The Willful Blindness Doctrine: Justifiable in Principle, Problematic in Practice

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INTRODUCTION

Under the willful blindness (WB) doctrine widely employed in federal criminal prosecutions, courts extend a statutory "knowledge" or "willfulness" requirement to encompass "willful blindness" or "deliberate indifference." For example, courts conclude that for drug possession or distribution crimes that explicitly require *knowing* possession of the illegal drugs, a defendant can be convicted merely upon proof that he or she was willfully blind to whether the item possessed contained an illegal drug.[1] (Suppose E pays money to D to transport a sealed box to F, and D knows that both E and F deal in drugs.) The doctrine has been applied to a wide range of other federal crimes, including smuggling firearms, medical insurance fraud and other types of fraud, identity theft, child pornography, transporting stolen property, money laundering, tax evasion, the Foreign Corrupt Practices Act, environmental crimes, failure to pay child support, and also conspiracy to engage in a variety of offenses.[2] The Supreme Court recently endorsed the WB doctrine in a noncriminal context, holding in *Global-Tech Appliances v. SEB S.A.* that active inducement of patent infringement requires either

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I received very helpful feedback on this draft from participants at Arizona State University's Guilty Minds: A Virtual Conference on Mens Rea and Criminal Justice Reform in September 2020; the Southern California Criminal Justice Scholars Roundtable; and at a workshop at UC Irvine School of Law. Special thanks to Eric Blumenson, Dan Burk, Jennifer Chacon, Kevin Cole, Kaaryn Gustafson, Jeff Helmreich, Song Richardson, Alex Sarch, Francis Shen, Katie Tinto, and Gideon Yaffe. I thank Arjay Parhar, UC Irvine School of Law '21, for helpful research assistance.

1. *See, e.g.*, United States v. Heredia, 483 F.3d 913, 918 (9th Cir. 2007).

2. *See* United States v. Little, 829 F.3d 1177 (10th Cir. 2016) (firearms); United States v. Lopez-Diaz, 794 F.3d 106 (1st Cir. 2015) (health care fraud); United States v. Mathauda, 740 F.3d 565 (11th Cir. 2014) (mail and wire fraud); United States v. Oloyede, 933 F.3d 302 (4th Cir. 2019) (identity theft); McCullough v. State, 769 S.E.2d 138 (Ga. Ct. App. 2015) (child pornography); United States v. Hale, 857 F.3d 158 (4th Cir. 2017) (stolen property); United States v. Freeman, 434 F.3d 369, 377–78 (5th Cir. 2005) (money laundering); United States v. Anthony, 545 F.3d 60 (1st Cir. 2008); United States v. Kozeny, 664 F. Supp. 2d 369 (S.D.N.Y. 2009) (Foreign Corrupt Practices Act); United States v. Williams, 295 F.3d 823 (6th Cir. 1999) (environmental crime); United States v. Mitrano, 658 F.3d 117 (1st Cir. 2011) (failure to pay child support); United States v. Gibson, 875 F.3d 179 (5th Cir. 2017) (fraud and conspiracy).

knowledge that the induced acts amount to patent infringement or WB to that fact.[3] The Court's endorsement is likely to spur wider use of the doctrine in other civil and criminal law contexts.

The WB doctrine has other names, including "willful ignorance," "deliberate indifference," "conscious avoidance," and the "ostrich" instruction.[4] All versions contain at least two elements. Roughly speaking, WB is equivalent to:

(1) Defendant's suspicion that the incriminating fact exists, plus

(2) Defendant's deliberate avoidance of the truth of that fact.

In Model Penal Code terms, WB requires recklessness[5] plus a culpable motive; recklessness alone is insufficient for WB, but knowledge is not necessary. Thus, WB picks out a subcategory of cases in which a defendant was reckless with respect to an incriminating fact and permits conviction of such a defendant so long as the statute also permits conviction of a defendant who actually knew that the incriminating fact existed or was true.

This article closely examines different versions of the WB doctrine as well as its application in recent cases. I conclude that the doctrine, although justifiable in the abstract as a matter of principle and policy, is highly problematic in practice. Courts should either significantly narrow the doctrine or, better, suspend its use until empirical research demonstrates that it can be accurately, consistently, and fairly implemented, either in general or in specific legal contexts.

Another problematic feature of the WB doctrine is the largely unexamined assumption that judicial expansion of an explicit statutory knowledge requirement to encompass WB is consistent with congressional (or state legislative) intent and history and with statutory language.[6] For the purposes of this paper, I do not explore this important issue of legitimacy and legality,

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3. 563 U.S. 754, 768 (2011). Unfortunately, *Global-Tech* glosses over significant differences in judicial approaches to WB. For example, *United States v. Heredia* does not actually require proof that the defendant deliberately avoided the truth. 483 F.3d at 919–20. Nor does the Model Penal Code. *See infra* note 36.

4. *See, e.g.*, Alexander Sarch, *Willful Ignorance, Culpability and the Criminal Law*, 88 ST. JOHN'S L. REV. 1023 (2014); *Freeman*, 434 F.3d at 378; United States v. Svoboda, 347 F.3d 471, 477 (2d Cir. 2003); United States v. Draves, 103 F.3d 1328, 1333 (7th Cir. 1997).

5. An actor is reckless with respect to a fact if, inter alia, he or she consciously disregards a substantial and unjustifiable risk that the fact is true. MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985).

6. Sometimes, but not often, the statute itself explicitly recognizes WB as a basis of liability. *See, e.g.*, MINN. STAT. § 609.671, subdiv. 2(a) (2021) (defining knowing for environmental crimes as "[k]nowledge may also be established by evidence that the person took affirmative steps to shield the person from relevant information").

but instead focus on the justifiability of the WB doctrine as a matter of criminal law principles and policies.

The article is divided into the following sections: theoretical and policy justifications of WB; conceptual issues about the meaning of knowledge and belief; different versions of WB; problems with WB as applied in recent cases; analysis; and conclusion. The last two sections highlight some important lessons, including the need for more empirical study of how ordinary people and legally trained actors understand mens rea terms such as knowledge, belief, recklessness, WB, and deliberate avoidance.

I. THEORETICAL AND POLICY JUSTIFICATIONS OF WB

In theory and as a matter of policy, WB is a justifiable doctrine. Or more precisely, some version of WB is justifiable. This paper will later examine some variations that may be more or less justifiable, but this section focuses on the larger picture.

Consider first the distinction between an actor committing a criminal act *knowing* that a material circumstance of the crime is true, and another actor committing the same act while only *reckless* about whether the circumstance is true. Suppose D1 and D2 both choose to transport a package that actually contains illegal drugs, but D1 believes it is almost certain that the package contains drugs while D2 believes there is only a twenty percent chance that the package contains drugs. All else being equal, D1 is more culpable than D2 because D1 consciously disregarded what D1 perceived to be a relatively high probability that the incriminating fact is true, while D2 only disregarded what D2 perceived to be a much smaller probability that the fact is true.[7] Put differently, D1's willingness to act despite a much higher risk of committing

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7. Alexander Sarch provides a helpful formulation of the "Comparative Confidence Principle" that underlies this distinction:

> For any two people who commit the actus reus of a crime, if they are identical in all respects except that one is more confident in the truth of the inculpatory proposition, p, than the other, then . . . the person with the greater degree of [subjective] confidence in p is more culpable than the one with the lesser degree of confidence in p.

ALEXANDER SARCH, CRIMINALLY IGNORANT: WHY THE LAW PRETENDS WE KNOW WHAT WE DON'T 88 (2019); *see also* Kenneth W. Simons, *Does Punishment for "Culpable Indifference" Simply Punish for "Bad Character"? Examining the Requisite Connection Between Mens Rea and Actus Reus*, 6 BUFF. CRIM. L. REV. 219, 251 (2002).

a criminal act ordinarily displays a greater level of culpability or responsibility for purposes of the criminal law.[8]

The WB doctrine bridges the gap between recklessness and knowledge by treating a subcategory of recklessness cases as if they were knowledge cases. WB permits conviction for a crime requiring knowledge as to a material element based on a somewhat less culpable cognitive mental state—the defendant's awareness of a *risk* that the incriminating fact exists, rather than what knowledge usually requires, namely, awareness of a *near certainty* that the fact exists. However, WB also requires a more culpable mental state or motive than plain-old-vanilla recklessness requires: WB requires not just that the defendant knowingly took a risk that an incriminating fact exists (and that it was unjustifiable and grossly unreasonable for the defendant to take that risk), but also that the defendant deliberately avoided confirmation of the incriminating fact.

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8. There are different ways of specifying the type of culpability displayed by an actor who proceeds despite awareness that an incriminating fact might be true. For example, "a cognitive emphasis [reflected in the MODEL PENAL CODE's knowledge/recklessness distinction] is easier to justify under a choice-based retributive account than under a character-based account." Kenneth W. Simons, *Punishment and Blame for Culpable Indifference*, 58 INQUIRY 143, 147 (2015). Thus, Yaffe argues:

> [W]e care about an agent's mental states, and the deliberative processes they guide, when assessing his responsibility because, thanks to them, his actions manifest his culpability-relevant values. In particular, thanks to the agent's mental states, his actions manifest the evaluative weight that he gives to his own interests in comparison to the interests of other people.

Gideon Yaffe, *The Point of Mens Rea: The Case of Willful Ignorance*, 12 CRIM. L. & PHIL. 19, 25–26 (2018) (emphasis omitted). Other variants of this quality-of-will point of view include SARCH, *supra* note 7; Simons, *supra* note 7; Peter Westen, *An Attitudinal Theory of Excuse*, 25 LAW & PHIL. 289 (2006). For some doubts that the culpability of acting knowingly always exceeds that of acting recklessly, see Simons, *supra* note 7.

This paper focuses on culpability with respect to a circumstance element of an offense. WB could, in theory, also apply to culpability with respect to a result element (such as causing a death in homicide). However, courts have not actually applied WB in this context. Nevertheless, the concept of "extreme indifference" or "depraved heart" performs an analogous function. *See* Simons, *supra*, at 159–60 (offering an example in which an arsonist turns "off the video feed in [a] house that" she is about to burn that would inform her that "the victim [is] likely [to] die . . . because she does not want to know").

Many criminal law scholars[9] (including yours truly[10]) have endorsed WB, albeit in different formulations and for different reasons.[11] In principle, the doctrine offers the promise of improving the typical modern hierarchy of

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9. *See generally* Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351 (1992); Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29; David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957 (1999); Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953 (1998); Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191 (1990); SARCH, *supra* note 7, at 109–38; Alexander Sarch, *Willful Ignorance in Law and Morality*, 13 PHIL. COMPASS 1–9 (2018), [hereinafter Sarch, *Wilful Ignorance in Law and Morality*] https://onlinelibrary.wiley.com/doi/full/10.1111/phc3.12490 [https://perma.cc/EY2K-MFEY]; Sarch, *supra* note 4.

Charlow endorses this formulation:

> A person is wilfully ignorant of a material fact if the person (1) is aware of very good information indicating that the fact exists; (2) almost believes the fact exists; and (3) deliberately avoids learning whether the fact exists (4) with a conscious purpose to avoid the criminal liability that would result if he or she actually knew the fact.

Charlow, *supra*, at 1429.

Husak and Callender state:

> [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.

Husak & Callender, *supra*, at 41.

The authors conclude that willfully blind defendants should be required to take reasonable steps to learn the relevant facts but should be punished less than knowing defendants. *Id.* at 68–69.

Sarch argues that the WB doctrine should require proof that the defendant, suspecting that an inculpatory proposition is true, breached a duty to inform himself or herself before acting. *See* SARCH, *supra* note 7, at 109–38.

According to Yaffe, omitting inquiry that would have disclosed knowledge sometimes manifests the "same degree of disregard of others' interests as [is] manifested in knowingly acting criminally." Yaffe, *supra* note 8, at 25–26. For a critique of Yaffe, see Alexander Sarch, *Ignorance Lost: A Reply to Yaffe on the Culpability of Willful Ignorance*, 12 CRIM. L. & PHIL. 107 (2018) [hereinafter Sarch, *Ignorance Lost*].

10. Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. Rev. 463, 500–02 (1992) [hereinafter Simons, *Rethinking Mental States*]; Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 187 (2003) [hereinafter Simons, *Should the Model Penal Code*]. One rationale for treating WB the same as knowledge is a counterfactual test: the willfully blind actor most likely would have proceeded with his action even if he had had knowledge. *See* Simons, *supra* note 7, at 264–67; Michaels, *supra* note 9.

11. Recently, a number of philosophers have also explored the concept of WB. *See, e.g.*, Kevin Lynch, *Willful Ignorance and Self-Deception*, 173 PHIL. STUD. 505 (2016); Jan Willem Wieland, *Willful Ignorance and Bad Motives*, 84 ERKENNTNIS 1409 (2019).

mental states reflected in the Model Penal Code and many modern codes (purpose, knowledge, recklessness, and negligence) by giving more weight to *noncognitive* aspects of criminal culpability. Model Penal Code recklessness and Model Penal Code knowledge differ mainly, and perhaps only, along the cognitive dimension—i.e., in the degree of risk that the defendant consciously adverts to. But WB adds a noncognitive criterion—namely, the defendant's reason or motive for not confirming her suspicion that she might in fact be violating the criminal law.[12] If the defendant had a culpable reason for remaining merely reckless and for not acquiring knowledge, then as a matter of policy or principle, it might be appropriate to treat the defendant as harshly as a person who acted despite actual knowledge of the relevant material fact.

The principal justification for WB is the equal culpability argument: although most reckless actors are less culpable than knowing actors, reckless actors who also are willfully blind are roughly equivalent in culpability to knowing actors.[13] Thus, just as "extreme indifference" or "depraved heart" murder is a "recklessness plus" doctrine, requiring more culpability than reckless manslaughter requires (but not requiring that the defendant knowingly or purposely cause a death), WB as to an incriminating fact is also a "recklessness plus" doctrine. It requires more culpability than recklessness requires but does not require that the defendant know that the fact exists. The equal culpability rationale is usually defended pursuant to a retributivist justification for punishment.[14]

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12. I say "in fact" because WB is most often applied to the question of whether a defendant's WB as to a relevant fact should be treated as satisfying a statutory requirement that defendant has knowledge of that fact (e.g., that defendant is transporting illegal drugs). But WB has sometimes been applied to the question of whether a defendant was willfully blind as to a relevant *legal* question. For example, if a criminal statute requires a defendant's knowledge that a campaign contribution is illegal, then WB, if applicable, would permit conviction if the defendant is merely willfully blind as to that legal question. *See* United States v. Reichert, 747 F.3d 445, 450 (6th Cir. 2014) (holding that it was proper to give WB instruction on question whether the defendant knew he was violating the Digital Millennium Copyright Act); United States v. Henry, 888 F.3d 589, 601 (2d Cir. 2018) (holding that it was proper to give WB instruction on question whether the defendant knew that the export of certain materials was unlawful); *cf.* People v. Chatha, 2015 IL App (4th) 130652, ¶¶ 16–18, 54–55, 33 N.E.3d 277, 287–88 (finding that the defendant did not act with willful ignorance regarding legality of the product's sale because the defendant convenience store owner willingly complied with applicable laws and showed concern about the legality of the sale of a product).

13. *See* Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 766 (2011); SARCH, *supra* note 7, at 2; Sarch, *Wilful Ignorance in Law and Morality*, *supra* note 9, at 6–7; Husak & Callender, *supra* note 9, at 15–25, 139–71 (supporting the equal culpability argument in some cases but also arguing that WB defendants are sometimes less, and sometimes more, culpable than knowing defendants).

14. *See, e.g.*, SARCH, *supra* note 7, at 28.

Accordingly, not all reckless actors are willfully blind. Suppose the actor has a suspicion (but not knowledge) that the incriminating fact exists, but the reason she does not acquire full knowledge is *nonculpable*—for example, it was impossible to acquire such knowledge, or the actor justifiably feared for her safety if she were to attempt to acquire that knowledge.[15] Then the actor, although reckless for taking the risk, would not be willfully blind and could not be punished under that doctrine. Moreover, in a number of situations, an actor's decision not to investigate the risks of the actor's conduct is unjustified, yet the question of justification is a close one. In such cases, because the decision is *almost* justifiable, the actor might be reckless but might not be as culpable as a knowing actor.[16]

Policy justifications for employing WB to expand criminal liability for crimes requiring knowledge also include the supposed difficulties of proving knowledge and the concern that white-collar defendants are especially likely to exploit these difficulties through strategies of "plausible deniability."[17] These rationales, insofar as they emphasize pragmatic proof difficulties and the risk that culpable actors will not be adequately deterred, are best understood as forward-looking, consequentialist justifications.

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15. This was the defendant's claim in the *Heredia* case: she asserted that her suspicions about whether her car contained drugs were first aroused while she was driving on a highway, but at that point, it was unsafe to stop and investigate. 483 F.3d 913, 920 (9th Cir. 2007). Similarly, if the friend of a drug dealer fears violence if she or he investigates the facts, that is a nonculpable (or only modestly culpable) reason, even if the defendant's fear is insufficient to establish a full defense of duress. *See id.*

The majority in *Heredia* purported to exclude liability when the defendant has a nonculpable reason for not confirming the truth of her suspicion: the majority interprets its requirement of "deliberate avoidance" of the truth as excluding "[a] decision influenced by coercion, exigent circumstances or lack of meaningful choice." *Id.* But the scope of this exclusion is unclear, as the concurring opinion notes. *Id.* at 928 (Kleinfeld, J., concurring).

16. *See* SARCH, *supra* note 7, at 102–03 (offering an example in which a drug manufacturer declines to investigate the risks of a drug to a small number of patients because the delay of such a study would preclude a large number of patients from obtaining the immediate and substantial benefits from the drug; even if the decision not to investigate is not justifiable, it is "nearly justified" and thus not equivalent in culpability to distributing the drug while knowing that a small number of patients will suffer severe harm).

17. *See* J.S. Nelson, *Disclosure-Driven Crime*, 52 U.C. DAVIS L. REV. 1487, 1540 (2019); Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. (Jan. 9, 2014), https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/ [https://perma.cc/DCB4-NT3M]; United States v. Jinwright, 683 F.3d 471, 478 (4th Cir. 2012) ("To allow the most clever, inventive, and sophisticated wrongdoers to hide behind a constant and conscious purpose of avoiding knowledge of criminal misconduct would be an injustice in its own right.").

II. PRELIMINARY CONCEPTUAL ISSUES

"Knowledge" of some proposition P, as the concept is used in the criminal law, requires both a belief that P and that P is true.[18] I cannot know that the goods are stolen if I do not believe that they are; nor can I know that they are stolen if, although I believe that they are, in fact they are not.[19] Thus, the terms "knowledge" and "knowingly" are not simply forms of mens rea (even though they are so treated in the Model Penal Code and many state criminal codes). Rather, they are useful shorthand terms by which a legislature (or court) can require both a mens rea (of belief) and an actus reus (the truth of the matter believed).[20] It is much simpler to prohibit "knowingly possessing stolen property" than to prohibit "possessing stolen property, believing that it is in one's possession and that it is stolen."[21]

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18. And the same is true of "awareness" that P or "consciousness" that P. I cannot be aware that it is raining if it is not. Perhaps the same is also true of analogous statements about risk: perhaps I cannot know or be aware that there is a ten percent risk that P unless there really is such a risk. *See* Alexander Sarch, *Review of Findlay Stark, Culpable Carelessness: Recklessness and Negligence in the Criminal Law*, 12 CRIM. L. & PHIL. 725, 727–28 (2018) (characterizing awareness in all of these contexts as "factive"). But the notion of a "real" risk that P is much more elusive and controversial than the notion that P itself "really" is the case. I can know or be aware that it is raining only if it really is raining. But does it follow that I can know or be aware that it *might* be raining only if it "really" might be raining? There is also disagreement about whether and how the concept of a real risk can be elucidated. Compare Eric A. Johnson, *Is the Idea of Objective Probability Incoherent?*, 29 LAW & PHIL. 419, 428–29 (2010); Paul H. Robinson, *Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation Offenses*, 4 THEORETICAL INQUIRIES L. 367, 367–96 (2003); Peter Westen, *The Ontological Problem of 'Risk' and 'Endangerment' in Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 304, 304–27 (2011) with the following skeptical views about "real" risk: LARRY ALEXANDER & KIMBERLY KESSLER FERZAN WITH STEPHEN J. MORSE, CRIME AND CULPABILITY 29–31 (2009); Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333, 358 (2002).

19. Philosophers plausibly assert that in ordinary language, knowledge requires more than this: it requires that the belief is justified in some manner, e.g., based on the evidence available to the defendant. But it is unclear whether criminal law requires this additional element of justification. *See* Simons, *supra* note 10, at 542 n.267; Husak & Callender, *supra* note 9, at 48 ("The conception of justification typically employed by philosophers is idealized, and may be unsuitable for purposes of imposing criminal liability."); FINDLAY STARK, CULPABLE CARELESSNESS: RECKLESSNESS AND NEGLIGENCE IN THE CRIMINAL LAW 128–40 (2016); SARCH, *supra* note 7, at 8.

20. *See* Simons, *Rethinking Mental States*, *supra* note 10, at 542 n.267; STARK, *supra* note 19, at 137.

21. A related question is whether WB can apply when a defendant *mistakenly* believes that an incriminating fact exists. More precisely, the doctrinal question is whether WB permits *attempt* liability in the following category of cases: a defendant believes the incriminating fact to be true, but it is not; and the governing attempt law permits an attempt conviction because the defendant intentionally engaged in the relevant conduct and had the required mens rea (namely, belief) for a circumstance element of the completed crime. (Suppose the defendant tries to buy illegal drugs

Nevertheless, it is unclear, both in ordinary language and in the criminal law, what constitutes a belief that P, and what this requires with respect to either the degree of the actor's confidence that P is true or the actor's subjective estimate of the probability that P.[22] Moreover, it is also unclear how specific, conscious, and occurrent an actor's cognitive state with respect to P must be in order to qualify as a belief that P.[23] Consider some examples:

- Driver D1's phone is on the passenger seat. While D1 is driving, the phone rings. He instinctively picks it up. The law prohibits knowingly using a cell phone while driving. Has D1 violated the law? Presumably he has, even if the thought, "I am now

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or stolen property from E who turns out to be an undercover agent, and E offers an innocent product or nonstolen property as part of the sting operation.) In principle, there is no reason why WB should not be applied here, and some cases have so held. *See, e.g.*, United States v. Nektalov, 461 F.3d 309, 318 (2d Cir. 2006) (allowing a conviction of conspiring to commit money laundering on a WB theory even though the defendant was the victim of a sting operation). *But see* Alexander Sarch, *Equal Culpability and the Scope of the Willful Ignorance Doctrine*, 22 LEGAL THEORY 276, 281 n.26 (2017).

22. Some philosophers treat beliefs and "credences" as conceptually linked: X believes that P just in case X has a sufficiently high "credence" that P, where a credence represents X's subjective probability or confidence level toward the proposition P. Other philosophers treat the two ideas as conceptually distinct. Under this second approach, it is possible both that X believes that P and that X assesses the probability that P as quite small. Thus, if X estimates the chance that drugs are in his car as only five percent, the first view entails that X does not believe that drugs are in his car; the second view leaves open the possibility that X actually does believes that drugs are in his car despite X assessing the chance of this as only five percent. However, the second view is also consistent with the conclusion that it is irrational for X to simultaneously believe that X but have a very low credence that X. *See* Elizabeth G. Jackson, *The Relationship Between Belief and Credence*, 15 PHIL. COMPASS 1, 2–7 (2020), https://onlinelibrary.wiley.com/doi/10.1111/phc3.12668 [https://perma.cc/AXN9-H5W2]; Eric Schwitzgebel, *Belief*, STAN. ENCYC. OF PHIL. (2019), https://plato.stanford.edu/entries/belief [https://perma.cc/SZ95-G7ZQ]. Whether and when the criminal law should impose liability on actors who hold such irrational beliefs is an important question.

23. On the question whether an actor's beliefs must be "occurrent" (i.e., occupying the actor's mind at the time of action), rather than merely dispositional (beliefs that the actor could very quickly bring to the forefront, if asked), see Schwitzgebel, *supra* note 22; STARK, *supra* note 19, at 90; Sarch, *supra* note 18; Kenneth W. Simons, *When Is Negligent Inadvertence Culpable?*, 5 CRIM. L. & PHIL. 97 (2011). A similar question is whether the law should only take account of an actor's "explicit" beliefs rather than "implied" beliefs that the actor could swiftly derive from explicit beliefs. *See* Schwitzgebel, supra note 22, § 2.2.1.

The Model Penal Code and many penal codes that rely upon the MODEL PENAL CODE use a variety of terms to refer to cognitive requirements—including (1) knowledge, awareness, consciousness; (2) belief; and (3) recklessness or suspicion. The first category of terms is "factive," *see* Sarch, *supra* note 18, each term requires both a cognitive state of mind and also that the proposition believed is true. (I can't be aware, or conscious of the fact, that it is sunny outside unless it is.) The first category also seems to require a greater degree of self-awareness, and perhaps a more occurrent mental state, than the second category of belief. But it is doubtful that legislators and courts who employ these different cognitive mental states intend to draw fine distinctions in degrees of consciousness of one's own beliefs.

using a cell phone" never crosses his mind and is thus not an occurrent belief.

- Driver D2 exceeds the speed limit and credibly claims that she did not look at the speedometer. Rather, she simply kept pace with the speed that most other drivers were traveling. D2 admits that she knows that almost all drivers speed but also credibly states that she didn't think about that when she was driving above the speed limit. Did D2 knowingly exceed the speed limit? In mens rea terms, did she believe that she was exceeding the speed limit?

- Driver D3 brings his briefcase to his car and drives to work. Minutes earlier, he knowingly placed a loaded gun in the briefcase because he planned to go later to target practice. He is stopped while speeding and also charged with the crime of knowingly carrying a loaded gun in public. If he credibly testifies that he wasn't thinking about the gun while driving, does this demonstrate that he did not violate the loaded gun law? It seems not. On the other hand, if a passenger in the car asked him where his gun was and he mistakenly believed it was still at home, presumably he is not violating the law. And similarly, if he had loaded the gun a year ago but forgot he had done so.[24]

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24. *See* Douglas Husak, *Negligence, Belief, Blame and Criminal Liability: The Special Case of Forgetting*, 5 CRIM. L. & PHIL. 199, 209 (2011); Simons, *supra* note 7, at 230; Simons, *supra* note 23, at 105.

If a defendant has forgotten a relevant fact at the time he commits the actus reus of an offense, presumably the defendant cannot be punished for a crime requiring knowledge of that fact. But sometimes the defendant will, at the relevant time, have dispositional or latent knowledge (but not occurrent) knowledge of the fact. Should this be sufficient to satisfy a knowledge requirement?

Another type of example explores what it means to believe that one is (recklessly) posing a *risk* of harm:

> Driver D4 becomes engrossed in a conversation with his chatty friend while driving, and therefore does not notice a pedestrian in his path. His car injures the pedestrian. D4 admits that he knows that when he is engrossed in a conversation, he pays much less attention to the risks on the road.

Is D4 reckless, i.e., aware of a substantial risk that his conduct might cause harm? An affirmative answer is problematic: it might convert almost all negligent inadvertence cases into recklessness cases.

III. DIFFERENT VERSIONS OF WB

It is time to examine more closely some other formulations of WB that courts have adopted or commentators have suggested.

The Supreme Court's *Global-Tech* patent law decision offers a generalization of the WB doctrine in federal criminal cases. The WB doctrine contains "two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact."[25] The Court's opinion also emphasizes that neither negligence nor recklessness is sufficient for WB.[26]

However, the federal courts of appeals have offered somewhat different versions of WB. (State court decisions endorsing WB are rarer.[27]) I will address four variations.

1. Motive to avoid criminal liability. Perhaps the most significant explicit variation in the case law concerns the breadth of the second prong. Is it sufficient that the defendant chose to remain in ignorance, or is it also necessary that the defendant's motive in so choosing was to avoid criminal liability? Courts and commentators disagree about whether this additional motive is required.[28] If it is not required—and most formulations of WB,

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

26. *Id.*

27. State court decisions endorsing WB include *Salomon v. State*, 126 So. 3d 1185, 1185–87 (Fla. Dist. Ct. App. 2012); *People v. Chatha*, 2015 IL App (4th) 130652, ¶¶ 42, 54–55, 33 N.E.3d 277, 287–88; *Mefford v. State*, 51 N.E.3d 327, 337 (Ind. Ct. App. 2016); *McCullough v. State*, 769 S.E.2d 138, 145 (Ga. Ct. App. 2015); *Steward v. State*, 98 A.3d 362, 370 (Md. Ct. Spec. App. 2014). By contrast, North Carolina rejects WB. *See* State v. Bogle, 376 S.E.2d 745, 746 (N.C. 1989).

28. The following federal circuits appear to require an additional motive of this sort: First Circuit (*see United States v. Griffin*, 524 F.3d 71, 79 (1st Cir. 2008)); Eleventh Circuit (*see United States v. Crabtree*, 878 F.3d 1274, 1289 (11th Cir. 2018) (finding that the defendant must purposely avoid learning all the facts "in order to have a defense in the event of a subsequent prosecution")). Georgia also seems to require this additional motive. *See McCullough*, 769 S.E.2d *passim*. The Ninth Circuit does not require an additional motive. *See* United States v. Heredia, 483 F.3d 913, 920 (9th Cir. 2007). For further discussion, see Sarch, *Wilful Ignorance in Law and Morality*, *supra* note 9, at 4; Husak & Callender, *supra* note 9, at 40 (endorsing a motivational condition).

It is not clear whether the D.C. Circuit recognizes the WB doctrine at all. *See* United States v. Alston-Graves, 435 F.3d 331, 336–40 (D.C. Cir. 2006). *Global-Tech*, 563 U.S. at 769 n.9, states that all federal circuits, with the possible exception of the D.C. Circuit, endorse the WB doctrine. For further discussion on the differences in approaches in different federal circuits, see Sarch, *Wilful Ignorance in Law and Morality*, *supra* note 9. In more recent cases, these differences appear to have narrowed, perhaps because of the influence of the Supreme Court's *Global-Tech* decision.

including the Supreme Court's in *Global-Tech*,[29] do not require it—then the WB doctrine is quite broad indeed. For example, even if the defendant's reason for not inquiring further into suspicious facts is a need to avoid physical harm,[30] the basic formulation in *Global-Tech* would be satisfied. At the very least, it would be sensible to require that the defendant *culpably* decided or chose to remain in ignorance, even if we do not require that that culpability be based on the defendant desiring to avoid criminal liability. As Deborah Hellman has pointed out, a lawyer or doctor should not be considered WB if, out of professional obligation, the lawyer does not investigate her doubts about her client's planned testimony, or the doctor does not investigate his doubts about whether his patient is illegally reselling prescribed medications.[31]

2. Affirmative steps v. psychological avoidance. A second possible variation concerns whether, in choosing to avoid criminal liability, the defendant must have taken affirmative steps (such as destroying documents or instructing another person not to inquire) or merely must have made a decision not to inquire further (which courts characterize as "psychological avoidance").[32] The Supreme Court in *Global-Tech* seems to require affirmative steps.[33] However, the Seventh Circuit has clearly stated that psychological avoidance suffices.[34] This approach is potentially extremely

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29. However, although *Global-Tech* does not explicitly recognize this motive requirement, it emphasizes the existence of such a motive when analyzing the facts of the case and concluding that the evidence was sufficient to demonstrate WB: "On the facts of this case, we cannot fathom what motive [defendant's CEO] could have had for withholding this information other than to manufacture a claim of plausible deniability in the event that his company was later accused of patent infringement." 563 U.S. at 771.

30. *See Heredia*, 483 F.3d at 920. SARCH, *supra* note 7, at 90, offers a similar example in which it would be dangerous to the defendant and his family to investigate whether his tenant is manufacturing drugs.

31. Deborah Hellman, *Willfully Blind for Good Reason*, 3 CRIM. L. & PHIL. 301, 314 (2009). Sarch offers a similar example of a non-professional obligation: a parent chooses not to investigate an adult child's suspicious package in order not to damage a recently repaired relationship. SARCH, *supra* note 7, at 92.

32. *See* Sarch, *Wilful Ignorance in Law and Morality*, *supra* note 9, at 4; *e.g.*, United States v. Tantchev, 916 F.3d 645, 653 (7th Cir. 2019).

33. The Court concludes that the Federal Circuit departed from proper WB standards "in demanding only 'deliberate indifference' to [the] risk" and in failing to "require active efforts." *Global-Tech*, 563 U.S. at 770. The Court also refers in a footnote to "parties . . . who take deliberate steps to remain ignorant." *Id.* at 768 n.8.

34. United States v. Carrillo, 435 F.3d 767, 782–83 (7th Cir. 2006) (citations omitted):

> Evidence of deliberate ignorance can be placed into two general categories: evidence of "overt physical acts," and evidence of "purely psychological avoidance." . . . The first category . . . is generally the easy case, because there is evidence the defendant physically acted to avoid knowledge. . . . The second

broad. To be sure, treating an omission to inquire further as sufficient for WB is not as problematic as punishing for an omission simpliciter: in almost all cases, the defendant still must have engaged in some affirmative action (such as transporting illicit items or filing false reports) as the actus reus of the underlying offense.[35] But it remains troubling that under the Seventh Circuit approach, the "deliberate avoidance" prong can be satisfied merely upon proof that the defendant decided not to inquire—for example, by not asking questions that might have confirmed the defendant's suspicions.

3. *Threshold degree of risk of which the defendant must be aware.* A third possible variation, but one that is not clearly discussed in the case law, is to require that the defendant perceive a specified threshold degree of risk under

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> category, psychological avoidance, is more troublesome. The act in this category is a mental act—"a cutting off of one's normal curiosity by an effort of will." . . . The difficulty in a psychological avoidance case—one without any outward physical manifestation of an attempt to avoid facts—lies in distinguishing between a defendant's mental effort of cutting off curiosity, which would support an ostrich instruction, and a defendant's simple lack of mental effort, or lack of curiosity, which would not support an ostrich instruction. . . . There is generally no way to peer directly into the defendant's thought process to determine whether he or she has become suspicious and then dismissed the uncomfortable thought for fear of its consequences.

In *Tantchev*, 916 F.3d at 653 (citations omitted), the court reasoned:

> [W]e must remember the instruction is aimed at defendants acting like fabled ostriches who bury their heads in the sand. We do not, if we may add to the metaphorical menagerie, require every defendant to act like Curious George. Accordingly, courts must be careful, lest we obliterate the already thin line between avoidance, which is criminal, and indifference, which "cannot be punished."

However, in *United States v. Macias*, 786 F.3d 1060, 1063–64 (7th Cir. 2015) (citations omitted), the court was skeptical that "psychological avoidance" could suffice for WB:

> The government . . . muddies the waters by offering, as an equivalent to "deliberate indifference," "psychological efforts" consisting of "cutting off . . . one's normal curiosity by an effort of will." That sounds like judge playing psychologist; no matter, for there indeed are circumstances in which a failure to ask questions is unnatural—a ducking of responsibility, a violation of duty, and perhaps therefore the equivalent of taking evasive action to avoid confirming one's suspicions. . . . [Cutting off curiosity] is a dispensable phrase . . . not only because of its air of folk psychology but also because American law is complicated enough without adding epicycles to every doctrinal formula. The author of this opinion pleads guilty to having used the phrase in *United States v. Giovannetti*.

The court concluded that the defendant had no need to know the source of the money he was paid to smuggle from the United States to Mexico, and thus the defendant did not act with deliberate ignorance about a drug smuggling operation by failing to inquire. *Id.*

35. *E.g.*, *Carillo*, 435 F.3d at 770.

the first prong. Is it sufficient that the defendant perceives *any* risk that the incriminating fact exists? Is it necessary that the defendant believes the risk is more than 50%? Close to a certainty?

The legal standard most often employed is that the defendant must be aware of a "high probability" that the fact exists. (This language is also used in the Model Penal Code definition of knowledge.[36]) Unfortunately, "high probability" is typically not defined,[37] so it is not clear what level of probability this requires. A 20% probability? A 40% probability? Must the perceived probability be greater than 50% or even a near certainty? I believe it is, well, highly probable, indeed nearly certain, that the drafters of the Model Penal Code intended that "aware of a high probability" would require the actor to believe that the probability is at least greater than 50%.[38] After all, the Model Penal Code carefully distinguishes knowledge (thus defined as including awareness of a high probability) from recklessness; but to be reckless, the actor only needs to be conscious of a "substantial" risk that an incriminating fact exists, not a "highly probable" risk.[39] Regrettably, "substantial" risk is also undefined.[40] Still, "highly probable" must be greater than, and perhaps significantly (substantially?) greater than, "substantial."

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36. MODEL PENAL CODE § 2.02(7) (AM. L. INST. 1985) provides that knowledge of a fact "is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." A number of courts, including the Supreme Court in *Global-Tech*, characterize this as the Model Penal Code's version of the WB doctrine. *See Global-Tech*, 563 U.S. at 767. But this characterization is highly misleading, for two reasons. First, this MODEL PENAL CODE provision does not include the second prong of the WB doctrine, the requirement that the defendant chose not to inquire or deliberately avoided knowledge. And second, the Model Penal Code includes the "unless" clause, a negative element that is not recognized by all courts employing WB. § 2.02(7).

37. In *Global-Tech*, the Court does state, in its preliminary discussion of the WB doctrine, the rationale that the defendants may not escape liability "by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances." 563 U.S. at 766. It also states that a willfully blind defendant "can almost be said to have actually known the critical facts," whereas "a reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing." *Id.* at 769–70. The Court concludes that the Federal Circuit departed from proper WB standards by permitting a finding of knowledge "when there is merely a 'known risk' that the induced acts are infringing." *Id.* at 770. This suggests that the Court believes a threshold higher than MODEL PENAL CODE recklessness is required for WB.

38. § 2.02(7). There is some evidence from the Model Penal Code Commentaries that "a 'high' probability [was] meant to be considerably more than a 50% probability": the Commentaries note the "definition in Ohio's code that knowledge is satisfied when the result or circumstance is 'probable'" and then remark that this definition is "more expansive" than the Model Penal Code position. Simons, *Should the Model Penal Code*, *supra* note 10, at 183 n.11; MODEL PENAL CODE § 2.02 cmt. 9 at 248 n.43 (AM. L. INST. 1985).

39. § 2.02(2), (7).

40. *Id.*

I delve into these devilish details because I doubt that most courts applying the "aware of a high probability" language realize that the American Law Institute members who drafted and approved this language probably intended to require awareness of a very high probability, at least 50% and perhaps more.

4. Negative criterion: the defendant believes that incriminating fact does not exist. A fourth variation found in many of the cases is a negative criterion: the state may not rely on WB if it is shown that the defendant actually believed that the incriminating fact was *not* true—for example, the defendant believed the suitcase did not contain drugs or that the property he received was not stolen. In effect, this amounts to a third, albeit negative, prong in the WB test, which is also found in the Model Penal Code's definition of knowledge.[41]

But this third prong is controversial and difficult to justify, especially if the required threshold probability under the first prong is greater than 50%—i.e., if the defendant must believe that the incriminating fact is more than 50% likely to be true.[42] Thus, suppose Ben is aware of a "high probability" that a package in Ben's possession contains illegal drugs because he thinks that the chance that it contains drugs is 70% (and Ben deliberately chooses not to find out for sure). The negative criterion provides that Ben cannot be guilty of WB if Ben nevertheless believes that the package does *not* contain drugs. But how could the negative criterion ever apply to someone with Ben's beliefs? Can a person believe that there is a 70% chance that a fact exists yet at the same time believe that the fact does not exist? This borders on incoherence.[43]

However, this incoherence difficulty does not arise if the threshold under the first prong is less than 50%. Thus, suppose Jen believes that there is a 40% chance that drugs are in the package (and Jen deliberately chooses not to find out for sure). The negative criterion provides that Jen cannot be guilty under WB if Jen believes that the package does *not* contain drugs. In this scenario, Jen's two beliefs—namely, (1) that there is a 40% chance that the package contains drugs and (2) that the package does not contain drugs—are

41. The following cases include this third, negative element, based on the Model Penal Code's "unless" clause, § 2.02(7), as quoted *supra* note 36. United States v. Clay, 832 F.3d 1259, 1314 (11th Cir. 2016); United States v. Henry, 888 F.3d 589, 600 (2d Cir. 2018).

42. For discussions of this problem, see Simons, *Should the Model Penal Code*, *supra* note 10, at 187; Kevin Cole, *Knowledge and Belief as Criminal Law Mental States*, 16 OHIO ST. J. CRIM. L. 441, 444 n.17 (2019).

43. Although this borders on incoherence, one possible explanation is that one might have a credence greater than fifty percent that P, yet at the same time disbelieve P or have a belief that not-P. Whether beliefs and credence can oppose one another in this manner is a question about which philosophers disagree. *See* Jackson, *supra* note 22.

quite compatible, at least if it is possible to hold belief (2) while also having a strong suspicion that (2) is not the case.

Still, although this second scenario is less problematic than the first, it raises a further difficulty. How is this second scenario different from a standard WB case? All WB cases involve a suspicion that an incriminating fact might be true. Don't many of them involve a mere or lower-probability suspicion, in which the defendant believes that the fact might be true but does not believe that its probability is greater than 50%? The lingering question is why the negative criterion is sensible even here. Why should it matter so much whether the defendant who suspects that P also forms the contrary belief that P is not the case? Consider Ken, who, like Jen, believes there is a 40% chance that the package contains drugs. But suppose Ken, unlike Jen, does *not* form the ultimate belief that the package does not contain drugs. Thus, Ken does not satisfy the negative criterion and is still willfully blind, while Jen is not willfully blind. Does it really make sense to punish Ken (who is no relation to the author) for knowing drug possession but not Jen?[44]

Other possible variations exist,[45] but these four demonstrate that the scope of WB depends significantly on precisely how it is formulated.

IV. PROBLEMS WITH WB AS APPLIED IN RECENT CASES

Notwithstanding the reasons of principle and policy that support the WB doctrine, the doctrine is highly problematic in practice. Researching hundreds of recent WB cases reveals a range of difficulties with respect to jury instructions and the reasoning in judicial opinions. Some of these difficulties flow from the courts' employing the four different WB criteria just noted or variations of these criteria. But other problems have also arisen.

1. Failure to define knowledge clearly. Courts do not clearly define the meaning and scope of statutory "knowledge" requirements, quite apart from whether knowledge embraces WB. This is a serious problem. Jury

44. It might be argued that if Ken believes there is a 40% chance that a package contains drugs, he must also believe there is a 60% chance that it does not contain drugs, in which case he must believe, simpliciter, that it does not contain drugs. But I do not think that the conclusion follows. Moreover, if it does follow, then the negative criterion that some but not all courts endorse would apply in every WB case in which the perceived probability that an incriminating fact exists is less than 50%. I am doubtful that courts that adopt the negative criterion intend to apply it that widely.

45. A fifth possible variation concerns the mens rea that the defendant must possess with respect to prong two. Must the defendant's acts or omissions that result in the defendant's ignorance of the truth be for the *purpose* of avoiding or ignoring the truth, or is it sufficient that the defendant acts in a way that she knows will result in her ignorance? Or is mere negligence sufficient? Courts appear to uniformly require purpose. *See* Sarch, *Willful Ignorance in Law and Morality*, *supra* note 9, at 2–4; SARCH, *supra* note 7, at 20.

instructions defining "knowledge" are frequently confusing or confused.[46] And the requisite object of knowledge is often quite unclear, especially in statutes with multiple actus reus elements.[47] For example, is it sufficient that the defendant knows the facts that make his conduct illegal, or must the defendant also know (or correctly believe) that his conduct is illegal?

2. Confusion about whether WB is a criterion distinct from knowledge. Courts sometimes state that WB permits an "inference" of knowledge. But this formulation confuses the view that WB is an alternative, independent ground for criminal liability with a second and more modest view, that evidence that a defendant was WB is sometimes sufficient for the factfinder to conclude that the defendant actually possessed knowledge. On the second view, WB is not an alternative to knowledge as a basis for criminal liability.[48]

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46. The following standard jury instruction is adequate. KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 17:04 (6th ed.), Westlaw (database updated Feb. 2021) ("The term 'knowingly', as used in these instructions to describe the alleged state of mind of Defendant, means that *[he] [she]* was conscious and aware of *[his] [her] [action] [omission]*, realized what *[he] [she]* was doing or what was happening around *[him] [her]*, and did not *[act] [fail to act]* because of ignorance, mistake, or accident.").

However, one common definition is confusing because it ignores or mischaracterizes the important question, "knowledge about what?" *See, e.g.*, U.S. DIST. CT. OF ME., 2019 REVISIONS TO PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT § 2.15 (2019) ("The word 'knowingly,' as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident."). A very similar instruction was given in *United States v. St. Junius*, 739 F.3d 193, 206 (5th Cir. 2013). This type of instruction is highly misleading because it focuses on whether the defendant engaged in an act knowingly, rather than on what is almost always at issue when a defendant asserts a lack of knowledge: whether the defendant acted knowingly with respect to a material circumstance of the crime (e.g., whether goods were stolen) or with respect to a required result element (e.g., whether the defendant would cause injury or death to a victim). *Cf.* MODEL PENAL CODE § 2.02 (AM. L. INST. 1985) (differentiating three potential objects of a mental state: conduct, circumstances, and results).

47. For a recent example of these complexities, see *Rehaif v. United States*, 139 S. Ct. 2191, 2199 (2019).

48. *See, e.g.*, United States v. Figueroa-Lugo, 793 F.3d 179, 192 (1st Cir. 2015) ("[C]ontrary to Figueroa's contention that the instruction allowed the jury to convict him of a [statutory] violation . . . by a less stringent requirement than 'knowingly,' a willful blindness instruction is one way in which a jury can permissibly find that a defendant acted knowingly."); United States v. Juarez, 866 F.3d 622, 625 (5th Cir. 2017); United States v. Holloway, 740 F.2d 1373, 1380 (6th Cir. 1984); Hawkins v. State, 830 S.E.2d 301, 310 (Ga. Ct. App. 2019). Thus, in *Hawkins*, the jury instruction provided that the element of knowledge may be "inferred" from WB, and the court stated that the instruction properly clarified that this was a permissive rather than mandatory inference; but then the court switched to the alternative view, stating that "it is the law that the element of knowledge may be satisfied by a finding of deliberate indifference." *Id.* at 310.

This confusion of the two distinct views is discussed in Husak & Callender, *supra* note 9, at 42–44; SARCH, *supra* note 7, at 12–13. A forthcoming article endorses the "mere evidence" view: Gregory M. Gilchrist, *Willful Blindness as Mere Evidence*, 54 LOY. L.A. L. REV. 405, 405 (2021).

3. Failure to distinguish WB from recklessness. Courts do a satisfactory job of explaining that negligence is insufficient for WB,[49] but in many cases, they fail to explain that recklessness is also insufficient.[50] *Global-Tech* was a salutary decision in this respect because it does carefully distinguish recklessness from WB, and some recent decisions draw this distinction.[51] Nevertheless, many decisions since *Global-Tech* fail to mention this important distinction.[52] Moreover, even when courts instruct that recklessness is insufficient, they typically do not explain what recklessness means and how it differs from WB.

4. Failure to clarify the first prong of WB. Courts do a poor job of explaining the *first* element of WB—specifically, how much suspicion a defendant must have that the incriminating fact exists.[53] The language "high

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49. Thus, it is improper to use "reasonable person" language in a WB jury instruction, United States v. Denson, 689 F.3d 21, 25–26 (1st Cir. 2012), or to use language that the defendant "should have known better," United States v. Lopez-Diaz, 794 F.3d 106, 114 (1st Cir. 2015). *But see* United States v. Singh, 222 F.3d 6, 11–12 (1st Cir. 2000) (reasoning that a WB instruction was proper "if the government adduces evidence that warning signs existed sufficient[ly] to put a reasonably prudent person on inquiry notice (and, thus, sufficient to permit a factfinder to infer conscious avoidance of guilty knowledge)").

50. *See, e.g.*, United States v. Reichert, 747 F.3d 445, 451 (6th Cir. 2014); United States v. Ross, 502 F.3d 521, 527 (6th Cir. 2007); United States v. Henry, 888 F.3d 589, 600 (2d Cir. 2018) (showing that although a court's opinion requires more than negligence or recklessness, a jury instruction does not require more than recklessness). Indeed, in *United States v. Anthony*, 545 F.3d 60, 66 (1st Cir. 2008), the First Circuit stated that it was not in error to omit a reference to "recklessness" as insufficient. However, since the Supreme Court's decision in *Global-Tech*, which stated that recklessness is insufficient for WB, many courts have included a clarification to that effect. 563 U.S. 754, 769 (2011); *see* United States v. Jinwright, 683 F.3d 471, 480 (4th Cir. 2012); United States v. Goffer, 531 F. App'x. 8, 20–21, 21 n.11 (2d Cir. 2013) (stating that recklessness is insufficient but also finding that the jury instruction was adequate even though it did not explicitly so provide because the instruction did require "proof that the defendant . . . deliberately closed his eyes to what would otherwise have been obvious" and required proof of more than negligence).

51. *See, e.g.*, United States v. Farrell, 921 F.3d 116, 122–23 (4th Cir. 2019); United States v. Tai, 750 F.3d 309, 314–15 (3d Cir. 2014).

52. *See, e.g.*, *Henry*, 888 F.3d at 601 (upholding the trial court's instruction informing jurors that WB may not be shown merely because the defendant was "negligent, foolish, or mistaken," but not mentioning that recklessness is inadequate). Part of the court's instruction also confusingly described the requirements of WB, for it seems to suggest that recklessness (which the Model Penal Code defines in part as "conscious[ ] disregard[ ] [of] a substantial . . . risk") is sufficient for WB: "If you find that the defendant was aware of a high probability that exporting the ablative materials without a license was unlawful *and that the defendant acted with deliberate disregard of that fact*, you may find that the defendant acted knowingly and willfully." *Id.* at 601 (emphasis added); MODEL PENAL CODE § 2.02(c) (AM. L. INST. 1985).

53. In some cases, courts do not even require any level of suspicion. *See* United States v. Mathauda, 740 F.3d 565, 568–69 (11th Cir. 2014) (requiring government to prove *either* that the "defendant purposely contrived to avoid learning all [of] the facts, or [that] the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact").

probability" is most often used, yet it is almost never defined. In the rare cases in which a further explanation is offered, the explanation is usually not very helpful.[54] To be sure, courts sometimes emphasize the relevance of "red flags," but they do not clarify what these terms mean.[55]

5. Failure to clarify the second prong of WB. Courts give varying and often inadequate explanations of the *second* element of WB—of the meaning of "conscious" or "deliberate avoidance" or "deliberate ignorance" or "deliberately blinding oneself" or "purposeful contrivance." For example, is a merely psychological effort not to inquire sufficient? Is some affirmative conduct required (e.g., instructing an employee not to inquire)? One court merely required that the defendant acted with "deliberate disregard of [suspicious] fact[s],"[56] phrasing that is very similar to the Model Penal Code definition of recklessness in section 2.02(2)(c), requiring only that the defendant "consciously disregard a substantial and unjustified risk."

6. Precluding WB instruction when evidence supports only actual or no knowledge. Courts sometimes state that a WB instruction should not be given when the evidence points solely to actual knowledge,[57] or points either to actual knowledge or to no knowledge,[58] but this approach is problematic.

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54. *See, e.g.*, United States v. Flores, 945 F.3d 687, 715 (2d Cir. 2019) (holding that WB can be established "where a defendant's involvement in the criminal offense may have been so overwhelmingly suspicious that the defendant's failure to question the suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge"); United States v. Rothrock, 806 F.2d 318, 323 (1st Cir. 1986) (using the language "the likelihood of wrongdoing"); United States v. Chavez-Alvarez, 594 F.3d 1062, 1067 (8th Cir. 2010) ("[A] jury may find willful blindness only if the defendant was aware of facts that put him on notice that criminal activity was probably afoot . . . ."). In *Juarez*, the court seemed to require more than awareness of a high probability: the state must present "facts that support an inference that the . . . defendant subjectively knew his act to be illegal." United States v. Juarez, 866 F.3d 622, 631 (5th Cir. 2017). In *Lange*, the court clarified "high probability" as follows: "A factual predicate may be established where a defendant's involvement in the criminal offense may have been so overwhelmingly suspicious that the defendant's failure to question the suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge." United States v. Lange, 834 F.3d 58, 78 (2d Cir. 2016). In *Ramsey*, the court gave some helpful guidance: "[I]t takes a fairly large amount of knowledge to prompt further investigation for the purpose of this instruction; to permit an inference of knowledge from just a little suspicion is to relieve the prosecution of its burden of showing every element of the case beyond a reasonable doubt." United States v. Ramsey, 785 F.2d 184, 190 (7th Cir. 1986).

55. *See* United States v. Tantchev, 916 F.3d 645, 653 (7th Cir. 2019); United States v. Ferguson, 676 F.3d 260, 278 (2d Cir. 2011).

56. United States v. Henry, 888 F.3d 589, 601 (2d Cir. 2018).

57. *See* United States v. Azubike, 564 F.3d 59, 67–68 (1st Cir. 2009) (holding that it is inappropriate to give a WB instruction "when the evidence presented at trial provides the jury with only a binary choice between actual knowledge and innocence"); *Tantchev*, 916 F.3d at 654.

58. *See, e.g.*, United States v. Kuhrt, 788 F.3d 403, 417 (5th Cir. 2015).

Why not permit the prosecution to argue actual knowledge and WB in the alternative in all cases?[59]

7. Endorsing the problematic negative criterion. Most recent jury instructions include the negative criterion: the defendant is not guilty if she believed the incriminating fact did not exist—e.g., if she believed that the package did not contain illegal drugs.[60] This criterion is problematic for reasons discussed earlier.

8. Tolerating erroneous WB instructions. Courts frequently find that instructions on WB contain errors, yet they almost never reverse convictions. Quite often, they find that the state offered sufficient evidence of knowledge, rendering the instructional error harmless.[61] Although appellate courts often warn district courts that WB instructions should be given rarely or with caution,[62] their bark is much worse than their bite.

V. ANALYSIS

The discussion thus far provokes several important questions about the WB doctrine, both as a matter of principle and as a matter of the law in action.

First, courts offer very little guidance to juries (or to each other) about the meaning of critical terms such as knowledge, recklessness, high probability, and deliberate or conscious avoidance. For example, most jury instructions require awareness of a "high probability" that the inculpatory fact exists, yet it is not clear whether this refers to a probability greater than fifty percent (as the Model Penal Code seems to contemplate) or to a probability much less than this.

Second, although it is perhaps understandable that courts do not wish to burden prosecutors with having to prove a defendant's guilt under a narrow definition of knowledge, the question remains whether WB is an intelligible standard that satisfies the Goldilocks test: neither too stringent, as knowledge might be, nor too relaxed, as recklessness might be (and as negligence would certainly be). If WB is to be used, there is much to be said for a narrower

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59. *See* United States v. Wert-Ruiz, 228 F.3d 250, 257 (3d Cir. 2000) ("[B]ecause the jury could selectively discredit some of the evidence in the prosecution's case, the existence of evidence that points to actual knowledge does not preclude consideration of other evidence that points to a finding that [the defendant] was wilfully blind.").

60. *See* cases cited *supra* note 41.

61. *See, e.g.*, United States v. Roussel, 705 F.3d 184, 191–92 (5th Cir. 2013) (finding harmless error because there was sufficient evidence of actual knowledge); *see also* United States v. Little, 829 F.3d 1177 (10th Cir. 2016); Salomon v. State, 126 So. 3d 1185 (Fla. Dist. Ct. App. 2012).

62. *See, e.g.*, United States v. Oloyede, 933 F.3d 302, 316 (4th Cir. 2019); Horchak v. State, 198 So. 3d 905, 908 (Fla. Dist. Ct. App. 2016).

version than the standard endorsed in *Global Tech*. A good candidate for a narrower version would be the approach adopted by some courts requiring an especially culpable motive: the defendant must have chosen not to investigate further in order to avoid potential legal liability. Or, more broadly, courts might simply require that the defendant chose not to investigate for a highly culpable reason.[63]

Third, it is fair to ask whether the Goldilocks game is worth the candle. Why not simply use recklessness as the required mens rea in all the cases that now require proof of either WB or knowledge? As a matter of policy, there is something to be said for this approach.[64] To be sure, one concern about lowering the standard to recklessness is that this mens rea standard might be too easily satisfied. If the threshold probability of risk for recklessness is low, permitting liability if the defendant harbors any suspicion at all that the incriminating fact exists, then the scope of criminal liability would be greatly enlarged. On the other hand, if recklessness is defined along the lines of the Model Penal Code, requiring "a *gross* deviation from the standard of conduct of a law-abiding person,"[65] this significantly limits the scope of recklessness.

As a matter of legislative interpretation, however, it is understandable that courts have not gone this far (at least not explicitly). The federal criminal code rarely employs recklessness as an explicit mens rea category, and courts only infrequently use the concept of recklessness in interpreting the code. Also, perhaps federal courts feel more comfortable using the WB test of "recklessness plus deliberate avoidance" because the "deliberate" or "conscious" avoidance requirement sounds rather similar to the explicit language in federal statutes requiring that defendant act "willfully" or "knowingly." But this last argument is a slender reed to lean upon. Deliberate, conscious, or knowing avoidance of the truth of an inculpatory proposition is

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63. SARCH, *supra* note 7, ch. 4, endorses a version of this test, as does Simons, *supra* note 7, at 248–53. Another possibility is for courts or legislatures to define knowledge as permitting a lower-level credence than near certainty. Perhaps it should suffice that the defendant believed that it was more likely than not that the relevant incriminating fact existed. Under this approach, however, proportionality principles should then require a lower punishment than if the defendant believed that the incriminating fact was almost certain to obtain.

64. *See* Robbins, *supra* note 9 (endorsing the substitution of recklessness for WB). Robbins cites other commentators sharing this view. *Id.* at 225; *see also* Christopher Sherrin, *Wilful Blindness: A Confused and Unnecessary Basis for Criminal Liability?*, 47 U.B.C. L. REV. 709, 710 (2014) (arguing that recklessness should be employed in lieu of WB in Canadian criminal law).

65. *See* MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985) (emphasis added) (providing the risk that the reckless defendant consciously disregards "must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation").

hardly equivalent to knowledge of that proposition. The mere fact that *some* aspect of the defendant's conduct is deliberate, knowing, or intentional is not nearly enough to characterize the defendant's conduct as knowing with respect to a material element of the offense. If I knowingly drive, and it turns out I am exceeding the speed limit (because, say, my speedometer is broken), it hardly follows that I am knowingly exceeding the speed limit.

Of course, if a criminal statute requires recklessness rather than knowledge with respect to a material element, the statute should impose a lesser punishment than would be justifiable if the defendant had acted with knowledge. And for some crimes, perhaps the legislature should grade degrees of the offense according to mens rea, creating an aggravated degree of the crime when a defendant acts with knowledge and a lesser degree when he or she acts only with recklessness.

Fourth and finally, I believe that it is unwise at this stage of our understanding to make any definitive judgment about which options to pursue—that is, about whether to (a) retain some version of WB, and if so, which version; (b) insist on actual knowledge instead; or (c) lower the mens rea to recklessness for certain crimes. The reason for caution is our ignorance. We simply do not know how ordinary people (actual and potential jurors) and legal specialists (judges and lawyers) interpret and apply terms such as recklessness, willful blindness, belief, and knowledge. In defining and explaining these terms, how much precision is realistically achievable? How much differentiation in mental state terms is practicable?

The critical questions here are accuracy, consistency, and distributive justice. With respect to accuracy, we need to know whether the mens rea categories actually capture and express the legal culpability and responsibility judgments that the law needs to make. With respect to consistency, the question is the likelihood that different factfinders, or different judges, if presented with the same evidence, will reach the same results. In evaluating accuracy and consistency, we must take account of the frequency of errors (false positives and false negatives) and must decide the normative weight to be given to each type of error. And, last but not least, we need to consider the distributive justice consequences of different legal rules. Does the WB doctrine facilitate the prosecution of white-collar criminals who are especially well-positioned to avoid criminal sanctions when the law requires proof of knowledge? Many commentators answer in the affirmative.[66] On the other hand, WB is quite frequently invoked in drug

66. *See supra* note 17. An example of the use of WB to defeat a white-collar criminal's claim of plausible deniability is *United States v. Goffer*, 531 F. App'x. 8, 19–20 (2d Cir. 2013). In this securities fraud prosecution, defendant Kimelman claimed ignorance that Goffer, the

crime prosecutions, and the evidence is overwhelming that such prosecutions disproportionately target Black and Latinx defendants.[67]

Fortunately, in evaluating these questions, we are not writing on a clean slate. In recent decades, a number of scholars have carefully investigated how ordinary people and legally trained actors understand the language and concepts used in the law, including mens rea concepts.[68] For example, in a recent series of articles (some of which I contributed to), scholars described empirical examinations that they undertook of the extent to which ordinary people could understand and apply the mental state terms used in the Model Penal Code.[69] The studies revealed that subjects could accurately and reliably distinguish purposeful from knowing, reckless from negligent, and negligent

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source of non-public information about an upcoming takeover, was an insider and also claimed ignorance that the information was illegally obtained. *Id.* The court rejected Kimelman's argument that he did not consciously avoid knowledge of Goffer's sources:

> While [Goffer] and Kimelman were recruiting Slaine [a third party], Goffer told Slaine that he was "better off not knowing where [his tips] were coming from." That way, Goffer continued, if "someone from the government ever ask[ed] you where did [that tip] come from. You [would] be like, I don't freakin' know where it came from." Building on Goffer's (facetious) assertion that his source was a construction worker, Kimelman added that it was a "[g]uy fixing that pothole down there." His additions to this conversation about the need for plausible deniability underscore Kimelman's conscious avoidance of knowledge as to Goffer's source. The jury was entitled to hear the conscious avoidance instruction.

Id. (citation omitted).

67. *See, e.g.*, Joseph E. Kennedy et al., *Sharks and Minnows in the War on Drugs: A Study of Quantity, Race and Drug Type in Drug Arrests*, 52 U.C. DAVIS L. REV. 729, 730 (2018).

68. *See, e.g.*, Robert A. Beattey & Mark R. Fondacaro, *The Misjudgment of Criminal Responsibility*, 36 BEHAV. SCI. & L. 457, 460 (2018) (discussing how in a surprisingly high percentage of cases, individual decision-makers are likely to attribute the most culpable mental state (purpose) to defendants, even when legal experts would judge the facts as depicting no more than negligent or reckless conduct); Markus Kneer & Sacha Bourgeois-Gironde, *Mens Rea Ascription, Expertise and Outcome Effects: Professional Judges Surveyed*, 169 COGNITION 139, 142 (2017) (discussing how judges as well as laypeople are sensitive to the Knobe effect: they are more likely to ascribe intentionality to conduct if the foreseen outcome is viewed as negative rather than positive).

69. Simons, *supra* note 8, at 147; Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1354 (2011) (concluding that experimental subjects do a good job of sorting cases into MODEL PENAL CODE categories of negligence and purpose but a poor job of sorting cases into knowing or reckless and of distinguishing these two categories); Matthew R. Ginther et al., *The Language of Mens Rea*, 67 VAND. L. REV. 1327, 1359 (2014) (finding that even when MODEL PENAL CODE definitions of recklessness and knowledge are improved, subjects have great difficulty sorting cases accurately); Matthew R. Ginther et al., *Decoding Guilty Minds: How Jurors Attribute Knowledge and Guilt*, 71 VAND. L. REV. 241, 242 (2018) (finding that although subjects can apply MODEL PENAL CODE mens rea framework in a manner largely congruent with MODEL PENAL CODE hierarchy, they tend to regard recklessness as sufficient for punishment even in circumstances where legislatures and courts tend to require knowledge).

from blameless.[70] Strikingly, however, subjects were unable to distinguish reliably between knowing and reckless.[71] This finding, and the findings of other studies,[72] have important implications for whether WB is a useful and viable criterion of criminal culpability, either in general or in specific legal contexts.

Thus, it would be highly desirable if carefully designed studies (e.g., surveys of ordinary people) were conducted to determine whether improved definitions of mental state categories such as knowledge, WB, and recklessness can satisfy the criteria of accuracy, consistency, and distributive justice.[73]

CONCLUSION

For these reasons, courts should refrain from using the WB doctrine or WB instructions until they have evidence that a narrow and precise version of WB can be understood by jurors and can be consistently and fairly applied. If courts feel bound by precedent not to suspend use of the WB doctrine, they should at least restrict WB to one of the narrow versions discussed above (e.g., requiring a motive to avoid criminality or a highly culpable reason for not investigating the facts).

One objection to this conclusion is a concern that eliminating the WB doctrine might cause courts to explicitly or implicitly impose a less rigorous definition of knowledge.[74] If that were to occur, then many of the problems with WB identified in this article would persist and would simply be less visible. This is indeed a legitimate worry. But once again, an empirical analysis of how ordinary people and legal actors understand the mens rea term (here, knowledge) would go some distance toward addressing the

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70. Simons, *supra* note 8, at 147.

71. *Id.*

72. *See, e.g.*, Iris Vilares et al., *Predicting the Knowledge-Recklessness Distinction in the Human Brain*, 14 PROC.'S NAT'L. ACAD. SCI.'S 3222, 3225 (2017) ("[R]esults that provide neural evidence of a detectable difference in the mental state of knowledge in contrast to recklessness and suggest, as a proof of principle, the possibility of inferring from brain data in which legally relevant category a person belongs."); *see also* Owen D. Jones, Read Montague & Gideon Yaffe, *Detecting Mens Rea in the Brain*, 169 U. PA. L. REV. 1 (2020) (summarizing the study by Vilares et al).

73. In his book-length treatment of WB, Sarch offers both an ideal criterion of WB (the "Restricted Equal Culpability Thesis 4") and several simpler versions of the criterion that he believes would be workable for juries. *See* SARCH, *supra* note 7, at 110, 132–38. It would be instructive to see whether one of his simpler versions could indeed be applied consistently and fairly.

74. I thank Jennifer Chacon for suggesting this concern.

concern, especially if we were to employ that analysis to improve the comprehensibility of jury instructions explaining the mens rea term.

A second objection to this conclusion is that there are practical limits to the legal system's ability to explain and consistently apply mens rea concepts and definitions such as knowledge, recklessness, and WB. The perfect should not be the enemy of the good. All legal concepts and definitions are capable of being misunderstood or inconsistently applied. Perhaps the WB doctrine is good enough and cannot realistically be improved. Perhaps WB is no worse, and no more confusing, than the more basic concepts of recklessness and knowledge.

Perhaps. More empirical work certainly should be done to clarify the definitions of recklessness and knowledge so that legal actors apply these mens rea terms accurately, consistently, and fairly. Nevertheless, it is very likely that a rule permitting factfinders to convict a defendant on the basis of either WB or knowledge expands criminal liability relative to a rule requiring them to find that the defendant acted with knowledge. Moreover, the use of the WB doctrine itself has significantly expanded in recent decades.[75] If we care about ensuring that criminal punishment is proportional to a defendant's culpability, we should pause the WB experiment and consider carefully whether continued use of the WB doctrine is justifiable.

75. *See generally* SARCH, *supra* note 7, at 15.