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A Hybrid Approach to the Use of Deliberate Ignorance in Conspiracy Cases

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NOTE

A Hybrid Approach to the Use of Deliberate Ignorance in Conspiracy Cases

Jessica A. Kozlov-Davis

TABLE OF CONTENTS

INTRODUCTION	473
I. THE RELATIONSHIP BETWEEN KNOWLEDGE AND DELIBERATE IGNORANCE	481
A. <i>Deliberate Ignorance as a Substitute for Knowledge</i>	481
B. <i>Potential Problems with Jury Confusion</i>	486
II. FLAWS OF THE SECOND AND FIFTH CIRCUIT APPROACHES	487
A. <i>Second Circuit's Approach: A Strict Adherence to the Correspondence Principle</i>	488
B. <i>Fifth Circuit's Approach: An Exercise of Logical Reasoning</i>	492
III. PROPOSAL FOR THE ADOPTION OF A VARIATION OF THE TENTH CIRCUIT'S APPROACH	495
CONCLUSION	501

INTRODUCTION

When hunted, the ostrich is said to run a certain distance and then thrust its head into the sand, thinking, because it cannot see, that it cannot be seen by the hunters.¹ Legal parlance therefore refers to the “ostrich instruction,” used when a defendant acts with the awareness of a high probability of the existence of an incriminating fact, but remains deliberately ignorant as to whether the fact actually exists, hoping his ignorance will maintain his innocence.² The defendant is like the ostrich — he thinks that if he does not actually see the facts, even though he knows they are there, he will maintain his innocence.

1. E. COBHAM BREWER, *DICTIONARY OF PHRASE AND FABLE* (1898).

2. See *Spurr v. United States*, 174 U.S. 728 (1899). In *Spurr*, the defendant was charged with knowingly certifying some checks drawn on a bank that was unable to cover them. The Court said: “And so evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of that fact.” *Id.* at 735.

The ostrich instruction allows the jury to equate deliberate ignorance³ with knowledge of a particular fact for the purpose of establishing the requisite mens rea for a crime, particularly in the context of conspiracy cases.⁴ Mens Rea is defined as “[a]n element of a criminal responsibility: a guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty Knowledge and wilfulness.”⁵ A person’s criminal culpability requires a showing that he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

The Model Penal Code says a person acts purposely with respect to an element of a crime:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.⁶

A person acts knowingly with respect to a material element of an offense:

- (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; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.⁷

A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.⁸ A person acts negligently when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.⁹

In *Spurr v. United States*¹⁰, the Supreme Court said that to act with deliberate ignorance is to act with the awareness of a high probability of the existence of the fact in question. The Court said that the jury

3. Other terms for “deliberate ignorance” include “conscious avoidance” and “willful blindness.”

4. MODEL PENAL CODE § 2.02(7) (1985). In adopting this approach, the Model Penal Code followed a common law tradition of equating deliberate avoidance of knowledge with actual knowledge. See Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 196-203 (1990).

5. BLACK’S LAW DICTIONARY 985 (6th ed. 1990).

6. MODEL PENAL CODE § 2.02(2)(a).

7. MODEL PENAL CODE § 2.02(2)(b).

8. MODEL PENAL CODE § 2.02(2)(c).

9. MODEL PENAL CODE § 2.02(2)(d).

10. 174 U.S. 728 (1899).

may infer knowledge of a certain fact if the defendant intentionally keeps himself in the dark about that fact.¹¹ In 1969, the Supreme Court formally adopted a variation of the definition of knowledge based on deliberate ignorance in *Leary v. United States*.¹² By 1970, many courts had followed this lead and acknowledged the validity of equating deliberate ignorance with guilty knowledge.¹³ Whether deliberate ignorance can satisfy the mens rea of knowledge, and if so, when the use of deliberate ignorance is appropriate in conspiracy cases is a hotly debated topic.¹⁴

The Supreme Court has approved of and been guided by the Model Penal Code's definitions of knowledge and deliberate ignorance, despite the fact that the Model Penal Code is *not* considered binding authority. The Model Penal Code says that "[w]hen 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."¹⁵ In *Leary*, the Court formally approved the Model Penal Code's definition of knowledge. Subsequently, each of the federal circuits has adopted this definition,¹⁶ indicating the general reliance on the Model Penal Code as a source of authority.

Model Penal Code commentaries of section 2.02 provide that a prosecutor can establish the defendant's knowledge of the existence of particular fact without establishing positive knowledge¹⁷ if the prosecutor can establish that the defendant is aware of a high probability of its existence, without the defendant's believing that it actually does not exist.¹⁸ The Commentaries explain that the subsection of the Model

11. *Spurr*, 174 U.S. at 735 ("[A]n evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not.").

12. 395 U.S. 6 (1969). In *Leary*, the defendant appealed his conviction for knowingly transporting illegally imported marijuana. He claimed the statute included an unconstitutional presumption he knew marijuana was imported. The Court employed the Model Penal Code section 2.02(7)'s definition of knowledge to invalidate the presumption that the defendant knew the marijuana was imported.

13. See Robbins, *supra* note 4, at 203.

14. See, e.g., *id.* (arguing that the Model Penal Code's definitional scheme of levels of culpability leads to the conclusion that deliberate ignorance substitutes recklessness, not knowledge); Jonathan L. Marcus, Note, *Model Penal Code 2.02(7) and Willful Blindness*, 102 YALE L.J. 2231 (1993) (arguing that courts such as the Second Circuit that use deliberate ignorance as a substitute for knowledge in limited circumstances have interpreted the definition of deliberate ignorance too loosely).

15. MODEL PENAL CODE § 2.02(7) (1985).

16. See, e.g., *United States v. Picciandra*, 788 F.2d 38 (1st Cir. 1986); *United States v. Restrepo-Granda*, 575 F.2d 524 (5th Cir. 1978); *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976); *United States v. Olivares-Vega*, 495 F.2d 827 (2d Cir. 1974).

17. Positive knowledge is contrasted with imputed or inferred knowledge of a fact. BLACK'S LAW DICTIONARY 873 (6th ed. 1990).

18. MODEL PENAL CODE § 2.02(2)(b)(i), 2.02(7) (Official Draft, review and commentaries); see also Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge & the*

Penal Code's definition of knowledge is designed to deal with the phenomenon of deliberate ignorance where a defendant is aware of the probable existence of a material fact, but chooses not to determine whether it exists or not.¹⁹

The Ninth Circuit first gave deliberate ignorance extensive treatment in *United States v. Jewell*.²⁰ In *Jewell*, neither party contested the fact that the appellant entered the United States driving an automobile in which 110 pounds of marijuana worth \$6,250 had been concealed in a secret compartment between the trunk and rear seat.²¹ The issue was whether the appellant possessed the requisite mens rea to be convicted.²² There was circumstantial evidence from which the jury could infer that the appellant had positive knowledge of the presence of the marijuana, and that his testimony to the contrary was false.²³ On the other hand, there was evidence from which the jury could conclude that the appellant was truthful when he said that although he knew of the secret compartment and knew of facts indicating it contained marijuana, he deliberately avoided positive knowledge of the presence of the contraband to avoid responsibility in the event of discovery.²⁴ If the jury concluded the latter was indeed the situation, and if positive knowledge was required to convict, the jury had no choice but to find appellant not guilty even though he deliberately contrived his lack of positive knowledge.²⁵

In *Jewell*, the Ninth Circuit allowed a deliberate ignorance instruction. The court concluded that the government may fulfill its burden of proof by proving that if the defendant was not actually aware that there was marijuana in the vehicle he was driving, his ignorance in that regard was solely a result of his conscious decision to avoid the truth.²⁶

"Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality, 1994 WIS. L.REV. 29, 36.

19. MODEL PENAL CODE §§ 2.02(2)(b)(i), 2.02(7) (Official Draft, review and commentaries).

20. See 532 F.2d 697 (9th Cir. 1976) (en banc); Marcus, *supra* note 14, at 2232.

21. *Jewell*, 532 F.2d at 698.

22. The appellant, convicted of violating the Comprehensive Drug Abuse Prevention and Control Act of 1970, testified that he did not know the marijuana was present, explaining that he had been paid \$100 by a stranger to drive the car into the country, and that he was not actually aware that it contained contraband. See *Jewell*, 532 F.2d at 699 n.1.

23. *Jewell*, 532 F.2d at 698-99.

24. *Id.* at 699.

25. *Id.*

26. *Id.* at 700. The Ninth Circuit found firm support for this instruction in the work of legal commentators, such as Professor Rollin M. Perkins, who wrote:

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 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.

The case provided one of the most comprehensive discussions of deliberate ignorance in the history of the circuit courts' dealing with the topic.²⁷ The *Jewell* court justified its allowance of a deliberate ignorance instruction by arguing that one who is deliberately ignorant is as culpable as one who possesses positive knowledge, and that acting knowingly necessarily includes acting with an awareness of the high probability of the existence of the fact in question.²⁸

The relationship between deliberate ignorance and the mens rea requirements of a conspiracy charge became a source of confusion and disagreement among lower courts. Following *Jewell*, courts took various approaches to the application of the deliberate ignorance instruction and accompanying evidentiary requirements in conspiracy cases.²⁹ As confusion mounted, many critics and courts turned to the Model Penal Code and its mens rea requirements for guidance.³⁰ Most commentators agree that the mens rea for conspiracy is purpose, or a specific desire to further the criminal enterprise.³¹ No federal statute explicitly prescribes a mens rea for conspiracy. The Supreme Court has consistently held that, based on the Model Penal Code, the appropriate mens rea is intent to further the aims of the conspiracy.³² According to the Model Penal Code, a person is guilty of conspiracy if, with the purpose of promoting the commission of a crime, he agrees with another person to engage in such conduct as constitutes a crime, or agrees to help another person plan or commit a crime.³³

Id. (citing R. PERKINS, CRIMINAL LAW 776 (2d ed. 1968)).

27. See Robbins, *supra* note 4, at 203.

28. See *id.* at 204-05.

29. For instance, while the Second and Ninth Circuits both apply similar evidentiary requirements for permitting a deliberate ignorance instruction, the Ninth Circuit maintains that the deliberate ignorance doctrine should be used only rarely, where the Second Circuit uses it more freely.

Other circuits have employed deliberate ignorance doctrines without reference to section 2.02(7) of the Model Penal Code. For instance, the Tenth Circuit rejected including section 2.02(7) as part of its deliberate ignorance instruction and has developed evidentiary standards for a finding of deliberate ignorance that differ from those of the Second and Ninth Circuit. See Marcus, *supra* note 14, at 2232.

30. See, e.g., MODEL PENAL CODE § 2.02 (1985).

31. See, e.g., Christine L. Chinni, *Criminal Law — Whose Head Is in the Sand? Problems with the Use of the Ostrich Instruction in Conspiracy Cases*, 13 W. NEW ENG. L. REV. 35, 41 (1991) (citing Fridman, *Mens Rea in Conspiracy*, 19 MOD. L. REV. 276 (1956)); Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624 (1941)).

32. See *Scales v. United States*, 367 U.S. 203 (1961); see also *Dennis v. United States*, 341 U.S. 494 (1951); Fridman, *supra* note 31.

33. The Model Penal Code states:

A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

The prosecution must meet two burdens in a conspiracy case. First, it must establish that the defendant knew of the unlawful goals of the conspiracy. Second, it must establish that the defendant had the purpose or intent to further its goals, and thus intended to be member of the conspiracy.³⁴ The Model Penal Code equates intent with purpose.³⁵ Because most federal courts allow the ostrich instruction in conspiracy cases to prove the first element,³⁶ commentators have raised concerns that confused juries could parlay deliberate ignorance into the second element and convict the defendant on a lesser mens rea.³⁷ They worry that juries will convict the defendant on a finding of knowledge rather than purpose.

Courts have taken varying approaches to this problem, some much more liberal than others. One approach is to allow the prosecution to use deliberate ignorance to establish the defendant's knowledge of the unlawful goals of the conspiracy, but not to establish that the defendant intended to further the goals of the conspiracy. Courts using this approach argue that the element of intent to further the goals of a conspiracy requires specific intent, and thus requires proof of purpose, as well as knowledge.³⁸ Because deliberate ignorance is sufficient only as to knowledge, these courts reason that deliberate ignorance is insufficient to establish this latter element of conspiracy. In *Ferranini*,³⁹ the appellants challenged jury instructions explaining the applicability of conscious avoidance to a conspiracy charge. The court had instructed the jury that

they could find a defendant to have known a particular fact if the evidence showed "beyond a reasonable doubt that the defendant. . . was aware that there was a high probability of a fact, but deliberately and consciously avoided confirming this fact." The court also instructed the jury. . . that, as to the conspiracy count, it could find a defendant to have

MODEL PENAL CODE § 5.03.

34. For instance, if someone gives the defendant a package of cocaine, and if the defendant agrees to take the package across the border of the United States and Mexico for a large sum of cash, then it is clear that the defendant intended to further the goals of the conspiracy (smuggling cocaine across the border) as evidenced by his commission of the overt act (traveling across the border with the package).

35. MODEL PENAL CODE § 1.13(12).

36. See *United States v. Ferrarini*, 219 F.3d 145 (2d Cir. 2000); *United States v. Inv. Enters., Inc.*, 10 F.3d 263 (5th Cir. 1993).

37. See Chinni, *supra* note 31, at 41-42 (explaining that the drafters of the Model Penal Code noted a meaningful difference between knowledge and purpose: "Knowledge that the requisite external circumstances exist is a common element in both conceptions. But action is not purposive with respect to the nature or result of the actor's conduct unless it was his conscious object to perform an action of that nature or to cause such a result."); see also MODEL PENAL CODE § 2.02 commentary at 223.

38. See *Ferranini*, 219 F.3d 145. This Note will refer to this approach as the "strict compliance" approach.

39. *Id.*

known of the unlawful object of the conspiracy — a requisite finding to sustain a conspiracy conviction — if it found the defendant to have “deliberately closed his eyes to what otherwise would have been obvious.”⁴⁰

The circuit court found that the lower court’s instructions were appropriate because they permitted the jury to consider conscious avoidance to support a finding with respect of knowledge of the conspiracy’s unlawful goals, but did not permit the jury to consider conscious avoidance to support a finding of the defendant’s knowing participation or membership in the conspiracy.⁴¹ Consequently, the Second Circuit promotes a strict compliance approach in applying the deliberate ignorance instruction. The instruction is only appropriate when the prosecutor offers evidence of deliberate ignorance to show knowledge, but not purpose.

Supporters of an alternate approach, however, argue that if the prosecution can establish that the defendant knew of the unlawful purpose of the conspiracy by proving deliberate ignorance, it follows that the defendant must have intended to further the conspiracy’s purpose because he participated in the conspiracy.⁴² For instance, in *United States v. Investment Enterprises, Inc.*,⁴³ the defendant was charged with conspiracy to ship obscene videos interstate. The Fifth Circuit ruled that the evidence was sufficient for the jury to infer that the defendant knew of the unlawful aims of the conspiracy. His participation was evidence of his intent to further its purpose. In other words, this approach allows the jury to connect logically the two elements of conspiracy. This “logic approach” permits the jury to use proof of deliberate ignorance to establish both knowledge of the unlawful aims of a conspiracy and intent to further the goals of the conspiracy: If the defendant knew of the unlawful goals of the conspiracy, it follows that he intended to further the goals of the conspiracy as evidenced by his action.

A third approach, taken by the Tenth Circuit, is perhaps the most conservative of the three. Courts adopting this approach assert that a “deliberate ignorance” instruction is appropriate in conspiracy cases only when a defendant denies knowledge of a relevant fact, and when the evidence shows that the defendant engaged in deliberate acts to avoid knowledge of that operant fact.⁴⁴ In other words, the court may

40. *Id.* at 154.

41. *See id.*

42. This Note will refer to this approach, adopted by the Fifth Circuit, as the “logic” approach.

43. 10 F.3d 263 (5th Cir. 1993).

44. *See, e.g., United States v. Delreal-Ordonez*, 213 F.2d 1405 (10th Cir. 2000). In this case, the defendant was prosecuted for possession with the intent to distribute methamphetamine. An agent noticed that the defendant had purchased a one-way ticket on a train from California to Kansas with cash, and observed the defendant with a black suitcase in the storage compartment. Upon being asked by the agent if his luggage could be searched, defen-

tender a deliberate ignorance instruction only when the government presents evidence that the defendant took *deliberate* and *unequivocal* acts to avoid knowledge in order to have a defense in the event of prosecution. The purpose of the instruction is to alert the jury that the act of avoidance could be motivated by sufficient guilty knowledge to satisfy the knowing element.⁴⁵

This Note argues that the presently used approaches to a deliberate ignorance instruction in conspiracy cases are unsatisfactory. It further proposes an approach that allows the jury to use deliberate ignorance to establish purpose if there is evidence that the defendant has taken deliberate steps to avoid knowledge. Part I argues that deliberate ignorance is an appropriate substitute for knowledge. It also addresses concerns that juries will confuse deliberate ignorance with negligence or recklessness and thus convict on an inappropriate mens rea. Part II examines the Second Circuit's strict compliance approach and the Fifth Circuit's logic approach and concludes that neither is satisfactory. It asserts that the strict compliance approach is too strict in its allowance of the use of deliberate ignorance in conspiracy cases. Part II further argues that the logic approach is inadequate because it overlooks the mens rea requirements of conspiracy and the correspondence principle.⁴⁶ Part III proposes an alternate approach which is a variation of the Tenth Circuit's approach, by which the prosecution may use deliberate ignorance to establish purpose in conspiracy cases if the defendant has taken deliberate acts to avoid knowledge of his membership in a conspiracy. This Note concludes that this hybrid approach is the best way for the courts to consider deliberate ignorance in conspiracy cases because it does not confuse knowledge with recklessness and it requires unequivocal acts to prove deliberate ignorance.

dant agreed and the agent discovered bundles of methamphetamine in a detergent box. Defendant said he did not know how the drugs got into his suitcase, but that his friends had packed his suitcase for him and must have included the box of detergent. Prosecutors argued that the defendant must have known the drugs were in the box because when the defendant discovered on his train ride that detergent had been leaking on him, rather than throwing away the box, he simply cleaned it up. *See also* Marcus, *supra* note 14, at 2250.

45. *See, e.g.*, *Delreal-Ordonez v. United States*, 531 U.S. 915 (2000).

46. The correspondence principle is the principle of criminal law which states that each element of a crime has a corresponding mens rea (purpose, knowledge, recklessness or negligence) that the prosecution must prove to establish the defendant's guilt. *See* Kenneth W. Simons, *When Is Strict Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY, 1075, 1087 (1997); Jeremy Horder, *A Critique of the Correspondence Principle in Criminal Law*, 1995 CRIM. L. REV. 759. The Fifth Circuit's approach ignores this principle by allowing deliberate ignorance (knowledge) to establish part I and thus part II of a conspiracy charge, whereas the statute requires more than knowledge (purpose) to establish this second part.

I. THE RELATIONSHIP BETWEEN KNOWLEDGE AND DELIBERATE IGNORANCE

Generally, courts and commentators agree that the mental state of deliberate ignorance is sufficient to satisfy the requirement of knowledge.⁴⁷ But there are also several vocal opponents of this proposition. Whether and under what circumstances defendants with this mental state should be held liable for acting knowingly constitutes “the problem of willful ignorance.”⁴⁸ Section I.A argues that deliberate ignorance is an appropriate substitute for knowledge as a mens rea in the crime of conspiracy. Section I.B refutes oft-raised concerns that the jury will mistake deliberate ignorance for negligence, thus convicting a defendant on a lesser mens rea than that which is required by statute.

A. *Deliberate Ignorance as a Substitute for Knowledge*

This Section attempts to trace the origin of the concept of deliberate ignorance, and to explain how it sprung from the definition of knowledge. Next, this section explains the importance of equating deliberate ignorance with knowledge in conspiracy cases. Finally, this section refutes some of the concerns commentators have raised about equating deliberate ignorance with knowledge.

In *Jewell*, the Ninth Circuit called the mental state possessed by the defendant willful ignorance.⁴⁹ In that case, there was circumstantial evidence from which the jury could infer that the appellant had positive knowledge of the presence of the marijuana. There was also evidence from which the jury could conclude that the appellant was truthful when he said that although the appellant knew of the secret compartment and had knowledge of facts indicating it contained marijuana, he deliberately avoided positive knowledge of the presence of the contraband to avoid responsibility in the event of discovery.⁵⁰ If the jury concluded the latter was indeed the situation, and if the law required positive knowledge for a conviction, the jury had no choice but to find the appellant not guilty even though he deliberately contrived his lack of positive knowledge.⁵¹

With their definition of knowledge, the drafters of the Model Penal Code sought to develop a concept of knowledge that enables

47. E.g., Husak & Callender, *supra* note 18, at 33-34 (1994) (proposing in general that the mental state found in *Jewell* is either a kind of knowledge or the moral equivalent of knowledge, and as such, it is plausible to hold such a defendant liable for violating a statute that requires that he act knowingly).

48. *Id.* at 34.

49. United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) (en banc).

50. See *Jewell*, 532 F.2d at 699.

51. See *id.*

courts to convict defendants for acting deliberately ignorant.⁵² The Model Penal Code states that a person acts knowingly with respect to a material element of an offense when, if the element involves the nature of his conduct or attendant circumstances, “he is aware that his conduct is of that nature or that such circumstances exist.”⁵³ The Model Penal Code goes on to explain that the requirement of knowledge can be satisfied by a something less than knowledge with certainty: “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.”⁵⁴

The courts created the concept of deliberate ignorance to describe the culpable mental state found in cases like *Jewell*. The objective of the courts is to convict a defendant who may lack genuine knowledge and otherwise might be acquitted for acting knowingly, primarily because morally he is as culpable as someone who acted with actual knowledge.⁵⁵ Courts accomplish this by describing a mental state that is not a kind of knowledge, but can plausibly be construed as the moral equivalent of knowledge — willful ignorance.⁵⁶ The *Jewell* court explained the broad definition of knowledge the Model Penal Code provides by explaining that knowledge cannot be limited to positive knowledge because such an interpretation would make deliberate ignorance a defense.⁵⁷

Although the Supreme Court has approved the Model Penal Code’s definition of deliberate ignorance, this definition is too vague. The primary problem is the confusion between whether the Model Penal Code treats the willfully ignorant defendant as possessing genuine knowledge, or a substitute for knowledge.⁵⁸ It seems relatively

52. See Husak & Callender, *supra* note 18, at 36.

53. MODEL PENAL CODE § 2.02(2)(b)(i) (1985).

54. MODEL PENAL CODE § 2.02(7).

55. *But see* Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 TEXAS L. REV. 1351 (1992) (disagreeing with this proposition). Charlow argues that a person who is certain that his conduct is criminal is more culpable than one who is only aware with a high probability that that is the case. In sum, she claims that the certain actor is more dangerous because he is less deterrable insofar as he has shown his willingness to violate the law. Secondly, she points out that the certain actor is more callous in his disregard for the law.

56. See Husak & Callender, *supra* note 18, at 36.

57. *Jewell*, 532 F.2d at 700. The Ninth Circuit explained that the substantive justification for the [deliberate ignorance] rule is that deliberate ignorance and positive knowledge are equally culpable. The textual justification is that in common understanding one “knows” a fact of which he is less than absolutely certain. To act “knowingly” therefore, is not necessarily to act only with positive knowledge, but also to act with awareness of the high probability of the existence of the fact in question. When such awareness is present, “positive” knowledge is not required.

58. See Husak & Callender, *supra* note 18, at 43. Husak and Callender contrast the two views about the relationship between willful ignorance and knowledge: that is, whether will-

clear that deliberate ignorance is not genuine knowledge, otherwise it would be unnecessary to distinguish the concept of deliberate ignorance. The jury instructions in *Jewell* predicated liability on a particular explanation of *why* the defendant remained ignorant, not on a finding of knowledge. Logically, ignorance cannot be genuine knowledge.⁵⁹ Deliberate ignorance is *not* genuine knowledge. Rather, deliberate ignorance is something close to positive knowledge, without the defendant's actually knowing the fact is certainly true.

Nevertheless, deliberate ignorance is the moral equivalent of genuine knowledge.⁶⁰ The Model Penal Code states that knowledge of a fact is established if a person is aware of a high probability of its existence, unless he actually believes it does not exist.⁶¹ Thus one can be aware of a high probability that Fact *X* exists, but deliberately remain ignorant of that fact, or one can be aware of a high probability that Fact *X* exists, and actually know that it does. In both cases, the defendants are equally culpable because they were either aware of a high probability of *X*, or knew *X* — both satisfy the Model Penal Code's definition of knowledge.

The primary purpose of equating deliberate ignorance with knowledge, and of giving a jury instruction based on this equation, is to prevent a guilty defendant from escaping punishment by deliberately avoiding knowledge of some key facts.⁶² The notion is that the defendant is in fact guilty, and his ability to determine the facts which he should avoid confirming as true demonstrates that he did in fact possess the required knowledge, or level of culpability to be guilty of knowledge.⁶³ The ostrich instruction "allows the jury to impute knowledge to (a defendant) of what should be obvious to him if it found, beyond a reasonable doubt, a conscious purpose to avoid enlightenment."⁶⁴ Finding deliberate ignorance could be said to require an inquiry into the motive of the defendant. If the defendant intentionally remained ignorant of Fact *X* *because* he was aware of a high probability that Fact *X* was true, then he is just as culpable as the defendant

ful ignorance is genuine knowledge or a substitute for knowledge. Either of these two views, they argue, provides a basis to allow the willfully ignorant defendant to be held liable for violating a statute that requires that he act knowingly, although only those who embrace the "substitute for knowledge" interpretation need to provide a further reason to defend the justice of their result. *See id.* at 42.

59. *Id.* at 52 ("A particular explanation of why a defendant remains ignorant might justify treating him as though he had knowledge, but it cannot, through some mysterious alchemy, convert ignorance *into* knowledge.")

60. *See id.* at 36.

61. *See supra* note 14.

62. *See United States v. Rothrock*, 806 F.2d 318, 323 (1st Cir. 1986); MODEL PENAL CODE § 2.02 commentary *passim* (1985).

63. *See Chinni, supra* note 31, at 49.

64. *United States v. Zimmerman*, 832 F.2d 454, 458 (9th Cir. 1987).

who had genuine knowledge.⁶⁵ The ignorance of the deliberately ignorant defendant is deliberate precisely *because* he is all too aware of the existence of the offense.⁶⁶ As such, it would be unfair to allow one to use deliberate ignorance as a defense when the motive for his deliberate ignorance was his awareness of the existence of the offense — the high probability of its existence.

Not all commentators, however, agree with this proposition. Some argue that deliberate ignorance is merely recklessness, explaining that recklessness is conscious disregard of a substantial and unjustifiable risk.⁶⁷ Conscious disregard, they assert, requires that the actor actually have recognized a particular risk; it applies to a conscious disregard of the likelihood of any material element of a crime.⁶⁸ Recklessness describes a willingness to act in the face of a perceived probability of the existence or creation of a particular fact.⁶⁹

Knowledge, critics explain, is really an awareness of the existence of a particular fact, not an awareness of a high probability of its existence, as the Model Penal Code states.⁷⁰ Thus knowledge requires an awareness of the actual, certain *existence* of a fact rather than recognition of its probability.⁷¹ According to these critics, the difference between knowledge and recklessness rests in the qualitative difference between probability and certainty: recklessness describes recognition of a probability, while knowledge requires certainty.⁷² These critics object to equating deliberate ignorance with knowledge because in order to establish that the deliberately ignorant defendant was guilty of knowledge, the prosecutor must establish that the defendant was certain that a fact existed and deliberately avoided confirming it.⁷³ This is impossible, they argue, because the defendant cannot be certain of a fact and be ignorant of it at the same time.⁷⁴ On the other hand, if the

65. Husak & Callender, *supra* note 18, at 41.

66. *Id.* at 58.

67. See, e.g., Robbins, *supra* note 4; see also GRANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 96 (2d ed. 1983) (stating that recklessness usually involves conscious and unreasonably risk-taking, "either as to the possibility that a particular undesirable circumstance exists or as to the possibility that some evil will come to pass").

68. MODEL PENAL CODE § 2.02 comment 3, at 236 (1985).

69. See Robbins, *supra* note 4, at 221-22.

70. See MODEL PENAL CODE § 2.02(7); Robbins, *supra* note 4, at 222.

71. See Robbins, *supra* note 4, at 222; see also G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 124 (2d ed., 1983); Charlow, *supra* note 55.

72. See Robbins, *supra* note 4, at 222; see also Williams, *supra* note 71, at 125.

73. See Robbins, *supra* note 4, at 222. Robbins argues that the provision of the Model Penal Code defining knowledge was designed to eliminate the defense of deliberate ignorance, and that the high probability language in the Model Penal Code indicates recklessness.

74. See Robbins, *supra* note 4, at 222; see also MODEL PENAL CODE § 2.02 comment 3, at 236 (Official Draft and Revised Comments 1985); Charlow, *supra* note 55.

defendant believed there was only a probability that the fact existed and deliberately avoided confirming it, he is only guilty of recklessness, and not knowledge. In that case, they argue that deliberate ignorance cannot be a substitute for knowledge, but only for recklessness.

Several significant differences between knowledge and recklessness weaken arguments that deliberate ignorance is a substitute for recklessness and not knowledge. First, there is a difference in levels of culpability regarding defendants who act with knowledge and defendants who act with recklessness. The deliberately ignorant defendant is as culpable as the defendant who possesses positive knowledge, because in both cases, there is at least an awareness of a high probability of the existence of the fact. Critics are really attacking the "level" of knowledge required by the defendant, arguing that unless defendants know a fact to be true to a certainty, then they do not possess "knowledge." But deliberate ignorance is the perfect instance in which a defendant who does not possess actual knowledge but rather constructive knowledge is as culpable as the defendant who possesses actual knowledge. The deliberately ignorant defendant remains deliberately ignorant because he knows the fact is true, but does not want to confirm its truth. As such, this defendant is as culpable as the defendant who has actual knowledge. Thus the Model Penal Code's alternate definition of knowledge, which only requires knowledge of a high probability of the existence of a fact, accommodates specifically those defendants who act with deliberate ignorance, and thus is appropriate.

Furthermore, recklessness involves assessing the social utility of the conduct by balancing the justifiability of an act against the risk of harm, while knowledge requires no such balancing.⁷⁵ In other words, to find recklessness, the jury must balance justifiability with risk and harm. If the justifiability of the act is low, the defendant's necessary awareness of the risk and harm of the act must also be low to complete the balancing. The level of awareness for knowledge, on the other hand, does not depend on the level of social utility or risk or harm, but rather is an independent fact.⁷⁶ That the defendant must be aware of a high probability of the existence of a particular fact is always a specific level of awareness, regardless of other factors involved. So a high degree of certainty determines knowledge, and establishing deliberate ignorance is not impossible. It does not require establishing actual

75. WAYNE R. LEFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 3.5(f) at 239 (2d ed. 1986). As one commentator explained:

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 than one percent.' By contrast, 'high probability' entails well over a 51 percent chance of harm.

Marcus, *supra* note 14, at 2239-40.

76. See Marcus, *supra* note 14, at 2239.

knowledge and ignorance at the same time, as some commentators have asserted.⁷⁷

In sum, a defendant is deliberately ignorant of Fact *X* if he believes there is a high probability that *X* is true, he decides not to investigate to determine whether *X* is true and has a conscious desire to remain ignorant of whether *X* is true in order to claim ignorance as a defense and escape liability.⁷⁸ Because the defendant is aware of a high probability that Fact *X* is true, the mental state present in the defendant is the moral equivalent of knowledge, but not positive knowledge or certainty.⁷⁹

B. *Potential Problems with Jury Confusion*

Critics warn that without explaining the requirement of a specific level of awareness, a jury can interpret deliberate ignorance to mean that the defendant can be convicted because he *should have known* the fact, instead of convicting the defendant because he was aware of the high probability of the existence of the fact and deliberately chose not to investigate in an effort to avoid liability. Thus, critics worry that a jury will convict a defendant merely on a showing of recklessness or negligence, rather than knowledge established by deliberate ignorance. The jury should not punish the defendant, they warn, because he deliberately avoided learning of a fact, but only because he knew the fact, or was aware of the high probability of its existence.⁸⁰ The culpable behavior was his knowledge, not his failure to investigate. In addition, to convict the defendant because he should have known the fact is to convict on a negligence standard. Convicting on a negligence standard requires the jury to argue that a reasonable person would have known the fact, and thus the defendant should have known the fact.⁸¹

These concerns about jury confusion are unwarranted and can be overcome in two ways. First, even accepting the proposition that deliberate ignorance and knowledge are equivalent mens reas, a precise definition of deliberate ignorance would eliminate the risk of a jury's confusing the mental states of deliberate ignorance and recklessness and thus convicting on a lesser mens rea. This would address concerns of opponents of the very concept of deliberate ignorance, who argue juries should not receive deliberate ignorance instructions because they could unwittingly employ a negligence standard, thereby con-

77. *See id.* at 225. *See generally* Charlow, *supra* note 55.

78. *See* Husak & Callender, *supra* note 18, at 41-42.

79. *See id.*

80. *See* Marcus, *supra* note 14, at 2247-48.

81. *See id.* at 2248.

victing a defendant on the impermissible and inapplicable grounds that he *should have known* an illegal act was taking place.⁸²

Another potential solution to this dilemma, in an effort to protect defendants, lies in the jury instructions, where the court must be specific in its explanation of deliberate ignorance, and perhaps even contrast it explicitly with negligence and recklessness. Unlike the negligent defendant, who is unaware of a proposition that a reasonable person would have known to be true, the willfully ignorant defendant is *not* totally oblivious to the truth of that proposition. Rather, the willfully ignorant defendant is aware of a high probability of its existence.⁸³ Similarly, unlike the reckless defendant, who is aware of the possibility of risk and disregards it, a defendant with knowledge does not engage in any type of conscious disregard, but rather is aware of high probability of a certain fact, well over the level of awareness necessary for recklessness.⁸⁴ Explaining these differences to the jury could alleviate any confusion.

In sum, courts can alleviate the concerns that juries' jobs are hard enough without including a deliberate ignorance instruction with ease in primarily two ways. First, courts must pinpoint a precise definition of deliberate ignorance in an effort to provide more specificity with respect to the mental state of the defendant; as a result, the jury will be less likely to confuse the mental state of deliberate ignorance with the mental state of recklessness. Secondly, a simple instruction clearly outlining the differences between deliberate ignorance on one hand and negligence and recklessness on the other should clear up any potential jury confusion as well.

II. FLAWS OF THE SECOND AND FIFTH CIRCUIT APPROACHES

The federal circuits take various approaches to the problem of deliberate ignorance in conspiracy cases, but the current approaches are flawed and fail to hold guilty defendants accountable. This Part explains why neither the Second nor Fifth Circuits' approaches are satisfactory. Section II.A describes the Second Circuit's approach, the strict compliance approach, and argues that it is too strict in its allowance of the use of deliberate ignorance in conspiracy cases. Section II.B argues that the Fifth Circuit's logic approach is inadequate because it is too lenient in its use of deliberate ignorance and ignores the mens rea requirements of conspiracy and the correspondence principle.

82. See K. O'MALLEY ET AL, FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 17.09 (5th ed. 2000); *United States v. Beckett*, 724 F.2d 855, 856 (9th Cir. 1984) (per curiam).

83. See MODEL PENAL CODE § 2.02(7) (1985).

84. See *id.*

A. *Second Circuit's Approach: A Strict Adherence to the Correspondence Principle*

The strict compliance approach to the ostrich instruction, while not without merit, is too restrictive in its approach to deliberate ignorance. The Second Circuit recognizes the two elements of conspiracy: (1) knowledge of the unlawful goals of the conspiracy; and (2) intent to further the goals of the conspiracy.⁸⁵ The Second Circuit has approved the use of deliberate ignorance to establish knowledge of the unlawful goals of the conspiracy.⁸⁶ Nonetheless, it argues that conscious avoidance does not support a finding of intent to further the goals of a conspiracy, because intent requires a showing of knowledge and purpose, and deliberate ignorance is sufficient only as to knowledge.⁸⁷

In *United States v. Lanza*,⁸⁸ the defendant was accused of conspiracy to commit wire fraud. The defendant argued that while he was involved in the group's activities, he believed he was helping to commit extortion, not wire fraud. The court reasoned that evidence in *Lanza* indicated that there was no question regarding the defendant's intent to further the goals of the conspiracy, as defendant admitted that much. The issue was whether defendant had knowledge of the unlawful goals of the conspiracy. The court ruled that a conscious avoidance charge was appropriate vis-à-vis knowledge of the objectives of the scheme.⁸⁹

The Second Circuit enforced the *Lanza* ruling in *United States v. Ferranini*, explaining further the conscious avoidance charge, and expounding on the requirement that a factual predicate exist before the instruction may be given.⁹⁰ A factual predicate exists when the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming the fact.⁹¹ It permits a finding of knowledge even where there is no evidence that the defendant possessed actual knowledge. The *Ferranini* court explained that a conscious avoidance instruction permits a jury to find that a defendant had culpable knowledge of a fact when the evidence shows that the defendant intentionally avoided confirming the fact.⁹²

85. *United States v. Lanza*, 790 F.2d 1015, 1022 (2d Cir. 1986).

86. *See, e.g., id.*

87. *United States v. Eltatyib*, 88 F.3d 157, 170 (2d Cir. 1996).

88. 790 F.2d at 1017.

89. *Id.* at 1023.

90. *See United States v. Ferranini*, 219 F.3d 145 (2d Cir. 2000); *see also United States v. Rodriguez*, 983 F.2d 455 (2d Cir. 1993)

91. *Rodriguez*, 983 F.2d at 458.

92. *Ferranini*, 219 F.3d at 154.

Like the *Lanza* court, the court in *Ferranini* reiterated that the conscious avoidance instruction may be given only if the defendant asserts the lack of some specific knowledge required for conviction. In sum, the Second Circuit held that in cases where the defendant argues only that he or she did not know of the conspiracy's unlawful goals, and not that he or she did not intend to further the aims of the conspiracy, the ostrich instruction is appropriate because only the defendant's knowledge, not purpose/intent, is at issue. And deliberate ignorance is sufficient to establish knowledge.

But to establish the second element — intent to further the goals of the conspiracy — according to the strict compliance approach, evidence of *both* purpose *and* knowledge is necessary because the second element requires specific intent. Specific intent is “knowingly doing an act which the law forbids and purposely intending to violate the law.”⁹³ Conscious avoidance is relevant to the knowledge component of specific intent, but a finding of conscious avoidance alone could not by itself provide the basis for a finding of specific intent as a whole because specific intent is comprised of knowledge *and* purpose.

Thus, according to the strict compliance approach, because the ostrich instruction equates deliberate ignorance with knowledge, an offense that requires proof of no mental state beyond knowledge is an appropriate avenue for the ostrich instruction. In other words, courts should use a deliberate ignorance instruction only in connection with crimes for which the required mental state is knowledge or some lesser mens rea, but not for purpose.⁹⁴ When the crime charged requires that the prosecution prove that the defendant acted with specific intent, a carelessly worded ostrich instruction may give the jury the impression that the defendant's deliberate ignorance establishes not only guilty knowledge but also purpose.⁹⁵ The Second Circuit explains that the ostrich instruction confuses the two elements of conspiracy, collapsing them into one. This confusion could deprive the defendant of a legitimate defense that the defendant knew of the illegal goals of the conspiracy, but was not involved in the conspiracy in any way.⁹⁶ Thus the strict compliance approach does not allow an ostrich instruction when the defendant claims he was not involved in the conspiracy.

93. See *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1196 (2d Cir. 1989). The Model Penal Code says a person acts purposely with respect to a material element of an offense: “(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in the conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.” MODEL PENAL CODE § 2.02 (1985).

94. See Chinni, *supra* note 31, at 51 (1991).

95. See *id.* at 51.

96. See *id.* at 54.

The strict compliance approach is not without merit. It is logical to argue that a defendant must know of the conspiracy's unlawful goals in order to manifest the intent to further these unlawful objectives.⁹⁷ If only the defendant's knowledge of the unlawful goals of the conspiracy is established, the prosecution must still prove that the defendant acted with the purpose of furthering the objectives of the conspiracy.⁹⁸ If the defendant only asserts that he knew of the unlawful goals of the conspiracy but had no connection with the conspiracy, the defendant's knowledge of the existence of the conspiracy and its aims is merely evidence that would discredit the defendant's defense.⁹⁹ The defendant's knowledge makes it more likely that he was involved with and intended to further the goals of the conspiracy.¹⁰⁰ Supporters of the Second Circuit's approach argue that such knowledge can buttress an inference that the defendant must have been involved in some way with the members of the conspiracy in order to acquire the knowledge, but this knowledge is not equivalent to intent to further the aims of the conspiracy.¹⁰¹

This approach is much too restrictive in its allowance of an ostrich instruction in conspiracy cases.¹⁰² Deliberate ignorance establishes only knowledge according to this approach, and thus the Second Circuit allows deliberate ignorance to prove only the element of conspiracy that requires knowledge, and does not allow it to establish the element that requires specific intent, and thus requires purpose.¹⁰³ Strict compliance, however, focuses too narrowly on these mens rea requirements. It protects a defendant's right to raise the defense of noninvolvement: that he did not intend to further the goals of the conspiracy, but it "undervalues the potential that a finding of deliberate ignorance has for damaging the credibility of the defense of non-membership in a conspiracy."¹⁰⁴

97. *See id.* at 53. Proof of a defendant's knowledge or deliberate ignorance does have evidentiary value even if the prosecution must also prove that the defendant acted intentionally. If the prosecution shows that the defendant had knowledge (or the equivalent thereof) of the conspiracy, it becomes more likely that the defendant was involved with the conspiracy and intended to further it. *Id.* at 52 n.127.

98. *See id.* at 53.

99. *See id.*

100. *See id.*

101. *See id.* at 54 (citing *United States v. Mankani*, 738 F.2d 538, 547 n.1 (2d Cir. 1984)).

102. *See United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181 (2d Cir. 1989). The Second Circuit allows for deliberate ignorance to establish the first element of conspiracy, but not the second, because the second requires both purpose and knowledge, and deliberate ignorance is sufficient only as to knowledge.

103. *Id.*

104. Chinni, *supra* note 31, at 56-57.

At the very least, this approach deprives the prosecution of the opportunity to challenge the defendant's assertion that he was not a member of a conspiracy.¹⁰⁵ Evidence of deliberate ignorance regarding knowledge of the conspiracy's objectives would damage the credibility of a defendant who argued that he did not intend to further the goals of the conspiracy, and thus argues that he was not a member of a conspiracy. In order to avoid the risk that the jury would convict the defendant of conspiracy based only on evidence of his deliberate ignorance, the Second Circuit forbids the use of a deliberate ignorance instruction altogether when intent to further the goals of the conspiracy (i.e. membership in a conspiracy) is at issue.¹⁰⁶ In doing so, the Second Circuit deprives the prosecution of the opportunity to allow deliberate ignorance to damage the credibility of his defense of non-involvement.¹⁰⁷ For instance, in *United States v. Diaz*, the defendant argued that he had no connection with the conspiracy and was not a member.¹⁰⁸ The strict compliance approach would forbid the use of the ostrich instruction, and proof of deliberate ignorance, because membership is at issue. In cases like *Diaz*, proof of the defendant's knowledge of the unlawful goals of the conspiracy would tend to discredit his defense that he was not involved in the conspiracy. Thus, by preventing the prosecution from introducing such evidence, the court denies it of a useful tool to discredit the defense of non-involvement.

Although this approach is consistent with the Model Penal Code, the ostrich instruction is useful in those cases in which the defendant's membership is at issue because the defendant's deliberate ignorance, which is the equivalent of knowledge, makes it somewhat more likely that he was involved in the conspiracy and intended to further its aims.¹⁰⁹ While deliberate ignorance in this context is insufficient to establish positively the specific intent element of conspiracy — intent to further the goals of the conspiracy — it might damage the credibility of a defense that the defendant did not intend to further these goals.

105. *See id.* at 57.

106. *See Mankani*, 738 F.2d at 538. Defendants in *Mankani* were charged with conspiracy to possess and distribute hashish. The DEA received notice of the conspiracy's drug smuggling operation and began surveying the area, including aurally surveying a hotel room where one defendant was staying. The defendant against which the deliberate ignorance instruction was used was a tenant in the home located on property where some of the illegal activity took place, although she seemed to have no direct involvement with the operation. The government argued that the evidence established the defendant's participation in the conspiracy or at least proved that she consciously avoided knowledge of the conspiracy. The Second Circuit found that a conscious avoidance instruction was inappropriate because, it argued, a person cannot consciously avoid participating in a conspiracy and be a member of the conspiracy at the same time.

107. *See Chinni*, *supra* note 31, at 56-57.

108. 864 F.2d 544 (7th Cir. 1988).

109. *See Chinni*, *supra* note 31, at 61.

In conclusion, the Second Circuit's approach, while strictly adhering to the mens rea requirements set forth for a conspiracy charge, is *too* uncompromising in its blanket ban on the ostrich instruction in cases in which membership in a conspiracy is at issue.

B. *Fifth Circuit's Approach: An Exercise of Logical Reasoning*

The Fifth Circuit's approach,¹¹⁰ on the other hand, does account for the potential that a finding of deliberate ignorance has for damaging the credibility of the defense of non-membership in a conspiracy. The Fifth Circuit's approach, however, is much too lenient because it ignores mens rea requirements all together.

As used by the Fifth Circuit, the term "deliberate ignorance" denotes a conscious effort to avoid positive knowledge of a fact that is an element of an offense charged. In effect, the defendant chooses to remain ignorant so he can plead lack of positive knowledge in the event he should be caught.¹¹¹ The Fifth Circuit maintains that an ostrich instruction is properly given when: (1) the facts support an inference that the defendant was subjectively aware of a high probability of illegal conduct, and (2) the facts support an inference that the defendant purposely contrived to avoid learning of such conduct.¹¹² Unlike the Second Circuit, the Fifth Circuit tends not to distinguish between deliberate ignorance with respect to the two elements of the conspiracy charge. It allows the ostrich instruction to establish both knowledge of the unlawful goals of the conspiracy and intent to further the goals of that conspiracy.

The first prong of the Fifth Circuit's deliberate ignorance test protects a defendant from being convicted for what he *should have* known.¹¹³ The prosecution may not establish that a defendant had the requisite guilty knowledge merely by demonstrating that a reasonable person would have been aware of the illegal conduct.¹¹⁴ The jury may not convict the defendant simply because he was foolish, stupid, or negligent.¹¹⁵ The first prong permits a deliberate ignorance instruction only when the prosecution presents facts that support an inference that the particular defendant subjectively knew his act to be illegal. It

110. The Fifth Circuit's approach will also be referred to as the "logic approach."

111. See *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990); *United States v. Restrepo-Granda*, 575 F.2d 524, 528 (5th Cir. 1978).

112. Deborah Sprenger, Annotation, *Propriety of Instruction of Jury on "Conscious Avoidance" of Knowledge of Nature of Substance or Transaction in Prosecution for Possession or Distribution of Drugs*, 109 ALR FED. 710 (2001) (citing *United States v. Fierro*, 38 F.3d 761 (5th Cir. 1994)).

113. *Lara-Velasquez*, 919 F.2d at 952.

114. *Id.*

115. *Id.*

does not permit such an instruction when the prosecution presents facts establishing that a reasonable person would have known the acts to be illegal. In this way, the logic approach addresses the concern previously discussed that the deliberate ignorance instruction runs the risk that the jury will convict on a negligence standard, assessing instead what a reasonable person would have done in the defendant's position.¹¹⁶

The court may only consider the second prong of the Fifth Circuit's test if the prosecutor is able to establish the first prong. A defendant could not purposely avoid learning of illegal conduct unless he was subjectively aware that a high probability of illegal conduct exists. Nonetheless, the same evidence that will raise an inference that the defendant had actual knowledge of the illegal conduct ordinarily will raise the inference that the defendant was subjectively aware of a high probability of illegal conduct. Thus, in many cases, the propriety of a deliberate ignorance instruction depends upon evidence that the defendant purposely contrived to avoid learning of the illegal conduct — the second prong of the logic approach's deliberate ignorance instruction.¹¹⁷ Direct or circumstantial evidence may establish the defendant's purposeful contrivance to avoid guilty knowledge.¹¹⁸ For instance, courts have determined that a defendant's admission of an intent to avoid incriminating knowledge establishes the defendant's purposeful contrivance to avoid knowledge.¹¹⁹

The logic approach essentially equates deliberate ignorance with knowledge, and then argues that purpose follows logically. In other words, to the extent that the instruction is merely a way of allowing the jury to conclude that the defendant knew of the unlawful purpose of the conspiracy, it is hardly inconsistent with a finding that he intended to further the unlawful goals of the conspiracy with his overt acts.¹²⁰ The Fifth Circuit argues that if the defendant knew of the unlawful goals of the conspiracy, it follows that he intended to further the unlawful goals of the conspiracy if there is evidence of overt acts in furtherance of the conspiracy.

116. *See supra* Section I.B.

117. *Lara-Velasquez*, 919 F.2d at 952.

118. *Id.*

119. *See United States v. Peddle*, 821 F.2d 1521, 1523-25 (11th Cir. 1987).

120. *See United States v. Inv. Enters., Inc.*, 10 F.3d 263, 269 (5th Cir. 1993). The defendant argued that he cannot be deliberately ignorant of the object of the conspiracy and also intend to further its purpose as required by the conspiracy charge. The Fifth Circuit explained that his argument overlooked the fundamental nature of the deliberate ignorance instruction, which is to inform the jury that it may consider evidence of the defendant's charade of ignorance as circumstantial proof of guilty knowledge. *Id.* (citing *Lara-Velasquez*, 919 F.2d at 951). Viewed this way, the deliberate ignorance instruction is a particularized circumstantial evidence instruction.

The logic approach is too lenient in that it ignores all the mens rea requirements established by the Model Penal Code for conspiracy. On the surface, this approach appears to argue that if there is evidence that the defendant *purposely* contrived to avoid learning of the illegal conduct, it follows that he held the specific intent necessary to be guilty of intending to further the unlawful goals of the conspiracy. However, in making this logic argument, the Fifth Circuit ignores the mens rea requirements of conspiracy under the Model Penal Code. It allows deliberate ignorance to establish knowledge of the unlawful goals of the conspiracy, just as the Second Circuit does. The Fifth Circuit then argues, however, that purpose is not a necessary element to establish the second element of conspiracy because deliberate ignorance is sufficient to establish this second element. Thus, the logic approach does one of two things: it either changes the mens rea requirements for the second prong of the conspiracy test from specific intent, which would require both knowledge *and* purpose, or it equates deliberate ignorance not only with knowledge, but also with purpose.

Regardless of which of the above two alternatives accurately describes the approach taken by the Fifth Circuit, neither is consistent with the intent of the Model Penal Code. First, the drafters of the Model Penal Code intended a universal application of deliberate ignorance, not one limited by the two-prong test instituted by the Fifth Circuit. According to the Model Penal Code, "when 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."¹²¹ No language in the Code suggests that the definition apply only in the limited circumstances where the evidence indicates a conscious purpose to avoid the truth.¹²² The purposeful avoidance requirement does not add to the protection offered to the defendant from some of the risks inherent in a deliberate ignorance instruction, primarily because liability can be predicated on an *omission* to learn.¹²³ The defendant does not have to close his eyes to be liable. He can be convicted for failure to investigate. Under the logic approach, awareness of the risk plus omission to learn can establish the purposeful avoidance element. This makes awareness of the risk alone sufficient for guilt.¹²⁴

Under the logic approach, the jury can infer not only knowledge, but also purpose from a highly ambiguous omission. An examination of the facts of some other Fifth Circuit cases shows that it is frequently

121. MODEL PENAL CODE § 2.02(7) explanatory note (1985).

122. Marcus, *supra* note 14, at 2238-39.

123. Alan Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 988 (1998).

124. *Id.* at 989.

impossible to conclude that the defendant's failure to investigate was due to an affirmative desire or purpose to avoid learning the truth, rather than to sheer indifference to learning the truth.¹²⁵ For instance, in *United States v. Investment Enterprises, Inc.*, the court held that there was sufficient evidence to support a finding that the defendant purposely contrived to avoid knowledge of the illegal conduct.¹²⁶ As evidence of this conclusion, the court pointed to various failures to act on the part of the defendant. For example, although the illegal activity was taking place across the street from the defendant's workplace, the defendant only walked there twice in two years, often sending his subordinates;¹²⁷ the defendant never attended board meetings;¹²⁸ and despite his membership on the board of the company at issue, defendant did not involve himself in the sales, marketing or prices strategies of the company.¹²⁹ In sum, the jury concluded that the defendant purposely contrived to avoid knowledge based on a series of omissions, or failures to act. In doing so, the jury convicted the defendant of a crime requiring proof of both knowledge and purpose with evidence only of knowledge at best, and purpose by omission.

Thus, the logic approach uses the deliberate ignorance instruction much too leniently. It confuses purpose and knowledge and allows deliberate ignorance to establish purpose. In doing so, the logic approach disregards the mens rea requirements for conspiracy as established in the Model Penal Code.

III. PROPOSAL FOR THE ADOPTION OF A VARIATION OF THE TENTH CIRCUIT'S APPROACH

This Part proposes alternative criteria for permitting a deliberate ignorance instruction similar, but not identical, to that used by the Tenth Circuit. It argues for an approach where the prosecution may use deliberate ignorance to establish purpose in a conspiracy case if the defendant has taken deliberate acts to avoid knowledge of his

125. See *Lara-Velasquez*, 919 F.2d 946 (deciding that the defendant's failure was not due to an affirmative desire or purpose to avoid the truth where the defendant drove a truck containing drugs across the Mexico-U.S. border at the instruction of his cousin without questioning these instructions or inspecting the truck, but with the knowledge that his uncle has a poor reputation). *But see*. *United States v. Inv. Enterprises*, 10 F.3d 263 (5th Cir. 1994) (finding that a reasonable jury could conclude that the defendants conspired to transport obscene videos in interstate commerce, since the evidence undercut the defendant's position that he had no actual knowledge of the unlawful purpose of the conspiracy and had no intent to further it and was sufficient to prove not only that he knew of the unlawful purpose of the conspiracy to ship obscene videos interstate, but also that he joined it with the intent to further it).

126. 10 F.3d 263 (5th Cir. 1994).

127. *Id.* at 269.

128. *Id.*

129. *Id.*

membership in a conspiracy (hereinafter, hybrid approach). By allowing a deliberate ignorance instruction when a defendant takes clear and unequivocal steps to avoid knowledge, the Fifth Circuit limits the prosecution's ability to establish purpose by omission, as it is almost impossible and illogical to prove purpose by omission. Rather, the prosecution would have the burden of proving purpose through commission, the defendant's taking purposeful steps to avoid knowledge. Because there is some merit to both the strict compliance and logic approaches — the former's adhering to the mens rea requirements and the latter's argument that employs logic to allow deliberate ignorance to prove purpose in conspiracy cases — but also some serious flaws,¹³⁰ the courts must adopt a standard that accounts for these considerations. A variation of the Tenth Circuit's approach would accomplish this task.

Under the Code's conception of deliberate ignorance, evidence of an actor's purpose to avoid the truth will be sparse, if not entirely absent, because a decision not to investigate before participating in the conspiracy will involve only an *omission*.¹³¹ The only evidence will tend to establish the defendant's participation in the conspiracy: 1) evidence that the defendant engaged in a criminal act, and 2) evidence that he possessed a high level of awareness of a fact in question.¹³² The evidence will *not* distinguish between whether the defendant intended to avoid knowledge of the fact, did not care enough to investigate, or knew of the fact.¹³³ For instance, examine the classic example of deliberate ignorance. Someone asks defendant to carry a suitcase across the U.S./Mexico border and pays defendant a large sum of money for doing so. Stopped at customs, the defendant must display the contents of his suitcase, and officials find drugs in his possession. The defendant claimed he believed he was carrying only clothing across the border. It is almost an impossible task for the prosecution to prove beyond a reasonable doubt that the defendant "formed a conscious purpose to avoid the truth"¹³⁴ but with the ostrich instruction and the Model Penal Code's modified definition of knowledge to include awareness of the high probability that the fact in question is true, the prosecution does not have to bear such a burden. To establish knowledge or the equivalent thereof, and hence deliberate ignorance, the prosecution need only prove that the defendant pos-

130. See *supra* Part II.

131. See Marcus, *supra* note 14, at 2237 (citing MODEL PENAL CODE § 2.02 cmt. 9).

132. See *id.* at 2237-38.

133. See *id.* at 2238. Marcus goes on to explain that the point of MODEL PENAL CODE § 2.02(7) is that this ambiguity does not matter as long as the evidence indicates that the defendant was aware of a high probability that the fact existed.

134. *Id.*

essed a high level of awareness of a fact in question, but it has no burden to establish why the defendant had no *actual* knowledge of the fact in question.

The Tenth Circuit sought to restrict the deliberate ignorance doctrine to the rare case that presents evidence of deliberate and unequivocal acts to avoid learning the truth.¹³⁵ The Tenth Circuit ruled in *United States v. Francisco-Lopez* that courts cannot give a deliberate ignorance instruction unless there is sufficient evidence pointing to acts by the defendant to avoid knowledge.¹³⁶ A deliberate ignorance instruction is appropriate, the court explained, when a defendant denies knowledge of an operant fact and the evidence, direct or circumstantial, shows that the defendant engaged in deliberate acts to avoid actual knowledge of that operant fact.¹³⁷ In other words, the district court may tender a deliberate ignorance instruction when the government presents evidence that the defendant purposefully contrived to avoid learning all of the facts in order to have a defense in the event of prosecution.¹³⁸ An example of such deliberate or unequivocal acts would be if a defendant were sitting in a room with his co-conspirators, and they began to discuss the success and goals of the conspiracy, and defendant stood up and walked out of the room. This evidence would tend to indicate that defendant was purposely trying to avoid knowledge of the conspiracy — that he was purposely trying to remain ignorant, but was aware of a high probability of its existence. The facts of the case would have to support the inference that defendant knew he was involved in a conspiracy, yet intentionally closed his eyes to that fact.

This requirement of deliberate and unequivocal acts is excessive given that the prosecution is attempting to use deliberate ignorance to establish only knowledge. Courts have generally accepted the proposition that knowledge and deliberate ignorance are equally culpable.¹³⁹ Because knowledge can include acknowledgement of a high probability that the fact in question is true, the Model Penal Code guidelines

135. See *United States v. Galindo-Torres*, No. 91-2020, 1992 WL 14921 (10th Cir. Jan 30, 1992); see also *United States v. Francisco-Lopez*, 939 F.2d 1405 (10th Cir. 1991); Marcus, *supra* note 14, at 2251.

136. 939 F.2d at 1411. In this case, the defendant was stopped by a highway police officer during a drive from Los Angeles to New York City. One of the officers noticed that the rear door vent of the car was held in place by pop rivets rather than the factory-installed screws. After the defendant consented to a search of the car, the police officer determined that there were hidden compartments in the car's frame containing drugs. Defendant was arrested and fifteen kilograms of cocaine were extracted. The defendant denied knowing that the drugs were in the car. The prosecution's case was comprised of inferences arising from the unusual circumstances under which the defendant came to possess the cocaine.

137. See Marcus, *supra* note 14, at 2251.

138. See *id.* at 2252.

139. See *supra* Part I.

do not warrant the requirement that the defendant engage in specific acts to avoid positive knowledge of the unlawful goals of the conspiracy in order to establish the knowledge element alone.

Requiring proof of unequivocal acts, however, is not an excessive burden if the prosecution is attempting to establish the specific intent element of the conspiracy charge. According to the hybrid approach, omission is sufficient to establish deliberate ignorance with respect to knowing participation in a conspiracy, while commission is necessary and sufficient to establish deliberate ignorance with respect to intent to further the goals of the conspiracy. Under the hybrid approach, the court would require evidence of deliberate and unequivocal acts to avoid actual knowledge to capitalize on the merit of the logic approach taken by the Fifth Circuit,¹⁴⁰ thereby allowing the prosecution to establish the specific intent required by the second element of a conspiracy charge by satisfying both parts of the conspiracy charge with deliberate ignorance. In reality, under the hybrid approach, the prosecution is only *directly* establishing the first element of conspiracy via deliberate ignorance, and inferring the second. In other words, the issue is whether the prosecution establishes knowledge of the unlawful goals of the conspiracy with evidence of commission or omission. If the prosecution relies on evidence of the defendant's failure to act, as the court did in *United States v. Francisco-Lopez*,¹⁴¹ then deliberate ignorance is only sufficient to establish knowledge, and hence the first element of the conspiracy charge.

Under the hybrid approach, suppose the prosecution relies on unequivocal acts taken by the defendant that indicate that he intentionally avoided knowledge of these facts but was practically certain they were true. In that case, the prosecution can use deliberate ignorance to establish not only knowledge, but also purpose, hence proving the specific intent element of conspiracy. The jury uses the vehicle of the Fifth Circuit's logic argument to arrive at establishment of this second element of conspiracy. If the defendant had knowledge of the unlawful goals of the conspiracy, established by evidence of deliberate ignorance proven by commission, and assuming evidence of an overt act in furtherance of the conspiracy, then the defendant must have intended to further the goals of the conspiracy. Although no language in the Model Penal Code indicates that the definition of deliberate ignorance apply only in limited circumstances where the evidence indicates a conscious purpose to avoid the truth,¹⁴² adopting this narrow definition would allow courts to use deliberate ignorance to establish the

140. See *supra* Section II.B.

141. 939 F.2d. at 1405.

142. See Marcus, *supra* note 14, at 2238-39. Marcus goes on to point out that the Second and Ninth Circuits have nonetheless, rather than viewing § 2.02(7) as a standard definition of knowledge of a fact, applied it as a limited deliberate ignorance alternative.

“purpose” element of conspiracy — intent to further the goals of the conspiracy.

Critics may argue that, according to this approach, the prosecution need only establish that the defendant knew of the unlawful goals of the conspiracy, and without any further effort by the prosecution, the jury is free to infer that the defendant must have intended to further the goals of the conspiracy, assuming evidence of an overt act. As the logic approach advocates, however, if the prosecutor can prove that the defendant had knowledge of the unlawful goals of the conspiracy, and that he took overt acts in furtherance of the conspiracy, it follows that he intended to further the goals of the conspiracy.¹⁴³ If the defendant took deliberate acts purposely to avoid learning of the conspiracy, but continued to participate in the conspiracy, then by the traditional implementation of a deliberate ignorance theory, the prosecution can prove that the defendant knew he was in a conspiracy.¹⁴⁴ By continuing to participate and taking deliberate steps to avoid obtaining certain knowledge,¹⁴⁵ the prosecution can prove that the defendant purposefully furthered the goals of the conspiracy. The hybrid approach uses not deliberate ignorance per se, but rather a variation of the mens rea of purpose, just like deliberate ignorance itself is a variation of the mens rea of knowledge.

The hybrid approach also accounts for previously raised concerns regarding the jury’s confusion of knowledge and negligence. Recall from Part I that critics are concerned that unless a court explains the requirement of a specific level of awareness, a jury can interpret deliberate ignorance to mean that it can convict the defendant because he should have known the fact, instead of convicting the defendant because he was aware of the high probability of the existence of the fact and deliberately chose not to investigate in an effort to avoid liability. Thus, critics worry that a jury will convict a defendant merely on a showing of recklessness or negligence, rather than knowledge established by deliberate ignorance.¹⁴⁶ To convict the defendant because he *should have known* the fact is to convict on a negligence standard, because the jury would be arguing that a reasonable person would have known the fact, and thus the defendant should have known the fact.¹⁴⁷

143. See *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990); *United States v. Restrepo-Granda*, 575 F.2d 524, 527-28 (5th Cir. 1978).

144. See *supra* Section II.B.

145. See, e.g., *United States v. Galindo-Torres*, No. 91-2020, 1992 WL 14921 (10th Cir. Jan. 30, 1992); *Francisco-Lopez*, 939 F.2d at 1405.

146. KEVIN O'MALLEY ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL* § 17.09 (5th ed. 2000); see also *United States v. Beckett*, 724 F.2d 855, 856 (9th Cir. 1984) (per curiam); *supra* Section I.B.

147. As Marcus argues:

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

Under the hybrid approach, however, the jury cannot convict a defendant with evidence of failure to act when the law requires evidence of purpose because the law would require evidence of *unequivocal acts* to use deliberate ignorance to establish purpose.¹⁴⁸ It would no longer be sufficient to rely on a defendant's *failure* to act to establish purpose, as the Fifth Circuit logic argument proposes. Rather, evidence of commission would ensure that juries do not convict a defendant for *failing* to act when the prosecution must establish a specific intent to further the goals of the conspiracy. Negligence and recklessness are often proven by failure to act when one should have,¹⁴⁹ but by forcing the prosecution to establish purpose by commission, there is a minimal risk that the jury will confuse the specific intent necessary to prove conspiracy with negligence.

Furthermore, the hybrid approach addresses the previously raised concern that refusing a deliberate ignorance instruction with respect to the second element of a conspiracy charge deprives the prosecution of the opportunity to challenge the defendant's assertion that he was not a member of a conspiracy.¹⁵⁰ As previously stated, a defendant's deliberate ignorance and the inference of knowledge that it supports can cast doubt on his claim that he was not involved in the conspiracy.¹⁵¹ Evidence of deliberate ignorance regarding knowledge of the conspiracy's objectives would damage the credibility of a defendant who argued that he did not intend to further the goals of the conspiracy, and thus argued that he was not a member of a conspiracy. In order to avoid the risk that the jury would convict the defendant of conspiracy based only on evidence of his deliberate ignorance, the Second Circuit has opted to forbid the use of a deliberate ignorance instruction altogether in those cases in which intent to further the goals of the conspiracy is at issue.¹⁵² In doing so, the Second Circuit deprives the prosecution of the opportunity to allow deliberate ignorance to damage the credibility of his defense of non-involvement.¹⁵³

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.

Marcus, *supra* note 14, at 2248.

148. It is important to note here that the knowledge element of conspiracy can still be established with evidence of omission. Establishing "knowledge" as defined by deliberate ignorance requires no special proof of positive, unequivocal acts to avoid actual knowledge.

149. See MODEL PENAL CODE § 2.02 (1985).

150. See *supra*, Section II.A; see also Chinni, *supra* note 31, at 57.

151. See *supra* Section II.A.

152. See *United States v. Mankani*, 738 F.2d 538 (2d Cir. 1984).

153. See Chinni, *supra* note 31, at 56-57.

The hybrid approach considers this tool of the prosecution and allows a deliberate ignorance instruction even when only the defendant's intent to further the goals of the conspiracy is at issue — an instruction the Second Circuit currently forbids under its approach. By adopting the hybrid approach, the concern that the jury would convict the defendant of conspiracy based only on evidence of his deliberate ignorance is no longer legitimate, because the prosecutor is not denied this opportunity to challenge the defendant's membership in a conspiracy. It takes into consideration the idea that deliberate ignorance, especially if established by the defendant's action rather than failure to act, makes it more likely that he or she was involved in the conspiracy and intended to further its aims. And deliberate ignorance evidenced by positive acts would be sufficient to establish the defendant's guilt if used to establish that he intended to further the goals of the conspiracy — in other words, if used to establish his membership in the conspiracy.

CONCLUSION

None of the current approaches to a deliberate ignorance instruction in conspiracy cases is satisfactory. The strict compliance approach is too strict in its allowance of the use of deliberate ignorance in conspiracy cases. This approach ignores some of the merits of the logic approach, and it strips the prosecution of the opportunity to address the likelihood that the defendant intended to further the goals of the conspiracy as evidenced by his deliberately remaining ignorant of certain facts pertaining to the conspiracy. On the other hand, the logic approach is too lenient in its use of deliberate ignorance, and it ignores the mens rea requirements of conspiracy and the correspondence principle. A hybrid of the strict compliance and logic approaches that adheres to the mens rea requirements while taking into account the Fifth Circuit's logic argument is a better approach. Courts should adopt an approach similar to the one adopted by the Tenth Circuit that allows the jury to use deliberate ignorance to establish purpose if there is evidence that the defendant has taken purposeful, deliberate acts to avoid knowledge. This way, the prosecution may use deliberate ignorance to establish purpose in a conspiracy case if the defendant has taken deliberate acts to avoid knowledge of his membership in a conspiracy. By allowing a deliberate ignorance instruction only in the case where a defendant has taken clear and unequivocal steps to avoid knowledge, the prosecution will have the burden of proving purpose through commission, the defendant's taking purposeful steps to avoid knowledge.