criminally liable if he procures or receives an illegal substance for an innocent purpose. The most obvious (but not the only) such innocent purposes are to dispose of the prohibited item, or to surrender it to the authorities.[157] A well-drafted offense of possession should therefore allow a "grace period" before liability can be imposed.[158] For this reason, the Model Penal Code includes within its description of the actus reus of possession the requirement that a person must "have been able to terminate his possession."[159] Imposing liability on persons who had no opportunity to dispose of a prohibited item, although logically coherent, would be manifestly unfair. States came to appreciate the injustice of punishing unknowing possessors, and modified their statutes accordingly.[160]

The opportunity to terminate unlawful possession would not be especially valuable to those defendants who did not actually know that they possessed something illegal. Suppose the proposed statutory reforms were enacted and recklessness replaced knowledge as the mens rea of possessory offenses. A defendant would be required to take steps to terminate his possession of something he did not know he had, as long as he consciously disregarded a substantial and unjustifiable risk that he had it.[161] Confronted with the prospect of criminal liability for reckless

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157. *See* People v. Mijares, 491 P.2d 1115 (Cal. 1971).

158. *See* 1 LAFAVE & SCOTT, *supra* note 14, at 280 n.47.

159. MODEL PENAL CODE § 2.01(4) (Official Draft, review and commentaries, 1985).

160. Two representative statements will suffice to indicate that many courts came to appreciate the injustice of punishing unknowing possessors. One court wrote: "Otherwise seeming 'possession' by accident or the design of another . . . would suffice; and it is not within the competency of the lawgiver to render that criminal which in its very nature is innocent and essentially nonculpable." State v. Labato, 80 A.2d 617, 622 (N.J. 1951). Another court, in holding that a statute proscribing "unknowing possession" of a controlled substance is unconstitutional, wrote: "It requires little imagination to visualize a situation in which a third party hands the controlled substance to an unknowing individual who then can be charged with and subsequently convicted for violation of [the statute] without ever having been aware of the substance he was given. A situation such as the above does indeed offend the nature of the conscious [sic]. The 'unknowing' possession of a dangerous drug cannot be made criminal." State v. Brown, 389 So. 2d 48, 51 (La. 1980).

161. Some of the concerns about punishing innocent behavior would be mollified by requiring that persons guilty of reckless possession must consciously disregard a *substantial* and *unjustifiable* risk. See the definition of recklessness in the MODEL PENAL CODE § 2.02(2)(c) (Official Draft, review and commentaries, 1985). It is difficult to anticipate the conditions under which jurors would find that the risk of illegal possession

possession, defendants would be required to invest substantial amounts of time and energy to ascertain whether they possessed something illegal.[162] Legislators should be very cautious before adopting a statutory reform that requires this effort. Many persons are employed in the legitimate business of importing legal goods from drug-producing countries. Surely the (potentially high) risk that drugs might be concealed among their legal imports must have occurred to such persons. The State should be reluctant to impose affirmative duties of inspection on these individuals. Changing the mens rea of possessory offenses from knowledge to recklessness will punish these persons for activities that might best be left beyond the reach of the criminal sanction. Contrary to the conventional wisdom that surrounds the principle of legality, the considerations of justice that oppose this statutory reform serve to protect law-abiding persons, and not only scoundrels.

It does not follow, however, that criminal liability should not be imposed on persons who are wilfully ignorant. Their conduct is not innocent, and they clearly deserve punishment. Liability, however, should not be imposed by changing the mens rea terms that appear in existing statutes[163]—or by redefining these terms.[164] The problem of wilful ignorance has proved intractable because commentators have sought to hold defendants liable for violating possessory offenses. But preferable alternatives are available. The key to a better solution is to identify exactly what a wilfully ignorant defendant did—or failed to do—that is the proper concern of the criminal law. This problem is easily solved. Most wilfully ignorant defendants allow themselves to be used in a criminal scheme by failing to inform themselves of the relevant facts. In many cases, it is relatively clear what such a defendant should have done to learn the truth. He need only have opened his suitcase, for example. In general, a defendant who is wilfully ignorant and thus is suspicious that he is committing the actus reus of a crime should be required to take whatever steps are *reasonable* to learn the facts.[165] If wilfully ignorant

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is unjustifiable. Of course, the best guarantee that such possession is unjustifiable is the requirement that defendants have knowledge that they possess something illegal. The concern that persons will be punished for innocent behavior becomes more pressing to the extent that defendants are held liable for less than knowing possession.

162. The same result would follow if criminal liability were imposed for knowing possession, but knowledge were redefined pursuant to § 2.02(7) of the Model Penal Code, so that a person knows a fact if he "is aware of a high probability of its existence." *See* Marcus, *supra* note 36.

163. *See* Robbins, *supra* note 52.

164. *See* Marcus, *supra* note 36.

165. In this light, reconsider United States v. Jewell, 532 F.2d 697, 699 n.2 (9th Cir. 1976). Here the defendant, upon suspecting that his vehicle contained drugs, testified that he "looked in the glove box and under the front seat and in the trunk" and "didn't

defendants are to be held liable, the proper course is to draft a new statute that imposes reasonable duties of inspection on them. Presumably, such an offense would be less serious than that of knowing possession.

This recommendation differs in three crucial respects from the proposed statutory reforms critiqued here. First, the rejected reforms would impose duties of inspection and the threat of criminal liability on *all* reckless defendants,[166] not only on those who are wilfully ignorant. As a result, the rejected reform would create anxiety about the punishment of innocent activity. Second, the rejected reforms would impose criminal liability on reckless and wilfully ignorant defendants *for possession*. Thus these defendants would be punished for what they would have discovered had they made further inquiries, and not for their failure to have made such inquiries in the first place. The recommendation endorsed here provides a more accurate description of the guilty conduct that wilfully ignorant defendants actually perform. Finally, the recommendation endorsed here would allow liability to be imposed even on wilfully ignorant defendants whose suspicions were unfounded and who were not in possession of drugs after all. Since the new statute would punish the failure to make reasonable inquiries, and not possession per se, the existence of illegal drugs would be immaterial to liability. Theoretically, wilfully ignorant defendants who actually possessed illegal drugs would be guilty of the same offense as those who did not.[167] For these reasons, the proposed recommendation is preferable to the rejected reforms, and respects the deeper considerations of justice that underlie the principle of legality.

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find anything." Drugs were eventually discovered in a secret compartment in the trunk. Is it clear that wilfully ignorant defendants should be required to search for secret compartments in which drugs may be concealed? Perhaps. New statutes that impose reasonable duties of inspection on wilfully ignorant defendants will shift the focus of inquiry away from the issue of whether such persons possess the moral equivalent of knowledge toward the question of what duties of inspection are reasonable.

166. A similar reform would achieve the same result by redefining knowledge to resemble recklessness. Duties of inspection and the threat of criminal liability would be imposed on defendants who were "aware of a high probability" that they possessed something illegal. *See* Marcus, *supra* note 36.

167. Of course, it would be very difficult to prove that a defendant was wilfully ignorant of an incriminating proposition p unless p were true. Still, the truth of p would not be required to impose criminal liability.