

Willful ignorance in law and morality

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Abstract

This article introduces the main conceptual and normative questions about willful ignorance. The first section asks what willful ignorance is, while the second section asks why—and how much—it merits moral or legal condemnation. My approach is to critically examine the criminal law's view of willful ignorance. Doing so not only reveals the range of positions one might take about the phenomenon but also sheds light on foundational questions about the nature of culpability and the relation between law and morality.

1 | INTRODUCTION

Your childhood friend appears one day saying he wants to give you a gift for old times' sake. His car is filled with boxes of electronics, and he gives you a new laptop. You suspect he may not have come by it honestly. Still, you can't buy this computer in stores yet, and you really want it. Your friend starts to tell you a complicated story about where it came from, but you interrupt saying “no, don't tell me, I don't want to know.” (Actually, the laptop is stolen.) You happily accept, thinking that because you don't *know* it's stolen, you'll have a defense should the authorities investigate.

You might feel content in your ignorance, but this is a mistake. You were *willfully ignorant*. Accordingly, the criminal law can treat you as though you actually knew the laptop was stolen.¹ It's generally a crime to purposely receive property with knowledge that it's stolen (Model Penal Code, 1962, section 223.6), so you could end up in serious trouble here.

In this way, the law prevents us from escaping responsibility by burying our heads in the sand. Similar thinking applies outside the courtroom. Suppose the President decides not to attend intelligence briefings in which he expects to learn of critical security risks that only he can properly respond to. This is also willful ignorance. Although the President is immune from criminal prosecution for actions taken in office, he can still be morally blamed more harshly because of his willful ignorance.

Willful ignorance is of increasing political importance as well. Many anti-vaccination activists or climate change deniers plausibly count as willfully blind to the robust scientific evidence in support of vaccination programs or human-caused climate changes. Propaganda, fake news, and conspiracy theories likely would not spread so quickly and widely on social media were it not for the willful ignorance of politically impassioned internet users who circulate

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articles or links without investigating their veracity first. Willful ignorance arguably is one mechanism by which our public discourse has moved in the direction of so-called “post-truth politics.”

Accordingly, willful ignorance is an increasingly important phenomenon to understand, evaluate, and ultimately combat. This article introduces the main conceptual and normative questions about willful ignorance, leaving the rich psychological literature on the causes of willful ignorance for another time. Section 2 asks what willful ignorance *is*, while Section 3 asks why—and how much—it merits moral or legal condemnation. My approach is to critically examine the criminal law's view of willful ignorance. Doing so not only reveals the range of positions one might take about the phenomenon but also sheds light on foundational questions about the nature of culpability and the relation between law and morality.

2 | WHAT IS WILLFUL IGNORANCE?

My point of departure is the criminal law's conception of willful ignorance. As we'll see, the law takes a stand on several conceptual questions, though other views are possible. The aims of this section are mainly descriptive: I want to explain how Anglo-American criminal law actually answers the core conceptual questions about willful ignorance, sketch the other available answers, and explain what motivates the law's view. As we'll see, the law's conception of willful ignorance is narrow, though a wider notion may be suitable for purposes of moral evaluation. The narrow legal conception stems from certain evaluative assumptions, which I explain in this section as well. However, directly confronting the question of when and why willful ignorance is bad, so as to reach a theory of how to systematically evaluate willful ignorance, will be deferred to Section 3.

2.1 | The basic legal conception

First, some terminology. *Knowledge crimes* require that one know some *inculpatory proposition*, *p*. To be guilty of such a crime, one must do some action (the *actus reus*) with the mental state (or *mens rea*) of knowledge² of *p*. Common examples are receiving property one knows to be stolen, and transporting what one knows to be drugs. Contrast these knowledge crimes with *willfully ignorant misconduct*. This occurs when one does the crime's *actus reus* not with knowledge of *p*, but in willful ignorance of *p*.³ Courts routinely allow willful ignorance to substitute for knowledge. The willfully ignorant may be punished as if they actually had the knowledge required for the crime.

What, then, is willful ignorance? The Supreme Court noted there is widespread agreement on at least “two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.”⁴ Similarly, as Glanville Williams put it, one is willful ignorant if one “has his suspicions aroused but then deliberately omits to make further enquiries” (Williams, 1961, p. 157). To summarize,

Basic Legal Account: To be willfully ignorant of an inculpatory proposition *p* (which let's suppose is true⁵), one must

- (1) have sufficiently serious suspicions of *p* (i.e., believe there is a sufficiently high likelihood that *p* is true, short of practical certainty), and
- (2) deliberately (as opposed to negligently or recklessly) fail to take reasonably available steps to learn with greater certainty whether *p* actually is true.

As we'll see, some courts add further requirements. Nonetheless, courts agree that *at least* these two prongs are required. So let's assume for now the account is complete. Already it takes a stand on several important questions about willful ignorance—one for each prong.

Start with (1). It says one can't be willfully ignorant without being aware of a risk that *p* is true (i.e., suspecting it).⁶ Thus, one can't be willfully ignorant without qualifying as at least *reckless* toward *p* (Alexander & Ferzan, 2009, p. 43). Recklessness involves acting while aware of a substantial and unjustified risk of harm or another inculpatory fact (Model Penal Code, 1962, section 2.02(2)(c)). Thus, on the basic legal account, willfully ignorant actors are always at least reckless. But they also go further. Unlike garden-variety reckless actors, willfully ignorant actors can reasonably investigate their suspicions of *p*'s truth but they then decide to preserve their ignorance about *p*. Thus, willful ignorance "surpasses recklessness and negligence."⁷

Not all agree that suspicions are needed for willful ignorance. Some philosophers claim one can be willfully ignorant of *p* even without suspecting it, i.e., being aware of a risk that *p* (Wieland, 2017a, p. 115). On this view, if one merely *should* have been aware of such a risk (but wasn't), and then prevented oneself from obtaining more information about *p*, one is willfully ignorant. So our first substantive question is

Q1: Are suspicions of *p* (i.e. believing there is a substantial risk it is true) required for being willfully ignorant of *p*?

By answering in the affirmative, the law's conception of willful ignorance becomes narrower than it otherwise would be.

Given prong (2), the basic legal account also takes a stand on a second question:

Q2: To be willfully ignorant, what mental state must you have toward the fact that you're preserving your ignorance of *p*? Do you need *purpose* (or intent) to preserve your ignorance? *Knowledge* that this will result? Awareness of a *risk* thereof (i.e., recklessness)? Is it enough that you *should* have been aware of the risk that you'd preserve your ignorance, but weren't (i.e., negligence)?

This question matters because not all ignorance for which one is responsible is *willful*. Sometimes it's just accidental. Perhaps one suspected *p* and could have investigated but forgot or was distracted. Where is the line between willful and non-willful ignorance?

The basic legal account again sets the bar high. Given (2), ignorance of *p* cannot be willful unless one *deliberately* declined to learn the truth about *p*. The term "deliberately" is the Supreme Court's in *Global-Tech*.⁸ What does it mean? At the very least, it's sufficient to act with *purpose*—or intent—to preserve one's ignorance of *p*. Most courts adopt this meaning.⁹ Others suggest that even when one did not have purpose to remain in ignorance, behaving in ways one merely *knows* will prevent one from coming to know that *p* would also suffice for willful ignorance.¹⁰ Thus, the law's answer to Q2 is that acting with at least purpose, and probably also knowledge, that one will remain ignorant of *p* qualifies as willful ignorance.

But, again, other views are possible. For instance, why not say people are willfully ignorant if they merely took a *risk* of not learning the truth? Suppose a doctor suspects the cutting-edge technology she will use on a patient tomorrow might be risky. She doesn't have the purpose to remain ignorant of these risks, but she's indifferent. So she leaves a note for her assistant to browse the relevant literature and let her know of any pertinent information. She's aware the (notoriously lazy) assistant may not see or act on the note. Thus, she takes a *risk* of remaining ignorant about whether the new technology is dangerous. Suppose in fact it is, and the patient is harmed. The doctor isn't willfully ignorant of these dangers in the legal sense. She fails prong (2), since she lacked both the purpose to remain in ignorance and knowledge that she would. After all, the assistant might well have seen the note and informed her in time. Still, one might think there's an intuitive sense in which the doctor was willfully ignorant. (Sarch, 2016, p. 142).

In taking willful ignorance to require suspicions plus deliberately (i.e., purposefully or knowingly) preserving one's ignorance, the law sets a high bar. What might be the motivation for this? The answer derives from the special function willful ignorance serves in law (Husak & Callender, 1994, pp. 35–36). In criminal cases, willful ignorance is meant to substitute for actual knowledge: When the defendant does not actually know *p*, but was willfully ignorant of it, courts may treat her as if she actually knew *p*.¹¹ Thus, the criminal law seeks to define willful ignorance so it is not

unfair to impose the same liability on willfully ignorant actors as on knowing actors. Indeed, as the Supreme Court observed, the “traditional rationale for this [willful ignorance] doctrine is that defendants who behave in [a willfully ignorant] manner are just as culpable as those who have actual knowledge.”¹² Thus, it is to avoid unfairness that criminal law adopts a narrow definition, which captures only what the criminal law assumes are the most culpable instances of willful ignorance.

The basic legal account's answers to Q1 and Q2 plausibly serve this end. One might think willful ignorance seems more culpable, all else equal, if one actually suspects *p* than if one has no such suspicions. Perhaps it's worse not to look inside the suitcase one was asked to carry if one actually suspects it might contain drugs than if one were unaware of this risk. If so, one might think it reduces the chance of unfairness for the law to answer Q1 as it does, so that actual suspicions of *p* are required before the willfully ignorant will be punished as if they knew that *p*. Similarly, willful ignorance might seem more culpable, all else equal, the more deliberate one's ignorance-preserving behavior is. Aiming at or ensuring one's ignorance about whether the suitcase contains drugs might seem worse than merely taking a risk of not learning the truth. This evaluative assumption would likewise explain why the law answers Q2 as it does, thereby narrowing its definition of willful ignorance still further.

By contrast, outside the criminal law, there may be less pressure to adopt a similarly narrow account. If one's concern is attributing moral blame, a wider definition might do just fine. For instance, suppose I *should have* suspected I might be endangering one of my guests with a seafood allergy when I serve a new Caesar salad dressing with dinner but neglected to inquire about the guests' allergies because they're my wife's friends, who I'm less careful to be courteous to. Even if this shouldn't count as legal willful ignorance (for in failing prongs (1) and (2), it may seem unfair to punish me the same as if I *knew* I'd harm a guest), it might still be plausible to call this willful ignorance in wider moral discourse.

2.2 | Further restrictions beyond the basic account?

Some courts add further prongs to the basic legal account. Thus, the next question is

Q3: Once Q1 and Q2 have been answered—as the basic legal account does in prongs (1) and (2)—is the account complete, or must it be further restricted?

Two such restrictions are especially common. First, some courts and theorists add a “motive prong” to the definition. They insist the defendant's motive for remaining in ignorance must have been to preserve a defense against liability in the event of prosecution.¹³ Thus, besides (1) and (2), they think willful ignorance also requires that

(3) one's motive for taking the ignorance-preserving actions in (2) was to set up a defense in the event of prosecution.

Second, other courts insist willful ignorance requires affirmative steps to avoid knowledge—not merely omitting to investigate.¹⁴ On this view, (2) should be replaced with

(2') deliberately (as opposed to negligently or recklessly) take affirmative steps to prevent oneself from obtaining more information about *p* that would establish whether *p* is true, which one otherwise would have obtained.

Thus, merely declining to expend time, effort or resources on investigating one's suspicions wouldn't suffice for willful ignorance. Suppose you suspect your construction project may be dangerous. You could easily find out by glancing at the construction site as you drive by on your way home tonight. But you want to avoid confirming your suspicions, so you take a 30-minute detour to keep yourself from learning that the construction site is dangerous. (2') states that willful ignorance requires such affirmative steps to block oneself from obtaining naturally available information.

What might motivate these further restrictions? They likely stem from certain evaluative assumptions about willful ignorance, just as (1) and (2) were seen to do. In particular, one might think adding (3) and (2') helps the criminal law to home in on the worst cases of willful ignorance to make sure it's not unfair to punish willfully ignorant actors the same as knowing actors. Some might think the motive to preserve a defense would be a particularly culpable one. Likewise, some might think it worse to expend resources in actively avoiding freely available information than merely declining to expend resources to gather more information.

Nonetheless, these further restrictions are not universally adopted. Some courts expressly reject prong (3).¹⁵ This likely reflects doubts about the evaluative assumption behind (3). Even if wanting to preserve a defense might be one culpable motive for preserving one's ignorance, there is in principle no limit to the reasons for which one might do so. Many of these might seem just as bad as the desire to maintain a defense—e.g., if one wants to get paid from a conspiracy, but knows one will get kicked out if one learns too much. Thus, one might think it arbitrary to insist that the particular motive mentioned in (3) is required to be willfully ignorant *at all*. Perhaps one might try to modify prong (3) to better pick out the worst motives for remaining in ignorance. Still, it seems difficult to enumerate *ex ante* which of these motives are sufficiently bad—at least if one wants to do so with enough specificity to be illuminating (not to mention keep the definition applicable by courts). Even more fundamentally, some theorists argue that *no* specific motive should be required because the criminal law generally should be indifferent to motives (Hellman, 2009, pp. 310–311).

The restriction in (2') is also not universally accepted. As before, natural worries may explain why. Restricting willful ignorance to only those cases where affirmative ignorance-preserving steps were taken rests on the much maligned distinction between actions and omissions. It's difficult to draw the act-omission distinction in a principled way, since putative omissions typically can be redescribed as actions. Thus, prong (2) might seem more principled.

2.3 | A consistent approach

Given all these possible answers to the conceptual questions, how do we make progress? My suggestion is to resist the temptation we saw some courts give in to above to allow evaluative considerations to influence the *definition* of willful ignorance. Rather, it is clearer and more transparent to keep the question of what willful ignorance is distinct from the question of how bad it is. This suggests a two-step approach for theorists to use. First, I propose adopting as wide a definition as is plausible for the context in question. In the law, the *basic* legal definition seems adequate (as is suggested by the fact that it already enjoys fairly broad acceptance). For moral discourse, I'm at least open to using a wider definition. With a suitably wide definition in hand, the second step is to explicitly recognize that not all cases of willful ignorance are equally bad and to directly tackle the question of how criticizeable it is in different cases. Plausibly, not all willfully ignorant misconduct is as culpable as the analogous knowing misconduct (Sarch, 2017b). Thus, not all willfully ignorant defendants should be punished as knowing wrongdoers—only those who really are as culpable as their knowing counterparts. We would then seek a theory of what makes willful ignorance culpable in order to systematically determine when defendants should be punished as knowing wrongdoers. This two-step approach, I suggest, is more transparent than modifying the *definition* of willful ignorance to cover only what one regards as the worst cases. Better to foreground the relevant evaluative issues and tackle them directly. Let us go on, therefore, to do just that.

3 | EVALUATING WILLFUL IGNORANCE

In this section, I'll directly confront the question of why—and how much—willful ignorance merits condemnation. In principle, many normative concepts might be used to evaluate willful ignorance (e.g., permissibility or virtue). But culpability, or blameworthiness, has been particularly central to the literature on willful ignorance. So that is my focus here.

I distinguish between moral and legal culpability, since different evaluations of willful ignorance may be plausible depending on which one picks. I'll use "moral culpability" to refer to the moral notion, "criminal culpability" to refer to the legal notion, and "culpability" to refer to both together.

Some might object that there is little difference between moral and legal culpability (Moore, 1990, pp. 30–31). By contrast, other views (Dsouza, 2015, p. 453; Sarch, 2017a) emphasize that criminal culpability is subject to a range of practical considerations and institutional design constraints that the moral notion is not. While moral culpability figures into our informal blaming practices and is what makes one an apt target of reactive emotions like resentment and indignation, criminal culpability informs the content of the law and helps determine how much condemnation by the state one's conduct merits.

Rather than defend this distinction, I'll adopt a theoretical framework that makes room for it but does not require it. Specifically, the *quality of will theory* has become an increasingly popular way to understand both moral and criminal culpability. Applied to the former, it's roughly the view that one is morally culpable for an action to the extent it manifests ill will—i.e., insufficient regard for (or a failure to properly weigh and respond to) the moral reasons that bear on how to act (e.g., the interests of others) (Markowitz, 2010; Arpaly & Schroeder, 2014, p. 170). The dominant approach to criminal culpability follows a similar pattern: An act is criminally culpable to the extent it manifests insufficient regard for the interests and values that are properly protected by the applicable legal provisions—that is, for the relevant legally cognizable reasons bearing on how to act. (Alexander & Ferzan, 2009, pp. 67–68; Tadros, 2005, p. 250; Yaffe, 2011, p. 38; Sarch, 2017a).

On the quality of will view, criminal culpability collapses into moral culpability if the reasons the law properly recognizes simply *are* the moral reasons bearing on how to act. But the quality of will view can also preserve differences between these two concepts if it turns out the law should recognize a different—perhaps narrower—set of reasons that one's behavior shouldn't manifest insufficient regard for. The quality of will framework thus allows us to see criminal culpability as a stripped down analog of moral culpability, with the legal notion tracking a narrower, less fine-grained set of reasons than the moral notion.¹⁶

A natural way to evaluate willful ignorance, then, is to directly apply one's preferred theory of culpability to particular cases of the phenomenon. On quality of will views, this amounts to asking how much insufficient regard one's willfully ignorant conduct manifests for the relevant set of reasons, whether moral or legal.

Still, we might also want more concrete guidance about willful ignorance than this. Thus, let's consider the question that is crucial to the law: When is willfully ignorant conduct as culpable as knowing misconduct? (This question, of course, comes in a moral version too). I'll discuss the two main answers to this question that apply the quality of will theory.

3.1 | Duty to inform oneself

One way to answer the question of when willfully ignorant misconduct is as culpable as knowing misconduct, which I've defended (Sarch, 2017b), involves a pro tanto duty to inform oneself. On this view, willful ignorance always involves a breach of this pro tanto duty, and breaching it without justification manifests insufficient regard. Thus, assuming a quality of will theory, it increases the culpability of one's conduct, all else equal. Sometimes, this breach—if serious enough—can raise the culpability of one's willfully ignorant conduct up to the level of the analogous knowing misconduct. To summarize,

Duty-Based Test: A's risky action, *x*, done in willful ignorance of inculpatory proposition *p*, is at least as culpable as B's performance of *x*, which is identical to A's except that B had knowledge of *p*, *iff* A did *x* pursuant to a *sufficiently culpable* breach of A's duty to reasonably inform herself about *p*.

What does this duty require? The formulation I've defended (Sarch, 2017b) is roughly this:

Duty to Reasonably Inform Oneself (DRI): If A i) intends to perform risky action x (e.g., the actus reus of a crime), ii) possesses substantial confidence (short of knowledge) that the relevant p is true (i.e., suspicions about p), and iii) believes or reasonably should believe that there are available ways to inform herself about whether p that are not unduly burdensome, **then** A has a pro tanto obligation, conditional on continuing to hold the relevant intention, to (at least try to) acquire more information about whether p, in the reasonably available ways (if any), before doing x.

DRI tracks the basic legal account of willful ignorance in requiring suspicions of p. One can't be willfully ignorant in the legal sense without breaching DRI. Formulating DRI to track the basic legal notion answers a general worry about investigative duties. Arpaly and Schroeder argue we have no "obligation to scrutinize all of [our] beliefs," since "we cannot in general know which of our beliefs need checking" (Arpaly & Schroeder, 2014, p. 237). But DRI avoids this worry because it's narrow and is only triggered if one has suspicions about p. DRI does not require scrutinizing all our beliefs.

To clarify, DRI only requires taking *reasonable* steps to inform oneself. Moreover, it is a pro tanto duty in the sense that it can be outweighed, e.g., if complying would make it too hard to comply with the primary duty not to do x, or if investigating proved overly harmful. Finally, DRI requires not only actively acquiring new information as appropriate, but also not *blocking* information one would have otherwise received.

Breaching DRI can be an independent source of culpability. That is, well-motivated actors would be moved to inform themselves as DRI requires. Why? The truth of p is assumed to entail some added harm or wrong beyond the underlying risky action, x. Having sufficient regard for the applicable reasons (whether moral or legal) thus should prompt one to assure oneself that this added harm or wrong will not come to pass. One way to accomplish this is to investigate whether p really is true before doing x. (Learning that p is true places one under more pressure not to do x.) The second way, of course, is to refrain from doing x at all. Thus, when one declines to investigate whether p although one reasonably could (i.e., breaches DRI), and proceeds to do x, then one has rejected *both* of one's opportunities to assure oneself that one will not bring about the harm involved in [doing x when p is true]. Therefore, someone who breaches DRI before doing x will be more culpable, all else equal, than the analogous merely reckless actor who *cannot* reasonably investigate whether p (such that DRI does not apply and is not breached) before doing x. The latter actor only has one opportunity to avoid the harm in question—viz., only by not doing x.

The culpability of breaching DRI equals the amount of insufficient regard it manifests for the applicable reasons. Several factors affect how much, including¹⁷

- (a) *The harm in p*: Breaching DRI manifests more insufficient regard, all else equal, the more serious harms or wrongs p would entail if true.
- (b) *The burdens of obtaining information*: Breaching DRI manifests more insufficient regard, all else equal, the less burdensome, dangerous, or costly (for oneself or others), it would be to obtain the relevant information about p.
- (c) *One's mental state*: Breaching DRI manifests more insufficient regard, all else equal, the more deliberate one's mental state is toward the fact that one will not acquire the relevant information about p. That is, it's worse to purposefully remain ignorant of p than to know this will result, worse to know it will result than to consciously risk it, and worse to run such a risk than to be negligently unaware of this risk.

Factor (b) captures the fact that there can be justifications—whether full or partial—for breaching DRI, which can lower one's culpability. What these justifications are is a substantive question. It seems uncontroversial that if acquiring information would risk harm to oneself or others, this at least helps justify the decision to remain ignorant of p. Perhaps if investigating p would damage one's close familial relationships, this too could help justify (at least partially) remaining in ignorance. Deborah Hellman argues that investigating suspicions about one's clients or patients can erode the attorney–client relationship or the doctor–patient relationship (Hellman, 2009, p. 302). Thus, professional obligations might also help justify remaining ignorant. Still, precisely what costs or burdens help justify breaching DRI warrants more investigation.

A further question is whether one's *motives* in breaching DRI affect the culpability of willful ignorance. Jan Willem Wieland contends that they do (Wieland, 2017b, p. 4,492). If I suspect my once-estranged child is carrying drugs in her suitcase, I might seem less culpable if my motive for not investigating is to preserve our fragile relationship than if it's because I hope to get a cut of the payment my child might get for the job.

While motives—i.e., one's goals in acting—plausibly affect moral culpability, the law typically takes motives to be irrelevant. The default legal position is that motives don't affect the seriousness of the offense one is guilty of.¹⁸ Thus, whether motives for being willfully ignorant impact culpability likely depends on whether we're focusing on moral or legal culpability.

The duty-based view also faces objections—perhaps most importantly about additivity.¹⁹ Willfully ignorant conduct consists of (i) deliberately breaching DRI and then (ii) doing underlying risky action *x*. To determine the overall culpability of such willfully ignorant conduct, the culpability of (i) is added to that of (ii). However, one might worry²⁰ that there is something fishy about adding these two quanta of culpability together. Aren't these two bits of behavior (the refusal to investigate and the subsequent risky action) distinct? What's to stop us from adding together the culpability of breaching DRI and, say, cheating on one's taxes or some other unrelated conduct? I've attempted to answer this objection by arguing that refusing to investigate one's suspicions and then doing the underlying risky action reveal insufficient regard for the same set of reasons, such that the two bits of misconduct can legitimately be treated as a unified course of conduct (Sarch, 2017b, section 6). However, this remains a challenge for the duty-based view.

3.2 | Counterfactual test

Given the additivity problem, one might prefer another approach.²¹ Some suggest a counterfactual test, under which a willfully ignorant actor is as culpable as a knowing wrongdoer iff she'd act the same way even with full knowledge (Michaels, 1998, p. 995; Luban, 1999, pp. 968–969; Wieland, 2017b). More specifically,

Counterfactual Test: A's risky action *x*, done in willful ignorance of inculpatory proposition *p*, is at least as culpable as B's performance of *x*, which is identical to A's except that B had knowledge of *p*, iff A would still do *x* even if she had knowledge that *p* is true.

This view can also be grounded in a quality of will theory. When it's true that A *would* do *x* with knowledge of *p*, then A, acting in willful ignorance, plausibly possessed as much insufficient regard as a knowing wrongdoer.²²

The counterfactual test may be promising in the moral domain, but faces difficulties for criminal culpability. Specifically, it conflicts with a fundamental and attractive feature of the criminal law: Legal theorists emphasize that punishment should be imposed only on the basis of one's actual conduct, and therefore should not be based on merely counterfactual mental states that one would have acted on, but didn't (Simons, 2002, p. 267–275). This, the worry goes, amounts to improper punishment for things like character or unmanifested attitudes. As Ken Simons (2002, pp. 233–234) puts it,

the harsh sanctions of the criminal law should not be brought to bear on individuals who have not yet done anything wrong, but who merely have disreputable—or even dangerous—character traits. (...) We are similarly, and properly, reluctant to impose punishment on a person simply for [attitudes or characteristics] unless and until [they] are expressed in action.

The counterfactual test, however, runs afoul of this principle.

Wieland's view helps answer this objection. Perhaps, the counterfactuals in the test—about what one would do with knowledge—are not *constitutive* of one's level of insufficient regard but are merely evidence of (explained by) the underlying attitudes with which one actually acts. These underlying attitudes one actually acts from are what determine culpability (Wieland, 2017b, pp. 4,492–4,493). This might block the objection. It means the counterfactual test wouldn't attribute culpability on the basis of counterfactual conduct, but rather the actual mental states that produced one's behavior.

Nonetheless, trouble remains at least where legal culpability is concerned. Plausibly, the criminal law—since it should be a publically available guide to action, as well as a practically applicable standard of evaluation—should peg culpability not to the amount of insufficient regard one *possesses* when acting, but rather the level of insufficient regard one's conduct *manifests*.²³ (As I've argued, the level manifested can be understood as the least amount of insufficient regard needed to get a well-motivated person to behave the same way as the defendant—even if the defendant actually *possessed* more insufficient regard than this.)

This generates two problems. Consider Diana, who has a partial justification for deciding not to investigate her suspicions that her intended action, *x*, of rolling a boulder down a hill might inflict grievous bodily harm on someone. She realizes that investigating would be dangerous (it would require her to climb a tall tree), so she decides not to investigate. Given this partial justification for not investigating, it seems Diana's conduct is not as criminally culpable as the analogous conduct of someone who *knows* the boulder will hit someone. However, suppose Diana also happens to satisfy the counterfactual test: She *would* have done *x* even with knowledge. Diana actually *possesses* so much insufficient regard that she'd do *x* even with knowledge that it would injure someone. Nonetheless, her actual conduct does not fully *manifest* the total amount of insufficient regard she possesses. What she actually did, after all, was to roll the boulder down the hill while aware of a *risk* that it would harm someone—having decided not to investigate this suspicion with fairly good reason. Thus, what she actually did manifests less insufficient regard than the analogous knowing misconduct. And this seems true even though she also satisfies the counterfactual test.²⁴

A second and more straightforward problem is this. If we say willfully ignorant misconduct is as culpable as knowing misconduct when the actor would act the same with full knowledge, then why not make the same claim about negligent actors? That is, why not say that also actors who are unaware of any risk that their conduct will be harmful *also* are as culpable as knowing actors provided they would act the same if they knew these harms would result? This would allow the law to punish even some merely negligent actors (who are unreasonably unaware of the risks they impose) as much as knowing wrongdoers. That implication is too radical to accept. It would erase the boundaries between the criminal law's traditional mental state categories and would be a serious departure from the principle that punishment should be doled out for what one actually did, not what one was merely willing to do.

Accordingly, even if the counterfactual test remains plausible for moral culpability, it encounters difficulty in the legal realm. Thus, at least for the legal culpability of willful ignorance, the duty-based account appears more promising.

4 | CONCLUSION

In this paper, I've outlined some core views of what willful ignorance is and why it's culpable. I suggested that the basic legal account—requiring suspicions and deliberately preserving one's ignorance—is apt for legal contexts, but a wider definition might fit outside the law. I then argued, adopting a quality of will framework, that the duty-based account of when willfully ignorant misconduct is as culpable as knowing misconduct is more defensible than the counterfactual test—at least where legal culpability is concerned. Still, the counterfactual test might remain plausible as applied to moral culpability. Examining willful ignorance thus provides a window into fundamental questions about culpability and the relation between law and morality. Even more, a better understanding of willful ignorance will help avoid mistakes and unfairness in our moral and legal evaluations of willfully ignorant individuals.

ENDNOTES

¹ See *infra*, notes 4 and 9-15.

² The Model Penal Code, section 2.02(2)(b), construes knowledge as practical certainty of a fact. This reflects the law's view that knowledge is high subjective certainty plus truth (Charlow, 1992, pp. 1,374-1,375). Thus, it's more anemic than philosophical accounts of knowledge requiring true justified belief plus some anti-Gettier condition.

³ Similarly, Holly Smith distinguishes the benighting (i.e., ignorance-preserving) act from the subsequent unwitting act (i.e., *actus reus*) (Smith, 1983, pp. 547-548).

⁴ *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011).

- ⁵ It's not clear if one can be willfully ignorant of a proposition that's false. But this isn't important here, since one shouldn't be charged with—let alone convicted of—a knowledge crime unless the inculpatory proposition is shown to be true.
- ⁶ It's a further question, which I leave open here, whether these suspicions must be warranted (Husak & Callender, 1994, p. 36).
- ⁷ *Global-Tech*, 131 S. Ct. 2060 at 2070.
- ⁸ *Global-Tech*, 131 S.Ct. at 2070.
- ⁹ See, e.g., *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (requiring “purpose to avoid learning the truth”).
- ¹⁰ This is suggested by statements that willful ignorance requires “conscious avoidance” of inculpatory knowledge. See, e.g., *United States v. Ferrarini*, 219 F.3d 145, 155 (2d Cir. 2000) (concluding “the jury was properly instructed that conscious avoidance could ... be used to infer knowledge”).
- ¹¹ *Global-Tech*, 131 S. Ct. 2060 at 2070.
- ¹² *Id.* at 2069.
- ¹³ *United States v. Willis*, 277 F.3d 1026, 1032 (8th Cir. 2002) (requiring that “the defendant was aware of a high probability... of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense’ against subsequent prosecution”); *United States v. Delreal-Ordones*, 213 F.3d 1263, 1268 (10th Cir. 2000); *United States v. Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003). See also Husak & Callender, (1994, p. 40).
- ¹⁴ See *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990).
- ¹⁵ *United States v. Heredia*, 483 F.3d 913, 920 (9th Cir. 2007) (upholding “two-pronged” rule, which required only that defendant suspected “drugs were in the vehicle ... and deliberately avoided learning the truth”).
- ¹⁶ For example, one plausibly manifests insufficient regard for the legally relevant reasons when one steals with good motives. But this conduct may demonstrate *less* insufficient regard for the wider and more fine-grained set of moral reasons. Why the difference between the moral and legal reasons? It might be due to practical considerations like our epistemic limitations or the law's need for easy-to-apply bright-line rules. Or perhaps the explanation is something more principled like the need for the law to be simple enough to serve as a publically available guide to action.
- ¹⁷ For more discussion, see Sarch, 2017b.
- ¹⁸ As LaFave (2016, section 5.3) explains, “motive, if narrowly defined to exclude recognized defenses and the ‘specific intent’ requirements of some crimes, is not relevant on the substantive side of the criminal law.” Motives might still affect sentencing, however.
- ¹⁹ See Sarch, 2017b for other objections.
- ²⁰ For more discussion, see Sarch, 2017c, section 5.
- ²¹ Gideon Yaffe defends an expected-utility account of the culpability of willful ignorance, which may help avoid the additivity worry (Yaffe, 2016). While Yaffe's view is intriguing, I suspect additivity remains a problem (Sarch, 2017c).
- ²² One might object the counterfactual test encounters trouble for actors who remain ignorant to preserve a defense. Suppose I'm such an actor. While I would not do x with knowledge, suppose that's only because I then wouldn't have a defense. In that case, my willfully ignorant conduct might still seem as culpable as knowing misconduct although I fail the counterfactual test. After all, the only reason I wouldn't knowingly do x is a very bad one. (Thanks to Guy Fletcher for this worry.) This suggests that perhaps the counterfactual test is best seen not as a *necessary* condition for equal culpability, but as merely a *sufficient* condition. The objections discussed below target the counterfactual test as a sufficient condition.
- ²³ Similarly, Arpaly and Schroeder (2014, p. 188) argue that the amount of “ill will that an action manifests is not the same as the amount of ... ill will that exists and is being acted on.”
- ²⁴ To this, a reviewer objects that Diana may not really be willfully ignorant since a condition of willful ignorance isn't met here: perhaps she doesn't have any reasonably available methods of investigation given the dangers involved in climbing the tree (cf. prong 2 of the Basic Legal Account). Nonetheless, I submit that, given the serious risks posed by rolling the boulder, it doesn't seem unreasonable to expect Diana to incur the costs of climbing the tree to investigate her suspicions. Her decision not to investigate was supposed to be *partially justified*, but not fully justified. As a result, climbing the tree intuitively still is a *reasonably available* method of investigation. I take the point that if the risks to Diana in investigating were so great as to fully justify her decision not to investigate, then perhaps we'd no longer want to call her willfully ignorant, as she then really may have no reasonably available way to confirm her suspicions. The present objection to the counterfactual test, however, assumes that there can be cases where (i) D has a reasonably available method of investigation and (ii) it entails costs or risks to D that provide a partial, but not full, justification for deciding not to investigate. In such cases, it's possible for D not to *manifest* as much insufficient regard as the analogous knowing wrongdoer *even if* D also satisfies the counterfactual test and thus *possesses* as much insufficient regard as a knowing wrongdoer. I think there are such cases (see also Sarch, 2017b, pp. 275–276 & n.38 for more discussion).

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