Model Penal Code Section 2.02(7) and Willful Blindness

Jonathan L. Marcus

Courts and criminal law scholars have struggled for decades to sort out the relationship between the basic concept of knowledge, which is central to our notions of criminal responsibility, and the concept of "willful blindness."[1] According to the Model Penal Code (the Code),[2] knowledge of a fact is satisfied by finding an "awareness of a high probability" that it existed.[3] The drafters of the Code explain that they defined knowledge of a fact this way in

---

1. Courts and commentators employ several phrases interchangeably with willful blindness, including deliberate ignorance, conscious avoidance, purposeful avoidance, willful ignorance, deliberate shutting of the eyes, and conscious purpose to avoid the truth.

As the following citations indicate, commentators differ on the relationship between willful blindness and knowledge. *See* ROLLIN M. PERKINS, CRIMINAL LAW 776 (2d ed. 1969) ("One with a deliberate antisocial purpose in mind . . . may deliberately 'shut his eyes' to avoid knowing what would otherwise be obvious to view. In such cases, so far as the criminal law is concerned, the person acts at his peril in this regard, and is treated as having 'knowledge' of the facts as they are ultimately discovered to be."); GLANVILLE WILLIAMS, CRIMINAL LAW, THE GENERAL PART § 57 at 159 (2d ed. 1961) ("To the requirement of actual knowledge there is one strictly limited exception . . . . [T]he rule is that if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge . . . . The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law."); J. Ll. J. Edwards, *The Criminal Degrees of Knowledge,* 17 MOD. L. REV. 294, 298 (1954) ("For well-nigh a hundred years, it has been clear from the authorities that a person who deliberately shuts his eyes to an obvious means of knowledge has sufficient *mens rea* for an offence based on such words as . . .'knowingly'."). *But see* Robin Charlow, *Wilful Ignorance,* 70 TEX. L. REV. 1351, 1429 (1992) ("Although wilful ignorance is usually employed to satisfy a statutory mens rea of knowledge, the most prevalent definitions of the doctrine describe a state of mind that is . . . not as culpable as knowledge . . . ."); Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea,* 81 CRIM. L. & CRIMINOLOGY 191, 195 (1990) ("[D]eliberate ignorance constitutes recklessness, rather than knowledge."); Comment, *Willful Blindness as a Substitute for Criminal Knowledge,* 63 Iowa L. Rev. 466, 467 (1977) [hereinafter *Substitute for Criminal Knowledge*] ("It is at least arguable that by permitting a jury to substitute this sort of deliberate ignorance—or "willful blindness"—for the statutorily specified element of knowledge, a court violates the defendant's fundamental right to due process.").

2. The Model Penal Code, adopted by the American Law Institute in 1962, and revised in 1985, distinguishes among four levels of criminally culpable mens rea: purposeful, knowing, reckless, and negligent. The Code considers the purposeful actor to be the most culpable, and the other states of mind follow in descending order of culpability. The purposeful actor has it as "his conscious object" to engage in a particular kind of conduct or to cause a particular result. MODEL PENAL CODE § 2.02(2)(a)(i) (Official Draft and Revised Comments 1985) [hereinafter MODEL PENAL CODE]. The knowing actor is aware that his conduct is of a particular nature or is aware that it is "highly probable" that a particular fact exists. *Id.* §§ 2.02(b)(i), 2.02(7). The reckless actor "consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." *Id.* § 2.02(2)(c). And the negligent actor "should be aware of a substantial and unjustifiable risk. . . ." *Id.* § 2.02(2)(d).

3. *Id.* § 2.02(7).

order to address "the situation British commentators have denominated 'willful blindness' or 'connivance,' the case of the actor who is aware of the probable existence of a material fact but does not determine whether the fact exists or does not exist."[4]

All the federal circuits have employed willful blindness doctrines.[5] These doctrines are used in order to facilitate conviction of defendants who may not have had actual knowledge of the crucial fact but who are considered culpable nonetheless. Recent decisions by the Second, Ninth, and Tenth Circuits, however, highlight the confusion and conflict that willful blindness doctrines have generated[6] since the Ninth Circuit first gave willful blindness extensive treatment in *United States v. Jewell*.[7]

The Second and Ninth Circuits have cited Model Penal Code Section 2.02(7) as support for their willful blindness doctrines and include the provision in their willful blindness jury instructions.[8] In so doing, these circuits have drawn a distinction between actual or positive knowledge of a fact and willful blindness, creating separate jury instructions and evidentiary requirements for each condition.[9] Although both circuits apply a similar evidentiary test for permitting a willful blindness instruction, the Ninth Circuit has stood by its view that the willful blindness doctrine should be used only "rarely," whereas the Second Circuit has maintained that the doctrine is "commonly used."[10] Other circuits have employed willful blindness doctrines

4. *Id.* § 2.02 cmt. 9.

5. *See, e.g.*, United States v. Campbell, 977 F.2d 854, 857 (4th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3583 (1993); United States v. Sasser, 974 F.2d 1544, 1551-53 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1063 (1993); United States v. Bahadar, 954 F.2d 821, 831 (2d Cir.), *cert. denied*, 113 S. Ct. 149 (1992); United States v. Mapelli, 971 F.2d 284, 285-87 (9th Cir. 1992); United States v. Barnhart, 979 F.2d 647, 651-53 (8th Cir. 1992); United States v. Nazon, 940 F.2d 255, 258-60 (7th Cir. 1991); United States v. Rivera, 944 F.2d 1563, 1570-73 (11th Cir. 1991); United States v. Chen, 913 F.2d 183, 186-93 (5th Cir 1990); United States v. Jack, 890 F.2d 1250 (D.C. Cir. 1989) (unpublished disposition) No. 88-3137, 1989 U.S. App. LEXIS 17927, at *8; United States v. Picciandra, 788 F.2d 39, 46-47 (1st Cir.), *cert. denied*, 479 U.S. 847 (1986); United States v. Caminos, 770 F.2d 361, 365-66 (3d Cir. 1985); United States v. Gullett, 713 F.2d 1203, 1212 (6th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984).

6. *See* Tomala v. United States, 112 S. Ct. 1997, 1998 (1992), *denying cert. to* 946 F.2d 883 (2d Cir. 1991) (White, J., dissenting) ("[T]he outcome of a federal criminal prosecution [where the case presents the issue of willful blindness] should not depend upon the circuit in which the case is tried."); *see also* Brief for the United States at 7-13, Tomala v. United States, 112 S. Ct. 1997 (1992) (No. 91-7051) (identifying conflict among circuits and arguing that Model Penal Code § 2.02(7) is definition of knowledge approved by Supreme Court).

7. 532 F.2d 697 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976).

8. *See id.* at 700-01; United States v. Bright, 517 F.2d 584, 587 (2d. Cir. 1975); *see also* United States v. Feroz, 848 F.2d 359, 361 (2d Cir. 1988) (language from § 2.02(7) should be incorporated into every willful blindness instruction); United States v. Murrieta-Bejarano, 552 F.2d 1323, 1324 (9th Cir. 1977) (proper willful blindness instruction includes language from § 2.02(7)).

9. The Ninth Circuit appears to use the terms "actual" or "positive" knowledge to denote knowledge derived from direct evidence. For example, in a prosecution for the knowing importation of marijuana, evidence or testimony to the effect that the defendant viewed the marijuana or was told specifically to transport the marijuana would support an inference of actual or positive knowledge.

10. United States v. Rodriguez, No. 92-1184, 1993 U.S. App. LEXIS 576, at *4 (2d Cir. Jan. 14, 1993) ("In this Circuit, a 'conscious avoidance' instruction has been authorized somewhat more readily than elsewhere. In the Ninth Circuit, for example, the charge is to be given 'rarely' . . . . We, on the other hand, have observed that the charge is 'commonly used.'") (citations omitted).

without reference to Section 2.02(7),[11] and the Tenth Circuit has recently rejected including Section 2.02(7) as part of its willful blindness jury instruction.[12] The Tenth Circuit also has developed special evidentiary standards for a finding of willful blindness that differ from those of the Second and Ninth Circuits.

This Note argues that employing a broad definition of knowledge, rather than carving out a willful blindness alternative to a strict knowledge requirement, will promote a simple, effective, and more honest enforcement of the criminal law. Adopting such an approach will eliminate the need to rely on the vague and misleading notion of conscious avoidance[13] and will permit conviction of culpable defendants without jeopardizing the rights of innocent actors.

Part I discusses the common law doctrine of willful blindness and how the Code drafters addressed it in their definition of knowledge of a fact. Part II discusses federal case law, focusing on the conflict that has emerged among the Second, Ninth, and Tenth Circuits with regard to willful blindness. To resolve the conflict, Part III proposes abandoning the willful blindness doctrine where the statute requires knowledge, employing instead a revised Section 2.02(7) as the appropriate definition of knowledge of a fact.

I. FROM THE COMMON LAW DOCTRINE OF WILLFUL BLINDNESS TO SECTION 2.02(7)

A. *Origins in English law*

Willful blindness first appeared as a substitute for actual knowledge in English case law over a century ago.[14] A judge in *Regina v. Sleep*[15] ruled that an accused could not be convicted for possession of "naval stores" unless the jury found that he "knew that the goods were government stores or wilfully shut his eyes to the fact."[16] English judicial authorities thereafter referred to the state of mind that accompanied one who "wilfully shut his eyes" as "connivance" or "constructive knowledge."[17] Several cases in the late

11. *See, e.g.*, United States v. Crabtree, 979 F.2d 1261, 1269-70 (7th Cir. 1992).

12. United States v. Sasser, 974 F.2d 1544, 1551-52 (10th Cir. 1992).

13. Since January 1990, LEXIS has reported over thirty-five cases in the Second, Ninth, and Tenth Circuits alone involving the evidentiary support for a conscious avoidance instruction.

14. For a thorough discussion of the doctrine's origins, see Edwards, *supra* note 1, at 298-306 ("[B]y the turn of the century the concept of connivance or wilful blindness had become firmly embedded in the minds of the [English] judges as an alternative to actual knowledge."); *see also* Robbins, *supra* note 1, at 196-203 (tracing development of willful blindness doctrine in English and American courts).

15. 169 Eng. Rep. 1296 (Cr. Cas. Res. 1861).

16. *Id.* at 1302 (Willes, J.). Edwards labeled the decision "the first occasion in which judicial approval was given to the notion that some lesser degree of knowledge than actual knowledge would suffice to establish *mens rea*." Edwards, *supra* note 1, at 298.

17. Edwards, *supra* note 1, at 298.

nineteenth century, involving innkeepers and hall-porters denying knowledge of "gaming" on their premises, also addressed willful blindness. In both *Bosley v. Davies*[18] and *Redgate v. Haynes*,[19] for example, the courts noted that actual knowledge was unnecessary for conviction if the defendant purposely abstained from acquiring this knowledge.[20]

These English authorities were unclear, however, on the level of awareness the defendant had to have of a fact in order to make him subject to conviction on a willful blindness theory. Some decisions suggested that a defendant's failure to investigate a suspicion of wrongdoing in order to avoid knowledge would be considered willful blindness. Others indicated that only where the evidence demonstrated that criminal activity was obvious to the defendant would the defendant's ignorance be culpable, because such evidence suggested that the defendant's ignorance was really just a charade.[21]

B. *The Common Law Doctrine in the Federal Courts*

The Supreme Court approved the use of the willful blindness concept in *Spurr v. United States*.[22] The defendant, Spurr, was charged with knowingly certifying certain checks drawn on a bank that was unable to cover them. The Court noted that an "evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not . . . ."[23] The rationale behind this presumption may have been that the defendant had a *duty* to know the amount of money in a customer's account. Lower courts later began to use willful blindness as an alternative to actual knowledge but did not limit its application to statutes that imposed a duty to know on defendants. Indeed, the willful blindness doctrine is currently invoked most frequently under federal narcotics statutes, which are only prohibitory and involve no legal duty to know.[24]

---

18. 1 Q.B. 84 (1875).

19. 1 Q.B. 89 (1876).

20. *See Bosley*, 1 Q.B.D. at 88; *Redgate*, 1 Q.B.D. at 94. According to Edwards, since these decisions, "no real doubt has been cast on the proposition that connivance is as culpable as actual knowledge." Edwards, *supra* note 1, at 302. Some commentators, however, have disagreed. *See, e.g.*, Charlow, *supra* note 1 (arguing that current formulations of willful blindness describe mental state that is not as blameworthy as knowledge); Robbins, *supra* note 1 (arguing that willful blindness constitutes recklessness, not knowledge).

21. *See* Charlow, *supra* note 1, at 1361-65.

22. 174 U.S. 728 (1899).

23. *Id.* at 735. Professor Charlow points out that the reference to willful blindness was dictum because the issue of the trial court's willful blindness jury instruction was not raised on appeal. She also argues that the Court allowed willful blindness to satisfy a finding of "wrongful intent," and not knowledge. Charlow, *supra* note 1, at 1404-05, nn.217, 222.

24. The increased application of willful blindness can be correlated with the rise in federal narcotics prosecutions, where there is a perceived need for the doctrine. *See* United States v. Nicholson, 677 F.2d 706, 711 (9th Cir. 1982) (stating that testimony revealed that deliberate avoidance was established practice in drug trade). However, the government has sought willful blindness instructions in other contexts as well, such as tax avoidance and mail fraud. *See, e.g.*, United States v. Sasser, 974 F.2d 1544, 1551-53 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1063 (1993) (mail fraud and false statements); United States v. Fingado, 934

Applying the doctrine as an alternative to knowledge in the absence of a legal duty to know raises problems. Culpability based on conscious avoidance of a fact seems intuitively more reasonable where there is a duty to know that fact, since, where a statute imposes a duty to know, willful blindness under virtually any conception of it would be a violation of that duty. By contrast, where a statute is only prohibitory and requires a finding of "knowing" conduct, an actor is not necessarily culpable if he avoids knowledge of the critical fact. Because the common law doctrine of willful blindness condemns avoiding knowledge of a fact without specifying any particular level of awareness the defendant must have with respect to that fact, use of this doctrine in the absence of a duty to know creates the risk of unjust conviction.

C. *The Model Penal Code Approach and the Rationale Behind Section 2.02(7)*

The Code drafters did not view willful blindness as actual knowledge disguised by pretended ignorance. Nor did they characterize it as acting despite a suspicion of wrongdoing. Rather, the drafters understood the willfully blind actor to be one who acts with a high level of awareness of a particular fact.[25] They defined knowledge of a fact in order to cover this mental state, requiring the prosecution to prove that the defendant had an "awareness of a high probability" that a fact existed.

Knowledge is initially defined in Section 2.02(2)(b)(i) of the Code:

> (b) *Knowingly.* A person acts knowingly with respect to a material element of an offense when: i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist.[26]

This initial definition of knowledge leaves unclear the level of awareness needed for a defendant to have knowledge of a fact that makes his conduct "of that nature." However, Section 2.02(7), stating that knowledge of a fact is established if a person is aware of a high probability of its existence, makes it clear that the defendant need not be certain of a fact in order to be convicted under a statute requiring "knowing" conduct. Section 2.02(7) provides:

> (7) *Requirement of Knowledge Satisfied by Knowledge of High Probability.*
> 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

---

F.2d 1163, 1166-67 (10th Cir.), *cert. denied,* 112 S. Ct. 320 (1991) (tax avoidance).

25. *See supra* text accompanying note 4.

26. MODEL PENAL CODE § 2.02(2)(b)(i).

> high probability of its existence, unless he actually believes that it does not exist.[27]

This rule rests on the assumption that the actor who commits an act even though he knows it is highly probable that a crucial fact exists is just as culpable as the actor who has virtually certain knowledge. The actor who is aware of a high probability of a fact's existence has been "put on notice;"[28] that is, he has the opportunity, if he cares, to investigate and eliminate any doubt before acting[29] or, in any event, to refrain from acting. That his knowledge does not rise to the level of certainty should not excuse commission of the act. By engaging in conduct while aware of a high probability that such conduct is criminal, the actor has manifested his *indifference* to the values underlying the criminal prohibition in much the same way as the actor who is certain his conduct is criminal.[30] Consequently, the criminal law should not differentiate between them.[31]

---

27. *Id.* § 2.02(7).

28. *Id.* § 2.02 cmt. 9.

29. It is hard to imagine a situation where an actor is aware of a high probability that a fact exists yet does not have the opportunity to investigate and discover the truth before committing the act. This rationale also explains why § 2.02(7) does not apply to knowledge of a result. For a defendant to be found guilty of having knowledge of a result, the government must prove that the defendant was *"practically certain"* the result would occur. *See* MODEL PENAL CODE § 2.02(b)(2). The actor who is only aware of a high probability that a result will occur (e.g., that the shot he fired will hit someone in the crowd) will typically not have any opportunity to obtain certain knowledge of the result before he acts, since the result is contingent upon the execution of his act. This actor can therefore be said only to be creating the *risk* of harm without being able to ascertain beforehand whether that harm will actually result. In this sense, the actor is only reckless—disregarding a substantial and unjustifiable risk that harm will result.

30. This analysis of § 2.02(7) so far has ignored its second prong, "unless he actually believes that it does not exist" because, as this Note argues *infra* Part III(B), it is largely redundant.

31. Professor Charlow, who has recently written a comprehensive article on "wilful ignorance," contends that this approach is flawed. She argues that a person who is certain that his conduct is criminal is more culpable than one who is only aware of a high probability that such is the case. *See* Charlow, *supra* note 1, at 1397-1400.

First, she claims that the certain actor is more dangerous because he is less deterrable insofar as he has demonstrated his willingness to violate the law even though he is certain his conduct is criminal. The actor who is only aware of a high probability that his conduct is criminal, on the other hand, might be deterred from acting if he had certainty. The fact that a particular actor might generally be more dangerous to society, however, should not be relevant to his culpability for a particular crime. Moreover, her argument leads to perverse results. The actor who is aware of a high probability that his conduct is criminal will be undeterred by the criminal law (since he is not culpable enough to be convicted for knowing conduct, according to her theory) and thus will not be induced to acquire that greater degree of certainty that (theoretically) might deter him.

Second, she points out that the certain actor is more callous in his disregard for the law. Yet the actor who is aware that it is highly probable that his conduct is criminal shows sufficient disrespect for the law to make it unwise to differentiate. Requiring virtually certain knowledge places too heavy a burden on the prosecution. *See infra* note 118. In order to ensure the provision of due process, however, some distinctions in levels of awareness need to be made. Section 2.02(7) defines the requisite level of awareness in a manner that balances the goals of the criminal law, most importantly, deterrence, with the need to protect a defendant's rights. If awareness of the *possibility* that a fact existed became the standard under which a defendant could be convicted for acting knowingly, there is too great a risk that the defendant will be convicted for nothing more than negligence.

1. *The Common Law Approach Versus The Model Penal Code*

In defining knowledge of a fact broadly to include not only actors with near-certain knowledge but also those who are aware of a high probability that the fact exists, the Code does not require the latter group to have "purposely avoided" or "wilfully shut [their] eyes" to that fact, as does the common law doctrine of willful blindness.[32] The confusion willful blindness has engendered among courts and scholars alike suggests some reasons for the Code's approach. First, there has never been universal agreement on what willful blindness to the truth represents. It has been treated both as a failure to investigate upon suspicion of wrongdoing and as actual knowledge masquerading as ignorance.[33] Second, given the different conceptions of willful blindness, the Code drafters may have realized the danger in allowing willful blindness as an alternative ground for conviction. Many courts have voiced concern that a jury could easily translate the notion that the defendant consciously avoided the truth into the idea that the defendant *should have known* the truth.[34] Such a concern is reasonable since the very idea that avoiding knowledge is culpable suggests a duty to acquire that knowledge.

The drafters also may have foreseen the difficult evidentiary problems that a requirement of willful blindness presents. Under the Code's conception of willful blindness,[35] typically no evidence of an actor's conscious purpose to avoid the truth will be available, because a decision not to investigate before acting will involve only an *omission*, which cannot be corroborated by any piece of evidence. The relevant evidence will suggest 1) that the defendant

---

32. *See supra* text accompanying notes 16 & 20.

33. *See supra* text accompanying note 21. The Second and Ninth Circuits view willful blindness as a conscious decision to avoid learning all the facts in order to protect against being found to have had actual knowledge. *See, e.g.*, United States v. Rodriguez, No. 92-1184, 1993 U.S. App. LEXIS 576, at *6 (2d Cir. Jan. 14, 1993) ("That emphasis on 'deliberate ignorance' was significant because it captured the thought, essential to the concept of conscious avoidance, that the defendant must be shown to have decided not to learn the key fact . . . ."); United States v. Mapelli, 971 F.2d 284, 286 (9th Cir. 1992) ("A deliberate ignorance instruction . . . is appropriate only when the defendant purposely contrives to avoid learning all the facts, as when a drug courier avoids looking in a secret compartment . . . because he knows full well that he is likely to find drugs there."). The Tenth Circuit views willful blindness as deliberate *acts* to avoid the truth, acts which indicate that the defendant did indeed know the truth. *See, e.g.*, United States v. Francisco-Lopez, 939 F.2d 1405, 1409 (10th Cir. 1991) ("The acts relied upon . . . must be deliberate and not equivocal, otherwise the defendant's acts do not imply the avoidance of knowledge which is the key to the inference of actual knowledge.").

34. *See, e.g.*, United States v. Sanchez-Robles, 927 F.2d 1070, 1073 (9th Cir. 1991) ("Because of the risk that a jury might convict a defendant on mere negligence—'that the defendant *should* have known his conduct was illegal'—we have recognized that the [conscious avoidance] instruction should be used sparingly.") (quoting United States v. Garzon, 688 F.2d 607, 609 (9th Cir. 1982)). Until this year the Second Circuit often used just such a negligence standard to allow the prosecution to give its case to the jury on a theory of conscious avoidance. *See, e.g.*, United States v. Mang Sun Wong, 884 F.2d 1537, 1541 (2d Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990) (conscious avoidance charge appropriate where circumstances alone *should have apprised* the defendant of the unlawful nature of his conduct). If the Second Circuit repeatedly interpreted conscious avoidance this way, it is difficult to believe that a jury never would.

35. *See supra* text accompanying note 4.

committed the prohibited act; and 2) that the defendant possessed a high level of awareness of the fact in question. Yet the evidence will *not* reveal whether the defendant consciously avoided the fact, did not care enough to investigate, or had actual knowledge of the fact. The point of Section 2.02(7) is that this ambiguity *does not matter* so long as the evidence indicates that the defendant was aware of a high probability that the fact existed. Section 2.02(7) thus serves as an antidote to the shortcomings of circumstantial evidence in a way that the willful blindness doctrine does not.

To illustrate, suppose the government presents evidence indicating that the defendant, who was arrested at customs in Los Angeles and charged with knowingly importing cocaine, was paid a large sum of money by a well-known drug dealer to take a suitcase on her flight from Colombia and to deliver it to someone upon her arrival in Los Angeles. The suitcase contained cocaine hidden in panels along its sides. The defendant testifies that she believed she was transporting only clothing and thus was ignorant of the cocaine. If the jury chooses to credit her testimony, it should find her not guilty. Suppose, however, that the jury believes that, given the circumstances, at the very least she was aware of a high probability that she was bringing drugs into the country. The jury does not know beyond a reasonable doubt whether she 1) opened the suitcase and actually saw what was inside; 2) believed it was highly probable that she was transporting drugs into the United States but made a calculated decision not to confirm her belief; or 3) believed it was highly probable that she was transporting drugs to the United States but did not confirm her belief because she was indifferent to the truth. The prosecution has not proved beyond a reasonable doubt either that she had actual knowledge or that she formed a conscious purpose to avoid the truth. Yet because the jury has concluded that she was aware of a high probability that she was transporting drugs, no further determination is necessary because her conduct was culpable. Not only is finding a choice between actual knowledge and conscious avoidance unnecessary, but, as this example illustrates, such a finding is likely to be unsupported by evidence. The foregoing reasons may explain why the Code required a threshold level of awareness in order to obtain a conviction for knowing conduct, rather than creating a separate willful blindness doctrine that required finding a conscious purpose to avoid the truth.

Viewed properly as a definition of knowledge, Section 2.02(7) may be applied in all cases where the jury must determine whether the defendant had knowledge of a particular fact. The Code appears to have intended universal application: "[w]hen the issue is whether the defendant knew of the existence of a particular fact . . . . [it] is enough that the actor is aware of a high probability of its existence . . . ."[36] No language in the Code suggests that the

36. MODEL PENAL CODE § 2.02 explanatory note 7.

definition apply *only in limited circumstances where the evidence indicates a conscious purpose to avoid the truth.*[37]

2. *Recklessness Distinguished*

One commentator has claimed that Section 2.02(7) describes reckless, rather than knowing, conduct.[38] As a comment to the Code notes, whether Section 2.02(7) should be considered a knowledge or recklessness standard presents a "subtle but important question."[39] Guided by the intuition that some mental states should be treated no differently from actual knowledge, the Model Penal Code drafters formulated Section 2.02(7) as a definition of knowledge of a fact.[40] This decision is justified by the high level of certainty that Section 2.02(7) requires.[41] Recklessness, by contrast, "requires a consciousness of something far less than certainty or even probability."[42]

Recklessness also involves assessing the social utility of the conduct, that is, balancing the justifiability of the act against its risk of harm, while Section 2.02(7) requires no such balancing. Where the act in question has little or no social utility, recklessness may require a far lower degree of awareness than does Section 2.02(7). Indeed, "if there is no social utility in doing what he is doing, one might be reckless though the chances of harm are something less

---

37. Nonetheless, the Second and Ninth Circuits, instead of viewing § 2.02(7) as a standard definition of knowledge of a fact, have applied it as a limited willful blindness alternative. For a criticism of their approaches, *see infra* Parts II(A) & (B).

38. *See* Robbins, *supra* note 1, at 223-27. Professor Robbins argues that § 2.02(7) should be temporarily scrapped and should not be used to facilitate convictions until the legislature decides that recklessness is sufficiently culpable conduct under the relevant criminal statutes. For a criticism of his approach and a thorough discussion of differences between knowledge and recklessness, see Charlow, *supra* note 1, at 1380-86. Perkins, on the other hand, believes that even § 2.02(7) "covers much *less* than 'knowledge' as it has been interpreted as a mens rea requirement in the common law." Rollin M. Perkins, *"Knowledge" as a Mens Rea Requirement*, 29 HASTINGS L.J. 953, 961 (1978) (emphasis added). He criticizes the Model Penal Code for not defining knowledge to include an individual who has no belief one way or the other, but is aware of *the possibility* that his activity is criminal and deliberately avoids investigating for fear of discovering that his conduct is criminal. *See id.* at 961-65. Perkins recognizes, however, that such a definition would pose the risk of conviction for negligence: "[W]ithout awareness of facts indicating a high probability of unlawfulness, the need to investigate may be overlooked." *Id.* at 964.

Charlow disagrees with both Robbins and Perkins. She argues that § 2.02(7) defines a hybrid mental state that falls somewhere between knowledge and recklessness. Like Robbins, she also suggests discarding § 2.02(7), but rather than arguing that willful ignorance is recklessness, Charlow creates a new definition of willful ignorance that she believes may properly be substituted for a knowledge standard. *See infra* note 86.

39. MODEL PENAL CODE § 2.02 cmt. 9.

40. There is, it should be noted, no universally accepted definition of knowledge. *See* WAYNE R. LEFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.5(b), at 220 (2d ed. 1986). It is not clear that knowledge should be limited to knowledge derived from direct evidence, although this is apparently what the courts intend when they refer to actual knowledge in contrast to willful blindness. *See infra* note 118 and accompanying text. For purposes of the criminal law, such as deterrence, as well as for practical reasons, such as enforcement, it may be important not to define knowledge too rigidly.

41. The Code describes the distinction as follows: "[R]ecklessness involves conscious risk creation. It resembles acting knowingly in that a state of awareness is involved, but the awareness is of risk . . . ; the matter is contingent from the actor's point of view." MODEL PENAL CODE § 2.02 cmt. 3.

42. LEFAVE & SCOTT, *supra* note 40, § 3.7(f), at 239-40.

than 1%."[43] By contrast, "high probability" entails well over a 51% chance of harm.

Finally, a mistaken belief negates culpability under Section 2.02(7) but does not negate recklessness. For example, consider the actor who believes the gun she points at her friend is empty (because her parents told her that the gun was rarely loaded) and is shocked when the gun fires as she pulls the trigger. This actor could not be convicted of knowingly shooting her friend, because she was not aware of a high probability that the gun was loaded and she actually believed the gun to be empty. On the other hand, she could be convicted for recklessness because she consciously disregarded a substantial and unjustifiable risk that the gun was loaded.

In short, lines must be drawn somewhere, and the distinctions between Section 2.02(7) and recklessness are significant.

3. *The Supreme Court Applies Section 2.02(7)*

The Supreme Court first applied Section 2.02(7) in a federal narcotics prosecution. In *Leary v. United States*,[44] the defendant, Dr. Timothy Leary, appealed his conviction for knowingly transporting illegally imported marijuana. He claimed the conviction was invalid because the statute included an unconstitutional presumption that he knew the marijuana was imported.[45] The Court employed Model Penal Code Section 2.02(7)'s definition of knowledge "as a general guide"[46] and invalidated the statutory presumption that the defendant knew the marijuana was imported. The Court reasoned that the defendant was not necessarily aware of a high probability that the marijuana was imported since, among other reasons, large amounts of it were grown domestically.[47]

The following year in *Turner v. United States*,[48] a similar case which involved heroin and cocaine, the Court again utilized Section 2.02(7). This time it upheld a statutory presumption that the defendant knew the heroin he possessed was imported, reasoning that any defendant would be aware of a high probability that heroin came from a foreign country.[49]

The Court's decision to employ Model Penal Code Section 2.02(7)'s definition of knowledge of a fact in *Leary* and *Turner*[50] demonstrated to

43. *Id.* at 239.
44. 395 U.S. 6 (1969).
45. *Id.* at 44-53.
46. *Id.* at 46 n.93.
47. *Id.* at 52-53.
48. 396 U.S. 398 (1970).
49. *Id.* at 416. The Court invalidated the statutory presumption that the defendant knew the cocaine he possessed was imported because substantial amounts of cocaine are produced in the United States. *Id.* at 418-19.
50. *See also* Barnes v. United States, 412 U.S. 837, 845-46 (1973) ("On the basis of this evidence alone common sense and experience tell us that petitioner must have known or been *aware of the high*

lower courts that using Section 2.02(7) was permissible.[51] But instead of reading Section 2.02(7) as a general definition of knowledge of a fact, the Second and Ninth Circuits have incorporated it into their common law willful blindness doctrines, which serve as *substitutes* for knowledge in limited circumstances.[52] This misinterpretation of *Leary*, *Turner*, and Section 2.02(7) has contributed to the morass in which the federal courts are currently mired.[53]

II. USE OF SECTION 2.02(7) AND WILLFUL BLINDNESS IN THE FEDERAL CIRCUIT COURTS

A. *United States v. Jewell*

In *United States v. Jewell*,[54] the Ninth Circuit held that the government had presented evidence sufficient to show that the defendant "knowingly" attempted to drive an automobile containing a controlled substance across the border into the United States in violation of sections 841 and 960 of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[55]

---

probability that the checks were stolen. . . . Such evidence was clearly sufficient to enable the jury to find beyond a reasonable doubt that petitioner *knew* the checks were stolen.") (emphasis added).

51. *See, e.g.*, United States v. Jewell, 532 F.2d 697, 700 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976) ("To act 'knowingly' . . . is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question."); United States v. Bright, 517 F.2d 584, 587 (2d Cir. 1975) ("This coupling of the 'high probability' test with its negation by an actual belief of the non-existence of the fact has been accorded 'at least nodding approval in *Leary v. United States*, and perhaps more than that in *Turner v. United States*.") (citations omitted). *But cf. Substitute for Criminal Knowledge*, *supra* note 1, at 474-75. The Comment argues that Congress rejected the reasoning employed in *Turner* when it passed the Drug Control Act of 1970. The author points to the fact that the statute repeals the presumption of knowledge permitted in *Turner*. The repeal of the presumption, however, does not mean that Congress rescinded the *definition* of knowledge (§ 2.02(7)) adopted in that decision. Section 2.02(7) does not set out presumptions, but rather a definition of knowledge.

52. The Court in *Leary* and *Turner* did not address the issue of whether the defendants were willfully blind, although in *Turner* it intimated that willful blindness in any event would not constitute a defense: "[T]hose who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled." 396 U.S. at 417. Rather, the Court in both cases simply cited § 2.02(7) as a definition of knowledge; it did not consider § 2.02(7) as either a definition of willful blindness or a limited substitute for a knowledge standard.

53. The Supreme Court has refused many opportunities to address the relationship between knowledge and willful blindness. *See, e.g.*, United States v. Fingado, 934 F.2d 1163 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991); United States v. Mang Sun Wong, 884 F.2d 1537 (2d Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990); United States v. Alvarado, 838 F.2d 311 (9th Cir. 1987), *cert. denied*, 487 U.S. 1222 (1988).

54. 532 F.2d 697 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976).

55. 21 U.S.C. 841(a) provides that "it shall be unlawful for any person *knowingly* . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." (emphasis added). 21 U.S.C. 960(a)(1) sanctions any person who "*knowingly* . . . imports or exports a controlled substance . . . ."

It was uncontested that Jewell crossed the border carrying 110 pounds of marijuana worth $6,250 in a secret compartment between the trunk and the back seat. But Jewell claimed that, even though he was aware of the secret compartment, he did not know it contained marijuana. He testified that he saw a void in the trunk but did not investigate further. According to Jewell's version of the facts, a stranger named "Ray" approached him and his friend in a Tijuana bar, asked them if they wanted to buy marijuana, and offered them $100 to drive a car north across the border. Jewell accepted the offer and was told to leave

Significantly, the court ruled that a "deliberately contrived lack of knowledge" satisfied the definition of "knowingly" in the statute.[56] For support, the Ninth Circuit cited commentators who have approved using willful blindness as a substitute for knowledge,[57] the Supreme Court's decisions in *Leary* and *Turner*,[58] and Section 2.02(7) of the Model Penal Code.[59] The Ninth Circuit feared that if deliberate ignorance were a legitimate defense, the statute's purpose—combating the nation's burgeoning drug problem—would not be served,[60] particularly since convictions under the statute would be too difficult to obtain because many defendants would plausibly deny positive knowledge of the controlled substance.[61]

In putting its imprimatur on the substitution of willful blindness for positive knowledge, the Ninth Circuit approved a jury instruction that read:

> The Government can complete their burden of proof by proving, beyond a reasonable doubt, that if the defendant was not actually aware that there was marijuana in the vehicle . . . *his ignorance in that regard was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle* . . . .[62]

This jury charge and minor variations thereof came to be labeled as "*Jewell*,"[63] "deliberate ignorance,"[64] or "conscious avoidance"[65] instructions

---

the car at the address on the car registration slip and to leave the keys in the ashtray. A Drug Enforcement Agent (DEA) testified that Jewell told him that he believed there was probably something illegal in the vehicle but he did a quick check and concluded that, since he could not find anything, "the people at the border wouldn't find anything either." *Jewell*, 532 F.2d at 699 n.2 (emphasis omitted).

56. *Jewell*, 532 F.2d at 700. Judge (now Justice) Kennedy in his dissent took issue with this proposition. *See infra* note 67.

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

58. *Id.* at 701. The court noted that Congress was familiar with *Leary* and *Turner* when it passed the Drug Control Act and "expressed no dissatisfaction with their definition of the term [knowingly]." *Id.* at 703.

59. *Id.* at 700-01.

60. *Id.* at 703; *see* H.R. REP. NO. 1444, 91st Cong., 2d Sess. 1, *reprinted in* 1970 U.S.C.C.A.N. 4566, 4567 ("This legislation is designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States . . . through providing more effective means for law enforcement aspects of drug abuse prevention and control, and . . . by providing for an overall balanced scheme of criminal penalties for offenses involving drugs.").

61. *Jewell*, 532 F.2d at 703 ("It is no answer to say that . . . the fact finder may infer positive knowledge. It is probable that many who performed the transportation function, essential to the drug traffic, can truthfully testify that they have no *positive* knowledge of the load they carry . . . . [If the statute requires a finding of positive knowledge], such persons will be convicted only if the fact finder errs in evaluating the credibility of the witness or deliberately disregards the law.").

62. *Id.* at 700 (emphasis added).

63. United States v. Sanchez-Robles, 927 F.2d 1070, 1073 (9th Cir. 1991).

64. United States v. Fingado, 934 F.2d 1163, 1166 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991).

65. United States v. Aulet, 618 F.2d 182, 190-91 (2d Cir. 1980).

by the federal courts,[66] and the question of when such an instruction is warranted soon became a source of conflict among the circuits.

Although the Ninth Circuit purported to adopt the Code's definition of knowledge, this deliberate ignorance language is nowhere to be found in Section 2.02(7). Nonetheless, the *Jewell* court reasoned in a footnote that a "conscious purpose to avoid learning the truth" is implicitly included in the Code's formulation since such a purpose cannot be formed in the absence of an awareness of a high probability of that truth. In dissent, Judge Kennedy disagreed with this contention, pointing out that one can consciously avoid a fact that one only suspects exists and can even consciously avoid a fact of which one is entirely unaware.[67] Moreover, contrary to the Ninth Circuit's position, Section 2.02(7) suggests nothing about the actor's intent with regard to a fact, but rather only her level of awareness of it.[68]

If the *Jewell* court had applied Section 2.02(7) correctly, it would have found it unnecessary to resort to the common law doctrine of willful blindness, which focuses on a conscious purpose to avoid the truth as an alternative to actual knowledge.[69] Section 2.02(7) allows conviction of mules or couriers in the drug trade (as well as all other defendants charged with a knowing violation of the criminal law) without requiring the government to prove a conscious purpose to avoid the truth. By demonstrating that the defendant was aware of a high probability of a critical fact's existence, the government meets its burden of proof under the Code's knowledge standard. In creating an alternative ground for conviction, the *Jewell* court planted the seeds of a separate evidentiary requirement for finding deliberate ignorance.

B. *The Current Conflict*

Subsequent Ninth Circuit decisions elaborated on the decision in *Jewell* and held that, because of the risk that a jury will convict on a negligence standard, the *Jewell* instruction should be given rarely and only where the

66. The Seventh Circuit labels it an "ostrich" instruction. *See, e.g.*, United States v. Ramsey, 785 F.2d 184 (7th Cir.), *cert. denied*, 476 U.S. 1186 (1986).

67. Applying the Code's definition of knowledge, Judge Kennedy reasoned that the defendant's "conscious purpose to avoid learning the truth" would *not* be culpable if the defendant were not "aware of facts indicating a high probability of that truth." *Jewell*, 532 F.2d at 707 (Kennedy, J., dissenting). It followed for Judge Kennedy that the court must draw the jury's attention to the defendant's subjective awareness of the facts, as § 2.02(7) does. He provided as an example the child who, when given a gift-wrapped package while on vacation in Mexico, formed a conscious purpose to wait until he arrived home before learning what was inside. This child's state of mind would be innocent unless he were aware of a high probability that the package contained a controlled substance; deliberate ignorance here would not satisfy § 2.02(7)'s definition of knowledge. *Id.* Judge Kennedy thus sought correctly to highlight the threat posed to a defendant's rights when deliberate ignorance standing alone is equated with knowledge. The negligent or reckless actor should not be convicted where the statute requires knowing conduct. Yet this is precisely the risk that the deliberate ignorance doctrine creates without § 2.02(7)'s threshold requirement that the actor be aware of a high probability that a fact exists.

68. *See supra* text accompanying note 27.

69. *See supra* text accompanying note 32.

evidence points to deliberate ignorance.[70] The Tenth Circuit, similarly concerned that using willful blindness as a substitute for knowledge might unconstitutionally reduce the government's burden of proof, sought to limit the doctrine's scope radically in *United States v. Francisco-Lopez*,[71] ruling that a *Jewell* instruction cannot be delivered to the jury unless the evidence includes unequivocal, deliberate acts by the defendant to avoid actual knowledge.[72]

After *Jewell*, the Second Circuit parted with the Ninth and Tenth Circuits. Until this year the Second Circuit liberally applied the willful blindness doctrine when evidence demonstrated that circumstances *should have apprised* the defendant of his conduct's unlawfulness.[73] Although the Second Circuit in *United States v. Rodriguez*[74] recently adopted an evidentiary standard similar to that of the Ninth Circuit, it demonstrated that it would continue to approve conscious avoidance instructions more readily than the Ninth Circuit.

Model Penal Code Section 2.02(7), properly applied, provides a desirable alternative to all the current approaches.[75]

1. *The Ninth Circuit's Approach*

In *United States v. Alvarado*,[76] a case involving the illegal importation and possession of cocaine, the Ninth Circuit found the evidence presented at trial insufficient to warrant a *Jewell* instruction.[77] It reasoned that an inference

---

70. *See* United States v. Sanchez-Robles, 927 F.2d 1070, 1073 (9th Cir. 1991) ("Because of the risk that a jury might convict a defendant on mere negligence . . . we have recognized that the instruction should be used sparingly."); United States v. Alvarado, 838 F.2d 311, 314 (9th Cir. 1987), *cert. denied*, 487 U.S. 1222 (1988) ("The relevant evidence points to actual knowledge, rather than deliberate avoidance, and therefore does not support the giving of a *Jewell* instruction."); United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096, 1098 (9th Cir. 1985) ("[T]he government [if it seeks a *Jewell* instruction] must present evidence indicating that defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of subsequent prosecution.").

71. 939 F.2d 1405 (10th Cir. 1991).

72. *Id.* at 1410.

73. United States v. Mang Sun Wong, 884 F.2d 1537, 1541 (2d Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990). The Ninth and Tenth Circuits would probably have reasoned that such a rule impermissibly creates a presumption of guilt. *See* United States v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (1977) ("The effect of a *Jewell* instruction in a case in which no facts point to deliberate ignorance may be to create a presumption of guilt."); *Francisco-Lopez*, 939 F.2d at 1411 ("[C]ourts must studiously guard against the danger of shifting the burden to the defendant to prove his or her innocence . . . . ").

74. No. 92-1184, 1993 U.S. App. LEXIS 576 (2d. Cir. Jan. 14, 1993).

75. This Note only examines in detail the approaches of three circuits. The solution proposed, however, would apply to the other circuits as well. *See, e.g.*, United States v. Rivera, 944 F.2d 1563, 1570-71 (11th Cir. 1991) (adopting Ninth Circuit's approach to deliberate ignorance).

76. 838 F.2d 311 (9th Cir. 1987), *cert. denied*, 487 U.S. 1222 (1988).

77. In *Alvarado*, a jury found Gustavo Alvarado and Oscar Oqueli-Hernandez guilty for conspiring to import, for importing, and for possessing with the intent to distribute 12.7 kilograms of cocaine. Upon arriving at the Los Angeles airport from Brazil, Oqueli took Alvarado's suitcase and went through customs without being checked. Alvarado picked up Oqueli's brown suitcase and black suitcase and proceeded to the customs station. The customs agent found Alvarado's conduct suspicious (his hands trembled, he gave the agent an unused Japan Airlines ticket from Brazil to the United States scheduled for three days earlier) and referred him to a secondary inspection station. There the agent asked to check the black suitcase.

of deliberate ignorance was unjustified because the relevant evidence pointed to actual knowledge, not deliberate ignorance.[78]

The Ninth Circuit attempted to draw a sharp distinction between deliberate ignorance and actual knowledge in order to limit the applicability of its deliberate ignorance doctrine. The distinction, however, is not as clear as the Ninth Circuit makes it out to be. While some evidence admittedly will permit only an inference of either actual knowledge or "innocent" ignorance,[79] circumstantial evidence often will suggest something more ambiguous. *Alvarado* serves as a good example, although the Ninth Circuit did not acknowledge it. The evidence in this case could have been construed to indicate a variety of mental states, including deliberate indifference, deliberate ignorance, or actual knowledge. In light of an alleged promise of a $5000 payment upon delivery of the black suitcase, the jury could have viewed Alvarado as Oqueli's mule, following directions without ever seeing or asking what was inside the suitcase. Although there was evidence that Alvarado appeared especially reluctant to open the black suitcase and appeared especially nervous when it was opened, he may have only strongly suspected what was inside and may not have had actual knowledge of the cocaine. If he did not have actual knowledge, he may have omitted to look inside the suitcase because he wanted to protect himself from being found to have had knowledge of its contents (conscious avoidance),[80] or because he simply did not care what lay inside. Notwithstanding the Ninth Circuit's decision, the evidence here did not point clearly to either actual knowledge or innocent ignorance.

Model Penal Code Section 2.02(7), which the *Jewell* court cited as support for its deliberate ignorance doctrine, defines knowledge so as to make the Ninth Circuit's evidentiary distinction between actual knowledge and deliberate ignorance unnecessary. The Code does not require the jury to find

---

Alvarado explained that his friend, Oqueli, had the key. Alvarado brought a set of keys back to the station, but the keys did not open the black suitcase. The keys did open the brown suitcase, and Alvarado offered to open it. The suitcase contained only clothes and dental equipment. Alvarado then agreed to have the black suitcase opened with a crowbar since Oqueli had left the airport with the key. The agent found cocaine at the bottom of the suitcase and Alvardo claimed that he knew nothing about the cocaine since the suitcase belonged to Oqueli. There was conflicting evidence as to whether Alvarado said he was paid for taking the suitcase. The interpreter testified that Alvarado said that Oqueli offered to give him a $5,000 gift when he returned to the United States if he would carry Oqueli's suitcase. Alvarado claimed that he had not said that. After his arrest, the DEA agents, with Alvarado's cooperation, set up Oqueli, who was arrested when he returned to the airport to pick up the suitcases. Oqueli claimed that he was unaware of the cocaine in the black suitcase, which he admitted was his. *Id.* at 312-14.

78. *Alvarado*, 838 F.2d at 314.

79. For example, in United States v. Garzon, 688 F.2d 607, 608-09 (9th Cir. 1982), the defendant admitted carrying a package of cocaine across a room and opening it up to show DEA informants. He claimed, however, that he did not know that the substance in the bag was cocaine or that he was participating in a drug deal but instead believed he was only doing a favor for his father. If the jury believed defendant's story, he had a plausible claim of ignorance. If the jury did not believe the story, then it could only infer actual knowledge.

80. *See, e.g.*, United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096, 1098 (9th Cir. 1985) (deliberate ignorance instruction proper where evidence indicates that defendant purposely contrived to avoid learning all the facts to have a defense in potential prosecution).

that the defendant was certain there were drugs in the suitcase. Instead, if the jury finds beyond a reasonable doubt that Alvarado was aware of a high probability that drugs were in the suitcase, it may convict;[81] if it finds that the evidence does not show beyond a reasonable doubt that Alvarado was aware of a high probability of drugs in the suitcase, it must acquit. Whether the jury viewed this evidence as suggesting deliberate ignorance, actual knowledge, or deliberate indifference is not relevant under the Model Penal Code.

Because circumstantial evidence often cannot demonstrate conclusively whether the defendant had actual knowledge of a fact, was aware of a high probability that it existed, or consciously avoided it, the Model Penal Code approach is preferable. In many cases, including this one, pigeonholing the evidence into the category of actual knowledge or deliberate ignorance is an inaccurate method of adjudication; not surprisingly, the ambiguity surrounding the notion of conscious avoidance provides a constant source of litigation.[82]

The willful blindness jury instruction that the Ninth Circuit currently approves, a combination of Section 2.02(7) and the common law notion of deliberate ignorance, is also problematic. In order to convict, a jury must find that 1) defendant was aware of a high probability that the fact existed; 2) defendant did not actually believe that the fact did not exist; *and* 3) defendant's ignorance was solely a result of a conscious purpose to avoid learning the truth.[83] According to the Code, the actor who is aware of a high probability that her conduct is criminal is sufficiently culpable for the purposes of the criminal law to be convicted of knowing conduct; requiring the jury to find, in addition, a conscious purpose to avoid the truth is simply unnecessary and confusing.[84] Moreover, because of the evidentiary difficulty in distinguishing between the actor who is indifferent to a high probability that a fact exists and the actor who forms a conscious purpose to avoid that fact,[85] any marginal difference in culpability between the two is not worth

81. Under § 2.02(7), even if the government proved beyond a reasonable doubt that Alvarado was aware of a high probability that there was cocaine in the suitcase, he could still claim that he "actually believed" that the cocaine did not exist. *See supra* text accompanying note 27. If the jury credited his testimony, § 2.02(7) requires acquittal. Yet the likelihood of his claim being plausible is slight where the government has satisfied the first prong of § 2.02(7), and the distinction the Code draws between awareness and belief may then be more confusing than helpful. *See infra* Part III(B).

82. In only the past two years, LEXIS has reported eighteen decisions by the Ninth Circuit on the propriety of a *Jewell* instruction. The Ninth Circuit has recently demonstrated its own confusion about the distinction it draws. In *United States v. Bobadilla-Lopez,* the Ninth Circuit ruled that testimony that garbage bags carried by the defendant gave off a strong odor of marijuana supported a deliberate ignorance instruction. 954 F.2d 519, 523 (9th Cir. 1992), *cert. denied,* 113 S. Ct. 987 (1993). Yet just one year earlier, in *United States v. Sanchez-Robles,* it held that a *Jewell* instruction was reversible error because evidence of a strong odor of marijuana emanating from the van the defendant was driving could only support an actual knowledge finding. 927 F.2d 1070, 1073-75 (9th Cir. 1991).

83. *See, e.g., Sanchez-Robles,* 927 F.2d at 1073.

84. *See supra* text accompanying notes 25-35.

85. *See supra* text accompanying notes 32-35.

recognizing in the criminal law.[86] Emphasizing the notion of conscious avoidance will confuse juries, provide a constant source of evidentiary disputes, and provide an escape hatch for defendants who may have formed a conscious purpose to avoid the truth but did not evidence the purpose in any manifest way.

The Ninth Circuit's decision to restrict exceptions for deliberate ignorance is driven by a concern that in many situations its application will subject the defendant to the risk of being convicted for negligence.[87] Yet the Ninth

---

86. *Contra* Charlow, *supra* note 1, at 1429. Professor Charlow adopts the Ninth Circuit's rule that, if the government cannot prove actual knowledge, it must prove in the alternative a conscious purpose to avoid the truth in order to obtain a conviction for knowing conduct. Under her approach, a person is "wilfully ignorant" and thus as culpable as the knowing actor "if the person (1) is aware of very good information indicating that the fact exists; (2) almost believes the fact exists; and (3) deliberately avoids learning whether the fact exists (4) with a conscious purpose to avoid the criminal liability that would result if he or she actually knew the fact." *Id.* The first two requirements appear to be a restatement in slightly different form of the Code's definition of knowledge in § 2.02(7). Charlow argues that § 2.02(7) standing alone does not define conduct that is as culpable as what she considers knowing conduct (i.e., certain knowledge). She essentially adds on to it the common law doctrine of willful blindness in order to create a mental state that she believes approximates actual knowledge. Although the approach that both she and the Ninth Circuit take may have some theoretical appeal, its practical shortcomings argue in favor of employing a relaxed knowledge standard, such as § 2.02(7), rather than carving out a willful blindness alternative to a rigid actual knowledge standard. *See supra* Part I(C)(1).

Charlow argues not only that a conscious decision to avoid the truth is crucial to the willfully ignorant actor's culpability, but also that such a decision must be motivated by an express purpose to evade the sanctions of the criminal law. *See* Charlow, *supra* note 1, at 1410-1413. This distinction suffers from the same evidentiary problem as the notion it modifies. First, it is safe to say that the vast majority of persons who act on an awareness that it is highly probable that their contemplated conduct is criminal want to avoid criminal sanction. In fact, so long as awareness of a high probability is not sufficient for conviction, as Charlow advocates, virtually all those persons who are aware of a high probability that their conduct is criminal but act anyway will believe that lack of certain knowledge will protect them from conviction. The desire to evade criminal sanction will always be at least an *implicit* goal of these actors. Furthermore, as a practical matter, it will be the rare case where evidence will differentiate those who act with the "express goal" of avoiding sanction from those for whom it is only an implicit goal.

Even if there were evidence that could serve to differentiate the two cases, why should the actor with the express goal be punished and the actor with the implicit goal exonerated? It is unclear how an express purpose to avoid criminal sanction "adds measurably," *id.* at 1412, to the culpability of the behavior involved. Charlow provides an example of an individual who avoids knowledge that suspicious goods he buys are stolen because he does not want to question the legality of his friend's (the seller's) conduct (in contrast to the buyer who avoids knowledge because he wants to be able to avoid sanction by arguing that he did not have positive knowledge). The former buyer's explanation should not serve as an excuse, yet under Charlow's definition of willful ignorance, it would. If the latter buyer is more culpable, the differential in culpability is negligible and, because of the practical difficulties of distinguishing an express from an implicit goal, should not serve as a basis for distinguishing between actors. The irony here is that while Charlow believes that an actor with a purpose to avoid criminal sanction is highly culpable, she is at the same time promoting the very conduct she finds reprehensible by rejecting § 2.02(7)'s definition of knowledge. Her rule will encourage all those actors who are aware of a high probability that their behavior is criminal to act anyway, knowing that they can successfully *avoid the sanction of the criminal law* by not having positive knowledge, so long as they do not manifest "a conscious decision to avoid the truth, with the express purpose to evade the criminal sanction." *Id.* at 1429. Charlow effectively invites defendants to provide explanations such as the one offered in her hypothetical.

87. The Ninth Circuit continues to voice reservations about its deliberate ignorance doctrine and has sought to use it only in rare circumstances. See, e.g., United States v. Mapelli, 971 F.2d 284, 286 (9th Cir. 1992) (ruling deliberate ignorance instruction reversible error); *Sanchez-Robles,* 927 F.2d at 1073 (same); United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096, 1098 (9th Cir. 1985) (same); United States v. Garzon, 688 F.2d 607, 609 (9th Cir. 1982) (same); United States v. Alvarado, 838 F.2d 311, 314-17 (9th Cir. 1987), *cert. denied,* 487 U.S. 1222 (1988) (deliberate ignorance instruction harmless error).

Circuit itself created that risk by approving a deliberate ignorance jury instruction in *United States v. Jewell* that required no specific level of awareness of the marijuana in question. Without such a requirement, a jury may indeed interpret deliberate ignorance to mean that the defendant may be convicted because she should have known the fact—i.e., a negligence standard. The idea that a defendant is culpable because she avoided knowledge suggests the defendant had a duty to obtain that knowledge; the notion of conscious avoidance improperly targets the defendant's alleged failure to investigate as the culpable aspect of her conduct. The Model Penal Code, however, protects against conviction under a negligence standard by supplying a general definition of knowledge, which requires a finding that the defendant possessed a high level of awareness of the critical fact. Section 2.02(7) focuses not on the defendant's avoidance of knowledge but rather on his level of knowledge.

In creating the artificially sharp distinction between evidence of actual knowledge and deliberate ignorance, the Ninth Circuit has failed to see the ultimate irony in its approach. Not only is it often difficult to draw lines in order to separate cases of actual knowledge and deliberate ignorance, but the justification for drawing the distinction (in order to protect innocent defendants from being convicted for negligence) is at odds with the result—allowing a jury instruction that facilitates conviction only when the government presents a *weaker* case. Because it has not identified any particular kind of evidence that clearly suggests a conscious purpose to avoid the truth, the Ninth Circuit attempts to distinguish evidence of defendant's actual knowledge of the fact from evidence that is not as strong and suggests only that the defendant was aware of a high probability that the fact existed (from which it may be inferred that the defendant deliberately avoided actual knowledge).[88] The Ninth Circuit somehow manages to reason that it is in the *former* kind of case that use of a deliberate ignorance instruction creates too great a risk of injustice to the defendant, whereas in cases that fit the latter category it is permissible to allow an instruction that facilitates conviction.[89]

The *Jewell* court appeared to recognize the virtue of Section 2.02(7) when it suggested that in future cases the deliberate ignorance jury instruction include the language from the Code.[90] Yet the decision in *Jewell* to *equate*

88. This criticism is not intended to suggest that the government has a weak case when it presents evidence that the defendant was aware of a high probability that his conduct was criminal, but merely that it is weaker than a case with direct evidence of actual knowledge. Again, although the Ninth Circuit has claimed that the deliberate ignorance instruction is permitted only when "the defendant purposely contrives to avoid learning all the facts," *Mapelli*, 971 F.2d at 286, this is merely one of several inferences that can be made from evidence that the defendant was aware of "suspicious circumstances surrounding the activity," *Sanchez-Robles*, 927 F.2d at 1073.

89. *See Sanchez-Robles*, 927 F.2d at 1073 ("In our cases disallowing a *Jewell* instruction, there were no suspicious circumstances surrounding the activity beyond direct evidence of the illegality itself.").

90. United States v. Jewell, 532 F.2d 697, 704 n.21 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976). Nonetheless, trial courts continue to use an instruction virtually identical to the one approved in *Jewell*, which does not include § 2.02(7). *See, e.g., Mapelli*, 971 F.2d at 285-86. Because the *Mapelli* court

Section 2.02(7) with deliberate ignorance was a mistake. The Ninth Circuit has simply failed to dissociate Section 2.02(7) from the common law doctrine of willful blindness it approved in *Jewell*.[91]

2. *The Second Circuit's Approach*

The difficulty of distinguishing actual knowledge from conscious avoidance is further illustrated by the Second Circuit's decision in *United States v. Rodriguez*.[92] The Second Circuit altered the precedent of more than a decade[93] by ruling that a conscious avoidance instruction is warranted where a rational juror could conclude beyond a reasonable doubt that "the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact . . . ."[94] The Second Circuit acknowledged that for years it had "used a formulation that c[ame] perilously close to a negligence standard."[95] Its new approach resembles the Ninth Circuit's rule, but the Second Circuit appears prepared to continue appproving the conscious avoidance jury instruction more readily.

Although the facts of *Rodriguez* are similar to those in the Ninth Circuit's decision in *Alvarado*,[96] the Second Circuit approved a conscious avoidance instruction.[97] The Second Circuit's approach also demonstrates the problem

---

found that the evidence did not warrant the *Jewell* instruction, it did not reach the issue of the content of the instruction.

91. *See supra* Part I(C)(1).

92. No. 92-1184, 1993 U.S. App. LEXIS 576 (2d Cir. Jan. 14, 1993).

93. *See, e.g.*, United States v. Mang Sun Wong, 884 F.2d 1537, 1541 (2d Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990); United States v. Guzman, 754 F.2d 482, 489 (2d Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); United States v. Mohabir, 624 F.2d 1140, 1154 (2d Cir. 1980).

94. *Rodriguez*, 1993 U.S. App. LEXIS at *7.

95. *Id.* at *6. Other circuits have also applied a negligence standard when determining the sufficiency of the evidence for a willful blindness instruction. *See, e.g.*, United States v. Picciandra, 788 F.2d 39, 46 (1st Cir. 1986) ("*Any reasonable person* would have realized that in today's society the bizarre bearing of shopping bags filled with large sums of cash signalled some form of illegal activity.") (emphasis added); United States v. Del Aguila-Reyes, 722 F.2d 155, 157 (5th Cir. 1983) ("[I]t was reasonable for the jury to infer that Del Aguila-Reyes *should have known* that his trip to Miami was prompted for some additional, probably illegal, reason.") (emphasis added).

96. Rodriguez, her daughter, and a friend, Yesenia Maria Taveras, were arrested at JFK airport after a customs inspector cut open the sides of Rodriguez's suitcase and found 1,939 grams of 75% pure cocaine. Rodriguez and Taveras were charged with conspiracy and substantive narcotics offenses. Rodriguez testified that her mother had given her and her daughter tickets to Venezuela as a gift. While in Venezuela, their hotel room was burglarized and Rodriguez called her mother for more cash. Her mother contacted their friend, Taveras, who offered personally to deliver the cash to Rodriguez in Venezuela. Rodriguez said that she bought the suitcase at a flea market in order to carry gifts for friends. She denied any knowledge of drugs in the suitcase, and stated that she did not notice that the sides of the suitcase appeared abnormally thick.

97. In fact, the evidence in *Alvarado* presents a stronger case for the possibility of conscious avoidance than does *Rodriguez*. In *Alvarado* there was evidence that Oqueli may have hired Alvarado to transport his suitcase. The idea that Alvarado was Oqueli's mule suggests the possibility that Alvarado carried the suitcase without asking too many questions in order to protect himself from being found to have had actual knowledge of the contents. As the Ninth Circuit noted in *Jewell*, this kind of arrangement is prevalent in the drug trade. 532 F.2d 697, 703 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976). By contrast, there was no evidence in *Rodriguez* suggesting that the defendant had been hired by anyone to carry the drug-

with requiring evidence of conscious avoidance before permitting use of Model Penal Code Section 2.02(7). The Second Circuit concluded that the conscious avoidance instruction was warranted because 1) defendant was found in possession of a suitcase in which more than four pounds of cocaine were secreted; 2) the weight of the cocaine would have been noticeable in an empty suitcase; and 3) the careful concealment of the cocaine within the suitcase linings precluded the possibility that it had been quickly placed there without the defendant's awareness.[98]

These points suggest that the defendant was aware that she was bringing drugs into the country. Various inferences, however, could be drawn from this evidence. One might infer that Rodriguez herself placed or watched Taveras place the cocaine in her suitcase, and thus had actual knowledge of the cocaine. One could also conclude that she took the suitcase for Taveras as a favor, but deliberately avoided viewing the cocaine in order to protect herself from being found to have had actual knowledge of the contents. Or maybe she strongly suspected what was inside but just wanted to help her friend. As this case and *Alvarado* illustrate, evidence often will not clearly indicate whether the defendant had actual knowledge of the drugs, consciously avoided the drugs, or was indifferent to their probable presence. Focusing on conscious avoidance, as both the Second and Ninth Circuits have done, simply does not clarify matters because it is only one of several rational inferences that may be drawn from evidence indicating that the defendant was aware of a high probability that the drugs existed—typically there will be no evidence that demonstrates whether or not the defendant looked to see what was in the suitcase or whether calculation was involved if the defendant did not look. In short, the Second Circuit is misleading when it states that "the defendant must be shown to have decided not to learn the key fact" in order to warrant a conscious avoidance instruction.[99] The evidence in *Rodriguez* did not show this, yet the instruction was approved.

The Second Circuit, like the Ninth Circuit, misapplies the Model Penal Code by creating a doctrinal split between actual knowledge and conscious avoidance. In contrast with the Ninth Circuit, however, the Second Circuit has stated that the conscious avoidance doctrine may commonly be used.[100] Yet so long as it preserves the distinction between actual knowledge and conscious avoidance and requires evidence of conscious avoidance before permitting a Section 2.02(7) jury instruction, the Second Circuit invites utterly wasteful litigation in which defense attorneys will continue to challenge the conscious avoidance jury charge as unsupported by the evidence.

---

filled bag.

98. *Rodriguez*, 1993 U.S. App. LEXIS at *8.

99. *Id.* at *6.

100. *See* United States v. Fletcher, 928 F.2d 495, 502 (2d Cir.), *cert. denied*, 112 S. Ct. 67 (1991).

3. *The Tenth Circuit's Approach*

Unlike the Second Circuit, the Tenth Circuit has sought to restrict the willful blindness doctrine to the rare case that presents evidence of deliberate and unequivocal acts to avoid the truth.[101] Moreover, the Tenth Circuit does not include Section 2.02(7) in its willful blindness doctrine[102] and differs with both the Second and Ninth Circuits in its understanding of what constitutes willful blindness. Its confused approach to willful blindness is further testimony to the mistake of creating a division between actual knowledge and willful blindness and establishing separate evidentiary requirements for each.

In *United States v. Francisco-Lopez*[103] the Tenth Circuit ruled that courts must not give a deliberate ignorance instruction absent sufficient evidence of deliberate *acts* by the defendant to avoid knowledge.[104] This requirement effectively restricts the operation of its willful blindness doctrine to a mere handful of situations.[105] The Tenth Circuit began with the proposition that deliberate ignorance is circumstantial evidence of actual knowledge.[106] A jury may thus infer actual knowledge from circumstantial evidence, whether it be evidence of deliberate avoidance of knowledge or evidence suggesting a defendant's personal observation of the illegality itself.[107]

---

101. United States v. Galindo-Torres, No. 91-2020, 1992 U.S. App. LEXIS 1399, at *3 (10th Cir. Jan. 30, 1992) (citing United States v. Francisco-Lopez, 939 F.2d 1405 (10th Cir. 1991)).

102. *See* United States v. Sasser, 974 F.2d 1544, 1551-52 (10th Cir. 1992), *cert. denied,* 113 S. Ct. 1063 (1993) (rejecting use of high probability language from § 2.02(7) in willful blindness instruction).

103. 939 F.2d 1405 (10th Cir. 1991).

104. *Id.* at 1410-11. Eduardo de Francisco-Lopez was convicted of possession with intent to distribute five kilograms or more of a mixture containing cocaine. A Utah state highway patrolmen stopped Mr. Lopez for speeding and asked if he could search the car after noticing something suspicious about the vehicle's construction. *Id.* at 1407. About fifteen kilograms of nearly pure cocaine were found in hidden compartments in the car. Mr. Lopez consistently denied knowing about the cocaine. Mr. Lopez, an experienced auto mechanic, claimed that he was hired by a stranger named "Juan" to do repair work on the car and to drive it to New York (where he was directed to leave the car in an open air parking lot, with the keys under the carpet). Mr. Lopez "testified that he was 'worried [about what Juan was trying to get him to do] but [he] was worried more about the lack of money to take care of [his] family.'" Mr. Lopez admitted that he believed the car was stolen and was suspicious that it contained drugs; nevertheless, he claimed that he did not investigate and embarked on the journey to New York. *Id.* at 1407-08, 1417-18 (brackets in original).

105. Since it created this standard in 1991, the Tenth Circuit has yet to approve use of the deliberate ignorance instruction. *See, e.g., Sasser,* 974 F.2d at 1551-53 (deliberate ignorance instruction harmless error); United States v. Barbee, 968 F.2d 1026, 1033-35 (10th Cir. 1992) (same).

106. *Francisco-Lopez,* 939 F.2d at 1409. The First Circuit takes this approach as well. *See, e.g.,* United States v. Cincotta, 689 F.2d 238, 243 n.2 (1st Cir. 1982) ("Evidence of conscious avoidance is merely circumstantial evidence of knowledge; a defendant who seeks to refute such evidence follows the same course no matter how the evidence is labeled."). The courts that employ this rule appear to believe that deliberate ignorance is really just pretended ignorance. *See* United States v. Manriquez Arbizo, 833 F.2d 244, 248 (10th Cir. 1987) ("[The deliberate ignorance instruction] informs the jury that it may look at the *charade* of ignorance as circumstantial proof of knowledge.") (emphasis added).

107. *Francisco-Lopez,* 939 F.2d at 1408 ("[C]ircumstantial evidence, taken together with any reasonable inferences which flow from such evidence, is sufficient to establish guilt beyond a reasonable doubt.").

Because the Tenth Circuit views deliberate ignorance as evidence of actual knowledge it could have ended its discussion in *Francisco-Lopez* by stating that a deliberate ignorance alternative to the knowledge requirement serves no identifiable purpose. Instead, it strained to preserve a role for the doctrine by establishing discrete evidentiary requirements for prosecutors relying on a deliberate ignorance theory.[108] These requirements are superfluous and will serve as a source for more litigation and confusion.[109]

Describing deliberate ignorance and actual knowledge as "mutually exclusive," the Tenth Circuit reasoned that the same evidence cannot be used as proof of both.[110] Yet such a distinction is inconsistent with its earlier premise that evidence of deliberate avoidance of actual knowledge can support an inference of actual knowledge.

Having established an illusory distinction, the Tenth Circuit formulated a rule that is inevitably defective. If the government attempts to obtain a conviction on deliberate ignorance grounds, the evidence must include deliberate, and not equivocal, acts by the defendant to avoid actual knowledge.[111] Yet this requirement misconceives the essence of willful blindness. The decision to avoid knowledge typically involves an *omission*;[112] the purpose is formed in the actor's mind and will rarely be manifested by any kind of unequivocal act or "deliberate undertaking."[113]

By holding that there must be deliberate and unequivocal acts of avoidance by the defendant in order to warrant a willful blindness instruction, the Tenth Circuit makes the case of conscious avoidance a rare one indeed. The majority reasons, however, that any other rule on willful blindness would subject the defendant impermissibly to "an inference that he negligently avoided knowledge of the existence of drugs."[114]

---

108. *Id.* at 1410-12.

109. The Tenth Circuit decided that review of a decision to give a deliberate ignorance instruction is *de novo*. *Francisco-Lopez*, 939 F.2d at 1409. Since most appeals on the issue of deliberate ignorance will concern the nature of the evidence, the Tenth Circuit will be involved in a tedious review of facts. Indeed, not long after *Francisco-Lopez*, the Tenth Circuit in *Galindo-Torres* compared the evidence in that case with the facts of *Francisco-Lopez* before concluding that a deliberate ignorance instruction was not warranted. United States v. Galindo-Torres, No. 91-2020, 1992 U.S. App. LEXIS 1399 (10th Cir. Jan 30, 1992). The Tenth Circuit decided two other cases involving this issue last year. *See supra* note 105.

110. *Francisco-Lopez*, 939 F.2d at 1410 ("[T]he same fact or facts cannot be used to prove both actual knowledge *and* deliberate indifference because the two are mutually exclusive concepts.").

111. *Id.* at 1411.

112. The court ruled that, although there was not sufficient evidence to support a finding of deliberate ignorance, there was sufficient evidence to infer that Lopez had actual knowledge. *See id.* at 1408. It is quite possible that Lopez did not have actual knowledge because he deliberately avoided or simply did not bother searching the car (the omission) before he took off on his journey. Under § 2.02(7) he still could be found guilty if the jury believed he was aware of a high probability that drugs were in the car. The fact that he did not personally observe the drugs would not exonerate him. Yet his *inaction* (failure to search the car) would not meet the Tenth Circuit's deliberate ignorance test, which requires affirmative acts of avoidance.

113. *Galindo-Torres*, 1992 U.S. App. LEXIS at *3 (10th Cir. Jan. 30, 1992).

114. *Francisco-Lopez*, 939 F.2d at 1412. The Tenth Circuit has recently rejected using the language from § 2.02(7) in its deliberate ignorance instruction, contending that it creates a risk of convicting the

Ironically, the Tenth Circuit believes that deliberate acts to avoid knowledge reflect *actual* knowledge.[115] But this assumption contradicts the explanation for its separate deliberate ignorance standard (i.e., actual knowledge and deliberate ignorance are mutually exclusive concepts). Given the Tenth Circuit's view of deliberate ignorance, it would be much simpler always to require a finding that the defendant had actual knowledge and to permit evidence of deliberate acts to avoid knowledge to support such a conclusion.

III. RESOLVING THE CONFLICT

All the circuits could more effectively serve the interests of the criminal justice system by discarding their present deliberate ignorance doctrines. Instead of applying a rigid actual knowledge standard, however, they should apply Section 2.02(7) as the standard definition of knowledge of a fact.

A. *Straightforward Application of Section 2.02(7) Should Be Adopted*

Both the majority and the dissent in *United States v. Jewell*[116] identified problems with requiring proof of actual knowledge in order to convict a defendant of knowing conduct. The majority noted that many culpable defendants could honestly have no positive knowledge of the drugs they transported.[117] Judge Kennedy in dissent reasoned that actual knowledge is a misleading standard insofar as it suggests that a jury must find that the defendant knew of a fact with certainty, since traditional conceptions of knowledge have not been so strict.[118] While the majority approved a deliberate ignorance exception to actual knowledge in order to facilitate conviction of culpable defendants, Judge Kennedy argued that such a standard was dangerous to a defendant's rights without the important limitation Section 2.02(7) provides by requiring the defendant to have had a high level of awareness of the critical fact. He also pointed out that Section 2.02(7) defined knowledge, not deliberate ignorance.

---

defendant for negligence. It prefers language such as "deliberate ignorance" or "willful shutting of the eyes." United States v. Sasser, 974 F.2d 1544, 1552 (10th Cir. 1992).

115. *Francisco-Lopez*, 939 F.2d at 1409 ("Employing such circumstantial evidence [of deliberate ignorance] allows the government to prove a defendant had *actual* knowledge of an operative fact by proving deliberate acts from which that *actual* knowledge can be logically inferred.") (emphasis added).

116. 532 F.2d 697 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976).

117. *Id.* at 703.

118. *Id.* at 706 n.6 (Kennedy, J., dissenting) ("The use of the term 'actual knowledge' in this manner [in contrast to willful blindness] is misleading in suggesting the possibility of achieving a state of total certainty, and that only such knowledge is 'actual.' In fact, we commonly act on less than complete information and in this world may never know one-hundred-percent certainty."); *see also* Perkins, *supra* note 1, at 775 ("'Absolute knowledge can be had of very few things,' said the Massachusetts court, and the philosopher might add, 'if any.' For most practical purposes 'knowledge' 'is not confined to what we have personally observed or to what we have evolved by our own cognitive faculties.'") (citations omitted).

Having equated Section 2.02(7) with deliberate ignorance, the Ninth Circuit is reluctant to use Section 2.02(7) because of the perceived risk of convicting the defendant for negligence. It has not managed to separate Section 2.02(7) from the deliberate ignorance doctrine it approved in *Jewell*, which, by failing to require a specified level of awareness, does indeed risk conviction based on mere negligence. As a consequence, the Ninth Circuit, although it recognized in *Jewell* the inadequacies of an actual knowledge standard, subsequently created an ambiguous evidentiary rule designed to restrict use of Section 2.02(7) to very limited circumstances.

The explanation for limiting application of Section 2.02(7), to prevent the conviction of innocent defendants, is not persuasive. In practice the Ninth Circuit's evidentiary rule has served to foreclose application of the broad knowledge standard when the government has offered direct evidence of the defendant's guilt and to permit it when the government's case is comparatively less convincing.[119] As long as the Ninth Circuit identifies Section 2.02(7) solely with the concept of deliberate ignorance, it will not appear sensible to permit use of Section 2.02(7) where there is direct evidence of knowledge. Yet if the Ninth Circuit dropped the notion of conscious avoidance and viewed Section 2.02(7) in a straightforward fashion as defining a threshold level of certainty that constitutes knowledge in the criminal law, applying it in cases where there is direct evidence of knowledge would no longer seem so counterintuitive.

The Second Circuit also mistakenly treats Section 2.02(7) as a willful blindness alternative. The Second and Ninth Circuits have failed to realize that Section 2.02(7) compensates for the deficiency of circumstantial evidence[120] by making a choice between an actual knowledge or deliberate ignorance theory unnecessary if the jury finds the defendant had a high level of awareness of the crucial fact.

The Tenth Circuit has conceived of deliberate ignorance somewhat differently, understanding it as actual knowledge in disguise.[121] Although this conception would appear to warrant dispensing with the deliberate ignorance doctrine altogether, the Tenth Circuit has attempted to maintain two different standards. Its special rule for conscious avoidance does not serve any purpose at all.

One response to the problems the various willful blindness doctrines create is simply to abolish them and to apply only an actual knowledge standard. An actual knowledge standard is troubling for several reasons, however, and Section 2.02(7), which provides a less rigid definition of knowledge, offers a more desirable alternative. First, applying Section 2.02(7)

119. *See supra* notes 88-89 and accompanying text.

120. This deficiency is amply highlighted by the Ninth and Second Circuit's creation of the actual knowledge/deliberate ignorance dichotomy. *See supra* notes 76-100 and accompanying text.

121. *See supra* notes 103-115 and accompanying text.

as the standard definition of knowledge obviates any need to create willful blindness doctrines, which all the circuits have felt compelled to do.[122] The confusion and evidentiary problems created by the willful blindness doctrines invite a single definition of knowledge that requires less than practically certain knowledge of a fact. Second, Section 2.02(7) provides a more honest approach to law enforcement than does a system that requires a finding of actual knowledge. It is quite difficult to prove actual knowledge beyond a reasonable doubt when relying on circumstantial evidence;[123] juries under the current system likely disregard the standard in order to convict those they believe are culpable. Finally, Section 2.02(7) might deter those actors who had believed they could escape the sanction of the law by simply concealing or avoiding actual knowledge.

B. *Minor Revision of Section 2.02(7) Would Be Helpful*

Application of Section 2.02(7) fulfills the purpose the various deliberate ignorance doctrines were designed to serve without the side effects of flawed evidentiary rules and the threat of conviction on the basis of mere negligence.

Minor revision of Section 2.02(7) is desirable, however, in order to clarify the standard for judges and juries. In its current form, Section 2.02(7) distinguishes between what the defendant is aware of and what the defendant believes:

> 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.[124]

This two-pronged formulation is confusing because it is difficult to imagine how one can simultaneously be aware of a high probability that a fact exists yet believe that it does not exist.

One explanation is that the language implies examining probability at two different time points. The drafters of the Model Penal Code may have contemplated the following scenario when they wrote Section 2.02(7): the defendant is put on notice that there is a high probability that a particular fact exists. The defendant then investigates and satisfies himself that the fact does not exist before he commits the act. At time one, the actor is aware of a high

---

122. *See supra* note 5.

123. *Cf.* Jackson v. United States, 330 F.2d 679, 681 (8th Cir.), *cert. denied*, 379 U.S. 855 (1964) ("Knowledge and intent, because of their nature, must largely be proved by circumstantial evidence."). For example, in the typical federal narcotics prosecution for illegal importation of a controlled substance, a defendant will not admit that he had actual knowledge of the controlled substance, and there will not be any witnesses to testify that he did.

124. MODEL PENAL CODE § 2.02(7) (emphasis added).

probability that the fact exists. At time two, during the commission of the act, the actor actually believes the fact does not exist. This actor should not be convicted of knowing conduct. While this scenario makes sense as the Model Penal Code language is written, it is unnecessary for the jury to consider the defendant's state of mind at two separate times. It should only determine the defendant's state of mind at the time he committed the act.

Another possible explanation is that the first prong addresses an objective standard of high probability while the second prong emphasizes the subjective element of belief.[125] For example, a jury could infer from the evidence that a reasonable person would have been aware of a high probability that drugs were in the car, but that would not be determinative of the defendant's guilt since the defendant may have believed otherwise. It would then be necessary to ask what the defendant believed, because in the criminal law, the defendant's mens rea is an element of virtually every offense. Thus the most plausible purpose behind the second clause is to reinforce the idea that it is the defendant's state of mind that counts, and not those of hypothetical persons.

Under such a reading, however, the second prong is redundant, since the first prong actually contains both a subjective and objective element. The "high probability" language invites the fact finder to make an assessment of whether a reasonable person would have been aware of the crucial fact, but the first clause also requires a subjective finding that the *defendant was aware* of a high probability that it existed.[126] The redundancy of the second prong makes the test confusing.

In order to eliminate confusion that may be engendered by the distinction made between awareness and belief in Section 2.02(7), the standard should read as follows:

> Knowledge of a fact is established if the defendant believes it is highly probable that the fact exists.

This proposal retains the "high probability" language to promote proper enforcement and deterrence by requiring a level of awareness less than actual

---

125. The Ninth Circuit has treated § 2.02(7)'s high probability language to set out only an objective standard, at least for the purposes of determining the sufficiency of the evidence. *See* United States v. Nicholson, 677 F.2d 706, 710 (9th Cir. 1982) ("The circumstances surrounding the investment opportunity . . . would have put any *reasonable person* on notice that there was a 'high probability' that the undisclosed venture was illegal.") (emphasis added).

126. For example, in *Tomala v. United States*, 112 S. Ct. 1997, 1998 (1992), *denying cert. to* 946 F.2d 883 (2d Cir. 1991), although the circumstances suggested that a reasonable person would have been aware of a high probability that a suitcase contained a controlled substance, the defendant, Tomala, testified that her suspicion was not aroused when she was approached by a stranger who asked Tomala to deliver a suitcase to her sister. Yet because the first clause of § 2.02(7) also contains a subjective element, if the jury credited her testimony, it would have concluded not only that she "actually believed" there were no drugs, but also that she was not aware of a high probability that she was transporting drugs. Professor Kenneth Simons makes the same point. *See* Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 501 n.128 (1992).

knowledge. The "high probability" language also provides the jury an objective reference point. Jurors will judge the credibility of the defendant's claim that he did not believe the fact existed against evidence suggesting the contrary. The proposal also drops the second prong of the test, which is both redundant and confusing. Finally, this proposal substitutes "believes" for "is aware" in order to respond to those commentators who contend that Section 2.02(7) is not a knowledge standard because knowledge requires correct belief and the defendant who is merely "aware" of a high probability that a fact exists may not have formed any belief with respect to that fact.[127]

Consistent with the foregoing analysis, in cases where knowledge of a fact is the required mens rea, the jury should generally be instructed as follows:

> The government has argued that the defendant had knowledge of the [critical fact]. You may find that the defendant had knowledge of the fact if you conclude that the defendant believed it was highly probable that the fact existed. You need not find that the defendant was certain the fact existed. If, on the other hand, you conclude that the defendant merely disregarded a substantial risk that the fact existed, or merely should have known the fact existed, you must find that the defendant did not have knowledge.[128]

IV. CONCLUSION

The conflicts and confusion created by the disparate applications of willful blindness need to be resolved. This Note has proposed that courts cease relying on the notion of conscious avoidance as an alternative to a rigid actual knowledge standard and instead adopt a revised form of Model Penal Code Section 2.02(7) as the standard definition of knowledge of a fact, for the purpose of enforcing the criminal law. The Supreme Court has allowed the problem of what constitutes knowledge to fester for over twenty years since it approved use of Section 2.02(7) in *United States v. Leary*[129] and *United States v. Turner*.[130] The Court should take the earliest opportunity to resolve this issue by granting certiorari in an appropriate case.

---

127. *See, e.g.*, Charlow, *supra* note 1, at 1375 ("In short, criminal knowledge is correct belief."). This Note will not address the possible differences between awareness and belief. Suffice it to say that it does not seem outrageous to assume that the actor who is *aware* that it is highly probable that he is transporting drugs into the country also *believes* that it is highly probable. Nonetheless, this Note proposes the change in order to ensure that the actor's belief is central, rather than relevant only when the actor believes unreasonably in the nonexistence of the fact, as with the current standard. Optimally, this proposed change would alert courts to the error in applying a reasonable person standard.

128. This is only a generic instruction. In any particular case, specific language fitting the facts involved should be substituted for "the fact" to make the instruction easier to understand.

129. 395 U.S. 6 (1969).

130. 396 U.S. 398 (1970).