

Contrived ignorance

The sad fact is that honest lawyers sometimes have crooked clients. In a notorious 1980 case of client fraud, a pair of businessmen used the services of an unsuspecting law firm to close hundreds of millions of dollars worth of crooked loans for their computer leasing company. The businessmen created forged leases to inflate the value of their company's contracts, which they used as collateral for the loans. In the evenings, the pair would turn the lights off in their office. Goodman would crouch beneath a glass table shining a flashlight upward so that Weissman could trace signatures from genuine leases on to the forgeries. New loans serviced previous loans in a decade-long pyramid scheme.

After nearly ten years, Goodman and Weissman's accountant stumbled across their frauds. He wrote a detailed warning to the swindlers' law firm, which the accountant's lawyer tried to hand-deliver to Joseph Hutner, the law firm's lead partner.

But Hutner didn't want to see it. In fact, he wanted the accountant to take the letter back. Above all, Hutner seemed to want to preserve his own oblivion. As the accountant's lawyer later recounted, "I had visions of him clamping his hands over his ears and running out of the office."¹

Well, wouldn't you? Hutner had been used. He had mouths to feed in his firm, and the computer crooks represented more than half the firm's annual billings. His flight reaction probably came straight from the gut. It may also have been the result of a calculation, however. Legal ethics rules forbid lawyers from knowingly participating in fraud, and Hutner may have reasoned that if he didn't know about any fraud, his firm would not have to part ways with its bread-and-butter client. At the very least, maintaining deniability might buy some time to figure out the next move.

The fact is that ignorance can be vital. A white-collar defense attorney offers the following recollection: "I can remember years ago when I represented a

¹ Stuart Taylor, Jr., *Ethics and the Law: A Case History*, N.Y. Times Mag., Jan. 9, 1983, at 33.

fellow in a massive case of political corruption. I was very young, and I asked him, 'Would you please tell me everything that happened.' And he said, 'What, are you out of your mind?'"²

The man had a point. Because lawyers are forbidden from lying or knowingly putting on perjured testimony, knowing too much can tie a lawyer's hands.³ The lawyer is foreclosed from using the strongest arguments on the client's behalf because, unfortunately, the strongest arguments are false.

Lawyers often complain that it's hard to get clients to tell them the unvarnished truth. But it can be an equal challenge to avoid facts that the lawyer really doesn't want to know. Criminal defense lawyers rarely ask their clients, "Did you do it?" Instead, they ask the client what evidence he thinks the police or prosecution have against him — whom he spoke with, who the witnesses are, what documents or physical evidence he knows about. If the client seems too eager to spill his guts, the lawyer will quickly cut him off, admonishing him that time is short and that it will be best if the client answers *only* the questions his lawyer asks him. The lawyer will pose the questions carefully and frame them narrowly. "Don't ask, don't tell" is the strategy, and the preservation of deniability is its goal.⁴

Lawyers may be exceptional in the self-conscious casuistry they bring to their quest for deniability, but they are in no way exceptional in the quest itself. The very word "deniability," which originated after the Bay of Pigs debacle, gained currency in the Watergate era to describe something that Richard Nixon's subordinates wanted to preserve for him at all costs. The Iran-Contra principals turned out to be veritable Balanines when it came to choreographing Ronald Reagan's deniability. They knew very well that deniability is a politician's best friend. Business managers also understand the value of deniability. Analyzing the authority system in large American corporations, sociologist Robert Jackall writes that "pushing down details relieves superiors of the burden of too much knowledge, particularly guilty knowledge."⁵ In the familiar corporate adage, bad news doesn't flow upstream.

A superior will say to a subordinate . . . "Give me your best thinking on the problem . . ." When the subordinate makes his report, he is often told: "I think you can do better than that," until the subordinate has worked out all the details of the boss's predetermined solution, without the boss being specifically aware of "all the eggs that have to be broken."⁶

² Kenneth Mann, *Defending White-collar Crime: A Portrait of Attorneys at Work* 104-5 (1985).

³ ABA Model Rule of Professional Conduct 3.3(a)(3) states that "A lawyer shall not knowingly offer evidence that the lawyer knows to be false"; Rule 8.4(c) forbids a lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation."

⁴ See Lincoln Caplan, *Don't Ask, Don't Tell*, *Newsweek*, August 1, 1994, at 22.

⁵ Robert Jackall, *Moral Mazes: the World of Corporate Managers* 20 (1988).

⁶ *Ibid.*

Deniability refers to one's capacity to deny guilty knowledge truthfully. Clearly, deniability is a state of affairs desirable almost beyond price, and not only for lawyers, politicians, and executives. Deniability is the key to succeeding at the world's work, which is often dirty, while keeping a clean conscience — or at least a serviceable facsimile of a clean conscience. Perhaps the truth will set us free, but sometimes ignorance of the truth leaves us freer still.

Virtually all of us prefer not to know things, if knowing them will require us to take unwelcome action. Why does our conscience work that way? The reason, I suspect, is that the quest for deniability seems not as bad as dishonesty. A dishonest person learns the truth and then simply lies about it. Evading truth is an expedient for *avoiding* lies. It's a stratagem for tarnished angels like you and me, not for unrepentant scoundrels. It's the homage that vice pays to virtue.

And yet avoiding lies cannot be as simple as shutting one's eyes. Hungry lions don't go away when the ostrich in the legend sticks her head in the sand — that is one reason we know that the story must be a legend. Guilty knowledge is a hungry lion, and it can't be ignored out of existence. Or can it? This is the question I propose to investigate. Soon it will lead us into complications, but for the moment we can pose the question itself in three simple words: Does deniability work?

Willful ignorance in the criminal law

Let us start by asking what light the law sheds on our question. To lawyers in the common-law tradition, deniability brings to mind a familiar criminal law doctrine called *willful ignorance* — or, as it is sometimes called, "willful blindness" or "conscious avoidance."⁷ In essence, the doctrine states that willful ignorance is equivalent to knowledge. Self-generated deniability doesn't work: you can be convicted of knowingly committing a crime even if you don't commit it knowingly — provided that you contrived your own ignorance.

The doctrine seems intuitively just. But why? It is Biblical wisdom that we forgive those who know not what they do. Culpability presupposes a guilty mind. But ignorance is nothing more than an empty mind, and for that reason there is a profound puzzle in explaining exactly why ignorance, willed or not, should support criminal convictions. The Orwellian-sounding identity *IGNORANCE = KNOWLEDGE* is, to put it mildly, an equation crying out for a theory. Criminal lawyers take two approaches to this problem, neither of which turns out to be entirely satisfactory.

⁷ One writer identifies fourteen different terms for the concept in the criminal law. See Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 Tex. L. Rev. 1351, 1352 n. 1 (1992).

The negligence approach

The first approach is to argue that even if the wrongdoer didn't know, he should have known. But the phrase "should have known" triggers a familiar line of legal reasoning. "Should have known" implies a legal duty to know, and failure to know amounts to negligence.

In other words, "he should have known, but he didn't" means in the common law that he was negligent. This familiar point of doctrine leads to two problems. The first is explaining why we have a duty to know. The law is generally reluctant to impose affirmative duties on people, unless they occupy posts of special responsibility. And a duty to know looks especially dubious. It cannot really be that we have a duty to inform ourselves about everything that might affect our obligations – that duty would know no outer bound, and fulfilling it would take up all of our time for the rest of our lives. It also raises moral problems of its own. Is it a duty *not* to mind our own business? A duty to meddle? A duty to pry? A duty to snoop? A duty to mistrust and double-check every suspicious fact someone else tells us? Common sense tells us that we have no such duty. But then where is the negligence?

The second problem is that even if we agree that willful ignorance is a kind of negligence, doing something negligently is less culpable than doing it knowingly. The usual hierarchy of blame in the criminal law moves in ordered steps. The Model Penal Code, for example, distinguishes four levels of culpability. The worst is acting *willfully* or *purposely*, by making the misdeed our conscious object.⁸ Next is acting *knowingly*, by acting in full awareness of our misdeed, although not necessarily with the misdeed as our object. Next comes acting *recklessly*, by consciously disregarding a substantial and unjustifiable risk that we are doing wrong. Last comes acting *negligently*, by acting when we should be aware of a substantial and unjustifiable risk of misdeed, even if we are not actually aware.⁹

In other words, negligence isn't as bad as knowledge; in the Model Penal Code scheme, it is two levels removed from knowledge. Suppose that a statute forbids *knowingly* transporting a controlled substance across state lines. If I transport a controlled substance negligently – *merely* negligently, as my lawyer will insist – I cannot be convicted under this statute. The prosecutor must prove that I did it knowingly. Under the negligence analysis of willful ignorance, willful ignorance *cannot* be equivalent to knowledge, and the common law equation collapses.

Nor is this a purely theoretical problem. Every good criminal lawyer understands how it might play out in practice. The most frequent complaint

⁸ See Model Penal Code §2.02(2)(a) (Proposed Official Draft 1962).

⁹ See *ibid.* §2.02(2)(b).

about willful-blindness instructions to a jury is that such instructions illicitly convert crimes requiring knowledge to crimes of mere negligence. As the Seventh Circuit Court of Appeals admonished while reversing a willful-blindness conviction, ostriches "are not merely *careless* birds."¹⁰

The Model Penal Code approach

The alternative to treating willful blindness as negligence is to find an actual, occurrent mental state to which willful blindness corresponds. The drafters of the Model Penal Code simply abandoned the doctrine that willful blindness can substitute for knowledge. In its place, they proposed that awareness of the high probability of a fact is tantamount to knowledge of that fact.¹¹ In this way, they preserved the root intuition that criminal guilt requires some guilty mental state. Here, the guilty mental state is awareness of the high probability of a fact, presumably whatever fact the willfully blind person has arranged not to know.

Unfortunately, this proposal raises more problems than it solves. First of all, being aware that something is highly probable simply isn't the same as actually knowing it. I don't mean that knowledge implies certainty rather than probability. Knowledge claims need not be infallible. But knowledge does require belief – I can hardly be said to know something if I don't even believe it – whereas awareness that something is highly probable may stop short of the inferential leap into belief. We can see this by comparing the two statements "I know X but I don't believe X" and "I'm aware that X is highly probable, but I don't believe X." The first of these verges on performative self-contradiction – an observation that philosophers call Moore's Paradox – while the second does not.

This difference between awareness of high probability and knowledge has not passed unnoticed by commentators, who draw various conclusions from it. One recommends cutting the Gordian knot by *defining* knowledge of a fact as awareness that it is highly probable.¹² That solves the problem, but only by converting the word "knowledge" into a legal term of art. Departing from the everyday meaning of words is seldom a good idea in law, and never more so than in criminal law, in which substituting eccentric meanings for words risks punishing us without fair notice. Other commentators go in the opposite

¹⁰ *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990).

¹¹ See Model Penal Code §2.02(7) (Proposed Official Draft 1962) ("When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist").

¹² See Jonathan L. Marcus, Note, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 Yale L.J. 2231, 2233, 2253 (1993).

direction, and conclude that the Model Penal Code awareness-of-high-probability formula can really support convictions only for crimes requiring some mental state less than knowledge.¹³

The trouble with all these proposals is that they are not really about willful ignorance at all. Instead, they change the subject. The focus in a willful-ignorance case is on whether the actor deliberately avoided guilty knowledge. The inquiry is about whatever steps the actor took to ward off knowledge prior to the misdeed. By contrast, the Model Penal Code focuses on how certain the actor was about a fact. The inquiry is about the actor's subjective state at the moment of the misdeed. These are completely different issues. An actor can be aware of the high probability of a fact whether or not she took steps to avoid knowing it, and an actor can screen herself from knowledge of facts regardless of whether their probability is high or low.¹⁴

In practice, to be sure, the Model Penal Code standard provides a serviceable substitute for willful ignorance. That is because in most cases of willful ignorance the defendant will be aware of the high probability of the fact that he has hidden from himself, so that the Model Penal Code doctrine succeeds in convicting most of the miscreants who deserve it. It convicts the drug mule who deliberately refrains from looking in the satchel he's delivering. It convicts the corporate manager who doesn't ask why his overseas salesman needs a million in cash for "commissions." And it just may convict

¹³ One, for example, argues that the Model Penal Code standard defines not knowledge but recklessness, which (you will recall) means consciously disregarding a substantial risk of wrongdoing. See Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. Crim. L. & Criminology 191, 223-27 (1990). Another thinks that the Code standard, which requires awareness of *high* risk rather than mere *substantial* risk, has thereby defined something between recklessness and knowledge. See Charlow, *supra* note 7, at 1394-97. Both conclude that Code-based willful ignorance should support convictions only for crimes requiring mental states less culpable than knowledge.

¹⁴ Douglas Husak and Craig Callender illustrate the latter with a nice pair of examples. Suppose that a dope distributor tells each of his three couriers never to look in the suitcase he gives to each one, adding that it isn't necessary for them to know what the suitcases contain. If the suitcases contain dope, the case is plainly one of willful ignorance. But now suppose that the distributor adds that two of the three suitcases contain nothing but clothing, that he is truthful, and that the distributors know he is truthful. If the couriers deliver the suitcases without looking inside and without asking any questions, the case seems indistinguishable from the first case. It is still willful ignorance. But in the second case, the courier with dope in his suitcase lacks awareness of the high probability that it contains dope. Indeed, he knows that the probability is only one-third. He may even believe that his suitcase contains nothing but clothes. Thus, in the language of the Model Penal Code §2.02(7), he not only lacks awareness of a high probability of the fact's existence, "he actually believes that it does not exist." See Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 Wis. L. Rev. 29, 37-38.

the lawyer who clamps his hands over his ears and runs out of the office because he doesn't want to stop closing loans for crooked clients.¹⁵

Unfortunately, it does *not* convict the high-ranking executive who deliberately, skillfully, and self-consciously fashions an entire structure of deniability, a reporting system in which for years at a time guilty knowledge never flows upstream. Once that system is in place, business goes on as usual – most of it proper, but some of it perhaps improper. But the executive has no awareness of the probability of the improper stuff, maybe not even awareness of its possibility, because when he contrived the reporting system, he had no specific crimes in mind.

How does a structure of deniability work? It goes like this. The CEO lets everyone know that he hates to micro-manage. He is interested only in the big picture of *whether* goals are met, not in details about *how* they are met. It goes without saying (and I do mean without saying) that the CEO is to be sheltered from bad news, especially knowledge that anyone in the organization has cut legal corners. Like ambitious subordinates everywhere, his management team tries to anticipate his wishes and, in the familiar corporate adage, "follow them in advance" so they won't actually have to be spoken aloud. Managers too obtuse to understand this are said to lack initiative, and their careers are short. Prominent among the unspoken directives is the first commandment: Thou shalt maintain thy boss's deniability.¹⁶

For public consumption, the organization sets up an elaborate accountability mechanism, requiring employees to report in writing anything they observe that is illegal, unethical, or unsafe. In practice, however, employees who follow these instructions find themselves reassigned to the company's North Dakota Wind Chill Test Facility. Old-timers explain to newcomers that the purpose of the reporting mechanism is *not* to be utilized, thereby ensuring that only the lowest-level employees – those who fail to file their written reports – will bear the blame if anything goes wrong. In fact, management sees little advantage in an accurate system for tracking responsibility within the corporation. Too many managers advance by getting promoted to new divisions before the chickens come home to roost at the old divisions. This is called "outrunning your mistakes."¹⁷ The last thing they want is a paper trail.

¹⁵ In fact, Hutner was never indicted for aiding and abetting the computer crooks. But, for a case in which a lawyer went to jail for writing his client's lies into an opinion letter without investigating them, see *United States v. Benjamin*, 328 F.2d 854, 863-64 (2nd Cir. 1964).

¹⁶ See John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in *Codes of Conduct: Behavioral Research in Business Ethics* 13, 24-25 (David M. Messick & Ann E. Tenbrunsel eds., 1996). See also Jackall, *supra* note 5, at 18-19.

¹⁷ See Jackall, *supra* note 5, at 90-95. Jackall details the ways in which managers exploit the absence of responsibility tracking mechanisms to "milk" their businesses, get promoted up the corporate ladder as a reward for cost-cutting, and stick their successors with the aftermath.

Few subjects are as fascinating, important, or hard to conceptualize as the many and subtle ways in which organizations screen individuals within them from liability and dissolve employees' sense of personal accountability. In my view, concepts of collective or corporate responsibility are poor substitutes for individual responsibility. For one thing, blaming the collective may let individuals off the hook too easily. It's not for nothing that the Nuremberg Charter made individual criminal liability the linchpin of its approach to state-sponsored crime. At the same time, collectivizing guilt may blame innocent employees. Last but not least, collective responsibility concepts teeter on the brink of quack metaphysics or mystical science fiction, treating groups of people as single minds. No better illustration of this can be found than the collective knowledge doctrine in federal criminal law.¹⁸ According to this doctrine, a corporation "knows" the sum of what all of its employees know, whether they communicate with each other or not. The doctrine treats employees as synapses in the nonexistent brain of a legal fiction.

How, then, can the law apportion individual responsibility within the organizational context, where too many involved individuals act at a distance and each knows too little? In my view, the most promising approach is through the concept of complicity – aiding and abetting – and the concept of willful ignorance. Supervisors implicitly or explicitly encourage their subordinates to meet their targets by any means necessary. That's abetting. Supervisors provide assistance and resources. That's aiding. And supervisors structure the organization to preserve their own deniability. That's willful ignorance. Willful ignorance is a concept that applies almost uniquely to crimes committed by group enterprises. Of course, a good whodunit author can devise clever scenarios in which a lone gunman contrives his own ignorance at the moment he pulls the trigger. But, in real life, I can contrive ignorance only when I work with others who know the facts that I don't.

Together, the concepts of aiding, abetting, and willful ignorance enable us to understand the dimensions of supervisory wrongdoing – the wrongdoing C. S. Lewis had in mind when he wrote about evils committed by "quiet men with white collars and cut fingernails and smooth-shaven cheeks who do not need to raise their voice."¹⁹ In that case, however, the Model Penal Code substitute for the willful ignorance doctrine should be rejected because it is simply too narrow for the task at hand.

In sum, the common law's equation of willful ignorance with knowledge leaves us in a dilemma: is willful ignorance a guilty mental state, or the violation of a duty to know? The Model Penal Code employs a knowledge concept (awareness of a high probability) rather than mere negligence. But

not only is the Model Penal Code standard quite distinct from willful ignorance, it is also too weak for organizational settings. The negligence theory succeeds in explaining how mere ignorance can be culpable, as the Model Penal Code does not. But the negligence theory employs a duty-to-know concept less stringent than knowledge, and too demanding for real life.

A nasty example

Let me propose a diagnosis. The two theories fail because willful ignorance is neither knowledge nor negligence. Consider an example – a sinister example, but one that I find particularly thought-provoking.

In the early days of the Third Reich, Albert Speer was Hitler's official architect. Later, he moved into more essential posts, and eventually he became the minister of armaments during the war, responsible for, among other things, producing war materials through slave labor in concentration camps. Unsurprisingly, the Allies put Speer on trial in the first tier of Nuremberg defendants, as a member of the leadership of the Third Reich.

Speer stood out at the trial, because he was the only defendant who insisted on taking full responsibility for the crimes of the Reich. He accepted responsibility, he explained, in order to ensure that the German people would not suffer any more than they already had for the sins of their leaders. Probably because of his confession, Speer received a twenty-year sentence, where others no guiltier were hanged. After his release from Spandau Prison, Speer published a best-selling memoir, *Inside the Third Reich*, and followed it up with two more volumes of recollections. In the books, he once again took full responsibility for the crimes of the Third Reich, and cemented his reputation as, in the sarcastic title of a recent biography, "the good Nazi."²⁰

Let me be a bit more specific about what Speer did and did not confess to. Four points stand out:

1. He accepted full responsibility for the crimes of the Reich.
2. He denied, however, that he actually knew anything about the Final Solution.
3. He also acknowledged that he could have known, but he chose not to know in order to keep his conscience clear.
4. He insisted that his willful ignorance was just as bad as knowledge, and thus he refused to let himself off the hook.

For example, Speer recalls that in 1944 a friend of his warned him "never to accept an invitation to inspect a concentration camp in Upper Silesia.

¹⁸ See, e.g., *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987).

¹⁹ C. S. Lewis, *The Screwtape Letters and Screwtape Proposes a Toast*, at x (Collier, 1962).

²⁰ Dan Van Der Vat, *The Good Nazi: The Life and Lies of Albert Speer* (1997).

Never under any circumstances."²¹ Speer described his thought processes as follows:

did not query him, I did not query Himmler, I did not query Hitler, I did not speak with personal friends. I did not investigate – for I did not want to know what was happening there ... From that moment on, I was inescapably contaminated morally; from fear of discovering something which might have made me turn from my course, I had closed my eyes ... Because I failed at that time, I still feel, to this day, responsibility for Auschwitz in a wholly personal sense.²²

For Auschwitz was the very camp Speer's friend was warning him to avoid.

The interesting thing about Speer is that he was almost certainly lying about how little he knew. Indeed, journalists and historians have made a minor cottage industry of smoking out Albert Speer's lies.²³ Speer's response, to the end of his life, was to insist that he really didn't know.

What makes this interesting, of course, is that Speer also insisted that whether he knew or not is irrelevant, because his guilt was the same whether he knew or not. Then why insist on ignorance? The legal theorist Leo Katz suggests that Speer "was being coy, was playing Marc Anthony by saying he was not seeking to excuse himself while going to such extraordinary pains to establish his willful ignorance. He really did think it mitigated his guilt."²⁴

I am sure that Katz is right about Speer being coy. I am less certain that Speer really thought willful ignorance mitigated his guilt. Albert Speer was a master of public relations. From Nuremberg on, he instinctively understood that the best way to dodge responsibility is to assume it – but not to assume responsibility for any particular heinous deeds. Whether or not he himself believed that willful ignorance mitigated his guilt, I am sure Speer understood that the world at large believes it.

Or rather, he understood that the world at large can't make up its mind. The paradox is that we seem to accept his subtext, "I'm not as guilty as if I really knew!" but only because his text insists that he *is* as guilty as if he really knew. We nod yes when Albert Speer writes, "I was inescapably contaminated morally," and then we forgive him, at least in part.

²¹ Albert Speer, *Inside the Third Reich: Memoirs* 375–76 (Richard & Clara Winston trans., 1970).

²² *Ibid.* at 376.

²³ See, e.g., Henry T. King, Jr., with Bettina Elles, *The Two Worlds of Albert Speer: Reflections of a Nuremberg Prosecutor* 97–106 (1997); Matthias Schmidt, *Albert Speer: The End of a Myth* (Joachim Neugroschel trans., 1982); *Albert Speer: Kontroversen um ein Deutsches Phänomen* (Adelbert Reif ed., 1978); Van Der Vat, *supra* note 20. It should be noted that the evidence of the extent of Speer's knowledge is entirely circumstantial.

²⁴ Leo Katz, *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* 41 (1996).

I think that Leo Katz draws the wrong conclusion from this example. He argues that the forgiveness, the subtext, reflects our deepest moral understanding, and thus he concludes that willful ignorance really is a proper moral excuse. But why assume that we actually believe the subtext, when we nod yes to the text? Perhaps we do absolve Albert Speer, at least in part. But we also convict criminals on willful-blindness instructions. Curiously, Katz overlooks this fact. He writes that willful ignorance excuses "often work at a legal level ... The law here as so often is a good gauge of our moral intuitions. So I rather think the ruses work at a moral level as well."²⁵ Katz relies on an example to demonstrate that willful-ignorance excuses work at a legal level – the criminal defense lawyer who uses a "Don't ask, don't tell" strategy for circumventing the ethics rule against knowingly helping a client commit perjury. This is an example we have seen before. It's an apt example, for this is one place in the law where the "ostrich excuse" does work. The bar's legal ethics rules do not require a lawyer to investigate the client's story, nor do they incorporate the doctrine that willful ignorance equals knowledge.²⁶ But of course the criminal law does incorporate that doctrine, and that makes the legal ethics rules exceptional within the law. For some reason, Katz overlooks the fact that in the criminal law, willful ignorance is ground for conviction, rather than for acquittal.

The proper conclusion is that the law speaks with a divided voice about willful-ignorance excuses. If Katz is correct that the law is a good gauge of our moral intuitions, it would follow that morality speaks with a divided voice as well. The question is why.²⁷

²⁵ *Ibid.* at 44.

²⁶ ABA Model Rule 1.0(f) carefully defines the words "knowingly," "known," and "knows" to denote "actual knowledge of the fact in question."

²⁷ This puzzle exists in theological discussions as well. Christian moralists developed an elaborate theory about when ignorance excuses wrongdoing and when it does not. The key variables in the theory concern how cognizant of his own ignorance the wrongdoer is, whether he lies under a duty to dispel it, and whether he did anything, either by omission or commission, to foster his ignorance. The moralists distinguished ignorance arising from mere neglect to inform oneself – so-called "crass" or "supine" ignorance – from ignorance deliberately cultivated – "affected ignorance" (*ignorantia affectata*). Affected ignorance corresponds closely with the common law's willful blindness. According to one writer, "an act done through ignorance, even if that ignorance be crass or supine, is less culpable than an act done with clear knowledge; for it is less fully voluntary, and, therefore, less imputable. As regards the ignorance which is deliberately fostered, there is a divergence of opinion among moralists." G. H. Joyce, *Invincible Ignorance*, in 7 *Encyclopedia of Religion & Ethics* 404 (James Hastings ed., 1915). This "divergence of opinion among moralists" seems appropriate, given the divided voice in the law and in our moral intuitions.

Judaism places less emphasis than Christianity does on interior states of soul and more on external behavior. As befits a faith based on thousands of years of fidelity to a divinely authored text, Judaism also emphasizes the letter of the law over the spirit. Some of the most ingenious reasoning in Jewish law has been loophole lawyering designed to mitigate the rigors

The ostrich and the fox

Let's go back to something Albert Speer said in his *mea culpa* about his responsibility for Auschwitz. "From fear of discovering something which might have made me turn from my course, I had closed my eyes."²⁸ Speer's formulation gets close to the heart of our problem. Suppose for the sake of argument that Speer was *not* lying. Suppose that he really didn't know about Auschwitz, because he had closed his eyes. In that case, we confront the question of what Speer would have done had he *not* closed his eyes. He might have turned from his course, he tells us, but would he have? If the answer is yes, then we mitigate our judgment of him, at least a little bit.²⁹ If the answer is no, then we blame him *more*. Not only did he knowingly participate in genocide, but he prepared a coverup, a clever willful-ignorance defense, as well.

That's one reason why we can't make up our minds about willful-ignorance excuses. They amount to counterfactual assertions that if the person had known, he would have changed his course. To which the response must be: Maybe so, maybe not. Maybe the person offering the excuse really is an ostrich, a moral weakling in self-inflicted denial that a terrible moral choice confronts him. In that case, willful ignorance seems not as bad as actual knowledge. But maybe the would-be ostrich is actually a fox – a grand schemer who fully intends to follow the path of wrongdoing, and who contrived his ignorance only as a liability-screening precaution, like a good getaway car. In that case, willful ignorance seems *more* culpable than knowledge, because it adds to knowledge an element of unrepentant calculation.

Ostrich or Fox? We may never know. Nor can we ever be sure whether the Ostrich would have turned from wrongdoing if she had only taken her head out of the sand to learn that it was wrongdoing. Would she or wouldn't she? The excuse of willful ignorance functions precisely to make that question unanswerable.

of the commandments in the face of life on the edge of constant menace. A rigid textualism sometimes turns out to be the compassionate rabbi's best tool for blunting the law's harsh edges. As one contemporary rabbi explains, "God made no mistakes . . . If he left a loophole, he put it there to be used." Clyde Haberman, *Alon Shevut Journal: Thank the Lord for Loopholes: Sabbath Is Safe*, N.Y. Times, December 19, 1994, at A4. Unsurprisingly, then, Jewish ethics do not condemn willful blindness. In fact, in some cases Jewish ethics encourage it. The law treats bastard children harshly, and so a good Jew should remain willfully blind to the circumstances of birth of a suspected bastard. Likewise, compassion suggests willfully blinding ourselves to circumstances that would void a contract on which an innocent person relies. (I owe these examples to my colleague, Professor Sherman Cohn.)

²⁸ Speer, *supra* note 21, at 375–76.

²⁹ We no longer hold him fully accountable for knowingly participating in genocide, just for knowingly participating in the murder of Hitler's opponents, the planning of World War II, and twelve years of violent racism! If you're Albert Speer, you take your mitigation where you can find it.

The question may be unanswerable even by the Ostrich herself. Speer says only that knowledge *might* have made him turn from his course, and in this observation he is keenly perceptive. Many of us who close our eyes actually have no idea what we would do if we had dared to leave them open. We like to think that if we really knew that our course was wrongful we would turn from it; but perhaps we lack the guts. Willful ignorance is a moral strategy for postponing the moment of truth, for sparing ourselves the test of our resolve. St. Augustine famously prayed to God to give him the strength to resist temptation, only not yet.³⁰ The Ostrich hopes to God that she has the strength to resist temptation – only she doesn't want to find out yet. It's Augustine Lite, Augustine in a slightly more infantile form.

The Fox, on the other hand, is a premeditating crook, a grand schemer who guards himself from knowledge only to prepare a defense of ignorance.³¹ Our ambivalence about the willful-ignorance excuse reflects, at least in part, our inability to resolve a fuzzy stereoscopic image, the portrait of an Ostrich superimposed on the portrait of a Fox. Our intuitions run very differently depending on which image we have in mind, and, without thinking about matters carefully, we probably have both images in mind.

In fact, we have *three* images superimposed on each other, not just two. Alongside the Fox, we can imagine the weak-willed, unrighteous Ostrich who would have continued to do wrong even if she knew that that was what she was doing, *and* the stronger-willed, half-righteous Ostrich who shields herself from guilty knowledge, but would actually do the right thing if the shield were to fail.

At this point, let me venture a diagnosis of why we have so much difficulty deciding how blameworthy willful ignorance really is. The grand-scheming Fox, who aims to do wrong and structures his own ignorance merely to prepare a defense, has the same level of culpability as any other willful wrongdoer – the highest level, in the Model Penal Code schema. The Unrighteous Ostrich, who doesn't want to know she is doing wrong, but would do it even if she knew, seems precisely fitted for the common-law equation of willful ignorance with knowledge. By definition, her guilt is unchanged whether she knows or not, because her behavior would be unchanged. And the Half-Righteous Ostrich, who won't do wrong if she

³⁰ "I had prayed to you for chastity and said 'Give me chastity and continence, but not yet.' For I was afraid that you would answer my prayer at once and cure me too soon of the disease of lust, which I wanted satisfied, not quelled." St. Augustine, Book VIII, in *Confessions* 169 (S. Pine-Coffin trans., 1961).

³¹ In conversation, David Wasserman has pointed out another possible motivation for the Fox to choose willful ignorance. The Fox may fear that he is too squeamish to carry out his misdeed if he knows at the time what he is doing – but he nevertheless wants to carry it out, and therefore contrives to be ignorant. This alternative motivation still makes the actor a Fox, not an Ostrich, because the ignorance is willed only as a stratagem to facilitate the misdeed.

knows, but would prefer not to know, is in a state of conscious avoidance of a substantial and unjustifiable risk of wrongdoing – precisely the Model Penal Code's definition of recklessness.

In short, motivation makes a difference. Three different motivations correspond with three levels of blame. One is less blameworthy than knowledge, one is precisely as blameworthy as knowledge, and one is more blameworthy. Our moral intuitions aren't contradictory after all. Instead, our puzzles arise because when we evaluate willful ignorance we have three distinct moral intuitions, depending on which inhabitant of the bestiary we call to mind.

The structure of contrived ignorance

At this point, I want to look more carefully at the structure of contrived ignorance. The crucial point is that it involves not one set of actions, but two. The first consists of the actions or omissions by which an actor shields herself from unwanted knowledge. For convenience, let me call them the *screening* actions. When the lawyer interviewing her client breaks off a dangerous line of questioning, when the drug courier refrains from looking in the suitcase, when the executive rewards subordinates who maintain his deniability, they have performed screening actions. The second set of actions consists of whatever misdeeds the actor subsequently commits that would be innocent if, but only if, she was legitimately ignorant. Call these the *unwitting misdeeds*.³²

Once we draw this distinction, several interesting points emerge. The first is that screening actions, like unwitting misdeeds, can be performed with various degrees of *mens rea*. If we use words carefully, the word "willful" modifying "ignorance" should describe the *mens rea* with which an actor contrives her own ignorance. That leaves open the possibility that ignorance can be contrived at other levels of culpability. A political leader or corporate executive who intentionally sets up an organizational structure designed to maintain his deniability is willfully ignorant. His partner, who didn't set up the structure but is perfectly happy to benefit from it, may not be *willfully* ignorant, but is nonetheless *knowingly* ignorant. Their successor, who decides to run the risk of keeping the structure in place, may well be *recklessly* ignorant. And Reckless's dimwitted partner Feckless, who never even wonders why their predecessors are taking unpaid leave at Club Fed, is negligently ignorant. None of these levels of culpability, except willful ignorance, is a category recognized by the law, even though the hierarchy of mental

states (willful, knowing, reckless, negligent) is entirely familiar. Contrived ignorance turns out to be a genus, and each of these mental states a distinct species.

Ignoring the distinction between screening actions and unwitting misdeeds can lead to an overly simple theory of contrived ignorance. The Model Penal Code approach, which we examined earlier, is a perfect example. It focuses entirely on the level of awareness accompanying the unwitting misdeed, and completely ignores the screening actions. This leads to particularly troublesome results when the screening actions succeed completely in shielding the actor from guilty knowledge, as in our corporate cases. The actor lacks awareness of the high probability of guilty facts, so by the lights of the Model Penal Code she is off the hook – precisely because her contrived ignorance succeeded so well!

Ignoring the distinctions among the different species of contrived ignorance is a more subtle error, but an error nonetheless. A good example is what might be called the *waiver theory* of willful ignorance. According to the waiver theory, willful blindness waives the defense of ignorance. The waiver theory packs intuitive appeal, and it actually explains the mysterious equation *IGNORANCE = KNOWLEDGE*. The idea is that when ignorance is self-imposed, the plea of ignorance is nothing but *chutzpah*. The standard example of *chutzpah* is the young man who murders his parents and then pleads for mercy because he is an orphan. Now, of course, murdering one's parents is intrinsically evil, while screening actions may be as innocent as simply not looking in a suitcase. But the example nevertheless has much in common with willful ignorance. In both, the wrongdoer has intentionally caused the condition of his own defense, and thereby waived that defense.³³

The problem with the waiver theory is that it is too harsh. It seems appropriate when the accused is our grand-scheming Fox, craftily contriving his own defense. But what if the accused has been only recklessly ignorant, or negligently ignorant? In that case it seems unjust to waive the defense of ignorance, and convict him of performing the misdeed knowingly. He did nothing knowingly. He has been, at most, reckless in his screening actions, and his misdeeds were unwitting. Recklessness plus ignorance doesn't add up to knowledge.³⁴

The Model Penal Code standard and the waiver theory demonstrate the perils of focusing completely on the unwitting misdeeds while ignoring the screening actions. I now want to argue that it is equally wrong to focus entirely on the screening actions and ignore the unwitting misdeeds.

³² I am borrowing the term from Holly Smith, who speaks of "unwitting wrongful acts." Holly Smith, *Culpable Ignorance*, 92 Phil. Rev. 543, 547 (1983). Smith uses the nice term "benighting acts" for what I call "screening actions." I depart from her terminology with regret, and only because I've encountered too many people unfamiliar with the word "benighting."

³³ See generally Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 Va. L. Rev. 1 (1985).

³⁴ See *ibid.* at 8–15.

The locus of wrongdoing

A natural question arises as to whether the blameworthiness of willful ignorance comes from the screening actions or from the unwitting misdeeds. In the criminal law, the answer is simple. The actor will be convicted for knowingly committing the unwitting misdeed, not for willfully blinding himself. He could hardly be convicted for the screening actions, which most likely are perfectly lawful. There is nothing criminal about not looking in a suitcase.

Outside the criminal law, matters are not so straightforward. Screening oneself from knowledge can be viewed on analogy with drinking oneself into oblivion. If a driver injures someone while he is too drunk to know what he is doing, it may be unfair to blame him for driving poorly. His pickled synapses don't permit him to drive better, or even to realize that he is too drunk to drive. But it seems perfectly appropriate to blame him for drinking himself into oblivion. By the same token, one might argue that if an executive who screens herself from guilty knowledge then unwittingly sets performance goals that her subordinates cannot achieve lawfully, she shouldn't really be blamed for instigating their crimes. She should be blamed for discouraging them from telling her the truth. She wrongfully screened herself from guilty knowledge. As people sometimes say to one another in everyday life, "I don't blame you for what you did, but I do blame you for getting into the situation in the first place." This is a theory of willful blindness as a form of *culpable ignorance* – very literally, ignorance that is itself blameworthy.

On a culpable-ignorance theory, the screening actions bear the primary blame. What about the unwitting misdeeds? According to Holly Smith, who has published an admirable analysis of culpable ignorance, they should be regarded as mere consequences ensuing from the screening acts, consequences over which the actor has ceded control. He has done this by screening himself from the knowledge that would give him a reason to avoid an otherwise blameless action, the unwitting misdeed.

Smith suggests that whether we blame him for the unwitting misdeed as well as for the screening action depends entirely on whether we blame people for bad consequences of their actions, even when they have no control over those consequences.³⁵ The law is inconsistent on this issue. We do punish completed crimes more severely than failed attempts, even if the difference between success and failure was out of the criminal's control, but we don't typically punish criminals for the remote consequences of their crimes. Indeed, this is a well-known paradox in criminal law. Generations of theorists

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have labored to little avail trying to devise a theory to explain why bad consequences, not merely bad intentions, matter.³⁶

Fortunately, we need not enter this debate, because Smith is mistaken in treating unwitting misdeeds as brute consequences caused by the screening actions. In effect, Smith treats the actor at the time of the unwitting misdeeds as if he were a different person from the actor at the time of the screening actions.³⁷ The "screner" becomes something akin to a manipulative criminal who causes an innocent agent – his own later self – to commit a crime. In such cases, the principal rightly gets all the blame, and the innocent agent gets none.³⁸

But this analysis overlooks the important fact that the later self is not *entirely* innocent. The later self at least knows that he performed the screening actions at an earlier time. He is on notice that the sword of potential wrongdoing dangles over his head. The later self has an opportunity to reconsider and abandon a course of action that might turn out to be an unwitting misdeed. If he persists in acting, he shares in the blame. The more probable he believes the misdeed is, the more he shares in the blame. Thus, the right analogue is not that of a guilty principal (the earlier self) and an innocent agent (the later self) whose unwitting misdeed is a causal consequence of the earlier self's screening actions. The right analogue is that of a guilty principal and an agent who is at least reckless. The analogy, in other words, is to complicity, not causation – remembering, of course, that the complicitous principal and agent are the same person at two different times.

³⁶ George Fletcher has noted: "The relevance of the victim's suffering in the criminal law poses a serious hurdle to the struggle for reasoned principles in the law. Generations of theorists have sought to explain why we punish actual homicide more severely than attempted homicide, the real spilling of blood more severely than the unrealized intent to do so. Our combined philosophical work has yet to generate a satisfactory account of why the realization of harm aggravates the penalty. Yet the practice persists in every legal system of the Western world. We cannot adequately explain why harm matters, but matter it does." George P. Fletcher, *A Crime of Self-Defense*: Bernard Goetz and the Law on Trial 82-83 (1988). Fletcher explains the dimensions of the debate between "traditionalists," who focus on the consequences of criminal actions, which may be outside the actor's control, and "modernists," who focus on whatever is within the actor's control. *Ibid.* at 67-83.

³⁷ See Smith, *supra* note 32, at 565-66.

³⁸ To be precise, the analogy is not quite to a principal causing an innocent agent to act, because the innocent-agent doctrine applies only in cases where the principal intends the agent's action. The Fox intends his later self to perform the unwitting misdeed, but the Ostrich may not. In the Ostrich's case, the analogy is not to innocent agency, but to a different causation analysis: A is held liable for B's crime if B is innocent, and A unintentionally causes B to commit it. See Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 392 (1985). My argument and terminology in this and the succeeding paragraphs has been heavily influenced by Kadish's article. Kadish revisits the requirement of intention in a later article. See Sanford H. Kadish, *Reckless Complicity*, 87 J. Crim. L. & Criminology 369 (1997).

³⁵ See Smith, *supra* note 32, at 569.

Just as the Model Penal Code and the waiver theory err by focusing attention entirely on the unwitting misdeed (performed by the later self), the culpable-ignorance theory errs by focusing attention entirely on the screening actions (performed by the earlier self). To do full justice to cases of contrived ignorance, we need some way of combining the two. Here, unfortunately, the analogy to a guilty principal and a reckless agent doesn't help. There is no formula for combining the guilt of a principal with that of an agent to determine the guilt of both together, and thus there is no formula for assessing an actor's guilt by combining the guilt of the earlier and later selves. We need some alternative approach.

A proposal

The very statement of the problem suggests its solution. If it is a mistake to treat the screening actions and the wrongful misdeeds in isolation from each other, we must reunite them into a single complex. In essence, this amounts to broadening the time-frame in which we consider the unwitting misdeed, by regarding it as a unitary action *that begins when the actor commits the screening actions*.³⁹ Thus, the current suggestion avoids the errors of both the Model Penal Code and the culpable ignorance theory. On this proposal, the relevant question is "What was the actor's state of mind toward the unwitting misdeed at the moment she opted for ignorance?"⁴⁰ As support for this suggestion, we can return to the analogy of principal and agent. The agent, the self at the moment of the unwitting misdeed, in effect ratifies the earlier self's decision to screen off potentially guilty knowledge. This seems like a good reason for making the earlier self's attitude toward the unwitting misdeed the focus of inquiry – for that is the attitude that the later self is ratifying.⁴¹

³⁹ See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 Stan. L. Rev. 591 (1981) (distinguishing broad and narrow time-frames in constructing criminal liability).

⁴⁰ This proposal is Paul H. Robinson's suggested analysis of causing the conditions of one's own defense, although Robinson does not apply it to willful ignorance. See Robinson, *supra* note 33, at 28–31. David Wasserman suggested to me the possibility of applying Robinson's idea in the context of willful ignorance, and sketched the idea in a paper we co-authored with Alan Strudler. See David Luban, Alan Strudler, & David Wasserman, *Moral Responsibility in the Age of Bureaucracy*, 90 Mich. L. Rev. 2348, 2387–88 (1992). I now believe that my co-authors and I erred by coupling this analysis of willful ignorance with the kind of negligence analysis that I criticized earlier.

⁴¹ A word of explanation about what I mean by "the earlier self's attitude toward the unwitting misdeed." Readers may object that if the earlier self has an attitude toward the misdeed, it is not unwitting. If a business executive sets up a structure of deniability so that he never learns that his employees must break laws to accomplish the goals he sets them, then he never knows that his instructions unwittingly abet crimes. Thus, he has no attitude toward *specific* acts of aiding and abetting crime.

This sounds too abstract. To see the point of the proposal, let us revisit our old friends the Fox and the Ostrich. The grand-scheming Fox has mischief in his heart from the get-go, and his foray into contrived ignorance is nothing more than an exercise in liability-screening. What was his state of mind toward the unwitting misdeed at the moment he opted for ignorance? That's easy. Like Alfred P. Doolittle in *My Fair Lady*, he's wishing to commit mischief, he's wanting to commit mischief, he's waiting to commit mischief. And what is the judgment of him? It is a judgment that he *has* committed mischief *and* willfully so.

The case of the Ostrich is a bit more complicated, because, at the moment she pops her head in the sand, she herself may not know what her attitude is toward the unwitting misdeeds she prefers not to think about. So, when the Ostrich successfully contrives not to have any mental attitude toward a possible future misdeed, it may seem impossible, or even contradictory, to evaluate her blameworthiness by investigating the very mental attitude that, by assumption, does not exist.

However, matters are not as hopeless as this way of putting things suggests. The Ostrich contrives to block certain thoughts, but a mental state such as intention is not the same thing as an occurrent thought. As Wittgenstein pointed out, "intention is neither an emotion, a mood, nor yet a sensation or image. It is not a state of consciousness. It does not have a genuine duration."⁴² For example, the fact that I intend to go away tomorrow does not entail that some kind of thought about going away hovers in my consciousness from now until I leave.⁴³ Rather, the intention consists of a

However, even if he has no specific act of aiding and abetting in mind, he may still have a generic action in mind when he sets up the structure of deniability. That is, he may set up the structure with the intention of establishing his own deniability for whatever future crimes he expects his employees to commit on his orders, in which case his attitude toward those crimes is one of willfulness. Or he may set up the structure in conscious disregard of the substantial and unjustifiable risk that it will result in his giving orders that can be followed only by unlawful means. In that case, his attitude is recklessness. His attitude is toward the general act-type of aiding and abetting wrongdoing, not the particular instances – what philosophers call "tokens" of that type – the wrongful character of which he has concealed from himself.

⁴² Ludwig Wittgenstein, Zettel, §45, at 10 (G. E. M. Anscombe trans., G. E. M. Anscombe & G. H. von Wright eds., 1970).

⁴³ "I have the intention of going away tomorrow." – When have you that intention? The whole time; or intermittently? Ibid. §46, at 10. Wittgenstein presumably means us to doubt both answers – but if we must choose one, it is "the whole time," even though the conscious thought of going away tomorrow is intermittent: hence the conclusion that the intention is distinct from the thought. Wittgenstein elaborates on this idea: "Really one hardly ever says that one has believed, understood or intended something 'uninterruptedly' since yesterday. An interruption of belief would be a period of unbelief, not the withdrawal of attention from what one believes – e.g. sleep." Ibid. §85, at 17.

disposition to plan my activities around going away tomorrow.⁴⁴ In the same way, we answer our question about the Ostrich's mental state toward the misdeed by answering a counterfactual question about her disposition to commit it: "What would the Ostrich have done had she not contrived her own ignorance?" There is no reason to doubt that often we know what the answer to this question is.

Indeed, outside observers may be able to answer the question even when the Ostrich herself cannot. In everyday life, our friends and relatives often are able to predict what we are going to do in a major life-choice even while we ourselves twist in an agony of indecision. Self-knowledge has never been humankind's strong suit, and none of us is as unpredictable as we like to think. Even though we can't answer the counterfactual question "What would she have done had she not contrived her own ignorance?" by scrutinizing the Ostrich's psyche at the moment she performed the screening actions, other, less subjective evidence may allow us to answer with reasonable confidence. We never have direct access to another person's psyche in any event, and so every inquiry into subjective states infers them from external evidence. The counterfactual question is no harder to answer from external evidence than other questions about subjective states, and juries answer those every day, precisely by using external evidence to infer dispositions. Evidence about the Ostrich's way of life may shed light on how she would act if her contrived ignorance were stripped away. Remember Albert Speer, our prototypical ostrich. We know quite enough about him to predict that no revelation of horrors, not even a trip to Auschwitz, was likely to make Hitler's minister of slave labor resign in protest. Even in cases where the objective evidence is too scanty to judge confidently what the Ostrich would have done had she known all the facts, there is no reason in principle to doubt that the question has an answer.

So we can still say this: If she *would* do the right thing had she not screened herself from knowledge, then her attitude toward the misdeed at the time she opted for ignorance is recklessness. For at that moment she consciously elected to run the risk of unwitting wrongdoing. But, if she actually would persist in ways of wickedness whether she had full knowledge or not, it seems fair to attribute that willingness to her at the moment she performed the screening actions. Even if she is in denial about it, hindsight reveals that she is, very literally, the moral equivalent of a knowing performer of misdeeds.

In other words, the proposal to examine states of mind toward the misdeed at the time the actor opts for ignorance yields exactly the same judgments as our earlier intuitions about the Fox and the Ostrich. That is no coincidence, of

⁴⁴ This view is defended in Michael E. Bratman, *Intention, Plan, and Practical Reason* 1–5 (1987).

course. The question we answer to determine the Ostrich's mental state – "What would the Ostrich have done had she not contrived her own ignorance?" – is exactly the same question that in our earlier discussion we used to grade her culpability. That is at least one reason to think that the proposal gets it right: it leads us to ask the same question that underlies our moral intuitions about the culpability of the Ostrich and the Fox.

Lawyers behaving badly: a reprise

To conclude, I want to return to the cases I began with – cases of contrived ignorance by lawyers. As a law teacher, and in particular a teacher of legal ethics, these cases seem particularly pressing to me. In this final section, I consider two questions: first, whether the conclusion that willful ignorance is morally equivalent to culpable *mens rea* for the unwitting misdeeds should be embodied in the formal rules of legal ethics – to which my answer is a tentative no – and second, whether it nonetheless should figure in lawyers' moral deliberations – to which the answer is yes. To say that it should figure in lawyers' moral deliberations does not, however, mean that lawyers should never engage in contrived ignorance. Like most moral principles, the importance of avoiding contrived ignorance can be outweighed by other morally relevant factors in specific cases. I illustrate this point with an extended example in which – or so it seems to me – contrived ignorance is the lawyer's best choice.

Should the law penalize willful ignorance by lawyers of their clients' deceptions?

We've seen that the formal rules of legal ethics, unlike criminal law, contain no willful-blindness doctrine. Except in certain specialized circumstances, a lawyer is under no obligation to press her client for knowledge or to corroborate what her client tells her.⁴⁵ If she uses a "Don't ask, don't tell" interviewing strategy, and her client subsequently commits perjury, the lawyer will not be charged with knowingly putting on perjurious testimony. Here, willful blindness does not equal knowledge. The question is whether it should.

The approach developed in this chapter would ask about our lawyer's mental state toward possible client perjury at that moment in the interview

⁴⁵ One special circumstance is imposed by Rule 11 of the Federal Rules of Civil Procedure, which requires lawyers to certify that the assertions they file in court papers are warranted in fact. Fed. R. Civ. P. 11(b)(3). Another is the issuing of opinion letters containing assertions about a client's financial position. See *Greycas v. Proud*, 826 F.2d 1560 (7th Cir. 1987) (holding lawyer liable for damages resulting when lawyer relied upon fraudulent client assertions when writing an opinion letter to lender).

when she orders her client not to tell her too much. In my experience, many lawyers expect clients to perjure themselves when the stakes are high, suggesting that the "Don't ask, don't tell" lawyer is at least reckless toward future perjury, and, perhaps, willful. This intuition suggests that "Don't ask, don't tell" is an ethically dubious way for lawyers to proceed.

Perhaps, then, legal ethics rules should be modified so that willful and knowing ignorance count as knowledge. Doctrinally, adding a willful-blindness doctrine to legal ethics would involve nothing more than a minor change in the terminology section of the Model Rules of Professional Conduct. Where the Model Rules now state that "'knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question," the amended terminology would add: "or conscious avoidance of actual knowledge of the fact in question."

Minor as the change appears on the printed page, it has the potential to transform the nature of the client-lawyer relationship, and thus of legal practice, if it were honestly enforced. Most obviously, adding the willful-blindness doctrine to ethics rules leaves great uncertainty about how much inquiry into a client's case a lawyer must undertake to avoid disciplinary action. Perhaps the doctrine would be read narrowly, so that "conscious avoidance of knowledge" means only that the lawyer consciously refrained from asking questions that, but for the fear of discovering guilty knowledge, she would obviously have asked in order to help prepare the case. But even then it is unclear what questions this obligation encompasses. For example, does the doctrine require a criminal defense lawyer to ask every client if he did the acts alleged? Faced with uncertainties, the fear of liability might provoke lawyers to ratchet up the level of inquiry, which carries enormous potential for damaging the elements of trust essential to a successful client-lawyer relationship. Moreover, to determine how much due diligence a lawyer actually did undertake, or whether the lawyer employed impermissible "Don't ask, don't tell" interview techniques, disciplinary authorities would have to scrutinize privileged and confidential conversations between attorney and client – perhaps all their conversations. If these worries are genuine, the willful-blindness doctrine threatens to leave the client-lawyer relationship in a shambles.

Sophisticated clients with something to hide would have reason to actively frustrate their own lawyers' factual investigation of their case, because they would know that their lawyer is ethically required to ferret out guilty information that under some circumstances she might be ethically required to disclose. The worried client may frustrate the lawyer's investigation even of innocent facts that the lawyer needs, because the client does not know that the facts are innocent. For the lawyer's part, a lawyer who fears liability for consciously avoiding knowledge, and who in any case needs information to represent her clients competently, may be forced to play a cat-and-mouse

game of sleuthing against her own evasive clients. Adding to the tension is the fact that in many cases the client is paying by the hour for his lawyer to investigate him – and the more the client tries to frustrate the investigation, the more time-consuming and costly it becomes. The client retains the lawyer because he must, while viewing the lawyer askance, with a certain measure of dread and resentment. The client fears, sometimes rightly, that he would be better off with no lawyer at all.

All of these concerns have a familiar ring to them: they sound very much like the bar's standard objections to proposals that would weaken confidentiality in the name of truth. Invariably, the bar springs to the defense of confidentiality and trots out a parade of horrors if confidentiality is weakened – damage done to the client-lawyer relationship, clients evading their lawyers' questions for fear that the lawyer could be compelled to disclose damaging information, lawyers being left out of the loop in business decisions, clients hiding innocent information from their lawyers because they don't know that the facts are innocent. As William Simon has recently argued, none of these objections is very persuasive, for two fundamental reasons. First, they all focus exclusively on the costs to clients of enhanced disclosure, without considering the social benefits of hampering dishonest clients. Second, they all make behavioral assumptions about lawyers and clients that are at best unconfirmed and at worst implausible.⁴⁶ Do Simon's arguments apply here?

They may. The willful-blindness doctrine, which requires lawyers to ask clients hard questions that they would otherwise leave unasked because they prefer not to know the answers, will elicit evasive tactics only from clients who believe they have something to hide. If the aim is to diminish the amount of client crime and fraud by making it harder for dishonest clients to enlist lawyers in their efforts, that may be all to the good.

On the other hand, the number of clients who believe they have something to hide may be very large, and they are not all crooks. When disputes lead to litigation, all parties may have done something discreditable or embarrassing; and when clients enter into business transactions, all sides may be concealing weaknesses or defects in their wares. None of them will appreciate a doctrine that they fear will require their own lawyers to ferret out their dishonesties and then resign or report them. This result is much more alarming than rules weakening confidentiality, under which the client with a secret blemish at least has the option of withholding information from the lawyer, who can remain passive and do the best she can with whatever information the client gives her. Under the willful-blindness doctrine, the lawyer cannot remain passive. Her license is in jeopardy unless she actively investigates the client.

⁴⁶ See William H. Simon, *The Practice of Justice: A Theory of Lawyer's Ethics* 54–62 (1998).

The behavioral assumptions of this scenario are few and harmless. It assumes only that clients whose lawyers are investigating their embarrassments will try to hide the ball, that lawyers who face professional discipline if they avoid knowledge will feel impelled to investigate their clients, and that neither lawyers nor clients will like each other very well while all this is going on.

No doubt some of these problems could be solved. And perhaps the gain in preventing lawyers from assisting client fraud is worth disrupting the client-lawyer relationship as we now understand it. At the very least, however, we should be extremely cautious about affixing a willful-blindness doctrine to legal ethics. The Law of Unintended Consequences looms large.

Miriam's case, or, the messy morality of "Don't ask, don't tell"

Suppose, then, that formal legal ethics doctrine remains as it is today. The argument developed in this chapter tells us that willful blindness is morally equivalent to recklessness, or knowledge, or even willfulness, depending upon the lawyer's motive in avoiding knowledge. In that case, should the good lawyer avoid "Don't ask, don't tell" strategies even without a legal doctrine telling her to do so?

That is the conclusion toward which the argument points us. If, for example, a client commits perjury, most states' ethics rules require lawyers to disclose it to the court if the client insists on standing pat. In most cases, I believe, that is the morally right result.⁴⁷ If the lawyer avoids her disclosure obligation by arranging not to know that the client's story is false – the "Don't ask, don't tell" strategy – that is morally equivalent to knowingly (or recklessly, or willfully) failing to disclose known perjury.

There might, nevertheless, be exceptional cases in which the morally troubling consequences of knowing too much outweigh the duty to avoid "Don't ask, don't tell" strategies. An imaginary example will illustrate the point.⁴⁸ Consider a political asylum case involving a political activist – let's call her Miriam – who fled to the United States from a dictatorship. Miriam's asylum application is denied, which means that to avoid deportation she must prove her case in an immigration court. She hires a lawyer, and tells him her story. She had been imprisoned for two months by the political police in her home country because of her dissident activities. While in prison, she was raped and beaten. After her release, the police continued to threaten and harass her, until finally, following a credible death threat, she fled the country.

Miriam's lawyer sets about documenting the case, because he must prove to the judge that she truly was persecuted at home. He quickly confirms the

essential details. Fortunately, Miriam brought a birth certificate proving her identity, and she saved newspaper clippings from her home country that identify her as a political activist. Furthermore, Amnesty International reported on her arrest and imprisonment at the time. She even has a dated document showing when she was released from prison; and the Amnesty report gives the date she went in. A friend of Miriam's who moved to the United States a year before her will testify that Miriam phoned him from her home country when she received the death threat. So far, so good. Miriam has a powerful case for political asylum. A psychiatric examination finds symptoms of post-traumatic stress disorder in her, consistent with her terrible experiences in prison.

In the initial interview, Miriam mentioned that her brother, who has already won asylum, lives nearby. The lawyer asks her to arrange an interview with the brother, who can corroborate her story. Suddenly, however, Miriam becomes evasive. Her brother is very busy, Miriam tells the lawyer; he is studying for his college exams. In any case, she hardly ever speaks with her brother. And she is sure that her brother will not want to talk with the lawyer. As she says these things, Miriam seems flustered and alarmed; she won't look the lawyer in the face. He notices tears in her eyes; then she gets angry. What is going on?

Many things are possible. Maybe her PTSD is causing her strange reaction. Maybe she had a fight with her brother. Maybe her brother fears that if he testifies, the government will vindictively try to reopen his own asylum case. Or maybe he doesn't really have asylum, but is undocumented. Maybe, just maybe, he really is studying for his college exams.

But there is a worse possibility. Could it be that Miriam doesn't want the lawyer to speak with her brother because the brother won't corroborate Miriam's story? The lawyer has already documented the essentials. But perhaps she exaggerated some things. What if, despite her friend's testimony, the police never threatened her with death? Or what if she was never raped or beaten in prison, but said she was because someone (wrongly) told her that otherwise she wouldn't get asylum? The lawyer has seen it happen: refugees often get bad legal advice from other refugees. If so, her lie was understandable. She comes from a country where it doesn't pay to tell the truth to the government; her persecution was genuine; and everything her lawyer has learned convinces him that her peril if she is sent home is all too real.

What should the lawyer do? Immigration judges have discretionary power to turn down asylum applications if they doubt the credibility of the asylum-seeker; and this particular judge is less sympathetic to asylum-seekers than most. To insist on interviewing Miriam's brother, or even pressing Miriam on the issue, runs the risk of learning that parts of her story are untrue. In that case, the lawyer is ethically bound to retract court filings containing the false details. Doing so, however, would dynamite Miriam's credibility, even

⁴⁷ So I argue in *Lawyers and Justice*, at 197–201.

⁴⁸ The example is hypothetical, but I have drawn bits of it from real cases.

though the details aren't essential to proving her case; and a case that Miriam deserves to win is lost, perhaps at the cost of her life.

The alternative? Willful blindness – break off the investigation, elect not to interview the brother, go with the story that's already in the application and is well documented. It's almost certainly enough to win her case. I suspect that most lawyers would choose this alternative with scarcely a second thought, and the rules of legal ethics clearly permit it. But the theory that I have been elaborating counsels that such willful blindness is morally indistinguishable from knowingly (or recklessly) going along with Miriam's deception – if deception is what it is.

I know of no easy way out of the lawyer's dilemma, but in Miriam's case I accept the willful-blindness alternative. The reason is that in Miriam's case, in which telling the truth might defeat justice, and the stakes are enormous, even a lie might be morally excusable. It is a good principle to require candor to the court from lawyers, but even good principles have exceptions.⁴⁹ If a lie to save Miriam's life would be morally excusable, then why not avail oneself of willful blindness, which doesn't force the lawyer to lie and doesn't violate any rules?

Of course, this is moral loopholing, but here I think that there is a sound reason to indulge in it. In part, no doubt, lawyers choose willful blindness over morally excusable (but unlawful) lying to spare themselves the possibility of professional discipline. But even when there is no realistic chance of being caught, they still prefer willful blindness over morally excusable lying. That is because it matters to them that in legal ethics willful blindness is permissible and lying is not. Abiding by their rules of professional ethics is important to most lawyers' sense of professional identity. A lawyer who knew that Miriam's asylum application contains falsehoods might well withdraw it, even where going along with the false submission is morally preferable to the truth. Paradoxically, in Miriam's case, the lawyer should prefer willful blindness to knowledge *because willful blindness might spare him the temptation of wrongfully making her tell the truth*. Earlier, we observed that people engage in willful blindness to spare themselves moral dilemmas. Exactly that dynamic is at work here – only in this case sparing oneself a dilemma is the right thing to do, not because one might give in to the temptation to break a formal ethics rule, but because one might give in to the temptation to obey it. Breaking a rule of professional misconduct is a Rubicon many lawyers refuse to cross, even when it is the right thing to do. Availing themselves of the loophole that contrived ignorance provides enables them to do the right thing without crossing the Rubicon.

⁴⁹ Here I agree with William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 Georgetown J. Legal Ethics 433 (1999), which criticizes an exceptionless prohibition on lying.

Just call me an ostrich. But on this issue I am an unrepentant ostrich, because I don't think that the misdeed of putting on a fundamentally truthful case that may have a few unimportant false details – which the lawyer does not know are false – really is a misdeed. And that allows me to retain the conclusion that *as a general rule*, lawyers should avoid willful ignorance of inconvenient knowledge, just as everyone should, although this general rule has exceptions in extreme cases like Miriam's.

The fact that the general rule has exceptions should not deflect us from the moral importance of the rule, which takes away an excuse lawyers contrive for themselves when they have no reason more exalted than not wishing to have awkward confrontations with paying clients. In my view, the most inexcusable form of lawyer willful ignorance occurs when lawyers paper questionable deals for questionable clients because the price is right. A banker recollects that in the Roaring Eighties “for half a million dollars you could buy any legal opinion you wanted from any law firm in New York.”⁵⁰ The ethics rules prohibit lawyers from knowingly counseling or assisting a client in fraud, but if there's no “due diligence” duty to investigate the client and no willful-blindness doctrine, it becomes too easy for lawyers to evade the rule by evading the facts. Surely, a good lawyer should regard it as her duty to learn the facts before closing a deal.

That leads us back to Joseph Hutner and the computer crooks. We left Mr. Hutner figuratively clamping his hands over his ears and running out of the office. What happened next?

Hutner's law firm retained a pair of legal ethics experts, and made it clear that the firm hoped it wouldn't have to fire or blow the whistle on its wayward client. The ethics experts were only too happy to oblige. They advised that the law firm *could not* reveal the client's past frauds, and *could* continue to close deals for the computer company, provided that steps were taken to detect dishonesty. In fact, the experts cautioned, if the firm *stopped* representing the computer company it would signal that something was amiss, and that would violate client confidentiality.

Unfortunately, willful ignorance seems to be habit-forming, and the law firm's monitoring of the loans was timid and easy for the resourceful criminals to evade. Some evidence suggests that the firm wanted to know as little as possible about the uprightness of the loans it was closing, because it didn't want to part ways with the client. As a result, the firm closed another \$60 million in crooked loans for the computer company. When the lawyers discovered the new frauds, an ethics farce ensued. Their ethics experts advised that these new frauds had now become past frauds protected by the confidentiality rule. At this point, Hutner's firm decided that it was finally time

⁵⁰ Martin Mayer, *The Greatest-Ever Bank Robbery: The Collapse of the Savings and Loan Industry* 20 (1990).

to resign. The ethics experts sternly admonished that the firm should keep strict confidentiality while it turned the client over to another law firm. As a result, the new law firm proceeded in honest ignorance to close \$15 million in fraudulent loans for the crooks before the plot finally unraveled. First farce, then tragedy. Hutner's law firm paid \$10 million to defrauded lenders to settle lawsuits.

It's not a happy ending, but perhaps it's an edifying one. The law firm had two experts' opinions attesting that it had done what the ethics rules required, but it was nevertheless prepared to pay millions of dollars *not* to have its willful blindness put before a jury. Perhaps that tells us something about what we really think of contrived ignorance as a moral excuse.

7

The ethics of wrongful obedience

A century ago the legal realists declared that the real law is the law in action, not just the law in books. They urged us to think things, not words, and placed their faith in the power of the still youthful social sciences to think legal things accurately and rigorously. In legal ethics, I think most scholars would agree on the single biggest discrepancy between the law in books – the profession's ethics codes – and the law in action. The ethics codes are almost entirely *individualist* in their focus. They treat lawyers (clients, too, for that matter) largely as self-contained decision-makers flying solo. In fact, however, lawyers increasingly work in and for organizations. While most lawyers continue to practice in small firms, and sole practitioners still form the largest single demographic slice of the profession, the trend is toward organizational practice. The largest law firms and corporate legal departments have more than a thousand lawyers, and the biggest firms in the country three decades ago would not make this year's top hundred.

The importance of these trends for legal ethics can hardly be exaggerated. Psychologists, organization theorists, and economists all know that the dynamics of individual decision-making change dramatically when the individual works in an organizational setting. Loyalties become tangled, and personal responsibility diffused. Bucks are passed, and guilty knowledge bypassed. Chains of command not only tie people's hands, they fetter their minds and consciences as well. Reinhold Niebuhr titled one of his books *Moral Man, Immoral Society*, and for students of ethics no topic is more important than understanding whatever truth this title contains.

My own students, I might add, think about it without any prompting. No dilemma in the ethics class causes them more anxiety than the prospect of being pressured by their boss to do something wrong. Not only do they worry about losing their jobs if they defy the boss to do the right thing, they also fear that the pressures of the situation might undermine their ability to know what the right thing is.