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# CRIMINAL LAW

# THE OSTRICH INSTRUCTION: DELIBERATE IGNORANCE AS A CRIMINAL MENS REA

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## I. INTRODUCTION

In *Philosophical Issues in the Law*,[1] Kenneth Kipnis noted the following:

> From time to time the facts of a particular legal case may raise an issue which forces us to go beyond precedent, beyond statute, and even beyond the task of constitutional interpretation. The facts of such a case may take us to that area where law and philosophy intersect, where we find lawyers thinking like philosophers and philosophers reasoning like lawyers. As we read the cases which raise such issues and as we study articles by philosophers and lawyers which explore them, we can sense that what are being asked are very basic and very important questions about the way our society is to be. Further, we can come to understand that in trying to comprehend and resolve these questions, the profession of law and the discipline of philosophy have much to offer one another.[2]

The criminal-law doctrine of deliberate ignorance, or "willful blindness,"[3] is one such area that raises both legal and philosophical

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1 K. KIPNIS, PHILOSOPHICAL ISSUES IN THE LAW (1977).

2 *Id.* at xi.

3 The term "willful blindness" was first coined by the English authorities. *See infra* notes 19-30 and accompanying text. Other terms referring to the same concept include connivance, conscious avoidance, constructive knowledge, deliberate ignorance, deliberate indifference, deliberate or willful shutting of the eyes, knowledge of the second

issues concerning the level of subjective conviction and objective evidence that constitutes knowledge. Professor Glanville Williams described willful blindness in the following terms:

> A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness.[4]

A common example is the traveler who accepts a large sum of money from a stranger to transport a suitcase but chooses not to examine the contents for fear of discovering contraband.[5] This tactic appears to preserve the defense of ignorance when knowledge is an element of an offense.[6] By refraining from inquiry or investigation, most defendants can deny actual knowledge of the pertinent

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degree, purposely abstaining from ascertaining, and studied ignorance. It is beyond the scope of this discussion to analyze any subtle differences that may exist among these terms. *See generally* United States v. Krowen, 809 F.2d 144, 150 (1st Cir. 1987) (stating that "[w]e are aware . . . of no case holding that willful blindness and conscious avoidance constitute two distinct, albeit closely related, legal doctrines").

[4] G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 57, at 159 (2d ed. 1961). While recognizing that there are two forms of actual knowledge—personal and imputed—Professor Williams noted that willful blindness is a "strictly limited exception" to the requirement of actual knowledge. *Id.* at 157.

> Men readily regard their suspicions as unworthy of them when it is to their advantage to do so. To meet this, the rule is that if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge.

*Id.*

[5] *See, e.g.*, United States v. Batencort, 592 F.2d 916 (5th Cir. 1979). A passing stranger offered Batencort $2800 to carry a suitcase from Colombia to Texas. *Id.* at 917. When United States Customs agents found cocaine in the luggage, Batencort admitted that he knew there was something illegal in the suitcase but had not investigated to determine what it was. *Id.* Rejecting this ploy of deliberate ignorance, the trial court convicted Batencort of knowingly importing cocaine, and the court of appeals affirmed. *Id.* at 918; *cf.* Mitchell, *The Ethics of a Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980). Mitchell depicts four different senses of "not knowing" that a client is guilty, all subjective determinations: the metaphysical sense, the negative sense, the self-deceptive sense, and the factual sense:

> The metaphysical sense is, *e.g.*, "Because anything is possible in an infinite universe, I can never truly know anything, so I cannot 'know' that my client is guilty." . . . The negative sense of not knowing refers to conscious avoidance of the truth, *e.g.*, "Because I tell my clients not to tell me if they did it, I never 'know' that they did it." . . . The self-deceptive sense is, *e.g.*, "In order to function as an advocate, I convince myself, regardless of the facts, that I don't 'know' if my client is guilty." . . . Finally, the factual sense of 'not knowing' is the sense that most of us use in our daily lives, *e.g.*, "Because all I have heard is that he was arrested and I have not heard a single fact about the case, I do not 'know' if he is guilty."

*Id.* at 297 n.12.

[6] Although a wide variety of offenses require knowledge as the governing mens rea, federal narcotics violations are the most common source of current deliberate-ignorance case law. For the willful-blindness provisions of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988), see *infra* note 263.

facts and presumably escape conviction.[7]

Deeming deliberate ignorance to be a culpable attempt to cheat justice,[8] the federal courts have sought to eliminate the defense by expanding the definition of knowledge.[9] Traditionally, knowledge requires an actual awareness of the existence of a particular fact.[10] The federal courts have rejected this positive-knowledge standard in

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7 The prosecution must show knowledge of the material elements of the offense, rather than mere recognition of some wrongdoing. *See, e.g.*, United States v. Morales, 577 F.2d 769, 773 (2d Cir. 1978) (stating that, to convict for knowing importation, "the Government had to show that appellant knew she possessed drugs, not that she was aware that she might be involved in some sort of criminal activity").

8 *See, e.g.*, United States v. Jewell, 532 F.2d 697, 704 (9th Cir.) (en banc) (terming deliberate ignorance a "calculated effort to avoid the sanctions of the statute while violating its substance"), *cert. denied*, 426 U.S. 951 (1976); United States v. Sarantos, 455 F.2d 877, 881 (2d Cir. 1972) (referring to deliberate ignorance as a "loophole" for "circumventing criminal sanctions").

9 United States v. Jewell, 532 F.2d at 697, 702-03. The state courts have also addressed this problem, although they are not in agreement regarding its resolution. One approach equates deliberate ignorance with actual knowledge. For example, in Greenway v. State, 8 Md. App. 194, 259 A.2d 89 (1969), the defendant had been convicted of knowingly possessing a motor vehicle in which the engine serial number had been defaced in order to conceal or misrepresent the identity of the vehicle. *Id.* at 195, 259 A.2d at 91. On appeal, the court addressed two issues: "(1) what evidence is necessary to enable the trier of fact to find beyond a reasonable doubt that appellant *knowingly* [committed the offense]; and (2) was there such evidence before the trier of fact." *Id.* at 195, 259 A.2d at 90-91 (emphasis in original). After noting that the statute did not contain a definition of knowledge, a provision that failure to exercise reasonable inspection constituted knowledge, or a presumption of knowledge from mere possession, *id.* at 196, 259 A.2d at 91, the court held that

> a person may be found to have knowledge under the recognized rule of law, which states that one, with an unlawful purpose in mind, who deliberately "shuts his eyes" to avoid knowing what would otherwise be obvious to view, acts at his peril in this regard as far as the criminal law is concerned, and is treated as having "knowledge of the facts as they are ultimately discovered to be."

*Id.* at 197, 259 A.2d at 92 (quoting R. PERKINS, CRIMINAL LAW 684-85 (1957)). Because the engine had been accessible to the defendant and he admitted that he was aware of the statute, the court found sufficient evidence to prove deliberate ignorance and, therefore, knowledge. *Id.* at 201-02, 259 A.2d at 94. An alternative approach holds that deliberate ignorance is recklessness and defers to the legislature to make statutory changes. The Missouri Court of Appeals adopted this approach in State v. Nations, 676 S.W.2d 282 (Mo. Ct. App. 1984). For a discussion of *Nations*, see *infra* notes 220-30 and accompanying text. The latitude accorded state legislatures in defining knowledge is illustrated in State v. Van Antwerp, 22 Wash. App. 674, 591 P.2d 844 (1979), *rev'd on other grounds*, 93 Wash. 2d 510, 610 P.2d 1322 (1980), in which the Washington Court of Appeals held that "the State may criminalize certain forms of negligence and it may define knowledge on the basis of a prudent or reasonable man standard." *Id.* at 680, 591 P.2d at 848.

10 *See* MODEL PENAL CODE § 2.02(2)(b)(i) (Official Draft and Revised Comments 1985) (stating that a person acts knowingly with respect to the nature of his conduct or the attendant circumstances if "he is aware that his conduct is of that nature or that such circumstances exist"); *see also infra* notes 126-240 and accompanying text (discussing traditional philosophical and legal definitions of knowledge and concluding that both require actual awareness rather than recognition of risk).

favor of the Model Penal Code approach: 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."[11] Thus, the prosecution need only show that the defendant recognized the likelihood of a particular fact. This approach reaches many defendants who would otherwise avoid conviction simply by ignoring their suspicions.

The central legal question raised by this approach is whether a conviction based on a deliberate-ignorance, or "ostrich,"[12] jury instruction is compatible with the constitutional requirement that the prosecution prove each element of the crime, including knowledge, beyond a reasonable doubt.[13] The corresponding philosophical question is whether knowledge of a fact can exist in the absence of subjective certainty or objective confirmation.[14] These questions implicate both the relationship between the individual and the state and the relationship between the judiciary and the legislature. If neither question can be answered in the affirmative, then a conviction that is obtained would violate the defendant's constitutional rights because the state had not met its burden of proving knowledge. Furthermore, if the judiciary substitutes a lesser mental state for statutorily prescribed knowledge, then it encroaches on the leg-

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11 MODEL PENAL CODE § 2.02(7) (Official Draft and Revised Comments 1985) (emphasis added). The Supreme Court approved this definition of knowledge in Leary v. United States, 395 U.S. 6, 46 n.93 (1969). Each of the federal circuits has adopted this definition or a slight variation of it. *See, e.g.*, United States v. Picciandra, 788 F.2d 39 (1st Cir.), *cert. denied*, 479 U.S. 847 (1986); United States v. Olivares-Vega, 495 F.2d 827 (2d Cir.), *cert. denied*, 419 U.S. 1020 (1974); United States v. Caminos, 770 F.2d 361 (3d Cir. 1985); United States v. Martin, 773 F.2d 579 (4th Cir. 1985); United States v. Restrepo-Granda, 575 F.2d 524 (5th Cir.), *cert. denied*, 439 U.S. 935 (1978); United States v. Thomas, 484 F.2d 909 (6th Cir.), *cert. denied*, 414 U.S. 912 (1973); United States v. Moser, 509 F.2d 1089 (7th Cir. 1975); United States v. Cooperative Grain & Supply Co., 476 F.2d 47 (8th Cir. 1973); United States v. Jewell, 532 F.2d 697 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976); Griego v. United States, 298 F.2d 845 (10th Cir. 1962); United States v. Aleman, 728 F.2d 492 (11th Cir. 1984).

12 United States v. Ramsey, 785 F.2d 184, 189 (7th Cir.) (stating, *inter alia*, that "[a]n ostrich instruction informs the jury that actual knowledge and deliberate avoidance of knowledge are the same thing"), *cert. denied*, 476 U.S. 1186 (1986).

13 *See, e.g., In re* Winship, 397 U.S. 358, 364 (1970) (holding that due process requires proof beyond a reasonable doubt of every fact necessary to constitute the crime charged); Christoffel v. United States, 338 U.S. 84, 89 (1949) (stating that all elements of a crime must be proved beyond a reasonable doubt); United States v. Murrieta-Bejarano, 552 F.2d 1323, 1326 (9th Cir. 1977) (Kennedy, J., concurring in part and dissenting in part) (stating that, in deliberate-ignorance cases, "the evidence [must] sustain a finding, beyond a reasonable doubt, that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of being arrested and charged").

14 *See infra* notes 126-95 and accompanying text (discussing the relationship between objective and subjective components of knowledge).

islative prerogative of defining criminal conduct.[15]

This Article explores the deliberate-ignorance doctrine and recognizes that, through the loophole provided by the defense, the defendant may escape conviction by maintaining his or her ignorance despite indications that he or she is involved in criminal activity. The Article concludes, however, that the high-probability/unless definitional approach of the Model Penal Code is an unacceptable solution. Part II outlines the history of the doctrine, tracing its English origins and adoption in American law. Part III examines *United States v. Jewell*,[16] the most influential American discussion of deliberate ignorance, and addresses subsequent limitations of the doctrine.

Part IV explores the philosophical and legal definitions of knowledge. Subpart A analyzes the philosophical concepts of knowing, trowing or opining, and believing, and concludes that knowing requires both subjective certainty and sufficient objective confirmation of a fact. Subpart B discusses the legal definitions of knowledge and recklessness. This subpart demonstrates that, like its philosophical counterpart, legal knowledge requires actual awareness of the existence of a fact, rather than mere recognition of its probability. An examination of the Model Penal Code's definitional scheme, judicial and academic response to the deliberate-ignorance doctrine, and applicable jury instructions leads to this subpart's conclusion that deliberate ignorance constitutes recklessness, rather than knowledge.[17] Subpart C discusses the additional danger of imprecise jury instructions allowing conviction for merely negligent behavior, thereby eliminating even the subjective aspect of knowledge.[18]

Part V suggests that statutory revision, specifically the addition of recklessness or specific deliberate-ignorance provisions as an alternative basis for conviction, would correct these abuses and limit the deliberate-ignorance defense. A recklessness standard will re-

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15 As Chief Justice John Marshall wrote in 1820, "[i]t is the legislature, not the court, which is to define a crime, and ordain its punishment." United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 93 (1820).

16 532 F.2d 697 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976).

17 Recklessness is a conscious disregard of a substantial risk that a material element exists or will result from a person's conduct. MODEL PENAL CODE § 2.02(2)(c) (Official Draft and Revised Comments 1985); *see also* BLACK'S LAW DICTIONARY 661 (5th ed. 1983) (defining recklessness as disregard of probable consequences).

18 Negligence is the failure to exercise the care that a reasonably prudent person would exercise in similar circumstances. *See, e.g.*, BLACK'S LAW DICTIONARY 538 (5th ed. 1983); *cf.* MODEL PENAL CODE § 2.02(2)(d) (Official Draft and Revised Comments 1985) (stating that criminal liability for negligence requires a "gross deviation" from the reasonable-person standard). The actor's conduct is measured against an objective standard, without reference to his actual state of mind.

tain the subjective component of knowledge and will reach those defendants who consciously disregard a substantial risk that a particular fact exists. Statutory identification of the culpable mental state as recklessness or willful blindness, rather than knowledge, will also ensure that the defendant is convicted of the crime charged, instead of a judicially created alternative. Additionally, clarification of the mens rea requirement will produce more precise jury instructions, thus limiting the risk of conviction for negligence. Finally, in the event that the legislature does not reduce the mens rea requirement for a particular offense, Part V concludes that the judiciary should respect this decision and adhere to the traditional definition of knowledge.

## II. HISTORICAL DEVELOPMENT OF THE DOCTRINE OF DELIBERATE IGNORANCE

The correlation between knowledge and deliberate ignorance initially emerged in England in 1861.[19] *Regina v. Sleep*[20] was the first case in which this equivalence received judicial approval.[21] The defendant had been charged with possession of naval stores in violation of the Embezzlement of Public Stores Act,[22] an offense requiring knowledge that the goods were property of the government.[23] In quashing the conviction, Judge Willes stated that "the jury have not found, either that the man knew that the stores were marked [as government property], or that he willfully abstained from acquiring that knowledge."[24] This comment suggests that, with sufficient evidence, the court would have upheld conviction for deliberate ignorance in lieu of actual knowledge.

The doctrine then lay dormant for fourteen years until *Bosley v. Davies*[25] was decided in 1875.[26] The defendant, charged with allowing gaming on her premises, insisted that actual knowledge of the activity was necessary.[27] The court, however, disagreed:

19 Edwards, *The Criminal Degrees of Knowledge*, 17 MOD. L. REV. 294, 298 (1954).

20 169 Eng. Rep. 1296 (Cr. Cas. Res. 1861).

21 Edwards, *supra* note 19, at 298. Professor Edwards noted that the Criminal Lunatic Asylum Act, 1860, § 12, enacted one year before *Sleep*, made it a crime to allow the escape of an asylum inmate through willful neglect or connivance. *Id.*

22 Embezzlement of Public Stores Act, 1697, 9 & 10 Will. 3, ch. 41, § 2.

23 In two earlier prosecutions under the same Act, Regina v. Wilmett, 3 Cox C.C. 281 (1848), and Regina v. Cohen, 8 Cox C.C. 41 (1858), the court had required actual knowledge. *See* Edwards, *supra* note 19, at 298.

24 Regina v. Sleep, 169 Eng. Rep. 1296, 1302 (Cr. Cas. Res. 1861).

25 1 Q.B.D. 84 (1875).

26 Edwards, *supra* note 19, at 299.

27 The defendant, a hotel-keeper, was accused of suffering gaming to be carried on in a licensed premises. *Id.* The players, who had been in a private room, corroborated the

"[A]ctual knowledge in the sense of seeing or hearing by the party charged is not necessary, but there must be some circumstances from which it may be inferred that he or his servants had connived at what was going on."[28] Other courts repeated this rule in a series of gaming decisions and in a variety of other criminal prosecutions that required knowledge.[29] By the end of the century, willful blindness was firmly established as an alternative to actual knowledge in English law.[30]

In American law, an early discussion of the doctrine occurred in *People v. Brown*,[31] decided in 1887. In *Brown*, the defendants had been charged with procuring false evidence.[32] The trial judge gave the following instruction with respect to knowledge:

> There seems to be a prevalent notion that no one is chargeable with more knowledge than he chooses to have; that he is permitted to close his eyes upon all sources of information, and then excuse his ignorance by saying that he does not see anything. . . . [I]f he has the means of ascertaining the true state of facts by the exercise of ordinary diligence, he is bound to do so.[33]

The California Supreme Court reversed the convictions because the instruction indicated that mere negligence without intent was sufficient for conviction.[34] The court reserved the question of deliberate ignorance, however, stating that, "[i]f a case could arise . . . in which it should appear that he suspected the fact, and abstained from inquiry lest he should know, knowledge might be inferred."[35]

The United States Supreme Court signaled its approval of de-

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defendant's assertion that they had not received the cards from her, nor was she aware of their activities. *Id.*

28 *Davies*, 1 Q.B.D. at 88.

29 *See* Edwards, *supra* note 19, at 299-302 (providing citations).

30 *Id.* at 301. Edwards added that, "up to the present day, no real doubt has been cast on the proposition that connivance is as culpable as actual knowledge." *Id.* at 302.

31 74 Cal. 306, 16 P. 1 (1887).

32 *Id.* at 307, 16 P. at 1. The defendants had allegedly obtained an affidavit to be used on a motion for a new trial from a woman they knew to be incompetent. *Id.*

33 *Id.* at 308-09, 16 P. at 2.

34 *Id.* at 309-10, 16 P. at 2-3. The concern that deliberate-ignorance jury instructions would result in convictions for negligence reappeared in narcotics cases in the late 1970s. This led to a series of decisions holding that these instructions should be given only when there are facts indicating that the defendant deliberately avoided knowledge. *See infra* notes 120-25 and accompanying text (discussing United States v. Murrieta-Bejarano, 552 F.2d 1323 (9th Cir. 1977), the leading case in this area); *see also infra* notes 241-60 and accompanying text (outlining the continuing danger of conviction for negligence that arises from imprecise jury instructions).

35 People v. Brown, 74 Cal. 306, 310, 16 P. 1, 3 (1887). Twelve years later the court did in fact state that, in a prosecution for obtaining promissory notes by false statements, such statements must be made knowingly "or (which is tantamount to knowledge of falsity) recklessly, and without information justifying a belief that they were true." People v. Cummings, 123 Cal. 269, 271-72, 55 P. 898, 899 (1899). *But see* State v.

liberate ignorance as an alternative to actual knowledge in 1899, in *Spurr v. United States*.[36] The defendant had been charged with willfully certifying a check with insufficient funds in the drawer's account.[37] The Court interpreted "willful" to require both wrongful intent and knowledge,[38] and held that "evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank."[39] The Court also noted the trial judge's instruction that the jury could convict if it found that the defendant had "shut his eyes to the fact and purposely refrained from inquiry or investigation for the purpose of avoiding knowledge."[40] Nevertheless, the Court reversed the conviction because the trial judge's inadequate response to the jury's request for clarification of "willful" certification had foreclosed the defense of an honest contrary belief in the sufficiency of the drawer's funds.[41]

Following *Spurr*, the correlation between knowledge and deliberate ignorance appeared in a number of federal bankruptcy decisions.[42] Typical of these decisions is *In re Gurvitz*,[43] in which the defendant's failure to take stock of his assets—his "refusal to face the facts"—was sufficient to establish the requisite intent in a bankruptcy-fraud proceeding.[44] Federal courts also allowed deliberate ignorance to substitute for actual knowledge in *United States v. Erie R. Co.*[45] and *United States v. General Motors Corp.*,[46] both of which in-

Pickus, 63 S.D. 209, 221-23, 257 N.W. 284, 290-91 (1934) (rejecting a similar instruction and distinguishing the remarks in *Cummings* as dicta).

36 174 U.S. 728 (1899).

37 *Id.* at 729-30.

38 *Id.* at 736.

39 *Id.* at 735.

40 *Id.* at 738-39.

41 *Id.* at 739. Failure to balance deliberate-ignorance jury instructions with the caveat that an actual belief in the nonexistence of a fact is a complete defense is a recurring problem. *See infra* notes 107-25 and accompanying text (noting that failure to balance a charge constitutes reversible error, but that courts nevertheless continue to misinstruct juries).

42 *See, e.g.*, United States v. Yasser, 114 F.2d 558, 560 (3d Cir. 1940) (dicta) (stating that, in a prosecution for knowing and fraudulent concealment of assets from a receiver and trustee in bankruptcy, the defendant must have "actual knowledge . . . [unless] he willfully closed his eyes"); Rachmil v. United States, 43 F.2d 878, 881 (9th Cir. 1930) (dicta) (noting that the offense of knowing concealment "cannot be committed without some knowledge . . . unless [the defendant] willfully closes his eyes to that which is obvious"), *cert. denied*, 283 U.S. 819 (1931).

43 276 F. 931 (D. Mass. 1921).

44 *Id.* at 932.

45 222 F. 444 (D.N.J. 1915). The court held that one may not "willfully and intentionally remain in ignorance of the facts . . . which reasonable inquiry and investigation would reveal." *Id.* at 448-49.

46 226 F.2d 745 (3d Cir. 1955). The court stated that, while "one may not willfully and intentionally remain ignorant, . . . [o]nly a finding of *conscious purpose* to avoid en-

volved prosecutions under the Elkins Act.[47] The doctrine was applied as well in early prosecutions for obtaining money by false pretenses.[48]

The deliberate-ignorance question gained new prominence in the 1970s as the result of federal narcotics prosecutions. In response to rapidly increasing rates of drug use and addiction, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970.[49] The Act prohibits the knowing importation of controlled substances[50] and the knowing possession of such substances with intent to distribute.[51] Because knowledge had

lightenment will justify charging the defendant with knowledge." *Id.* at 749 (emphasis in original).

47 The Hepburn Amendment of 1906, ch. 3591, § 2, 34 Stat. 587, to the Elkins Act of 1903, ch. 708, § 1, 32 Stat. 847 (codified as amended at 34 Stat. 587, 49 U.S.C. §§ 41-43 (repealed 1978)), which was at issue in *Erie*, prohibited the granting of a concession by a railroad to a shipper. Paragraph 3 of section 1 of the Elkins Act, 49 U.S.C. § 41(3), which was addressed in *General Motors*, prohibited any shipper from knowingly receiving a rebate from a railroad.

48 *See, e.g.*, State v. Lintner, 141 Kan. 505, 509, 41 P.2d 1036, 1038-39 (1935) (stating that, in a prosecution for obtaining funds by false pretenses, the defendant "could not shut his eyes to information in his bank"); Rand v. Commonwealth, 176 Ky. 343, 355, 195 S.W. 802, 808 (1917) (noting that "making a statement recklessly and without information justifying a belief in its truth is equivalent to the making of a statement knowing it to be false"); People v. Burgess, 244 N.Y. 472, 475, 155 N.E. 745, 746 (1927) (dicta) (indicating that deliberate ignorance may substitute for actual knowledge in a charge of grand larceny resulting from stock fraud). For early examples of deliberate ignorance in other contexts, see State v. Rupp, 96 Kan. 446, 449, 151 P. 1111, 1112 (1915) (holding that one who makes an affidavit is guilty of perjury if he purposely abstains from inquiry into the facts to which he swears); State v. Drew, 110 Minn. 247, 249, 124 N.W. 1091, 1092 (1910) (stating that, in a prosecution for receipt of funds knowing the bank to be insolvent, "a banker cannot shut his eyes to his own financial status, and he is required to investigate conditions which are suggested by circumstances already known to him"); People v. Sugarman, 216 A.D. 209, 215, 215 N.Y.S. 56, 63 (holding that conscious avoidance of the status of stock "amounts in law to knowledge" in a prosecution for hypothecating a customer's stock), *aff'd*, 243 N.Y. 638, 154 N.E. 637 (1926).

49 The Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C. § 841(a)(1) (1988), provides that "it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Section 1002(a) of the Act, 21 U.S.C. § 952(a) (1988), states that "[i]t shall be unlawful to import into the customs territory of the United States . . . any controlled substance." This section also requires knowledge that the substance is controlled. United States v. Restrepo-Granda, 575 F.2d 524, 527 (5th Cir.), *cert. denied*, 439 U.S. 935 (1978); *see also* United States v. Davis, 501 F.2d 1344, 1345 (9th Cir. 1974) (noting that, where indictment specified that substance was LSD, it was error to instruct that a finding that the substance was either LSD or psilocybin satisfied the requirement that the defendant knew that the substance was controlled, but holding the error to be harmless).

50 21 U.S.C. § 952(a) (1988).

51 *Id.* § 841(a)(1).

theretofore referred to *actual* knowledge,[52] drug traffickers saw a convenient defense in deliberate ignorance. The ease with which narcotics are concealed,[53] coupled with most drug traffickers' reluctance to disclose the details of their operations,[54] facilitated use of the defense. Conversely, prosecutors saw a dual advantage in equating deliberate ignorance and knowledge. Such an approach would close the deliberate-ignorance "loophole" and, because deliberate ignorance is easier to prove than actual knowledge is, reduce the prosecutorial burden.[55]

In 1969, the Supreme Court laid the foundation for the modern doctrine of deliberate ignorance. In *Leary v. United States*,[56] in which the defendant had been charged with knowingly transporting illegally imported marijuana with knowledge of its illegal importation,[57] the Court "employed as a general guide" the Model Penal Code definition of knowledge.[58] The Model Penal Code does not require actual knowledge; instead, 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."[59] The Court found that, even using the Model Penal Code definition, it could not be said that a majority of marijuana smokers were aware that a high probability existed that their marijuana had been imported.[60] Thus,

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52 *See infra* notes 72-75 and accompanying text (discussing absence of precedent for substituting deliberate ignorance for actual knowledge).

53 Very small quantities of illicit drugs are often quite valuable. A mere milligram of pure heroin, for example, cost $2.00 in 1974. *See* G. UELMAN & V. HADDOX, DRUG ABUSE AND THE LAW SOURCEBOOK § 2.4(b) (1989). At 28 grams per ounce, one ounce of pure heroin was worth $56,000. Similarly, the 1984 price of cocaine was $25,000 per kilogram, or $700 an ounce. *Id.* § 2.6(c) (citing Wall St. J., Apr. 27, 1984, at 1, col. 1). Thus, it is quite easy for narcotics traffickers to conceal extremely valuable quantities of drugs.

54 Drug traffickers seek to avoid detection by sharing as little information as possible. A "complex, multilayered distribution system . . . makes it possible for each participant in the system to deal with only a few others whom he knows and trusts, and thus to minimize his risk of arrest." *Id.* § 7.1. Traffickers are also careful in their selection of customers, preferring older or familiar clients. *See* R. BLUM, THE DREAM SELLERS: PERSPECTIVES ON DRUG DEALERS 125 (1972) (noting that those dealers who had been arrested often sold to strangers or to younger customers).

55 *See, e.g.*, Comment, *Willful Blindness as a Substitute for Criminal Knowledge*, 63 IOWA L. REV. 466, 471 (1977) (noting that it is easier to prove deliberate avoidance of investigation through circumstantial evidence than it is to prove confirmation and actual knowledge).

56 395 U.S. 6 (1969).

57 The statute then provided that possession of marijuana was sufficient to charge the defendant with knowledge of illegal importation, unless he explained the possession to the satisfaction of the jury. *See* 21 U.S.C. § 176(a).

58 *Leary*, 395 U.S. at 46 n.93.

59 MODEL PENAL CODE § 2.02(7) (Official Draft and Revised Comments 1985).

60 395 U.S. at 47-53.

the presumption was held unconstitutional with respect to marijuana.[61]

Eight months later, in *Turner v. United States*,[62] the Court reiterated this definition in the deliberate-ignorance context, citing the Model Penal Code[63] and holding that "those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled."[64] Thus, the Court confirmed that actual knowledge is not necessary, although it offered no explanation beyond citation to the Model Penal Code.[65]

In the wake of *Leary* and *Turner*, deliberate-ignorance instructions appeared with increasing frequency in federal narcotics prosecutions.[66] Use of the instruction also extended beyond the drug

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61 *Id.* at 52-53.

62 396 U.S. 398 (1970). Turner was charged under 21 U.S.C. § 174 with knowingly receiving, concealing, and facilitating transportation and concealment of heroin knowing the same to have been illegally imported. He was also charged with the same offense with respect to cocaine. *Turner*, 396 U.S. at 398. Section 174 contained the identical provision at issue in *Leary*: possession of the drug was sufficient to indicate knowledge of its illegal importation unless the defendant explained possession to the satisfaction of the jury. Because the Court determined that little or no heroin was produced in the United States, it held the presumption to be constitutional as applied to heroin. *Turner*, 396 U.S. at 408-16. The Court held the presumption to be unconstitutional with respect to cocaine, however, because more cocaine was lawfully produced (and subsequently stolen) than was smuggled into the United States. *Id.* at 418-19.

Congress repealed these presumptions in 1970. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1101(a)(2), 84 Stat. 1236. One commentator has suggested that this repeal indicated Congress' disapproval of the Court's use of the Model Penal Code's definition and the deliberate-ignorance standard in *Leary* and *Turner*. *See* Comment, *supra* note 55, at 474. The author noted, however, that "no reason was expressly given for the deletion." *Id.* This fact was cited as support for the deliberate-ignorance standard in United States v. Jewell, 532 F.2d 697, 703 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976). Congress was aware of *Leary* and *Turner* and expressed no dissatisfaction with their definition of knowledge. *See* Comment, *supra* note 55, at 474. Given this congressional silence, the repeal of the presumptions is inconclusive with respect to Congress' opinion of the Court's decisions in *Leary* and *Turner*.

63 *Turner*, 396 U.S. at 416 n.29.

64 *Id.* at 417 (footnotes omitted).

65 The Court merely noted that this standard had been used in *Leary*. *Id.* at 416 n.29.

66 *See, e.g.*, United States v. Aleman, 728 F.2d 492, 494 (11th Cir. 1984) (importation and possession of cocaine with intent to distribute); United States v. Cano, 702 F.2d 370, 371 (2d Cir. 1983) (same); United States v. Nicholson, 677 F.2d 706, 710-11 (9th Cir. 1982) (conspiracy to import and possess marijuana with intent to distribute); United States v. Erwin, 625 F.2d 838, 841 (9th Cir. 1980) (importation of heroin); United States v. Restrepo-Granda, 575 F.2d 524, 528-29 (5th Cir.) (importation and possession of cocaine with intent to distribute), *cert. denied*, 439 U.S. 935 (1978); United States v. Moser, 509 F.2d 1089, 1092-93 (7th Cir. 1975) (possession with intent to distribute lysergic acid diethylamide (LSD)); United States v. Dozier, 522 F.2d 224, 226-27 (2d Cir.) (aiding and abetting the possession of cocaine with intent to distribute), *cert. denied*, 423 U.S. 1021 (1975); United States v. Joly, 493 F.2d 672, 675-77 (2d Cir. 1974) (impor-

context to offenses such as filing false statements in income-tax returns,[67] making false statements to the Immigration and Naturalization Service,[68] fraudulent use of the mails or interstate wires,[69] interstate transportation of stolen United States Treasury bills,[70] and willfully harboring or concealing an escaped federal prisoner.[71] Several recent writers have sought to justify this substitution of deliberate ignorance for actual knowledge as an established principle of criminal law.[72] This justification, however, is at best misleading. Although the doctrine received some attention prior to its emergence in federal drug prosecutions, judicial approval was often tentative or devoid of support. Several courts reserved judgment on whether deliberate ignorance would suffice when knowledge was re-

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tation of cocaine, possession of cocaine not entered in the manifest on board an aircraft, and possession with intent to distribute).

67 *See* United States v. Egenberg, 441 F.2d 441, 444 (2d Cir.) (holding that, in prosecution for falsely stating in an alien's tax return that the alien did not intend to return to the United States, an accountant need only have acted with reckless disregard of whether the statement was true or with a conscious purpose to avoid learning the truth), *cert. denied*, 404 U.S. 994 (1971).

68 *See* United States v. Sarantos, 455 F.2d 877, 880-82 (2d Cir. 1972) (upholding a similar instruction where defendants were charged with conspiracy to make false statements in conjunction with sham marriages).

69 *See, e.g.*, United States v. Joyce, 499 F.2d 9, 23 (7th Cir.) (mail fraud in connection with an insurance scheme), *cert. denied*, 419 U.S. 1031 (1974); United States v. Frank, 494 F.2d 145, 152-53 (2d Cir.) (mail fraud involving investment in foreign land), *cert. denied*, 419 U.S. 828 (1974); United States v. Sheiner, 410 F.2d 337, 340-41 (2d Cir.) (mail and wire fraud in possession and sale of fraudulently altered pennies), *cert. denied*, 396 U.S. 859 (1969).

70 *See* United States v. Brawer, 482 F.2d 117, 127 (2d Cir. 1973); United States v. Jacobs, 475 F.2d 270, 280-81 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973). In cases concerning stolen goods, the doctrine of deliberate ignorance complements the presumption that possession of the fruits of crime shortly after its commission justifies the inference that the possession is guilty unless explained in some way that is consistent with innocence. *See Jacobs*, 475 F.2d at 280 (discussing the presumption and asking "why did not [the defendant] take one of the simple means that would have led to revelation of the truth?"); *Brawer*, 482 F.2d at 125-27 (citing the presumption and holding that the defendants had failed to rebut it in light of the evidence of deliberate ignorance).

71 *See* United States v. Eaglin, 571 F.2d 1069, 1074-75 (9th Cir. 1977) (applying the doctrine in a case of willfully harboring or concealing a federal prisoner, which requires knowledge that the prisoner is an escapee), *cert. denied*, 435 U.S. 906 (1978).

72 *See* United States v. Jewell, 532 F.2d. 697 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976). The *Jewell* court stated that this "legal premise . . . is firmly supported by leading commentators here and in England." *Id.* at 700. The extensive citations provided by the court, however, reveal only six cases decided before 1970. *Id.* at 703-04 nn.12-13. That this doctrine is relatively new and in need of an analytical framework is demonstrated by the comprehensive treatment that the *Jewell* court provided. *See also* Perkins, *"Knowledge" as a Mens Rea Requirement*, 29 HASTINGS L.J. 953, 956-58 (1978). Professor Perkins stated that "the common law holds that one knew what he would have known if he had not deliberately avoided knowing it." *Id.* at 958. Although Perkins provides a wealth of case law, his citations are almost exclusively post-1970. *See id.* at 956-58 nn.18-28.

quired,[73] and many others mentioned the doctrine only in dicta.[74] Among the courts holding that deliberate ignorance was equivalent to knowledge, most provided no authority for this conclusion.[75] Given this lack of reasoned precedent for a correlation between deliberate ignorance and knowledge, American courts have developed another basis for the doctrine: a definition of knowledge that was expanded to include deliberate ignorance.

## III. *UNITED STATES V. JEWELL* AND SUBSEQUENT LIMITATIONS

*United States v. Jewell*,[76] decided by the United States Court of Appeals for the Ninth Circuit in 1976, provides the most comprehensive and influential discussion of deliberate ignorance to date.[77] The defendant, Jewell, had been charged with knowing possession of a controlled substance with intent to distribute. He had crossed the Mexican-American border with 110 pounds of marijuana concealed in a secret compartment in the trunk of the automobile he was driving.[78] There was circumstantial evidence that indicated that Jewell had actual knowledge of the presence of the marijuana.[79] Ev-

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[73] *See supra* notes 31-35 and accompanying text (discussing People v. Brown, 74 Cal. 306, 16 P. 1 (1887), in which the California Supreme Court withheld judgment on the doctrine); *see also* State v. Pickus, 63 S.D. 209, 233, 257 N.W. 284, 295 (1934) (stating that the term "designedly" might "*possibly* [reach] the man who knew he had no belief whatever concerning [a statement] when he made it," but rejecting as implying negligence a jury instruction that "making a statement recklessly without information to justify a belief in its truth is equivalent to making a statement knowing it to be false") (emphasis added).

[74] *See, e.g.*, United States v. Yasser, 114 F.2d 558, 560 (3d Cir. 1940); Rachmil v. United States, 43 F.2d 878, 881 (9th Cir. 1930), *cert. denied*, 283 U.S. 819 (1931); People v. Cummings, 123 Cal. 269, 271-72, 55 P. 898, 899 (1899); Rand v. Commonwealth, 176 Ky. 343, 355, 195 S.W. 802, 808 (1917); People v. Burgess, 244 N.Y. 472, 475, 155 N.E. 745, 746 (1927).

[75] *See, e.g.*, Spurr v. United States, 174 U.S. 728, 735 (1899); State v. Lintner, 141 Kan. 505, 509, 41 P.2d 1036, 1038-39 (1935); State v. Rupp, 96 Kan. 446, 449, 151 P. 1111, 1112 (1915); People v. Sugarman, 216 A.D. 209, 215 N.Y.S. 56, 63, *aff'd*, 243 N.Y. 638, 154 N.E. 637 (1926).

[76] 532 F.2d 697 (9th Cir.) (en banc) (9-to-4 decision), *cert. denied*, 426 U.S. 951 (1976).

[77] Indeed, the deliberate-ignorance jury instruction is often termed a "*Jewell* instruction." *See, e.g.*, United States v. Beckett, 724 F.2d 855, 856 (9th Cir. 1984); United States v. Nicholson, 677 F.2d 706, 710 (9th Cir. 1982); United States v. Erwin, 625 F.2d 838, 841 (9th Cir. 1980).

[78] *Jewell*, 532 F.2d at 698.

[79] *Id.* at 698-99. A stranger had approached Jewell and a companion in a Mexican bar, asked them if they wanted to smoke some marijuana, and offered them $100 to drive a car into the United States. *Id.* at 699 n.1. Jewell accepted the offer and was told to leave the vehicle at the address on the car registration, leaving the keys in the ashtray. *Id.* When a Customs agent questioned Jewell about the secret compartment, he acknowledged that he had been aware of it but that it had been in the car when he got it. *Id.* The *Jewell* court suggested that this evidence could have indicated "an abortive

idence also existed that, as Jewell claimed, he did not have positive knowledge of the contents of the compartment because he had deliberately avoided that knowledge in the hope of escaping conviction if the drugs were discovered.[80]

Jewell had urged that the jury be instructed that only actual knowledge could suffice for conviction, but the trial judge rejected this suggestion.[81] Instead, the judge instructed the jury that "knowingly" meant voluntarily and intentionally, rather than accidentally or mistakenly.[82] He further stated:

> The Government can complete their [sic] 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.[83]

The jury found Jewell guilty, and he appealed on the basis of the trial judge's instruction.[84]

Sitting en banc, the Ninth Circuit affirmed Jewell's conviction and fashioned a three-pronged rationale for equating deliberate ignorance and knowledge.[85] First, the court suggested that the doctrine was already established in American law.[86] Second, the court stated that "[t]he substantive justification for the rule is that deliber-

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scheme, concocted and carried out by appellant from the beginning, to acquire a load of marijuana in Mexico and return it to Los Angeles for distribution for profit." *Id.*

80 Jewell told a Drug Enforcement Administration (DEA) agent that "he thought there was probably something wrong and something illegal in the vehicle, but that he checked it over." *Id.* at 699 n.2. Jewell looked in the glove compartment, under the seats, and in the trunk, but he told the DEA agent that "[h]e didn't find anything, and, therefore, he assumed that the people at the border wouldn't find anything either." *Id.* At trial, Jewell testified that he had seen the "void" in the trunk but had not investigated further. *Id.*

81 *Id.* at 699. The trial judge found the instruction unacceptable because it suggested that "absolutely, positively, he has to know that it's there." *Id.* The judge stated that, "in this case, it's not too sound an instruction because we have evidence that if the jury believes it, they'd be justified in finding he actually didn't know what it was—he didn't because he didn't want to find out." *Id.*

82 *Id.*

83 *Id.* at 700.

84 *Id.* at 698.

85 The court had originally taken the case en banc "to perform a simple but necessary 'housekeeping' chore" of determining whether possession of a controlled substance is a "general intent" crime. *Id.* The court then found that, "[i]n the course of en banc consideration of this case, we have encountered another problem that divides us"—the problem of deliberate ignorance. *Id.*

86 *See id.* at 700-03; *see also supra* notes 66-75 and accompanying text (discussing the validity of this contention and concluding that deliberate ignorance is in fact a recent development in American law).

ate ignorance and positive knowledge are equally culpable"[87] and concluded that, were deliberate ignorance available as a defense, "[i]t cannot be doubted that those who traffic in drugs would make the most of it."[88] Finally, the court found that "[t]he textual justification is that in common understanding one 'knows' facts of which he is less than absolutely certain."[89] The court distinguished positive knowledge and deliberate ignorance, however, cautioning that "[i]t is no answer to say that in such cases the fact finder may infer positive knowledge."[90] Yet, the court held that knowledge includes both deliberate ignorance and positive knowledge.[91]

The *Jewell* majority adopted as its standard the Model Penal Code definition of knowledge: one knows a particular fact when he "is aware of a high probability of its existence, unless he actually believes that it does not exist."[92] The court noted that "the required state of mind differs from positive knowledge only so far as necessary to encompass a calculated effort to avoid the sanctions of the statute while violating its substance."[93] Although the court held that the jury should have been instructed in terms of the Model Penal Code, the trial judge's instruction did not require reversal because Jewell had not objected and the deficiency did not constitute plain error.[94] The majority concluded that the instruction that knowledge was established if "his ignorance . . . was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle" implied that the defendant must have been aware of facts indicating the near-certain presence of contraband; otherwise, his ignorance would not be "solely

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87 *Jewell*, 532 F.2d at 700. For discussion of culpability and deliberate ignorance, see *infra* note 265.

88 *Jewell*, 532 F.2d at 703. The court noted that a requirement of positive knowledge "is inconsistent with the Drug Control Act's general purpose to deal more effectively 'with the growing menace of drug abuse in the United States.' " *Id.* (quoting H.R. REP. No. 91-1444, 91st Cong., 2d Sess. 3, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4567); *see also supra* notes 53-54 and accompanying text (noting that secrecy and size-to-value ratio inherent in drug transactions are conducive to a deliberate-ignorance defense).

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

90 *Id.* at 703. The court continued that "[i]t is probable that many who performed the transportation function, essential to the drug traffic, can truthfully testify that they have no positive knowledge of the load they carry." *Id.* (emphasis omitted).

91 *Id.* at 700.

92 *Id.* at 700, 704 n.21 (citing MODEL PENAL CODE § 2.02(7) (Proposed Official Draft 1962)).

93 *Id.* at 704.

94 *Id.* at 704 n.21. The majority concluded that Jewell had neither objected at trial nor on appeal to the specific wording of the instruction. *Id. But see infra* note 104 and accompanying text (discussing the dissent's assertion that Jewell had in fact objected at trial and that the harmless-error standard of review was therefore required).

and entirely" the result of a conscious purpose to avoid the truth.[95] The majority also stated that Jewell's deliberate ignorance was inconsistent with "a good faith belief that there was no contraband present."[96]

Judge (now United States Supreme Court Justice) Kennedy, dissenting, rejected each of these conclusions.[97] He found the challenged instruction to be defective because it lacked the "high probability" language, and therefore allowed conviction of one who deliberately remains ignorant yet does not recognize the likelihood of the particular fact at issue.[98] He next questioned the failure to instruct that the defendant could not be convicted if he "actually believed" that there was no controlled substance in the vehicle.[99] He noted that, in failing to emphasize the subjective criterion, the instruction "may allow a jury to convict on an objective theory of knowledge—that a reasonable man should have inspected the car and would have discovered what was hidden inside."[100]

Judge Kennedy also challenged that portion of the charge that allowed conviction on a finding that Jewell had not been "actually aware" that the vehicle contained a controlled substance.[101] He found this aspect of the instruction "unacceptable because true ignorance, no matter how unreasonable, cannot provide a basis for criminal liability when the statute requires knowledge."[102] The dissenting opinion concluded that this language impermissibly indicated that deliberate ignorance is an alternative to, rather than a

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95 *Jewell*, 532 F.2d at 704 n.21. The court added that, "[u]nder this instruction, neither [recklessness] nor suspicion followed by failure to make full inquiry would be enough." *Id.*

96 *Id.* The court also noted that the instruction had not permitted "the jury to convict on an 'objective' rather than 'subjective' theory of the knowledge requirement; that is, on the theory that appellant was chargeable with knowledge because a reasonable man would have inspected the car more thoroughly and discovered the contraband inside." *Id.*

97 Judge Kennedy was joined by Judges Ely, Hufstedler, and Wallace. *See id.* at 705.

98 *Id.* at 707 (Kennedy, J., dissenting). Judge Kennedy suggested as an example a child who is given a gift-wrapped package while in Mexico but chooses not to open the package until his return home. *Id.* Although the child forms a conscious purpose to avoid enlightenment, his state of mind is innocent unless he suspects contraband. *Id.*

99 *Id.*

100 *Id.* Judge Kennedy noted that the Second Circuit had recently reversed a similar conviction because the trial judge did not balance his instruction with a provision that the defendant could not be convicted if he held an honest contrary belief. *Id.* (citing United States v. Bright, 517 F.2d 584, 586-89 (2d Cir. 1975)); *see infra* notes 241-60 and accompanying text (discussing the risk of conviction for negligence under faulty jury instructions).

101 *Jewell*, 532 F.2d at 707 (Kennedy, J., dissenting).

102 *Id.*

definition of, knowledge.[103] Finally, the dissent found that Jewell had in fact objected to the instruction, that the deficiencies did not constitute harmless error, and that his conviction should therefore have been reversed.[104]

While disagreeing on its application to the particular jury instruction at issue in *Jewell*, both the majority and the dissent identified the Model Penal Code definition of knowledge as the standard for deliberate-ignorance charges.[105] Since *Jewell*, the instruction has been revised, refined, and repeated by courts, but it has rarely been rejected.[106] Several circuits, however, have imposed limitations on the wording of the instruction and the circumstances in which it may be given.

In *United States v. Valle-Valdez*,[107] for example, a Ninth Circuit case with facts similar to those in *Jewell*,[108] the court considered an issue that had been of concern to the *Jewell* dissenters: whether the jury instruction was adequate if it "fail[ed] to add that the defendant's 'conscious purpose to avoid learning the truth' is culpable only if . . . he was aware of the high probability that the vehicle carried contraband."[109] Holding that "deliberate avoidance of knowledge is culpable only when coupled with a subjective awareness of high

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103 *Id.*

104 *Id.* at 707-08. Jewell's counsel had objected "strenuously" that the instruction would allow conviction for failing to investigate the car adequately. *Id.* at 708. When the judge rejected this challenge, counsel suggested "an addendum" to the charge so that the jury would understand it properly. *Id.* Judge Kennedy believed that these objections required reversal unless the deficiencies were harmless error. *Id.* He concluded that "we cannot say that the evidence was so overwhelming that the erroneous jury instruction was harmless." *Id.*

105 *Id.* at 700, 704 n.21 (majority opinion); *id.* at 706-07 (Kennedy, J., dissenting).

106 *See supra* note 11 (noting that each circuit now allows use of a deliberate-ignorance instruction). *But see* State v. Bogle, 324 N.C. 190, 198-99, 376 S.E.2d 745, 747-48 (1989) (unanimously holding that a willful-blindness instruction does not comport with North Carolina law because it "erroneously informs the jury that the evidence showing the deliberate avoidance of knowledge is, alone, a sufficient basis for a finding of knowledge"); Andrews v. State, 536 So. 2d 1108, 1112 (Fla. Dist. Ct. App. 1989) (en banc) (6-to-3 decision) (Stone, J., concurring in part and dissenting in part) (on issue of first impression in Florida, stating that deliberate-ignorance instruction "is error, regardless of the particular language used").

107 554 F.2d 911 (9th Cir. 1977). The panel was composed of Judges Goodwin, Wallace, and Ingram, with Judge Wallace writing for the majority.

108 A man named Pepe or Pablo Robles had offered Valle-Valdez $100 to drive a car from Calexico to a San Diego bus depot where he was to leave the keys in the ashtray. *Id.* at 913. When a Border Patrol agent discovered 302 kilo bricks of marijuana in the trunk, Valle-Valdez denied knowledge and even suspicion of the presence of the contraband, despite the fact that "the odor of marijuana permeated the passenger compartment and that the vehicle swayed and was difficult to control, due, in part, to the weight in the rear." *Id.*

109 *Id.* at 914.

probability,"[110] the court reversed the conviction because the deficient instruction kept the factual issue of the defendant's awareness from the jury.[111]

In *United States v. Esquer-Gamez*,[112] the Ninth Circuit addressed the second component of the instruction, which was later to become known as vital balancing language: knowledge of a fact is established by an awareness of high probability, " 'unless [the defendant] actually believes it does not exist.' "[113] Concerned that there was "no assurance that the jury succeeded in considering what the instruction did not tell them to expressly consider,"[114] the court reversed because the jury had not been given a "direct instruction to acquit" if it found an honest contrary belief inconsistent with knowledge.[115] The court concluded that, in failing to balance the instruction, the trial judge had "given only the part favoring the government."[116]

The United States Court of Appeals for the First Circuit, in *United States v. Picciandra*,[117] set out a three-part test for determining when the instruction is appropriate: (1) the instruction should be given only when the defendant claims a lack of knowledge; (2) "the facts [must] suggest a conscious course of deliberate ignorance";[118] and (3) the instruction must be formulated "so that the jury [knows] that it [is] permitted, but not required, to draw the inference."[119]

The same concern prompted the Ninth Circuit, in *United States v. Murrieta-Bejarano*,[120] to limit the circumstances in which a *Jewell* instruction may be given. The defendant, Murrieta, had been charged with importation and possession of marijuana with intent to

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110 *Id.*

111 *Id.* Judge Goodwin, however, would have affirmed the conviction on the ground of harmless error. *Id.* at 917 (Goodwin, J., concurring and dissenting).

112 550 F.2d 1231 (9th Cir. 1977). The panel was composed of Judges Duniway, Choy, and Kennedy, with Judge Duniway writing for the majority.

113 *Id.* at 1235 (quoting *Jewell*, 532 F.2d at 704 n.21).

114 *Id.* at 1236.

115 *Id.* The defendants, convicted of knowing importation, possession, and distribution of cocaine, maintained that they had mistakenly believed that the packages contained gifts for their brother's girlfriend. *Id.* While noting that "the circumstances surrounding the transfer of the packages make the defendants' explanations highly suspect," the court stated that the jury might nonetheless have believed the defendants. *Id.*

116 *Id.* Judge Choy, who dissented in part, contended that "the giving of the *Jewell*-type instruction was needless." *Id.* (Choy, J., dissenting in part). However, he found the erroneous instruction harmless beyond a reasonable doubt. *Id.*

117 788 F.2d 39 (1st Cir.), *cert. denied*, 479 U.S. 847 (1986).

118 *Id.* at 46; *see also* United States v. Alvarado, 838 F.2d 311, 314 (9th Cir. 1987), *cert. denied*, 487 U.S. 1222 (1988).

119 *Picciandra*, 788 F.2d at 46.

120 552 F.2d 1323 (9th Cir. 1977). The panel was composed of Judges Duniway, Choy, and Kennedy, with Judge Duniway writing the majority opinion.

distribute after a Customs agent had discovered 138 pounds of the drug under the bed of the truck Murrieta was driving.[121] The judge had given a knowledge instruction conforming to the Model Penal Code. Murrieta challenged the propriety of any such instruction, rather than the particular charge given.[122] The court of appeals held that "the *Jewell* instruction should not be given in every case where a defendant claims a lack of knowledge, but only in those comparatively rare cases where, in addition, there are facts that point in the direction of deliberate ignorance."[123] The court was concerned that a Model Penal Code instruction would create a presumption of guilt when there was no evidence of deliberate ignorance.[124]

With these limitations and refinements, the *Jewell* instruction has been established as a standard jury charge.[125] Despite its widespread acceptance, however, the *Jewell*/Model Penal Code formula-

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121 *Id.* at 1324.

122 *Id.* at 1325.

123 *Id.* The court held that such facts existed in Murrieta's case. *Id.* Murrieta testified that his employer had instructed him to drive the truck from Mexico to Tucson, where he was to meet the employer's cousin. *Id.* The cousin would then drop him off downtown so that Murrieta could meet his uncle and the employer's cousin could load a refrigerator onto the truck. *Id.* The court found that the following facts indicated deliberate ignorance: Murrieta carried $100, when his daily earnings were only $8; he had never asked about the source of the refrigerator or whether there was any other reason for the trip; he and his employer had made a similar trip two weeks earlier and had had a truck repaired in Tucson that could have been repaired in Mexico; Murrieta had spent his entire life within two hours of the border and knew of the drug traffic between the two countries; and he was not surprised when the drugs were found. *Id.* Judge Kennedy, in a separate opinion, disagreed that these facts indicated deliberate ignorance, and pointed out that the deliberate-ignorance theory was introduced only in the prosecutor's closing argument. *Id.* (Kennedy, J., concurring in part and dissenting in part); *see also* United States v. Garzon, 688 F.2d 607, 609 (9th Cir. 1982) (instruction erroneous when the defendant admitted that he had opened a bag containing cocaine in order to show the contents to the purchasers, an informant and two DEA undercover agents); United States v. Beckett, 724 F.2d 855, 856 (9th Cir. 1984) (instruction inappropriate when the evidence suggested that the defendant had actually seen cocaine that was the subject of the transaction); United States v. Nicholson, 677 F.2d 706, 710-11 (9th Cir. 1982) (instruction approved where circumstances "would have put any reasonable person on notice that there was a 'high probability' that the undisclosed venture was illegal," including delivery of cash on short notice and in brown paper bag and return of 300 percent on initial investment); United States v. Erwin, 625 F.2d 838, 841 (9th Cir. 1980) (charge appropriate where the defendant had cocaine hidden in her vagina).

124 *Murrieta-Bejarano*, 552 F.2d at 1325. The Fifth and Eleventh Circuits also require the presence of facts indicating deliberate ignorance. *See* United States v. Batencort, 592 F.2d 916, 918 (5th Cir. 1979) (quoting *Murrieta-Bejarano*); United States v. Aleman, 728 F.2d 492, 494 (11th Cir. 1984) (citing *Batencort*).

125 *See supra* note 106.

tion comports with neither philosophical nor traditional legal concepts of knowledge.

## IV. Defining Knowledge

### A. PHILOSOPHICAL DEFINITIONS

Philosophy recognizes three mental states with respect to empirical facts: opinion, knowledge, and belief.[126] Each describes a relationship between the quality of objective evidence and the level of subjective conviction that it produces. Immanuel Kant's delineation of the three concepts provides a point of departure:

> The holding anything to be true, or the subjective validity of a judgment admits, with reference to the conviction which is at the same time valid objectively, of the three following degrees, *trowing, believing, knowing*. *Trowing* is to hold true, with the consciousness that it is insufficient *both* subjectively and objectively. If the holding true is sufficient subjectively, but is held to be insufficient objectively, it is called *believing*; while if it is sufficient both subjectively and objectively, it is called *knowing*[127]

Trowing or opining is the holding of a provisional judgment that the holder realizes is based on incomplete evidence.[128] It is both subjectively and objectively insufficient.[129] One forms an opinion by deciding that the evidence for alternative *A* is stronger than that for alternative *B*.[130] Opinion is therefore a weighing of probabilities.[131] One might opine, for example, that a sealed parcel contains "A" based on its size, shape, and weight. At the same time, one recognizes that opening the package may in fact reveal a similar substance, "B."

Knowledge presents a far more difficult definitional problem, for while some assert that knowledge and belief are categorically distinct,[132] others contend that knowledge is merely a form of be-

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126 *See generally* Belief, Knowledge and Truth: Readings in the Theory of Knowledge (R. Ammerman & M. Singer eds. 1970) [hereinafter R. Ammerman & M. Singer] (collection of essays on the relationship among knowledge, opinion, and belief).

127 I. Kant, Critique of Pure Reason 524 (M. Muller trans. 1966) (emphasis in original).

128 *See* Wilson, *Knowledge, Opinion, Conviction, and Belief*, in R. Ammerman & M. Singer, *supra* note 126, at 31; *cf.* Laird, *Concerning Opinion*, in *id.*, at 127 (stating that opinion also includes judgments based on insufficient evidence to which the holder unqualifiedly assents).

129 I. Kant, *supra* note 127, at 524.

130 Wilson, *supra* note 128, at 31.

131 Laird, *supra* note 128, at 128.

132 H.A. Prichard is representative of this school. He stated:

> We must first recognize the fundamental nature of the difference between knowing and believing. . . . Knowing and believing differ in kind as do desiring and feeling, or as do a red color and a blue color. Their difference in kind is not that of species

lief.[133] Knowledge is often defined as subjective certainty coupled with conclusive evidence for the proposition.[134] In contrast, belief is certainty based on insufficient evidence.[135]

Philosopher Norman Malcolm has written, however, that "[a]s philosophers we may be surprised to observe that it can be that knowledge that *P* is true should differ from the belief that *P* is true *only* in the respect that in one case *P* is true and the other false. But that is the fact."[136] Taking as his starting point the question of whether the Cascadilla Gorge is dry, Malcolm provides a series of examples to illustrate this point.[137] In his fourth example, "[y]ou

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and genus, like that of a red color and a color. To know is not to have a belief of a special kind, differing from beliefs of other kinds; and no improvement in a belief and no increase in the feeling of conviction which it implies will convert it into knowledge.

Prichard, *Knowing and Believing*, in R. Ammerman & M. Singer, *supra* note 126, at 10-11.

133 *See, e.g.*, Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 877 (1989) (equating knowledge with "justified true beliefs"); *infra* notes 134-47 and accompanying text (discussing this argument in detail). *But see infra* notes 148-52 and accompanying text (demonstrating that, although this contention may be valid, knowledge or justified belief may nonetheless be distinguished from mere belief by the quality of the evidence supporting a proposition).

134 *See, e.g.*, I. KANT, *supra* note 127, at 524 (stating that, if a judgment "is sufficient both subjectively and objectively, it is called knowing") (emphasis omitted); H.H. PRICE, BELIEF 72 (1969) (lecture entitled "Belief and Knowledge") (defining knowledge as requiring that "*A* believes that *p* with full conviction," "*p* is in fact true," and "*A* has conclusive reasons for believing it"); Woozley, *Knowing*, in R. Ammerman & M. Singer, *supra* note 126, at 186-87 (identifying the following criteria for knowledge: (1) what is known is true; (2) the person knowing is sure that it is true; (3) the person knowing has evidence; (4) he is correct about the evidence; and (5) he is right about the relation between the evidence and his conclusion); *see also* Wilson, *supra* note 128, at 31 (noting that "it is of the very nature of knowledge not to make its statements at all on grounds recognized to be insufficient, nor to come to any decision except that the grounds are insufficient").

135 *See* I. KANT, *supra* note 127, at 524 (defining belief as subjectively sufficient but objectively insufficient); *infra* notes 141-52 and accompanying text (discussing H.H. Price's assertion that the distinction between knowledge and belief stems from the quality of the evidence supporting a proposition); *infra* notes 161-72 and accompanying text (outlining Hume's argument that conclusions concerning future occurrences are mere beliefs because, although one is certain that an event will occur, past experience is insufficient evidence for such a conclusion). *But see infra* notes 136-40 and accompanying text (discussing Malcolm's contention that knowledge and belief may differ only in the accuracy of the conclusion); Laird, *supra* note 128, at 126 (stating that the "upper limit" of opinion is belief).

136 Malcolm, *Knowledge and Belief*, in R. Ammerman & M. Singer, *supra* note 126, at 15 (emphasis in original).

137 *Id.* at 14. The first three cases that Malcolm poses are the following:

(1) You say "I believe that it won't be dry although I have no particular reason for thinking so." If we went to the gorge and found a flowing stream we should not say that you *knew* that there would be water but that you thought so and were right.

(2) You say "I believe that it won't be dry because it rained only three days ago and usually water flows in the gorge for at least that long after a rain." If we

say 'I know that it won't be dry' and give a strong[] reason, *e.g.*, 'I saw a lot of water flowing in the gorge when I passed it this morning.' If we went and found water, there would be no hesitation at all in saying that you knew."[138] In his fifth example, "[e]verything happens as in [case four], except that upon going to the gorge we find it to be dry. We should not say that you knew, but that you believed that there would be water."[139] In both cases, the subjective conviction and grounds for the proposition are identical; "[c]ases [four] and [five] differ in only one respect—namely, that in one case you did subsequently find water and in the other you did not."[140]

In his lecture entitled *Belief and Knowledge*,[141] H.H. Price formulated the issue more broadly:

> Shall we say that there are just two quite different states of mind in which we can be: one which is infallible or incapable of being erroneous, namely, a state of knowledge; and another which is fallible or corrigible, namely a state of belief—regardless of the degree of firmness or strength with which the belief is held?[142]

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found water we should be inclined to say that you knew that there would be water. It would be quite natural for you to say "I knew that it wouldn't be dry"; and we should tolerate your remark. This case differs from the previous one in that here you had a *reason*.

(3) You say "I know that it won't be dry" and give the same reason as in (2). If we found water we should have very little hesitation in saying that you knew. Not only had you a reason, but you *said* "I know" instead of "I believe." It may seem to us that the latter should not make a difference—but it does.

*Id.* (emphasis in original).

138 *Id.*

139 *Id.* (emphasis omitted).

140 *Id.* at 15. Malcolm notes that there is an argument that one might use to prove that you did not know that there would be water: "It could have turned out that you found no water; if it had so turned out you would have been mistaken in saying that you would find water; therefore you could have been mistaken; but if you could have been mistaken you did not know." *Id.* Malcolm rejects this argument, stating that "[t]his does not show, however, that you did not know that there would be water. What it shows is that *although you knew you could have been mistaken*." *Id.* (emphasis in original); *see also* Austin, *If I Know I Can't Be Wrong*, in R. Ammerman & M. Singer, *supra* note 126, at 180 (stating that "we are often right to say we know even in cases where we turn out subsequently to have been mistaken," and adding that it is "some concrete reason to suppose that you may be mistaken" rather than "being aware that you are a fallible human being" that negates knowledge) (emphasis omitted).

141 H.H. PRICE, *supra* note 134, at 72.

142 *Id.* at 83. Price initially discusses each type of knowledge that can be distinguished from belief. *Id.* at 72-79. He first addresses knowledge by acquaintance and concludes that "[t]here is no contrast . . . between knowing a person by acquaintance and believing him. What is contrasted with knowing an entity by acquaintance is believing propositions about it or him." *Id.* at 73. Price then suggests that "the contrast between belief and knowledge is most obvious when we compare belief 'that' with knowing 'that,' knowledge of facts or truths." *Id.* It is this distinction that he addresses at length in the essay. *See id.* at 79-91. He next discusses knowing "how to," and finds that "there is no contrast here between knowing and believing. There is no such thing as 'believing how to tie a bow-tie' or 'merely believing how to do it,' as opposed to knowing how to do it."

Price does not attribute the difference to a person's state of mind, for "[t]he man who knows something is absolutely sure about it; and the man who merely believes something without knowing it may also be absolutely sure about it. He too may have the highest degree of belief—complete conviction."[143] Rather, one factor separating the two concepts is some degree of *correct belief*.[144] Mere correct belief, however, is insufficient; "it is also necessary that there should be good reasons for the belief."[145] Price adds the final condition that "the man's reason for belief should be not merely good but conclusive—sufficient to make the proposition certain."[146] Thus, to know that *P*, one must believe that *P* with full conviction, *P* must in fact be true, and one must have conclusive reasons for believing that *P*.[147]

Price then addressed whether the difference between the two states was one of degree or of kind.[148] He found that

> the distinction between knowledge and belief which falls short of knowledge is partly one of degree: (1) in the degree of the conviction, since if a man believes with something less than complete sureness we refuse to say that he knows; (2) in respect of the strength of the evidence or of the reason for believing.[149]

Price continued, however, that the requirement that the proposition be true is not a matter of degree.[150] He also stated that the distinction between merely good reasons and those that are conclusive is only partly one of degree.[151] This is so because conclusive evidence is not only stronger than merely good evidence—a matter of degree—but it also differs in kind because it settles the question, while merely good evidence does not.[152] Thus, although knowledge and belief share certain characteristics, they differ in kind as well as in degree.

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*Id.* at 74. With respect to belief "in," Price finds the converse of knowing "how to": "[t]here is no 'knowing in' to serve as the optimum for which believing in would be a second-best or inferior substitute." *Id.* at 76. He concludes that, "[w]hen we enquire into the relation between belief and knowledge, we are mainly concerned with the relation between belief that and knowledge that." *Id.* at 79.

143 *Id.* at 83.

144 *Id.* at 84. Price notes that this is what Plato termed *orthe doxa*. *Id.*

145 *Id.* Price adds that, in the *Theaetetus*, Plato suggested that knowledge could be defined as *orthe doxa meta logou*—"correct belief with a reason." *Id.*

146 *Id.* at 85.

147 *Id.*; *see* Moore, *supra* note 133, at 877 (equating knowledge with "justified true beliefs").

148 H.H. PRICE, *supra* note 134, at 85-86.

149 *Id.* at 85.

150 *Id.*

151 *Id.*

152 *Id.* at 85-86.

The distinction between knowledge and belief is also at issue in the debate over empiricism. Empiricism is broadly defined as the thesis that all knowledge or all knowledge of facts is derived from experience.[153] John Locke, whose writing provided the foundation for classical British empiricism,[154] maintained that at birth the mind is "white paper, void of all characters,"[155] and that innate knowledge is a fiction.[156] Locke asserted instead that only experience can

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153 *See, e.g.*, A. FLEW, A DICTIONARY OF PHILOSOPHY 104 (2d ed. 1984). The major players in the British empirical school of philosophy included Francis Bacon, the forerunner to this tradition who in the early 17th century discussed what he called "the idols of the mind (false assumptions and illusions as the four main errors besetting the human mind in its pursuit of truth), which he believed stood in the way of objective knowledge," *id.* at 204, and George Berkeley, the 18th-century philosopher known for his doctrine that "there is no material substance and that things, such as stones and tables, are collections of ideas or sensations, which can exist only in minds and for so long as they are perceived." *Id.* at 41-42. For discussions of mind-body dualism and its relation to the criminal law, see, *e.g.*, Robbins, *Jurisprudence "Under-Mind"?: The Case of the Atheistic Solipsist*, 28 BUFFALO L. REV. 143 (1979), and Robbins, *Solipsism and Criminal Liability*, 25 AM. J. JURIS. 75 (1981).

154 *See* A. FLEW, *supra* note 153, at 204.

155 J. LOCKE, 1 AN ESSAY CONCERNING HUMAN UNDERSTANDING 121 (A. Fraser ed. 1894).

156 Book I of Locke's *Essay Concerning Human Understanding* is entitled "Neither Principles Nor Ideas Are Innate." In chapter I, Locke addressed innate speculative principles and concluded that they do not exist. *See id.* at 37-63. He described these principles as follows:

> There is nothing more commonly taken for granted than that there are certain *principles*, both *speculative* and *practical*, (for they speak of both), universally agreed upon by all mankind: which therefore, they argue, must need be the constant impressions which the souls of men receive in their first beings, and which they bring into the world with them, as necessarily and really as they do any of their inherent faculties.

*Id.* at 38-39 (emphasis in original; footnotes omitted). These speculative principles include "Whatsoever is, is" and "It is impossible for the same thing to be and not to be." *Id.* at 39. Locke suggested that, if it were true that there are certain principles to which all men assent, "it would not prove them innate, if there can be any other way shown how men may come to that universal agreement." *Id.* Locke then stated that, "which is worse, this argument of universal assent, which is made use of to prove innate principles, seems to me a demonstration that there are none such: because there are none to which all mankind give an universal assent." *Id.* He noted that "all children and idiots have not the least apprehension or thought of [these supposed principles]." *Id.* at 40. To the argument that all men know and assent to them when they come to the use of reason, Locke responded that "[t]hat certainly can never be thought innate which we have need of reason to discover; unless, as I have said, we will have all the certain truths that reason ever teaches us, to be innate." *Id.* at 43 (footnote omitted). Moreover, such an argument implies "that men know and know them not at the same time." *Id.* Locke also noted that "these maxims are not in the mind so early as the use of reason; and therefore the coming to the use of reason is falsely assigned as the time of their discovery." *Id.* at 45. Locke continued that, even if it were true that men know and assent to these principles when they come to the use of reason, this would not prove them innate,

> [f]or, by what kind of logic will it appear that any notion is originally by nature imprinted in the mind in its first constitution, because it comes first to be observed and assented to when a faculty of the mind, which has a quite distinct province, begins to exert itself? And therefore the coming to the use of speech, if it were

furnish the mind with the materials of reason and knowledge.[157]

supposed the time that these maxims are first assented to . . . would be as good a proof that they were innate, as to say they are innate because men assent to them when they come to the use of reason.

*Id.* at 47.

Locke maintained that a child knows and assents to these supposed innate truths not because they are innate, but instead because "he has settled in his mind the clear and distinct ideas that these names stand for." *Id.* at 50. Nor does the fact that these principles are assented to when proposed and understood prove them innate. Locke asked

whether ready assent given to a proposition, upon first hearing and understanding the terms, be a certain mark of an innate principle? If it be not, such a general assent is in vain urged as a proof of them: if it be said that it is a mark of innate, they must then allow all such propositions to be innate which are generally assented to as soon as heard, whereby they will find themselves plentifully stored with innate principles.

*Id.* at 51 (footnote omitted). Furthermore, such a standard "supposes that several, who understand and know other things, are ignorant of these principles till they are proposed to them." *Id.* at 54-55.

[I]f they were innate, what need they be proposed in order to gaining assent, when, by being in the understanding, by a natural and original impression, (if there were any such,) they could not but be known before? Or doth the proposing them print them clearer in the mind than nature did? If so, then the consequence will be, that a man knows them better after he has been taught them than he did before . . . which will ill agree with the opinion of innate principles, and give but little authority to them.

*Id.* at 55. Finally, Locke asserted that these principles cannot be innate, because they are not universally assented to; neither those who do not understand the terms nor those who understand the terms but have never considered the propositions assent. *Id.* at 58. He added that these principles, "if they were native and original impressions, should appear fairest and clearest in those persons in whom yet we find no footsteps of them"—*i.e.*, "children, idiots, savages, and illiterate people." *Id.* at 60-61. Thus, Locke concluded that there are no innate speculative principles. *Id.* at 62-63.

In chapter II, "No Innate Practical Principles," Locke undertook a similar analysis of moral principles. *See id.* at 64-91. He noted at the outset that far fewer practical principles than speculative principles enjoy universal assent, "[w]hereby it is evident that they are further removed from a title to be innate; and the doubt of their being native impressions on the mind is stronger against those moral principles than the other." *Id.* at 64. Locke rejected the contention that men universally assent to these principles in thought, rather than practice, because "the actions of men [are] the best interpreters of their thoughts," *id.* at 66-67, and "it is very strange and unreasonable to suppose innate practical principles, that terminate only in contemplation." *Id.* at 67. He then stated that there can be no innate practical principles, because "there cannot any one moral rule be proposed whereof a man may not justly demand a reason: which would be perfectly ridiculous and absurd if they were innate." *Id.* at 68 (emphasis omitted). The truth of these rules then rests on something antecedent to them, which is inconsistent with their being innate. *Id.* at 69. Locke listed a host of repugnant practices reportedly followed in various societies—*e.g.*, fatting and eating the children of female captives—and suggested that the generally allowed breach of a rule is proof that it is not innate. *Id.* at 73-76. Nor is the solution that men are merely ignorant of these innate principles, "[f]or if men can be ignorant or doubtful of what is innate, innate principles are insisted on, and urged to no purpose." *Id.* at 77-78. Locke found further support for the absence of innate moral principles in the fact that those who urge that they exist do not identify them. *Id.* at 78-80. He concluded that moral standards are the product of teaching and custom, and not innate principles. *Id.* at 87-88.

157 *Id.* at 122.

This experience is of two varieties: sensation and reflection. Sensation is the perception of external objects as conveyed by the senses,[158] while reflection is the perception of the operation of one's own mind.[159] Locke concluded that "[t]hese, when we have taken a full survey of them, and their several modes, combinations, and relations, we shall find to contain all our whole stock of ideas; and that we have nothing in our minds which did not come in one of these two ways."[160]

David Hume posited a similar division of the objects of human reason into two categories: relations of ideas and matters of fact.[161] Relations of ideas are propositions that "are discoverable by the mere operation of thought, without dependence on what is anywhere existent in the universe."[162] These relations include "the sciences of Geometry, Algebra, and Arithmetic; and in short, every affirmation which is either intuitively or demonstratively certain."[163] In contrast, all reasoning concerning matters of fact is founded on sensory perceptions and the relation of cause and effect,[164] and "causes and effects are discoverable, not by reason but by experience."[165] This leads to Hume's problem of induction:

> As to past *Experience*, it can be allowed to give *direct* and *certain* information of those precise objects only, and that precise period of time, which fell under its cognizance: but why this experience should be extended to future times, and to other objects, which for aught we know, may be only in appearance similar; this is the main question on

158 *Id.* at 122-23.

159 *Id.* at 123-24. Locke drew an analogy to sensation of external objects, noting that, "though it be not sense, as having nothing to do with external objects, yet it is very like it, and might properly enough be called *internal sense*." *Id.* at 123 (emphasis in original).

160 *Id.* at 124-25.

161 D. HUME, ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 25 (L. Selby-Bigge 2d ed. 1902).

162 *Id.*

163 *Id.*

164 *Id.* at 26.

165 *Id.* at 28 (emphasis omitted). This is so because "[t]he mind can never possibly find the effect in the supposed cause, by the most accurate scrutiny and examination. For the effect is totally different from the cause, and consequently can never be discovered in it." *Id.* at 29. Hume suggested as an example that,

> [w]hen I see, for instance, a Billiard-ball moving in a straight line towards another; even suppose motion in the second ball should by accident be suggested to me, as the result of their contact or impulse; may I not conceive, that a hundred different events might as well follow from that cause? May not both these balls remain at absolute rest? May not the first ball return in a straight line, or leap off from the second in any line or direction? All these suppositions are consistent and conceivable. Why then should we give the preference to one, which is no more consistent or conceivable than the rest? All our reasonings *a priori* will never be able to show us any foundation for this preference.

*Id.* at 29-30 (emphasis omitted).

which I would insist.[166]

Hume first suggested that demonstrative reasoning could not support the inference of future occurrences from past experience, "since it implies no contradiction that the course of nature may change, and that an object, seemingly like those which we have experienced, may be attended with different or contrary effects, . . . [and that which implies no contradiction] can never be proved false by any demonstrative argument."[167] Nor do arguments from experience prove the repetition of the past in the future, "since all these arguments are founded on the supposition of that resemblance."[168] Moreover, the qualities of objects, "and consequently all their effects and influence, may change, without any change in their sensible qualities."[169] Therefore, Hume concluded that inferences from experience are not the product of reasoning, but are instead the result of custom or habit.[170] Because these conclusions from "customary conjunctions" can never be certain, Hume added that, "if flame or snow be presented anew to the senses, the mind is carried by custom to expect heat or cold, and to *believe* that such a quality does exist, and will discover itself upon a nearer approach."[171] Hume termed this belief "a species of natural instinct[], which no reasoning or process of thought and understanding is able either to produce or to prevent."[172]

In formulating an objective theory of knowledge, Karl Popper addressed both Locke's empiricism and Hume's problem of induction.[173] Terming it "the bucket theory of the mind,"[174] Popper dismissed empiricism as "utterly naive and completely mistaken in all its versions."[175] He maintained that "the central mistake is the as-

166 *Id.* at 33-34 (emphasis in original).

167 *Id.* at 35.

168 *Id.* at 38.

169 *Id.*

170 *Id.* at 39-47.

171 *Id.* at 46 (emphasis in original).

172 *Id.* at 46-47. For a detailed discussion of this aspect of Hume's theory, see A. FLEW, HUME'S PHILOSOPHY OF BELIEF (1961).

173 *See* K. POPPER, OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH 60-67 (1972) (rejecting empiricism as an invalid theory of knowledge); *id.* at 1-31 (discussing and "solving" Hume's problem of induction, in part through reformulation).

174 *Id.* at 60.

175 *Id.* at 61. Popper's delineation of the bucket theory did not include the complete emptiness of the mind at birth, the "blank slate" or *tabula rasa* element of Locke's empiricism. *Id.* Popper deemed this "merely a minor point of discrepancy," because Popper's bucket theory and Locke's empiricism share the principal thesis that "we learn most, if not all, of what we do learn through the entry of experience into our sense openings." *Id.*

sumption that we are engaged in . . . *the quest for certainty*."[176] It is this quest that leads the empiricist to identify sense impressions and immediate experiences as a secure basis for all knowledge. Popper asserted, however, that "these elements or data do not exist at all."[177] Instead, one learns by innate dispositions and trial and error to decode the messages he receives, but this process will always yield some mistakes.[178] Thus, "the whole story of the 'given,' of true data, with certainty attached, is a mistaken theory."[179] Popper suggested that this theory "gets into the difficulty of admitting something like subjective sufficient reasons; that is, kinds of personal experience or belief or opinion which, though subjective, are certainly and unfailingly true, and can therefore pass as knowledge."[180] Popper added that in fact "experienced or subjective 'certainty' depends not merely upon degrees of belief and upon evidence, but also upon the situation—upon the importance of what is at stake."[181]

Unlike subjective knowledge, which is "knowledge possessed by some knowing subject," objective knowledge "consists of the logical *content* of our theories, conjectures, [and] guesses."[182] Popper proposed that "only a *formulated* theory (in contradistinction to a believed theory) can be objective, and . . . it is this formulation or objectivity that makes criticism possible."[183] This possibility of critical discussion provides Popper's "solution" to Hume's problem of

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176 *Id.* at 63 (emphasis in original).

177 *Id.*

178 *Id.* at 63-64.

179 *Id.* at 64. Popper also rejected Locke's *tabula rasa* empiricism as "pre-Darwinian: to any man who has any feeling for biology it must be clear that most of our dispositions are inborn." *Id.* at 66. Moving beyond the issue of innate factors, however, Popper found this subjective knowledge fatally flawed because he claimed that "*there is no such thing as association or conditioned reflex*," the process by which the empiricist derives knowledge or true belief from sense data. *Id.* at 67 (emphasis in original). Popper asserted instead that "[a]ll reflexes are unconditioned; the supposedly 'conditioned' reflexes are the results of modifications which partially or wholly eliminate the false starts, that is to say the errors in the trial-and-error process." *Id.*

180 *Id.* at 76.

181 *Id.* at 79. He suggested, for example, that with his hands in his pockets he would be "quite 'certain' " that he had five fingers on each hand. *Id.* at 78. If the life of his best friend depended on the truth of this assertion, however, Popper would more likely take his hands from his pockets and count the fingers. *Id.*

182 *Id.* at 73 (emphasis added). Such knowledge includes published theories, discussions of these theories, and difficulties or problems identified in connection with them. *Id.*

183 *Id.* at 31 (emphasis in original). This led Popper to state that the difference between Einstein and an amoeba is that, while Einstein was consciously critical of his theories, the amoeba cannot be critical of its expectations and hypotheses because they are part of it. *Id.* at 25.

induction.[184] Rephrasing the issue in objective terms, Popper agreed with Hume that "the claim that an explanatory universal theory is true [cannot] be justified by 'empirical reasons'; that is, by assuming the truth of certain test statements or observation statements (which, it may be said, are 'based on experience')."[185] He posed a second logical problem, however, a generalization of the first: "Can the claim that an explanatory universal theory is true or that it is false be justified by 'empirical reasons'; that is, can the assumption of the truth of test statements justify either the claim that a universal theory is true or the claim that it is false?"[186] Popper answered that, assuming the validity of the test statements, one can sometimes justify the claim that an explanatory universal theory is false.[187] Through this process of falsification it is possible to choose "the best" among competing theories;[188] however, one cannot establish its truth because "the number of *possibly* true theories remains infinite, at any time and after any number of crucial tests."[189] Although none of these theories can ever be proved true, Popper recognized that one must often choose among competing alternatives as a basis for action.[190] He concluded that, while one should not "rely" on the truth of any of these theories, one should prefer the theory that is best tested—namely, "the one which, in light of our *critical discussion*, appears to be the best so far."[191]

Despite the disparities in the foregoing theories of knowledge, a consensus emerges with respect to subjective conviction: with the exception of Popper's calculus, the various definitions require sub-

184 *See id.* at 1 (claiming to have solved the problem, but noting that few philosophers would agree with this contention).

185 *Id.* at 7. Popper noted that he did not address the issue of how one decides the truth or falsity of test statements, because that question is not part of the problem of induction; Hume asked instead whether one is justified in reasoning from experience to unexperienced instances. *Id.* at 8.

186 *Id.* at 7.

187 *Id.*

188 *Id.* at 13-17. Popper added that at any given time there may be more than one unrefuted proposed theory. *Id.* at 15. This in turn will lead the theoretician to devise further critical tests. *Id.*; *see* Moore, *supra* note 133, at 877 n.17 (stating that "a rational agent is justified in believing some proposition *p* only because *p coheres better* with everything else the agent believes than does not-*p*") (emphasis added); *id.* at 896-97 (discussing Richard Rorty's pragmatist interpretivism).

189 K. POPPER, *supra* note 173, at 15 (emphasis in original).

190 *Id.* at 21. Popper noted that in this context inaction is in fact a type of action. *Id.*

191 *Id.* at 22 (emphasis in original). Popper added that, while "this choice is *not* 'rational' in the sense that it is based upon *good reasons* for expecting that it will in practice be a successful choice," *id.* (emphasis in original), it is nonetheless rational to prefer the theory that has best withstood critical discussion. *Id.*

jective certainty before one is deemed to have knowledge.[192] The primary point of disagreement is instead whether conclusive evidence exists and can be identified as such.[193] It is nonetheless clear that some evidence is patently insufficient: such is the case if there is "some concrete reason to suppose that you may be mistaken"[194] or when "definitive proof" is available but not sought.[195] While these formulations do not settle the issue of what does constitute knowledge, they do indicate what is *not* knowledge. One does not "know" if he entertains any doubts concerning the validity of his judgment, and even when one is certain that he is correct he does not "know" if additional evidence is available to confirm or refute his conclusion.

### B. LEGAL DEFINITIONS

The distinction in the criminal law between recklessness and knowledge parallels the philosophical concepts of opinion and knowledge.[196] Recklessness is conscious disregard of a substantial

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192 *See supra* note 134 and accompanying text (outlining definitions of knowledge). In response to arguments such as Popper's, one commentator has suggested that,

> [w]hen we find mankind assured of the possession of a great deal of knowledge which the philosopher asserts is not knowledge at all, it would seem more modest, as well as more fruitful, if philosophy were to modify its definition in the direction of common usage, instead of setting up an *a priori* definition of its own, and then condemning actual human knowledge because it does not measure up to this.

Rogers, *Belief and the Criterion of Truth*, in R. Ammerman & M. Singer, *supra* note 126, at 466-67; *cf.* Moore, *supra* note 133, at 932-33 (discussing and refuting "ordinary language philosophy").

193 *Compare* sources cited in *supra* note 134 (holding that conclusive evidence does exist for some propositions) *and supra* notes 141-52 and accompanying text (suggesting that, while knowledge is in one sense correct belief, conclusive evidence differs in kind from merely good reasons) *with supra* notes 136-40 and accompanying text (arguing that knowledge and belief may be distinguishable only by the correctness of the result and not by the evidence supporting a proposition) *and supra* notes 161-72 and accompanying text (asserting that past experience can never provide conclusive evidence of the truth of a future occurrence).

194 Austin, *supra* note 140, at 180.

195 *See* Laird, *supra* note 128, at 128 (stating that one cannot hold a "competent" opinion, and hence cannot know, because knowledge requires a higher caliber of evidence, if definitive proof is neglected).

196 The philosophical and legal classifications of belief do not correspond. Many philosophers make an emphatic distinction between belief and knowledge. *See, e.g.*, Wilson, *supra* note 128, at 32 (stating that "[b]elief is not knowledge and the man who knows does not believe at all what he knows; he knows it"); *see also supra* notes 132, 134-35 and accompanying text (outlining distinctions between knowledge and belief). In contrast, the common law accepts belief as a substitute for actual knowledge. *See* Perkins, *supra* note 72, at 955-56 (providing case citations). Although this correlation appears helpful in the deliberate-ignorance context, it is in fact of little assistance. First, many defendants who invoke the deliberate-ignorance defense have no belief concerning the substance that they carry, beyond a more general belief that it is illegal. *See, e.g.*, United States v. Batencort, 592 F.2d 916, 917 (5th Cir. 1979) (noting that the defendant had

and unjustifiable risk,[197] or "conscious risk creation."[198] "Conscious disregard" requires that the actor actually have recognized the particular risk.[199] Recklessness is thus a subjective and not an objective standard.[200] The notion of "risk" indicates that recklessness concerns probability rather than certainty.[201] The situation is contingent rather than definite "from the actor's point of view."[202] Thus, like opinion, recklessness presupposes doubt.[203] Finally, the term "recklessness" applies to conscious disregard of the likelihood of any material element of a crime.[204] Recklessness therefore de-

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admitted that "he had something in the suitcase that he shouldn't but he didn't know exactly what"); United States v. Morales, 577 F.2d 769, 772 (2d Cir. 1978) (discussing "mules"—those who are paid to transport parcels of contraband without information as to their contents); United States v. Joly, 493 F.2d 672, 676 (2d Cir. 1974) (recognizing the same possibility, but discounting it when the defendant carried the packages on his person and presented no evidence that they contained something other than cocaine). This belief is insufficient to prove knowledge, because the defendant must have knowledge of the specific elements of the crime charged. *See, e.g.*, United States v. Morales, 577 F.2d 769, 773 (2d Cir. 1978) (holding that the prosecution must prove knowledge of required facts, rather than consciousness of some wrongdoing). Moreover, the defendant is not likely to admit his guilty belief, especially if he is invoking a deliberate-ignorance defense. The prosecution is then left with the burden of proving guilty belief. Assuming, however, that belief retains the subjective criteria of knowledge, while discarding only its objective element (and there is no indication to the contrary), the prosecution must still show subjective certainty, not mere recognition of probability. *See infra* notes 205-09 and accompanying text (discussing certainty required for legal knowledge).

197 MODEL PENAL CODE § 2.02(2)(c) (Official Draft and Revised Comments 1985); *see also* G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 96 (2d ed. 1983) (stating that recklessness "normally involves conscious and unreasonable risk-taking, either as to the possibility that a particular undesirable circumstance exists or as to the possibility that some evil will come to pass").

198 MODEL PENAL CODE § 2.02 comment 3, at 236 (Official Draft and Revised Comments 1985).

199 *See id.* (describing recklessness as actual awareness of risk).

200 *But see* G. WILLIAMS, *supra* note 197, at 97 (noting that some courts define recklessness as gross negligence, thus imposing an objective standard).

201 *See id.* at 96 (stating that "the foundation of the notion of recklessness" is that "[w]e can guess at the probable present even when we cannot directly perceive it, and can project ourselves into the future by foreseeing the probable consequences of our acts"); *see also* MODEL PENAL CODE § 2.02 comment 3, at 236 (Official Draft and Revised Comments 1985) (noting that "the awareness is of risk, that is of a probability less than substantial certainty").

202 MODEL PENAL CODE § 2.02 comment 3, at 236 (Official Draft and Revised Comments 1985).

203 *See supra* notes 126-31 and accompanying text (discussing the element of doubt or probability in the philosophical concept of opinion).

204 *See* MODEL PENAL CODE § 2.02 comment 3, at 236-37 (Official Draft and Revised Comments 1985) (stating that "[w]hether the risk relates to the nature of the actor's conduct, or to the existence of the requisite attendant circumstances, or to the result that may ensue, is immaterial; the concept is the same, and is thus defined to apply to any material element").

scribes a willingness to act in the face of a perceived probability of the existence or creation of a particular fact, circumstance, or result.

Knowledge, on the other hand, is an awareness of the existence of a particular fact or attendant circumstance.[205] Like recklessness, knowledge is a subjective standard in that it requires actual awareness by the actor.[206] Knowledge, however, requires awareness of the *existence* of a fact rather than recognition of its probability.[207] Like the philosophical notion of knowledge, criminal knowledge requires certainty and a corresponding absence of doubt.[208] It is this distinction between certainty and probability that separates knowledge from the legal concept of recklessness: both involve awareness, but recklessness describes recognition of probability while knowledge requires certainty.[209] Therefore, one "knows" something only if he or she is certain of it.

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205 *See id.* § 2.02(2)(b)(i) (stating that knowledge is an awareness of the existence of attendant circumstances or of the nature of the actor's conduct). The Code defines knowledge of the existence of a particular fact so as to include awareness of a high probability of its existence, unless the defendant holds a contrary belief. *Id.* § 2.02(7). This provision is discussed *infra* notes 210-32 and accompanying text (concluding that it actually describes recklessness).

206 *See id.* § 2.02 comment 2, at 234-36 (emphasizing the subjective requirement of knowledge); G. WILLIAMS, *supra* note 197, at 124 (stating that the "mere fact that the defendant *ought* to have known, *i.e.*, that he was negligent in not finding out, is insufficient") (emphasis in original).

207 *See, e.g.*, People v. Jaffe, 185 N.Y 497, 78 N.E. 169 (1906). Jaffe had been charged with attempting to receive stolen goods, although the goods were not in fact stolen. *Id.* at 499, 78 N.E. at 169. Noting that the offense of receiving stolen goods requires knowledge that the goods are stolen, the court reversed Jaffe's conviction:

> This knowledge being a material ingredient of the offense it is manifest that it cannot exist unless the property has in fact been stolen or larcenously appropriated. No man can know that to be so which is not so in truth and in fact. He may believe it to be so but belief is not enough under this statute. . . . [N]either he nor any one in the world could know that the property was stolen property inasmuch as it was not, in fact, stolen property.

*Id.* at 500-01, 78 N.E. at 170. For a thorough discussion of impossible attempts, see generally Robbins, *Attempting the Impossible: The Emerging Consensus*, 23 HARV. J. ON LEGIS. 377 (1986).

208 In this context, Professor Williams stated that the jury "may take a man to know a fact if they are satisfied that he was virtually certain that the fact existed, or (in other words) that he had no substantial doubt that it existed." G. WILLIAMS, *supra* note 197, at 125. The Model Penal Code employs the same criteria, using the phrases "substantial certainty" and "practically certain." MODEL PENAL CODE § 2.02 comment 3, at 236 & n.13 (Official Draft and Revised Comments 1985). These formulations are virtually identical to the philosopher's statement that one does not "know" if he has "some concrete reason" to believe that he is mistaken. *See supra* notes 194-95 and accompanying text. In each case, the requirement is defeated if the actor has an identifiable reason to question his conclusion. This situation is qualitatively different from a recognition of probability, because probability implies an absence of certainty and cause to doubt the validity of the judgment. *See supra* notes 141-60 and accompanying text.

209 *See* MODEL PENAL CODE § 2.02 comment 3, at 236 (Official Draft and Revised Comments 1985) (stating that recklessness "resembles acting knowingly in that a state of

In contrast, the Model Penal Code states 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."[210] This provision was designed to eliminate the defense of deliberate ignorance,[211] and has been approved by the Supreme Court and, in several variations, by each of the federal courts of appeals.[212] Yet, the high-probability language of the Code indicates recklessness, a dilemma that the drafters recognized.[213] Their attempt to justify this definition of knowledge, however, is ultimately unconvincing.

The Code first distinguishes matters of existing fact from future results of the actor's conduct, proposing that the high-probability standard of knowledge apply only to existing facts.[214] But the Code then specifically states that the provisions concerning recklessness apply to any material element of a crime,[215] thereby eliminating the basis for a distinction between existing facts and results with respect to the imposition of a knowledge standard resting on probability.

The Code next states that "the inference of 'knowledge' of a fact is usually drawn from proof of notice of a high probability of its existence" unless the actor demonstrates a contrary belief.[216] This contention directly contradicts the Code's knowledge requirement of actual awareness or practical certainty[217] and eliminates the distinction between recklessness and knowledge.[218] Although "sub-

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awareness is involved, but the awareness is of risk, that is of a probability less than substantial certainty").

210 *Id.* § 2.02(7). It should be noted that this provision is not part of the Code's definition of knowledge at section 2.02(2)(b). Instead, it is included in the general explanatory provisions concerning the culpability requirements, indicating that the provision is an exception that is designed to reach deliberate ignorance, rather than a general definition of knowledge.

211 *Id.* § 2.02 comment 9, at 248. Although the Code states that section 2.02(7) is a definition of knowledge, it is peculiar that the provision is not included with the full definition of knowledge in section 2.02(2)(b) and that it is specifically aimed at cases of deliberate ignorance. If it is in fact a definition of knowledge, there is no reason to distinguish and limit it in this manner.

212 *See supra* note 11 (providing citations); *see also* United States v. Jewell, 532 F.2d 697, 702-03 nn.12-13 (9th Cir.) (en banc) (offering extensive case citations), *cert. denied*, 426 U.S. 951 (1976); Perkins, *supra* note 72, at 956-58 nn.18-28 (same); MODEL PENAL CODE § 2.02 comment 9, at 248 n.43 (Official Draft and Revised Comments 1985) (listing revised and proposed state codes containing similar provisions).

213 *See* MODEL PENAL CODE § 2.02 comment 9, at 248 (Official Draft and Revised Comments 1985) (stating that "[w]hether such cases should be viewed as instances of acting recklessly or knowingly presents a subtle but important question").

214 *Id.*

215 *Id.* § 2.02 comment 3, at 236-37.

216 *Id.* § 2.02 comment 9, at 248.

217 *See supra* notes 205-09 and accompanying text (discussing actual awareness required under the Code's knowledge formulation).

218 In fact, the Reporter noted that the original draft required only "substantial

stantial risk" and "high probability" are meant to distinguish recklessness and knowledge, the Code neither defines these terms adequately nor suggests any criteria by which to differentiate them.[219] The Code has merely renamed recklessness with respect to existing facts in order to reach the deliberately ignorant defendant.

Employing a parallel analysis in *State v. Nations*,[220] the Missouri Court of Appeals, by contrast, concluded that deliberate ignorance constitutes recklessness rather than knowledge.[221] In *Nations*, the defendant had been charged with endangering the welfare of a child less than seventeen years old, an offense requiring knowledge of the child's age.[222] The child had been dancing "scantily clad" for "tips" in the defendant's bar.[223] Although the defendant initially told the police that she had checked the girl's identification when she hired her, both the defendant and the girl testified at trial that the girl was crossing the stage to get her identification when the police arrived.[224]

Reviewing the conviction under the plain-error standard,[225] the court of appeals found that "[t]hese facts simply show defendant was untruthful. . . . At best, it proves defendant did not know or

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probability," but the language was changed to "high probability" in an attempt to distinguish it from recklessness. MODEL PENAL CODE § 2.02 comment 9, at 248 n.42 (Official Draft and Revised Comments 1985).

219 Even the Code's drafters hinted at this inadequacy when discussing the "substantial risk" requirement of recklessness. The Code's commentary states:

> Describing the risk as "substantial" and "unjustifiable" is useful but not sufficient, for these are terms of degree, and the acceptability of a risk in a given case depends on a great many variables. Some standard is needed for determining *how* substantial and *how* unjustifiable the risk must be in order to warrant a finding of culpability. There is no way to state this value judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the actor's conduct and determine whether it should be condemned.

*Id.* § 2.02 comment 3, at 237 (emphasis in original). The Code's frank admission of the difficulty of defining "substantial" risk indicates that the notion of "high probability" is also a slippery slope. This is especially true when, as here, "high probability" is defined only with references to the nebulous concept of "substantial risk." *Id.* § 2.02 comment 9, at 248 n.43.

220 676 S.W.2d 282 (Mo. Ct. App. 1984).

221 *Id.* at 284-85.

222 *Id.*

223 *Id.* at 283.

224 *Id.* at 285. The child was in fact sixteen years old. *Id.*

225 *Id.* at 283. The defendant contended that the state had failed to make a submissible case, but she failed to preserve the issue for review on appeal. *Id.* The court nevertheless reviewed the issue under the plain-error doctrine, deeming it to be "manifest injustice for a trial court to submit a case to the fact finder on evidence insufficient to make a submissible case." *Id.* Under this standard, the court is to consider only those facts and inferences that are favorable to the government. *Id.* at 285.

refused to learn the child's age."[226] The court held that the defendant's conduct did not amount to knowledge under the Missouri Criminal Code.[227] Although the Missouri Code is derived from the Model Penal Code, it does not include the "high probability" provision, which the court characterized as "more like a restatement of the definition of 'recklessly' than 'knowingly.' "[228] Because the Missouri Criminal Code and the Model Penal Code are otherwise nearly identical in their definitions of knowledge and recklessness, the court concluded that "[t]he sensible, if not compelling, inference is that our legislature rejected the expansion of the definition of 'knowingly' to include wilful blindness of a fact and chose to limit the definition of 'knowingly' to actual knowledge of the fact."[229] Therefore, the court reversed the defendant's conviction because the prosecution had proved " 'recklessness,' nothing more."[230]

The conclusion that deliberate ignorance is merely recklessness is supported by several other considerations. First, several recent commentators have determined that deliberate ignorance is in fact recklessness.[231] Moreover, juries in cases concerning deliberate ignorance are often instructed in terms of recklessness; these instructions allow conviction on a finding of "conscious avoidance" or

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226 *Id.*

227 *Id.* at 286.

228 *Id.* at 284-85.

229 *Id.* at 285.

230 *Id.* at 286. The court noted that, although this construction allows a defendant to avoid conviction simply by refusing to check a dancer's age, "[t]his result is to be rectified . . . by the legislature, not by judicial redefinition of already precisely defined statutory language or by improper inferences from operative facts." *Id.* at 286 n.9.

231 *See, e.g.*, Edwards, *supra* note 19, at 303-06 (discussing the relationship between willful blindness and recklessness and concluding that they are "synonymous"); Lanham, *Wilful Blindness and the Criminal Law*, 9 CRIM. L.J. 261 (1985) (discussing the development of deliberate ignorance in Australia and concluding that the doctrine describes recklessness); Wilson, *The Doctrine of Wilful Blindness*, 28 U.N.B. L.J. 175 (1979) (tracing willful blindness in Canadian decisions and suggesting that that country's courts may ultimately treat it as an extension of recklessness). Glanville Williams stated that

> [t]he courts sometimes do equate wilful blindness with recklessness, but they ought not to do so. If knowledge is judicially made to include wilful blindness, and if wilful blindness is judicially deemed to equal recklessness, the result is that a person who has no knowledge is judicially deemed to have knowledge if he is found to have been reckless—which is not what the statute says. The word "knowing" in a statute is very strong. To know that a fact exists is not the same as taking a chance whether it exists or not. The courts ought not to extend a *mens rea* word by forced construction. If, when Parliament says "knowing or knowingly," it does not mean actual knowledge, it should be left to say as much by amending the statute. Parliament can quite easily say: "knowing that the fact exists or being reckless whether it exists."

G. WILLIAMS, *supra* note 197, at 125-26; *cf.* United States v. Garzon, 688 F.2d 607, 609 (9th Cir. 1982) (defining deliberate ignorance as "a middle ground" between knowing participation and innocent presence).

"reckless disregard" of a particular fact.[232] It is difficult to accept the Model Penal Code's characterization of this situation as knowledge when the courts have explicitly termed it recklessness.

The limitations imposed on the doctrine by the courts also indicate that deliberate ignorance is not knowledge. If Model Penal Code section 2.02(7) is indeed a general definition of knowledge, then there is no reason to limit its use to cases of deliberate ignorance.[233] Yet in *United States v. Murrieta-Bejarano*,[234] for example, the United States Court of Appeals for the Ninth Circuit held that a deliberate-ignorance instruction should not be given unless there are facts pointing to deliberate ignorance.[235] Two considerations indicate that the court was concerned with the definition of knowledge as high probability. First, the court held that the challenged instruction fully conformed to the *Jewell*/Model Penal Code requirement.[236] Accordingly, the court objected to the broader Model Penal Code definition rather than to a particular charge sought by

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232 *See, e.g.*, United States v. Cook, 586 F.2d 572, 579-80 (5th Cir. 1978) ("reckless disregard for the truthfulness of the claim and with the conscious purpose to avoid learning the truthfulness of the claim"), *cert. denied*, 442 U.S. 909 (1979); United States v. Thomas, 484 F.2d 909, 913 (6th Cir.) ("reckless disregard of whether the statements made were true or with a conscious purpose to avoid learning the truth"), *cert. denied*, 414 U.S. 912 (1973); United States v. Sarantos, 455 F.2d 877, 880, 882 (2d Cir. 1972) ("reckless disregard of whether the statements made were true or with a conscious effort to avoid learning the truth," although the court stated a preference for the connective "and"); United States v. Egenberg, 441 F.2d 441, 444 (2d Cir.) ("reckless disregard of whether the statement . . . was true" or "conscious purpose to avoid learning the truth"), *cert. denied*, 404 U.S. 994 (1971); *see also* United States v. Ramsey, 785 F.2d 184, 189 (7th Cir. 1986) (stating that "the evidence could support an inference of criminal recklessness, which is the legal equivalent of knowledge. . . . An ostrich instruction points the jury in the right direction without dwelling on the fine details of recklessness."), *cert. denied*, 476 U.S. 1186 (1986); *cf.* United States v. Wright, 537 F.2d 1144, 1145 (1st Cir.) (affirming district judge's holding that reckless disregard with a conscious purpose to avoid learning the truth constitutes knowledge), *cert. denied*, 429 U.S. 924 (1976).

233 Although the Code states that this provision is designed to combat the problem of deliberate ignorance, this statement is contained only in a comment. *See* MODEL PENAL CODE § 2.02 comment 9, at 248 (Official Draft and Revised Comments 1985). Section 2.02(7), which contains the definition, does not place this restriction on its use. In a similar vein, the *Jewell* court stated that "[t]o act 'knowingly,' therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question." United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976) (en banc). Undercutting the contention that this is a general definition of knowledge, however, the court later stated that "the required state of mind differs from positive knowledge only so far as necessary to encompass a calculated effort to avoid the sanctions of the statute while violating its substance." *Id.* at 704 (footnote omitted).

234 552 F.2d 1323 (9th Cir. 1977).

235 *See supra* notes 120-25 and accompanying text (detailing this limitation and noting that the Fifth and Eleventh Circuits have adopted similar restrictions).

236 *Murrieta-Bejarano*, 552 F.2d at 1325.

the defendant.[237] Second, the court stated that

> a jury, given the *Jewell* instruction, might infer that the defendant possessed "knowledge" when it would not otherwise have done so. A particular defendant may not have deliberately remained ignorant and yet not have affirmatively believed that—for example—the truck did not contain drugs. He might simply not have known one way or the other without any effort on his part to avoid learning the truth.[238]

This statement indicates that "high probability" is insufficient to establish knowledge. Even given that the defendant recognized a high probability of the existence of a fact, "[h]e might simply not have known one way or the other."[239] Finally, the court's holding also points to the risk of conviction for negligence created by a Model Penal Code instruction: the high-probability language may lead the jury to "infer that the defendant possessed 'knowledge' when it would not otherwise have done so."[240] The *Murrieta-Bejarano* restriction of the Model Penal Code definition to cases pointing to deliberate ignorance indicates that the *Jewell*/Model Penal Code instruction provides an exception; it is not a definition of knowledge.

### C. RISK OF CONVICTION FOR NEGLIGENCE

Although the Model Penal Code definition describes recklessness rather than knowledge, it serves as the standard against which deliberate-ignorance jury instructions are measured.[241] Both prongs of the Model Penal Code formulation protect the defendant from conviction for merely negligent behavior.[242] The high-

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237 *See id.* (noting that Murrieta had argued for "a more limited use" of *Jewell* instructions; the court agreed with this position).

238 *Id.*

239 *Id.* A practical example is the weather forecaster who predicts a sixty percent chance of rain: while there is a high probability of bad weather, the forecaster does not "know" that it will rain.

240 *Id.*

241 *See, e.g.*, United States v. Feroz, 848 F.2d 359, 361 (2d Cir. 1988) (stating that "[b]y now our message should be clear: the prosecutor should request that the 'high probability' and 'actual belief' language be incorporated into every conscious avoidance charge"); United States v. Jewell, 532 F.2d 697, 704 n.21 (9th Cir.) (en banc) (stating that "[t]he jury should have been instructed more directly (1) that the required knowledge is established if the accused is aware of a high probability of the existence of the fact in question, (2) unless he actually believes it does not exist"), *cert. denied*, 426 U.S. 951 (1976).

242 As Glanville Williams has written, "wilful blindness . . . requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge." G. WILLIAMS, *supra* note 4, at 159.

The Model Penal Code provides the following definition of negligence:

> A person acts negligently with respect to a material element of an offense when he *should be* aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree

probability prong aims to ensure that the defendant was in fact alerted to the possibility that the fact existed, thereby retaining the subjective character of the standard.[243] In addition, the high-probability provision reduces the likelihood of conviction for mere consciousness of some wrongdoing rather than knowledge of the material facts.[244] Furthermore, the "unless" clause highlights the importance of the defendant's actual state of mind, thereby mini-

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that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that *a reasonable person* would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(d) (Official Draft and Revised Comments 1985) (emphasis added); *see also* BLACK'S LAW DICTIONARY 538 (5th ed. 1983) (defining negligence as "failure to use such care as a reasonably prudent and careful person would use under similar circumstances"). Unlike knowledge and recklessness, negligence is an objective standard that does not require actual awareness. MODEL PENAL CODE § 2.02 comment 4, at 240-41 (Official Draft and Revised Comments 1985). Because negligent behavior is inadvertent, some commentators suggest that it is an inappropriate basis for imposing criminal liability. *See id.* (outlining this argument and providing citations). The Model Penal Code takes the view that negligence "should not be wholly rejected as a ground of culpability that may suffice for purposes of penal law, though it should properly not generally be deemed sufficient in the definition of specific crimes and it should often be differentiated from conduct involving higher culpability for the purposes of sentence." *Id.* at 243-44 (footnotes omitted).

243 *See supra* notes 107-11 and accompanying text (discussing United States v. Valle-Valdez, 554 F.2d 911 (9th Cir. 1977), in which the Ninth Circuit limited use of the *Jewell* instruction to those instances in which deliberate ignorance is joined with subjective awareness of high probability); *see also* Comment, *Conscious Avoidance of Knowledge: A Balanced Jury Charge Reinforces the Subjective Standard*, 45 BROOKLYN L. REV. 1083, 1089-94 (1979) (arguing that the high-probability language is necessary to ensure that the defendant's actual awareness be considered).

One commentator took the Model Penal Code drafters and the *Jewell* court to task for imposing the high-probability requirement. *See* Perkins, *supra* note 72, at 961-66. He emphasized hypothetical examples in which there is a fifty-percent chance of the existence of a given fact, such as a necklace being stolen property or a car trunk containing cocaine, and concluded that they were beyond the scope of the Model Penal Code's high-probability standard. *Id.* at 962-63. (This conclusion raises a serious contradiction in the Code provision. If the high-probability standard does not reach those situations in which there is, for example, a fifty-percent chance, then the Code does not provide an effective solution to the deliberate-ignorance problem. If the Code does encompass these situations, however, then there is not even a pretext of maintaining the "substantial certainty" standard that differentiates knowledge from recklessness.) Perkins stated that, "where there is direct evidence of a deliberate plan to avoid knowing the truth, the degree of probability is unimportant." *Id.* at 964. Perkins' argument rests on the premise that knowledge and deliberate ignorance are equally culpable. *But see infra* note 265 (discussing complexities of culpability and deliberate ignorance). He would amend section 2.02(7) of the Code to state that knowledge is established "if a person believes that it probably exists," and that "one is deemed to have knowledge of what he would have known if he had not deliberately avoided knowing." Perkins, *supra* note 72, at 965. This approach should be unacceptable, because it eliminates the "substantial certainty" standard that separates knowledge from recklessness.

244 *See* United States v. Morales, 577 F.2d 769 (2d Cir. 1978). The defendant in *Morales* had received $1000 to take a suitcase from Chicago to New York. DEA agents discovered that the bag contained two tape-wrapped packages of heroin under some

mizing the risk that the high-probability language may well lead the jury to apply an objective standard.[245] Once the jury's attention is properly focused on the defendant's state of mind, the unless prong also ensures that he has an opportunity to present the defense of a contrary belief.[246]

Despite the importance of these protections, trial judges and reviewing courts often give or approve jury instructions that exclude one of these components, eliminating even the minimal safeguards that these provisions afford.[247] This practice occurs so frequently

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dirty clothes. The court of appeals reversed the conviction because of cumulative errors in instructions regarding the relevance of the evidence. The court held that,

> [w]hile it is reasonable, as the Government points out, to infer that appellant could hardly have believed that she would be paid $1000 for transporting a suitcase full of dirty clothes to New York, this does not require an inference that she believed the contents to be narcotics, as distinguished from some other contraband such as stolen jewelry or precious metal, counterfeit bills, uranium, valuable documents, or the like.

*Id.* at 772. The court then noted that an available defense was that the defendant was a "mule" who was "ignorant of the nature of the contraband she carried." *Id.*; *see also* United States v. Joly, 493 F.2d 672, 675-76 (2d Cir. 1974) (noting that the defendant may buttress his claim of ignorance by presenting evidence that a parcel is the appropriate size and shape to contain a small and valuable article other than narcotics, but the inference of knowledge from possession "does not automatically disappear," especially when the package had been concealed beneath his belt).

245 *See supra* notes 112-16 and accompanying text (discussing United States v. Esquer-Gamez, 550 F.2d 1231 (9th Cir. 1977), in which the Ninth Circuit held that, without the "unless" provision, the jury's attention is not sufficiently directed to the defendant's actual state of mind); *see also* United States v. Bright, 517 F.2d 584, 587 (2d Cir. 1975) (stating that the "juror's difficult task of probing the mind and will of another person is hard enough with the aid of a charge that balances the countervailing considerations. His verdict becomes suspect when he has not had the benefit of a balanced instruction from the court.").

246 *See Esquer-Gamez*, 550 F.2d at 1236 (stating that, when the defense was that the defendants thought that parcels contained gifts for their brother's girlfriend, the jury should have been instructed that this contrary belief served as a defense); *Bright*, 517 F.2d at 588 (holding that the defendant was entitled to an instruction that an actual belief that checks were not stolen would negate an inference of knowledge); United States v. Christmann, 298 F.2d 651, 654 (2d Cir. 1962) (requiring that the defendant be provided an opportunity to present the defense of an honest belief that the smuggled substance was perfume essence, rather than heroin). *But see Morales*, 577 F.2d at 774 (holding that omission of an instruction concerning contrary belief is not erroneous when the defendant claims the "mule" defense of no belief about the substance).

247 *See, e.g.*, United States v. Shareef, 714 F.2d 232, 233-34 (2d Cir. 1983) (finding no reversible error where the judge instructed that "the requisite knowledge . . . cannot be established by demonstrating merely negligence or even foolishness," instead of phrasing the charge in terms of "actual belief"); United States v. Cano, 702 F.2d 370, 371 (2d Cir. 1983) (stating a preference for inclusion of the unless clause, but concluding that its absence did not warrant reversal); United States v. Jewell, 532 F.2d 697, 704 n.21 (9th Cir.) (en banc) (stating that an instruction ideally would include the unless provision, but that its absence was not plain error), *cert. denied*, 426 U.S. 951 (1976).

When the high-probability language is omitted, it is usually replaced by a charge that the jury may convict if it finds that the defendant "did not learn what the substance

that the United States Court of Appeals for the Second Circuit recently ordered that copies of its opinion in *United States v. Feroz*[248]—holding that an acceptable charge should include both the high-probability and unless provisions[249]—be issued to all of the United States Attorneys within the circuit.[250] Some courts further exacerbate the risk of conviction for negligence by instructing the jury that it may convict if the defendant "intentionally avoid[ed] knowledge by closing his eyes to facts which *should* prompt him to investigate."[251]

Reviewing courts also use the language of negligence in assessing the sufficiency of the evidence.[252] In *United States v. Del Aguila-Reyes*,[253] for example, Del Aguila-Reyes had been convicted of im-

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was, but that the only reason he did not learn it was because he deliberately chose not to learn for the very purpose of being able to assert his ignorance." United States v. Olivares-Vega, 495 F.2d 827, 830 n.10 (2d Cir.), *cert. denied*, 419 U.S. 1020 (1974); *see also* United States v. Aleman, 728 F.2d 492, 494 (11th Cir. 1984) ("a finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment or understanding would permit an inference of knowledge on the part of the defendant"); United States v. Grizaffi, 471 F.2d 69, 75 (7th Cir. 1972) ("No person can intentionally avoid knowledge by closing his eyes to facts which prompt him to investigate."), *cert. denied*, 411 U.S. 964 (1973).

248 848 F.2d 359 (2d Cir. 1988).

249 *Id.* at 360-61.

250 *Id.* at 361. Despite the court's frustration, *Feroz* illustrates why this abuse continues: although the instruction at issue contained neither the high-probability provision nor the unless clause, the court affirmed the conviction because the charge did not constitute plain error. *Id.*

251 United States v. Eaglin, 571 F.2d 1069, 1074 (9th Cir. 1977) (emphasis added), *cert. denied*, 435 U.S. 906 (1978); *see also* United States v. Ramsey, 785 F.2d 184, 189 (7th Cir.) ("No person can intentionally avoid knowledge by closing his or her eyes to facts which should prompt him or her to investigate."), *cert. denied*, 476 U.S. 1186 (1986); United States v. Burns, 683 F.2d 1056, 1059 (7th Cir. 1982) (same), *cert. denied*, 459 U.S. 1173 (1983); *cf.* United States v. Cooperative Grain & Supply Co., 476 F.2d 47, 59 (8th Cir. 1973) ("It should be noted, however, that a 'guilty avoidance of knowledge' and a 'bona fide belief resulting from negligence' can form generally the requisite criminal scienter.")

Judge (now Justice) Kennedy noted this problem in *Murrieta-Bejarano*:

> The *Jewell* instruction should not be given unless the evidence can sustain a finding, beyond a reasonable doubt, that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of being arrested and charged. . . . The danger is that juries will avoid questions of scienter and convict under the standards analogous to negligence. Such convictions are wholly inconsistent with the statutory requirement of scienter.

552 F.2d 1323, 1326 (Kennedy, J., concurring in part and dissenting in part).

252 On such a challenge, the evidence and reasonable inferences therefrom must be viewed in the light most favorable to the verdict and must enable a reasonable jury to find the defendant guilty beyond a reasonable doubt. United States v. Del Aguila-Reyes, 722 F.2d 155, 157 (5th Cir. 1983); United States v. Nicholson, 677 F.2d 706, 708 (9th Cir. 1982).

253 722 F.2d 155 (5th Cir. 1983).

portation and possession of cocaine with intent to distribute.[254] After he and his brother entered the United States at Hidalgo, Texas, a trained dog "sniffed" the vehicle and signaled that he smelled something under the seats.[255] A Customs official searched the vehicle and discovered thirty pounds of cocaine, worth twenty to forty million dollars, in a compartment beneath the seats.[256] Del Aguila-Reyes denied all knowledge of the cocaine and explained that his employer had instructed him to drive the vehicle to Miami, deliver it to one Oscar Diaz, and return to Guatemala with the vehicle and three Toyota pickup trucks.[257] He stated that he had made the trip four times and that Diaz had usually kept the vehicle for two or three days to have it washed and repaired.[258] The court held that it was reasonable to infer that Del Aguila-Reyes would not have been entrusted with such valuable cargo if he were "a mere casual employee," ignorant of all details, "that he knew that Toyotas could be obtained at less expense and with less effort in a city nearer to Guatemala," and that he knew that Diaz kept the vehicle for other than maintenance purposes.[259] The court phrased its conclusion in terms of negligence, however, stating that "it was reasonable for the jury to infer that Del Aguila-Reyes *should have known* that his trip to Miami was prompted for some additional, *probably* illegal, reason."[260]

## V. Recommendations and Conclusion

The Model Penal Code formulation should be rejected as a model for deliberate-ignorance jury instructions. The high-probability/unless standard describes recklessness rather than knowledge, and its adoption by the judiciary instead of the legislature infringes on the legislature's province of defining criminal con-

254 *Id.*

255 *Id.* at 155-56.

256 *Id.* at 156.

257 *Id.* Del Aguila-Reyes was to drive his vehicle and tow one of the Toyotas; his brother would drive the second Toyota and tow the third. *Id.*

258 *Id.*

259 *Id.* at 157. The court also found that Del Aguila-Reyes' lack of concern and surprise when the cocaine was found and his false statement that this was the first time that his brother had accompanied him would justify an inference of guilty knowledge. *Id.* at 158.

260 *Id.* at 157 (emphasis added). This standard is also deficient because suspicion of "some additional, probably illegal, reason" for the trip does not establish awareness of the presence of the cocaine, but instead indicates mere consciousness of some wrongdoing. *See also* United States v. Nicholson, 677 F.2d 706, 709 (9th Cir. 1982) (evaluating the sufficiency of the evidence and concluding that the "circumstances of this case would have made *any reasonable person* suspect that the undisclosed 'business venture' was illegal") (emphasis added).

duct.[261] Furthermore, it violates the defendant's right to proof beyond a reasonable doubt of each element of the crime charged.[262] Finally, despite the precision of the Model Penal Code language, inadequate statement and application of this standard often leads to conviction for mere negligence. In light of these deficiencies, fur-

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261 *See, e.g.*, Morissette v. United States, 342 U.S. 246, 263 (1952) (stating that "[t]he spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute") (footnotes omitted); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (stating that "[i]t is the legislature, not the court, which is to define a crime, and ordain its punishment" and "[i]t would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated").

262 *See supra* notes 7, 13 & 244 and accompanying text (noting requirement of proof beyond reasonable doubt of crime's elements as opposed to mere consciousness of some wrongdoing). Another area in which the knowledge/recklessness borderline is in issue concerns the crime of theft, embezzlement, or misapplication by a bank officer or employee. The relevant federal statute reads in pertinent part:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank . . . embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . .

18 U.S.C. § 656 (1988). In 1894, the Supreme Court held that the predecessor statute, 12 U.S.C. § 592, which utilized substantially the same language as section 656, required knowledge or purpose as the applicable mens rea. Evans v. United States, 153 U.S. 584, 592 (1894); *see also* United States v. Britton, 108 U.S. 193, 199 (1883) (bank president who allowed indebted depositor to withdraw further sums may have been neglectful, but was not guilty of willful misapplication of bank moneys under a similar statute). A typical jury instruction on a section 656 charge will include a statement requiring the intent to injure or defraud the bank. *See, e.g.*, United States v. Kington, 875 F.2d 1091, 1096 (5th Cir. 1989). On occasion, the instruction will also add that such intent "exists if the defendant acts knowingly and if the natural consequences of his conduct is [sic] or may be to injure the bank." *See, e.g., id.* Recent cases have reversed convictions based on this instruction, on the ground that it inappropriately dilutes the mental state required for conviction. *See e.g., id.* at 1098; United States v. Adamson, 700 F.2d 953, 965-67 (5th Cir.) (Unit B en banc), *cert. denied*, 464 U.S. 833 (1983). *Adamson*, for example, concluded that,

> [i]n order to convict a defendant for willfully misapplying funds with intent to injure or defraud a bank, the government must prove that the defendant *knowingly* participated in a deceptive or fraudulent transaction. The trier of fact may infer the required intent, *i.e.*, knowledge, from the defendant's reckless disregard of the interest of the bank; however, jury instructions should not equate recklessness with intent to injure or defraud.

*Id.* at 965 (emphasis in original); *accord* United States v. Unruh, 855 F.2d 1363, 1373 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 513 (1988); *see also* United States v. Cauble, 706 F.2d 1322, 1354-56 (5th Cir. 1983) (affirming conviction after application of *Adamson* standard), *cert. denied*, 465 U.S. 1005 (1984).

ther manipulation of the definition of knowledge to eliminate the deliberate-ignorance defense must be rejected.

Statutory revision—the addition of recklessness or specific deliberate-ignorance provisions as a basis of conviction for particular crimes—could simultaneously answer these concerns and effectively limit the deliberate-ignorance defense.[263] Such a statute and corresponding jury instructions prohibiting importation of drugs should provide that:

> **(1) It shall be unlawful for any person knowingly or recklessly to import into the Customs territory of the United States any controlled substance without proper authorization [as described elsewhere].**
>
> **(2) One acts knowingly with respect to facts, conduct, attendant circumstances, or results if he is aware that such facts, circumstances, conduct, or results exist or will be created or if he is virtually certain that such facts, circumstances, conduct, or results exist or will be created.**
>
> **(3) One acts recklessly with respect to facts, attendant circumstances, conduct, or results if he consciously disregards a substantial risk that such facts, circumstances, conduct, or results exist or will be created.**
>
> **One consciously disregards a substantial risk if he recognizes a high probability that such facts, circumstances, conduct, or results exist or will be created, unless he actually believes that they do not exist or will not be created.**[264]

A recklessness standard would reach most defendants who deliberately remain ignorant, without manipulating the definition of knowledge to achieve a desired but unwarranted result.[265] This ap-

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263 *See* State v. Nations, 676 S.W.2d 282, 286 n.9 (Mo. Ct. App. 1984) (suggesting that, although deliberate ignorance provides a convenient defense, legislative action rather than judicial redefinition of knowledge is the appropriate solution); G. WILLIAMS, *supra* note 197, at 126 (stating that, "[i]f, when Parliament says 'knowing' or 'knowingly,' it does not mean actual knowledge, it should be left to say as much by amending the statute"). The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988), for example, provides for forfeiture of vessels, vehicles, and aircraft used in drug-related offenses unless the offense is "established by that owner to have been committed or *omitted* without the knowledge, consent, or *willful blindness* of the owner." *Id.* § 6075, 102 Stat. 4324 (to be codified at 21 U.S.C. § 881(a)(4)(C)) (emphasis added); *accord id.* §§ 6076, 6079, 102 Stat. 4324, 4325-26.

264 Paragraph 1 of the recommended statute should address the type of activity that is sought to be prohibited, such as importation of controlled substances, possession of particular contraband, or receiving stolen property. Depending on the structure of the jurisdiction's penal code, paragraphs 2 and 3 of the recommended statute might be better placed in a general section of the code defining criminal mens rea, such as section 2.02(2) of the Model Penal Code, to avoid needless repetition throughout the code.

265 One important issue in this area is whether the sanctions for reckless violation of a particular law should be equal to or less than those for a knowing violation. Many commentators contend that deliberate ignorance and knowledge are equally culpable. *See, e.g.*, United States. Jewell, 532 F.2d 697, 700 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976); Clifford, *The Ethics of Belief*, in R. Ammerman & M. Singer, *supra* note 126, at 39-40 (providing a philosophical discussion of deliberate ignorance using the example of the owner of a potentially unseaworthy ship, concluding that the owner would be just

proach preserves both the appearance and the actuality of justice, while respecting the legislative role in our legal system. Finally, a frank admission that deliberate ignorance is in fact recklessness will likely result in more accurate and less prejudicial jury instructions, as judges would be applying a familiar standard.

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as guilty for any deaths that might result as if he had actually known that the ship would not make its passage because "he had no right to believe on such evidence as was before him," and further stating that the owner would be equally guilty even were no deaths to result because "[w]hen an action is once done, it is right or wrong forever; no accidental failure of its good or evil fruits can possibly alter that") (emphasis omitted); Perkins, *supra* note 72, at 961-66.

The risk that distinguishes deliberate ignorance (recklessness) from knowledge, however, cuts both ways with respect to culpability. On the one hand, recklessness is generally considered to be a lower grade of culpability because the actor is not certain, as he is with knowledge, that a given fact or result will materialize. *See* G. WILLIAMS, *supra* note 197, at 96 (noting this distinction); MODEL PENAL CODE § 2.02 explanatory note, at 227-29 (Official Draft and Revised Comments 1985) (stating that levels of culpability are graded, with recklessness below knowledge). On the other hand, recklessness/deliberate ignorance may indicate greater culpability in some situations. Suppose, for example, that a traveler is offered $10,000 to check a suitcase onto a plane that is destined for the United States. Suppose further that he knows that the owner of the luggage is a drug dealer and that there will be four DEA agents on the plane. Finally, suppose that he is instructed not to travel on the same plane, but to pick up the suitcase after his arrival on a later flight. Presumably, he could be convicted of knowing or reckless importation of narcotics under a deliberate-ignorance standard in the event that the suitcase is discovered to contain drugs. But perhaps his actions are *more* culpable than those of a person who knew that the luggage contained narcotics: in the hypothetical, the presence of the DEA agents and the instruction not to take the same flight are consistent with the possibility that the case contained a bomb rather than narcotics, a far more serious matter. (While the hypothetical may seem an exaggeration, such is not the case. *See, e.g., The Southwest Drug Connection,* NEWSWEEK, Nov. 23, 1987, at 29, 30 (describing rapidly increasing violence by Colombian drug dealers directed at both rival dealers and law-enforcement agents and their informants).) Alternatively, perhaps the element of risk offsets the possibility of greater harm in the hypothetical, resulting in culpability that is roughly equal to that of a knowing violation of the narcotics laws. Ultimately, the legislature must evaluate this difficult calculus.