The doctrine of willful blindness allows judges to instruct juries that they may convict a defendant under a statute that requires that the defendant *knowingly* do something by showing *either* that the defendant acted with *knowledge* of, or that he was *willfully blind* to, the relevant fact at issue. This doctrine has proved controversial. What makes willfully blindness an apt substitute for knowledge in such cases? Perhaps it is because willful blindness is a sort of knowledge. Alternatively, maybe the justification lies in the fact that the willfully blind actor is equally culpable as the actor with knowledge? Both approaches have been criticized and others have been proposed. This article begins by critiquing three prominent accounts of willful blindness and offers an alternative.

The article proceeds as follows. Part I begins with a short description of the paradigm case of willful blindness – the drug courier. With that exemplar in mind, Part I begins from the assumption the doctrine of willful blindness reflects a well-founded moral intuition, at least about the paradigm drug courier case. Any plausible account of willful blindness must thus explain the culpability of the willfully blind drug courier.

Parts II explains how three prominent accounts of the willful blindness doctrine explain the culpability of the willfully blind drug courier. Part III then moves to sketch two limiting cases – the criminal defense lawyer who avoids investigating her client’s story and the doctor prescribing narcotics for a patient who claims to be in pain. In each of these cases the actor exhibits a sort of contrived ignorance regarding possible misdeeds by the client or patient and yet in each this ignorance does not seem culpable and certainly not as culpable as knowingly suborning perjury or knowingly prescribing drugs to patients who resells them. A persuasive theory of willful blindness must not only account for the paradigm case of the drug courier, it must also succeed in distinguishing cases where blindness does not seem culpable. I proceed to show how the three accounts of willful blindness that I discuss are unable to exonerate the lawyer and the doctor in these cases.

Part IV offers an alternative account of when and whether the willfully blind actor is indeed morally culpable. Here I propose that we must look directly at whether the actor is justified in choosing blindness in order to assess whether he is culpably blind. I show how this account meshes with our intuitions about willfully blind drug couriers as well as willfully blind lawyers and doctors.

One caveat before beginning. The term “willful blindness” can be used in two different ways. First, the term could refer to that mental state (whatever it is) that exists in cases where we are sure the actor is culpable (the drug courier in the paradigm case, for example). Used this way, being *willfully blind* to whether one carries drugs into the country is blameworthy. Alternatively, we could begin in a more intuitive, unanalyzed way and use the term “willful blindness” to refer to being deliberately ignorant in a more general sense. Used this way, we
must go on to ask when a willfully blind actor is blameworthy. In what follows, I will use the term “culpable blindness” or “culpably blind” to refer to the mental state present in those cases where the actor is culpable and will use the term “contrived ignorance” to refer to the more general idea of deliberately choosing blindness. We can then ask the following question: when is contrived ignorance culpable blindness, where acting with “culpable blindness” is by definition blameworthy?

I.

The idea that contrived ignorance is blameworthy is motivated by cases like the following: a drug dealer offers a person a large sum of money to carry a suitcase from a drug producing country into the United States. The offeree recognizes that the suitcase might contain drugs and could easily confirm or refute his suspicions. But he chooses not to. If he is later arrested and prosecuted under a statute that criminalizes knowingly bringing prohibited drugs into the country, there is pressure to say that even if the carrier did not know, he is equally culpable as someone who did and should thus be subject to similar criminal penalties. This is precisely the scenario present in United States v. Jewell, the 1976 U.S. federal criminal case that led to the development of the now canonical jury instructions on willful blindness.

The doctrine of willful blindness presents the following problem. If a statute requires a mens rea of knowledge, why is it possible to convict a defendant who lacks knowledge – even if he does so because he contrives his own ignorance? One answer to this question is that contrived ignorance is really a kind of knowledge. In fact, commentators suggest that the Model Penal Code’s definition of knowledge arose in part as an attempt to bring instances of willful blindness within its ambit.

Many have critiqued this approach to the willful blindness problem, Husak and Callender most aptly. They make two important and convincing points. First, if an actor is blind to a certain fact, no matter how deliberately he schemed to remain blind, nor how easily such ignorance could be cured, this willfulness cannot magically transform his blindness into actual knowledge. Second, some actors who contrive their ignorance we might yet view as culpable notwithstanding the fact that they fail to meet the Model Penal Code’s definition of knowledge. This will occur when the actor is aware of some possibility, but not a high probability, that he might be doing X and willfully avoids the easily accessible route to confirm or dispel his suspicion. In other words, simply lowering the standards for knowledge will fail to capture some

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1 532 F.2d. 697 (1976).

2 These instructions provide: “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 in the vehicle he was driving when he entered the United States his ignorance in that regard was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth.” 532 F.2d. at 700.
of the cases that this strategy was designed to accommodate. These arguments seem correct to me. In any case, I will not pursue the possibility that contrived ignorance is itself a form of knowledge.

Assuming that contrived ignorance is not a sort of knowledge, perhaps we allow judges in certain circumstances to instruct juries that contrived ignorance may substitute for knowledge because the actor who acts in this circumstance is equally culpable as the knowing actor. If so, this approach raises a different sort of problem – compliance with the rule of law. As Husak and Callender argue, there is something deeply troubling about changing the mental state requirement for the crime in question. I will assume that legality concerns would demand a new and separately drafted statute making it a crime to do X with a mental state of contrived ignorance. The relevant question then becomes this: when should such parallel statutes be drafted and what should they look like?

I will assume for the purposes of this paper that the drug courier in the paradigm case is culpable (a view I endorse but will not argue for here). Whether he is equally culpable is more complicated. Moreover, if he is equally culpable, there is good reason to require that criminal law statutes specify that acting with contrived ignorance in these circumstances is culpable rather than allowing such culpability in via a back door route. In order to begin to articulate what such a statute should look like, I start with the widely shared intuition that it should, at least, cover the drug courier in the above example. The question is: what makes him culpable? We need to answer this question in order to articulate the elements of culpable blindness that a well-drafted statute would identify.

II

Below I survey three of the most interesting approaches offered in the literature. Each of these accounts succeeds in describing criteria of culpable blindness that apply to the paradigm drug courier case.

I begin with Husak and Callender. On their account, culpable blindness requires that the following three conditions be met. First, the defendant must be suspicious about the relevant fact (that the suitcase contains illegal drugs, for example) and his suspicion must be warranted (the “warranted suspicion criterion”). Second, the defendant must be able easily to confirm or dispel his suspicion (the “availability condition”). Third, the defendant must act with a particular motive, with regard to his decision not to further investigate. He must be motivated by a desire to avoid blame or liability for his actions (the “motivational condition”). This proposal picks out elements present usually in drug courier cases like Jewell, in that the drug courier is suspicious that the suitcase or trunk of his car contains drugs and his suspicion is warranted, the courier

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could easily open the suitcase or investigate the trunk\(^4\) and he is likely to be motivated by the desire to avoid criminal liability.

Second, we consider the proposal of Alan Michaels. In his view, contrived ignorance constitutes culpable blindness when the actor \textit{accepts} that he may be doing the action that is prohibited if done knowingly and acts nonetheless.\(^5\) Where a defendant would be willing to do the act if knew the relevant fact at issue (that the suitcase contains drugs, for example), he \textit{accepts} this outcome. Where he would not be willing to do so if he knew, he does not accept the outcome. On this view, the paradigm drug courier is culpable because, we assume, he would carry the suitcase even if he knew it contained drugs.

The third approach common in the literature is one that sees culpable blindness as a form of recklessness. Several commentators endorse this view, so I’ll simply refer to it as the recklessness account.\(^6\) According to the Model Penal Code’s [MPC] definition, an actor is reckless with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.”\(^7\) In many instances, a drug courier will be reckless and therefore culpable were culpable blindness conceived of as a form of recklessness. The courier is aware that the suitcase is very likely to contain drugs and risks bringing it into the country nonetheless. In most instances, there will be no justification for doing so. All drug courier cases may not be reckless, however. As Husak and Callender explain, one can imagine variants of the paradigm case where the courier is not in fact reckless according to the MPC’s definition of recklessness. In particular, where several couriers are each given a suitcase and told that only one of these contains illegal drugs, each courier is aware of less than a “substantial” risk that the suitcase he carries contains the contraband yet this case presents as compelling a case for culpability as the case of the single drug courier.

Larry Alexander, Kimberly Ferzan and Stephen Morse offer a way out of this particular dilemma while at the same time retaining the commitment to the view that culpable blindness is best conceived as a form of recklessness. They propose what they term a “unified conception of culpability” which amounts to recklessness without its substantiality prong. In their words: “Criminal culpability is always a function of what the actor believes regarding the nature and consequences of his conduct (and the various probabilities thereof) and what the actor’s reasons are for acting as he does in light of those beliefs. Recklessness, minus its substantiality of risk

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\(^4\) In \textit{Jewell}, this actually might have required slightly more than simply opening a case. The drugs were in a compartment in the truck that was sealed and somewhat concealed.

\(^5\) Michaels (1997-98).

\(^6\) Alexander, Ferzan, Morse (2008) and Robbins (1990) for example.

\(^7\) MPC 2.02. The MPC further provides: “The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.”
requirement, perfectly expresses these two dimensions of culpability.”

Using this account, the drug courier is culpable if he is aware of even a small possibility that he is carrying drugs into the country because there is no good reason for undertaking this risk. This modified recklessness account therefore succeeds in accounting for the classic case of culpable blindness, the drug courier.

III.

Any plausible theory of culpable blindness must explain and justify what makes the contrived ignorance of the drug courier culpable. Each account described above succeeds in doing so. We now turn to cases of contrived ignorance that are not culpable or are less culpable. In what follows, I show how the theories surveyed above fail to exclude these limiting cases and therefore fail as theories of when contrived ignorance constitutes culpable blindness.

In this section I will consider two hypothetical limiting cases: the criminal defense lawyer who refrains from investigating her client’s story and a doctor treating a patient who claims to be in pain. In my view, the actor in each of these cases is either significantly less culpable for doing the relevant action than a knowing actor or the actor is not culpable at all. At the same time, none of the theories of culpable blindness described above explains these intuitions. By focusing on what seems to justify the contrived ignorance of each actor, this section points the way to a new theory of culpable blindness.

a. The criminal defense lawyer

Rules of professional ethics in the United States prohibit lawyers from knowingly offering false evidence.9 The rules specifically identify knowledge as the relevant mental state with which the actor must act in order for her conduct to be prohibited. The comments to the ABA Model Rules of Professional Conduct [the Rules] thus make clear that a lawyer’s “reasonable belief that evidence is false does not preclude its presentation to the trier of fact.”10 In fact, the lawyer for a criminal defendant must allow the client to testify if she merely believes, but does

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8 Alexander, Ferzan & Morse (2008) at ___.

9 ABA Model Rules of Professional Conduct 3.3 (a) (3) provides that “A lawyer shall not knowingly offer evidence that the lawyer knows to be false.”

10 Comment [8] to ABA Model Rule 3.3.
not know, that the client’s testimony will be false. As with “knowledge” in criminal law, “knowledge” as defined by the Rules can be inferred from circumstances.

If the lawyer does know that the testimony the client intends to give will be a lie, the lawyer is faced with an ethical dilemma for which there is no easy answer. On the one hand, the ethics rules prohibit the lawyer from knowingly putting on perjured testimony. On the other hand, the rules require that the lawyer keep client confidences. While the confidentiality rules do have exceptions that would seem to permit disclosure of client fraud, traditional understandings of the ethical obligations of the criminal defense lawyer suggest otherwise. Indeed, Monroe Freedman argues that were lawyers to disclose client fraud to the tribunal without having first warned clients that confiding in their lawyer could lead to this result, the clients Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel are effectively violated. Whatever the merits of this argument, Freedman is surely right that a criminal defense lawyer faces a difficult ethical dilemma when faced with known client perjury. On one side of the dilemma are the lawyer’s obligations to zealously defend her client and to loyally maintain the client’s confidences. Moreover, the client has a right to testify (albeit not falsely) that the lawyer must take care to safeguard. On the other side are the lawyer’s obligations of candor to the tribunal and her obligation to refrain from assisting the client in perpetrating a fraud (here perjury).

Wouldn’t it be better for such a situation not to arise to begin with? When the lawyer learns information that suggests the client’s account is false, the lawyer has good reason not to investigate, even if doing so would be relatively easy. Because the lawyer can continue to represent the client without ethical strain if she suspects but does not know that her client’s account is false, the lawyer might well choose to remain ignorant. Investigation by the lawyer simply isn’t in the client’s interest in such a case. Of course, there may be some cases in which the lawyer judges that knowing all the facts is more important to providing a good defense for the client than avoiding too much knowledge. When that is the case, the lawyer ought to investigate. But this will not always be there case. Where it is not, the lawyer may well choose to remain ignorant.

The most extreme version of contrived ignorance by a lawyer would be where the lawyer effectively warns the client about the lawyer’s obligations of candor to the tribunal. It goes something like this: “Before you tell me what happened, I just want to let you know that I cannot put you on the stand if I know you are going to lie. While it is helpful for me to know everything that happened, and I am ethically required to keep what you say confidential, if I know that what you are about to say will be a lie, I cannot allow you to testify. If I know you

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11 The Rules provide that the lawyer may refuse to put on testimony that she believes is false with one exception. The lawyer for a criminal defendant may not refuse to offer testimony by her client that she believes is false. Add cite.

12 ABA Model Rule 1.0 provides the following definition: “‘Knowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of a fact in question. A Person’s knowledge may be inferred from circumstances.”

13 Cite.
have lied on the stand, I may even have to tell the judge. But, if I only believe that you will lie (or have lied) but don’t know for sure, I can continue to defend you as best I can. Do you understand what I’m saying?” This speech is surely an example of contrived ignorance. It is a deliberate attempt to shield the lawyer from knowing whether or not the account her client offers on the stand is true or false. As a result, the lawyer avoids knowingly putting on perjured testimony.

Is the criminal defense lawyer who refrains from gathering available information that might make clear whether the client is lying culpably blind?

The criminal defense lawyer faces a difficult ethical quandary. She owes her client loyalty and confidentiality and she owes the tribunal candor. Moreover as a lawyer for a criminal defendant, she must refrain from concluding that her client is lying without very convincing evidence. The fact that U.S. ethics rules require the lawyer for a criminal defendant to permit her client to testify when the lawyer reasonably believes but does not know that the client is lying mirrors the “beyond a reasonable doubt” standard used for convicting criminal defendants. A criminal defense lawyer who refrains from investigating her client’s story, perhaps even one who gives her client “the speech” when faced with a client she suspects is lying, thus both acts in a way that justifiably balances competing obligations to the client and to the tribunal and acts in a way that accords with the balance that governing ethics rules and evidentiary standards appear to strike between protecting the rights of the criminal defendant and the safety of society. In other words, her decision is (at least) a plausible resolution of competing ethical demands and a reasonable interpretation of governing legal standards.

According to the three views sketched above, what matters in assessing whether contrived ignorance constitutes culpable blindness is either whether: a) the actor has a warranted suspicion that he risks doing the act, could easily find out more, and is motivated by a desire to avoid criminal liability; b) the actor acts with a mental state of acceptance about whether he does the prohibited act; or c) the actor is reckless regarding whether he does the prohibited act. Each of these accounts treats the contrived ignorance of the lawyer giving her client the speech as culpable. In failing to distinguish this limiting case, each of the accounts is flawed as a theory of culpable blindness.

Husak & Calender’s three-part test is promising but fails distinguish this limiting case. The lawyer who refrains from investigating her client suspects that her client might be lying and that suspicion is often warranted. Second, the lawyer could easily be better informed. Moreover, she is likely motivated at least in part by the desire to avoid sanction for knowingly putting on perjured testimony. This example illustrates an ambiguity in how we ought to think about motivation here and shows the difficulties that would inhere in employing it. Should we say of the lawyer who thinks seriously about how to balance her competing ethical duties that she is motivated to comply with her professional role (a morally good motivation I assume) or that she is motivated to do the best she can for her client while avoiding professional discipline for going too far. Even the latter doesn’t sound blameworthy yet it too is an instance of trying to avoid punishment.

This ambiguity regarding how to describe the motivation, and even what motivations suggest culpable blindness, illustrates clearly the way in which Husak & Callender’s approach is
flawed. Their approach focuses on the subjective motivation of the actor – does she opt for ignorance in order to avoid criminal liability (or here professional sanction). The purpose of the motivation criterion in their account is to distinguish the culpably blind drug courier from his more careless counterpart. This “motivational condition” is important, according to Husak & Callender, because “the wilfully ignorant defendant must have a given motive for remaining unaware of the truth – he must consciously desire to preserve a possible defense from blame or liability in the event he is apprehended… [h]is failure to gain more information cannot be due to mere laziness, stupidity, or the absence of curiosity.” (Husak and Callender (1994)) While the motivation criterion does capture the central case (the drug courier) and avoid another limiting case (the careless actor), it fails to distinguish the limiting case of the lawyer described above.

The lawyer who refrains from investigating her client is not blameworthy and surely not as blameworthy as a lawyer who knowingly puts on perjured testimony even though she may well be motivated to avoid professional discipline because she deliberately avoids knowledge for a justifiable reason. Her professional role obligations provide a good reason for her to choose blindness. This view differs from Husak & Callender’s by focusing on objective justification rather than subjective motivation. According to the view I propose, it doesn’t matter whether the lawyer is motivated to avoid discipline (which some may be) or motivated to serve her client zealously or motivated to strike a balance between competing ethical demands. What matters is that professional obligations of loyalty and confidentiality constrain the lawyer’s actions in ways that are relevant here.

To see the flaw in the motivational approach from the other side, consider the case of a gang member committed to the internal norms of the gang. Call him the “romantic gang member.” According to these norms, let’s suppose, good gang members never question the actions of the boss. The romantic gang member may have a warranted suspicion that the package he is asked to carry contains illegal drugs. He may easily be able to confirm or dispel his suspicion by looking inside. Yet he refrains from doing so because he is motivated to conform his actions to those of the ideally loyal gang member rather than because he wishes to avoid criminal penalty. In such a case, Husak and Callender’s account would conclude that the romantic gang member’s contrived ignorance is not culpable blindness because he is motivated by loyalty to the gang rather than the desire to avoid punishment. This cannot be right.

The acceptance approach fares no better. According to the acceptance approach, the lawyer’s contrived ignorance constitutes willful blindness if and only if the lawyer would put her client on the stand if she knew he was going to lie. According to Michaels, the morally relevant factor is the lawyer’s attitude toward the state of affairs itself, here, client perjury. Michaels offers acceptance as an additional mental state to supplement the classic four and thinks one of its virtues is that it accommodates our uncertainties about when and whether contrived ignorance is culpable. The acceptance view fails to capture our moral intuitions about the lawyer because the criminal defense lawyer in the case we are considering may be indifferent to client perjury in just the way that Michaels suggests is culpable. In defining acceptance, Michaels is careful to make clear that “[a]lthough the mental state of acceptance is identified by a hypothetical question – would you have done it had you known – the mental state itself is actual, not hypothetical” and that acceptance “defines a particular level of indifference toward the result or circumstance – a
particular level of not caring.” If we take Michaels at his word about how to interpret the counterfactual question, it is meant to uncover whether the actor cares about the event rather than to assess what she would have done under different circumstances. Our lawyer may not care much about client perjury precisely because that is not how she conceives of her role within the adversary system. She cares about doing the best she can for her client. Admittedly there are boundaries that constrain how she can pursue this end and these boundaries prohibit her from knowingly putting on client perjury. What Michaels’ approach misses is the moral difference her involvement in client perjury might make to the lawyer. The acceptance approach would yield the odd result of making it the case that the lawyer who does care more in general about perjury would not be blameworthy for her contrived ignorance but another lawyer who takes a different view about the lawyer’s role and so does not concern himself with perjury generally would be – Monroe Freedman perhaps. This difference in attitude toward perjury fails to track any compelling reason to punish the second lawyer but not the first.

Lastly, consider the recklessness account. The criminal defense lawyer is surely aware of a relatively high probability that her client may lie on the stand. After all, that’s why she refrains from investigating or gives her client the speech in the first place. In order to be reckless, taking this risk must be unjustified. It is unclear how a recklessness account would even assess this. The idea of recklessness would suggest that this inquiry would proceed case-by-case, so that sometimes lawyer’s decisions not to investigate would be reckless and sometimes not. But such an approach misses something important about the role-based obligation that governs the criminal defense lawyer. If the lawyer owes the client a duty that would be compromised by investigation (because it could jeopardize the client’s interests), then this would apply in every case.

b. The Doctor Treating a Patient in Pain

The second scenario I consider is the doctor treating a patient who reports to be in pain. There are many patients with chronic non-cancer pain. Previously, these patients went untreated or inadequately treated. Increasingly many doctors are willing to treat these patients with opium-based narcotics which are safe and effective, even at high doses. The reason to highlight the fact that these are non-cancer patients is that such patients often have no significant symptom other than pain and so lack the ability to demonstrate to their physicians or others both the fact that they are in significant pain or the severity of that pain. The abuse and resale of these same medications (“drug diversion” as it is called) is also a growing problem in the U.S. As a result, prosecutors are looking increasingly closely at physicians and their prescribing practices as part of the “war on drugs.” United States federal law prohibits any person from knowingly distributing a controlled substance in an unauthorized manner. Physicians are authorized to prescribe these medications so long as they do so for a “legitimate medical purpose.”


15 I will not present data to support these claims here. Those interested can consult my article on the topic. Hellman (2008). For the purposes of this Article, it does not matter whether this case is representative of real cases or is instead a hypothetical.

16 Controlled Substances Act, 21 U.S.C. s. 801 et. seq.
the statute is far from clear as it pertains to when physicians can be prosecuted for drug trafficking, let us assume for our purposes here that a physician violates the statute if he prescribes narcotics to a person he knows is reselling the drugs. In several recent U.S. cases, judges have acceded to the requests of prosecutors for jury instructions that provide that the defendant may be convicted for knowingly prescribing drugs in an unauthorized manner if the jury finds either that the doctor knew the patient was reselling or if the jury concludes that the doctor was willfully blind to this fact.17

Doctors who are willing to treat chronic pain patients with high doses of opium-based drugs can become magnets for other patients. Some of those who come are legitimate patients who have suffered for long periods and have, up until then, been unable to find doctors willing to prescribe enough medication to provide them with the relief they need to be able to return to work and to the social world. Others are pseudo-patients, who fake symptoms of pain in order to get prescriptions for drugs they can they sell on the street.

Doctors are often justifiably suspicious about individual patients. The patient may repeatedly claim to have lost her prescription. The pharmacist may report that she saw the patient hand the bag containing the prescription to someone else in the pharmacy parking lot. The patient may use the prescription up far more quickly than the doctor anticipated and thus come back early to ask for more. Nonetheless, the physician may decide not to investigate. He could, if he were so inclined, take steps to verify whether his patients are diverting the drugs. For example, one physician treating patients in pain reports that he calls patients randomly between appointments and requires that they report to his office or to a pharmacy within two hours for a urine test or pill count.18 Urine tests will show whether the patient is actually taking the medication prescribed. Alternatively, the physician could require that patients come in weekly for urine screens, could require psychiatric evaluations, or could simply refuse to continue to treat the patients he suspects may be reselling the drugs.

Doctors treating patients who claim to be in pain may decide not to pursue these or other methods to confirm or dispel their suspicions for a number of reasons. Some doctors believe that a physician treating a vulnerable pain patient ought to demonstrate trust in the patient because many such patients have spent years being treated with suspicion and disrespect by doctors. In other words, these doctors believe that the obligations of the doctor-patient relationship require an attitude of trust. Other doctors may simply find investigative actions either too intrusive or too distasteful. Others may think that investigating patients is properly the role of police not


doctors. Still others may want to avoid the difficult choice between knowingly prescribing to patients who resell the drugs and dropping a lucrative patient.

While there are many possible motives we can ascribe to doctors in such cases, the contrived ignorance of the doctor treating a patient in pain is, in my view, a limiting case. Even the doctor motivated to avoid further inquiry by his desire to keep a paying patient in his practice acts in accord with a justified conception of the role of the doctor in making this choice. Each of the options open to the doctor to confirm or dispel his suspicion involves an intrusion into the doctor-patient relationship. In most cases, the patient would be aware of the doctor’s action, thereby damaging the trust she feels in her doctor. Pain patients are often uniquely vulnerable as extreme pain is debilitating. Because there are so few doctors willing to treat chronic pain patients, these patients may feel especially vulnerable vis-à-vis the sole doctor they have found who is willing to help them. Learning that her doctor is questioning her truthfulness or trustworthiness could be very damaging to the patient’s self esteem and sense of security. Second, some of the methods physicians could use to verify their suspicions could physically harm their patients. Patients in pain often live very restricted lives such that making extra trips to the doctor’s office on short notice would be difficult and could hurt their precarious health. Discussing suspicions with pharmacists could impede the patient’s ability fill her prescriptions at convenient places. Because the doctor owes a duty to act in the best interests of his individual patients, the doctor acts rightly in choosing not to further investigate his patients.

If the contrived ignorance of the doctor treating a patient who claims to be in pain is a limiting case, we now look at each of the three approaches to culpable blindness to see whether any can accommodate this moral intuition.

First, we look at the Husak & Callender’s account. According to Husak & Callender, contrived ignorance constitutes culpable blindness if the actor is suspicious of the relevant fact and that suspicion is warranted, if the actor could easily verify his suspicion and finally if he is motivated to choose ignorance in order to evade punishment. The contrived ignorance of the doctor treating the patient who claims to be in pain easily satisfies the warranted suspicion criterion. As I set up the example (a hypothetical based on real cases), the doctor has good reason to suspect that his patient is reselling the drugs.

The second criterion offered by Husak & Callender is availability – the actor must be able to easily confirm or dispel his suspicion about the relevant fact. It is more difficult to assess whether the doctor could easily verify his suspicion and this difficulty reveals a problem with the availability criterion offered by Husak & Callender. Most of the actions the physician could take to verify whether the patient is reselling (requiring random urine testing for example) are reasonably easy to adopt if by “availability” Husak & Callender refer to whether the actions require work, cost or danger. The problem is that they would be disruptive to the doctor-patient relationship. And this is a cost that the doctor rejects. Of course, were the courier to investigate the package he carries, this too might be disruptive to the relationship he has with the person who paid him to carry it. If the courier cannot look in the package without it being obvious that he has done so (breaking a lock, for example), would this indicate that the availability criterion in Husak and Callender’s test is not satisfied? This comparison suggests that availability is not simply a factual matter but rather requires evaluation of whether one ought to incur such costs,
given the circumstances. In other words, the Husak & Callender account can not use the concept of “availability” in the straightforward way that they suggest.\textsuperscript{19} It surely matters whether the actor can investigate and how difficult such investigation would be. But whether these costs are ones the actor should incur depends on the reasons that count in favor of taking them as compared to the reasons not to do. The costs to the doctor-patient relationship provide the doctor with a good reason not to investigate that the costs to the drug courier-kingpin relationship do not. Thus “availability” bleeds into justification in way that makes the Husak & Callender approach ultimately unhelpful.

The final element of the Husak & Callender test for culpable blindness focuses on the motivation of the actor. According to Husak & Callender, the “willfully ignorant defendant must have a given motive for remaining unaware of the truth – he must consciously desire to preserve a possible defense from blame or liability in the event that he is apprehended.”\textsuperscript{20} Applying this element of their test for culpable blindness will yield the result that for some doctors who prescribe to patients they suspect of reselling drugs, culpable blindness instructions will be appropriate. But for others they will not. The doctor who decides not to take actions to verify his suspicion that his patient is reselling \textit{because} he wants to be able to continue to collect fees from this patient services would be blameworthy, as his contrived ignorance would constitute culpable blindness. The doctor who decides not to take actions to verify similar suspicions \textit{because} he believes that a doctor treating a patient in pain ought not to jeopardize his patient’s trust and the relationship by taking actions to disrupt that relationship would not be blameworthy, as his contrived ignorance would fail the motivational criteria of culpable blindness.

This seems an odd and counter-intuitive result. I do not mean here to take a position in current debates about the relevance of intentions to moral permissibility generally, nor to the role they do or ought to play within criminal law.\textsuperscript{21} Rather, I rely on a more limited and I hope widely shared moral intuition that the intention of the doctor ought not to matter in the above pair of cases for two reasons. This case is remarkably similar to the well-known example offered by Judith Thompson in arguing against the relevant of physician-intentions in the case of assisted-suicide. She describes two doctors, each of whom is considering whether it is morally permissible to give a drug to a suffering, dying patient who requests it where the drug will

\begin{footnotesize}
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\item \textsuperscript{19} Husak and Callender define the “availability condition” in the following way: “If a defendant has the means to learn the truth (or to gather more evidence) about the significance of his actions and is aware of these means, his failure to act on these suspicions is a plan sign of wilful ignorance.” Husak & Calendar (1994) at 40.
\item \textsuperscript{20} Husak & Callender (1994) at 40.
\item \textsuperscript{21} In a recent article, Doug Husak challenges the view that intentions are not relevant to moral permissibility in part by showing the dramatic and untenable consequences of such a view for criminal law. See Husak (2008). Alec Walen responds that Husak has overstated the commitment that moral philosophers have to the irrelevance of intentions. In Walen’s view, most moral philosophers believe that intentions do not have the moral force that the Doctrine of Double Effect alleges. Walen (2008).
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provide pain relief but also cause his death. One doctor gives the patient the drug with the
intention of following the patient’s wishes. The other gives the patient the drug with the
intention of killing him (the patient is this doctor’s professional rival). If the patient requests the
drug, the drug is the only way to provide palliation to a patient in pain, the patient is dying, then
providing the drug is the right thing to do, whatever the motivation of the doctor. Similarly, the
doctor’s intentions in the contrived ignorance case we are considering aren’t relevant because the
distinction between intending and foreseeing does not have the moral force that the Doctrine of
Double Effect [DDE] suggests in this context. Second and again like in the pair of doctor cases
Thomson describes, the pain doctor’s obligations as a doctor require him to act in certain ways
such that his intentions, even if relevant at some level, are of less moral significance than his
professional duty. The doctor is obligated to provide palliation to his dying patient and this
obligation trumps any inhibitions that spring from his bad motives. Similarly, the pain doctor is
morally required to refrain from investigative action. This moral duty applies whether or not the
doctor is motivated to comply by his awareness of the happy circumstance that compliance will
shield him from prosecution for prescribing drugs to a patient who resells them. The Husak &
Callender approach thus fails to exclude the limiting case of the doctor treating a patient who
claims to be in pain.

The acceptance view also fails to accommodate this limiting case. The physicians who
treat chronic pain patients recognize and accept that some percentage of their patients is likely to
be diverting drugs. The doctor refrains from knowingly prescribing to a patient who is reselling
because prescribing in this context is not the practice of medicine. While the doctor would
refrain from prescribing if he knows the patient is reselling, this is not because he cares about
curtailing drug dealing but rather because his prescribing in such an instance does not fall within
his own understanding of medical practice. If Michaels’ test is meant as a way to assess whether
the actor cares about the result, then using it will lead to the conclusion that the doctor is
culpably blind. Like the lawyer in the previous section, it is his connection to the action that
matters to the doctor. The acceptance view has no way to capture this intuition.

Lastly, we consider the recklessness account. Does the doctor act recklessly in
continuing to prescribe to a patient he suspects is reselling the drugs? Possibly not. A doctor
treating pain patients some of whom turn out to be diverting drugs could offer the following
defense of his conduct. “My actions weren’t reckless because while I was aware that there was a
substantial likelihood that patient X was reselling drugs, I was justified in continuing to sell to
her (risk the harm) because the importance of not cutting off someone whom I mistakenly judged
to be a diverter but was really a legitimate patient outweighs the harm to society of continuing to
sell to a person who resells these drugs.” And the doctor might be right. Suppose that he
suspects with a high degree of certainty that his patient is reselling drugs. Further, suppose the
doctor is wrong and his patient is not reselling but legitimately needs the drugs to curb her
crushing pain. If so, then failing to prescribe to her will cause terrible harm. Because this harm
may be significantly greater (failing to relieve awful suffering) than the harm caused by
facilitating access to users or dealers, the doctor’s action is not reckless. And this is so even
when the likelihood that the patient is reselling is significantly greater than the likelihood that
she is legitimately in need.
At first blush then it seems that the recklessness account aptly distinguishes this limiting case. And sometimes it will, but not always. The conclusion that the doctor in the above scenario is not reckless depends on an assessment of the relative harm of failing to relieve the suffering of the legitimate patient as compared to the harm to users and society of facilitating the dissemination of illegal drugs. If the harms of cutting off a legitimate patient are outweighed by the harms caused by drug diversion (which of course depends on how harmful diversion is in fact), then the doctor would be reckless in continuing to prescribe in some cases where he thinks the patient is very likely diverting drugs.

But the doctor may still not be blameworthy for doing so. The doctor qua doctor is obligated to weigh the interests of his patient more heavily than the interests of society. The recklessness account, in contrast, envisions a neutral evaluation of the costs and benefits of each course of action. However, the role of the doctor directs him to adopt a biased perspective, one that weighs the patient’s interests more heavily than those of society at large. So while it may be reckless in some circumstances to continue to prescribe, where the evidence of diversion is quite strong and the harms of diversion great, the doctor may still be justified in choosing ignorance because of the special obligation his professional relationship gives him and the duty it imposes to put the concerns of his patient first.

A defender of the recklessness account might reply that the conception of recklessness I’ve described above is overly narrow and that an appropriate conception of recklessness is capacious enough to accommodate the special obligations of the actor. This may be right but in order for recklessness to accommodate this case, it must be stretched in a significant way. The doctor deciding whether it is reckless to prescribe to a patient he suspects is diverting drugs must consider not only the harms to the patient if his wrong (calibrated by the likelihood that he is wrong) as compared to the harms to society of drug diversion if he is right (calibrated by the likelihood that he is right) but also the doctor must adjust this calculation to take into consideration his special obligation to weigh his patients interests more heavily than those of society. Thus the concept of recklessness must expand to allow actors to consider special role-based obligations in deciding whether risks are justified.

IV.

When does contrived ignorance constitute culpable blindness? Contrived ignorance constitutes culpable blindness when the actor’s blindness about the relevant fact is not justified. The criminal defense lawyer is not culpably blind because his professional role obligations of confidentiality and loyalty to his client justify his decision to opt for blindness about whether his client’s story is true. The doctor treating a patient in pain is not culpably blind because his obligation to trust his patient justifies his decision not to question or investigate his patient. The person paid a large sum of money to carry a package is culpably blind regarding carrying drugs into the country because he lacks a justification for remaining blind to its contents where he suspects what it contains.

22 I am grateful to Alec Walen for pressing this objection.
The proposed test is objective so the mere assertion of a professional role obligation or other justification will not suffice. The role obligation the actor appeals to must both be a real obligation of that professional role and the role itself must be morally justified. The drug courier cannot appeal to his role obligation as a mule in a drug gang, notwithstanding the fact that a good mule is one who does not investigate the contents of the packages he is asked to carry. Even were “drug trafficker” a profession, it is not a morally valuable profession so that appeal to the role obligations it gives rise go cannot provide a justification for actions within the role. Lawyers and doctors, by contrast, are valuable social roles and thus are able to provide moral justifications for the actions that these roles require.23

There are limits to this justification even in the context of valuable social roles. Given the corporate scandals of the last decade or so, one cannot claim that lawyers have a good reason to opt for blindness about whether they assist client misdeeds without thinking about how appeals to professional roles have been used to justify lawyer facilitation of serious financial crimes by their clients. In fact, the “Sarbanes-Oxley” legislation can be seen as one reaction to appeals to professional role obligations by lawyers to justify their facilitation of client fraud.24 These situations are further complicated by the corporate nature of the client and Sarbanes-Oxley deals with this specifically by detailing when legal counsel must report suspected wrongdoing up the corporate ladder. A detailed analysis of whether a corporate legal counsel’s contrived ignorance to signs of client fraud constitutes culpable blindness would clearly require a more careful analysis. What this example demonstrates are two ways in which the appeal to professional role obligations can fail to justify the contrived ignorance at issue. First, we can ask whether a sort of blind trust is an important part of the role of the professional in that context. Here it is easy to see how that question might be answered differently in the context of a criminal defense lawyer for an individual client and a corporate legal counsel acting to aid the client to achieve a possibly illegal end. Second, even if trust is an important part of the professional role in that context, appeals to professional role can only justify risking so much. Where great harm is at stake, the lawyer or doctor’s role obligation to refrain from investigating will not be sufficient to justify risking this harm. In the case of massive corporate scandals, this limitation may also apply.

The view I propose differs in significant ways from the alternatives. As argued earlier, my view (call it the “Justification” approach) rejects the “availability” prong of Husak &

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23 An account of how the roles of doctor and lawyer can justify actions which would be prohibited if done outside of professional role clearly would require more detail. David Luban and Arthur Applbaum present such views. See Luban (1988) and Applbaum (1999).

24 Interestingly, the Sarbanes-Oxley Act of 2002, imposes very moderate obligations on lawyers. While corporate lawyers have an obligation to report wrongdoing “up the ladder,” they have no obligation to disclose it outside of the corporation itself. And specifically, the lawyers must investigate suspected client wrongdoing when they “become aware” of evidence of material wrongdoing. See Cramton, Cohen, Koniak (2004).
Callender’s test because either Husak & Callender are wrong about the fact that “availability” is a criterion of culpable blindness or the concept itself includes the sort of evaluation proposed by the test I propose. If “availability” refers to the simple factual question of whether the information is accessible to the actor, then the doctors and lawyers satisfy this criterion too – which is problematic if these are limiting cases. Alternatively, “availability” contemplates an evaluation of whether the difficulties or costs are ones that the actor ought to bear. In that case, availability fades into an assessment of justification.

The view I propose also rejects Husak & Callender’s “motivation” criterion. For the reasons I offered above, we ought instead to ask whether there are good reasons for the actor to choose blindness rather than focusing on what reasons the actor actually acted upon in choosing blindness.

Finally, and most controversially, my view rejects the focus on the awareness of risk that is hallmark of the recklessness account. Awareness should not be seen as a static fact. It is the product of a process that is influenced by some factors that ought not to affect culpability (cognitive reasoning ability) but by others that should (epistemic partiality). The first is not relevant to whether blindness is culpable but the second sometimes is. But not always. Sometimes reasoning in a manner not aimed at truth is justified. Sarah Stroud and Simon Keller present interesting accounts of the way in which friendship does and should produce just such epistemic partiality. As Stroud and Keller each explain, friendship entails an obligation to see the friend is the best possible light. Similarly, the doctor treating a patient who claims to be in pain may not be aware that his patient is reselling the drugs even though he is aware of facts that would alert most other doctors to this possibility. Here the doctor is disposed to trust his patient in the way that friends are disposed to trust friends, to believe the best of them, to search for alternative explanations for revelations that cast a friend in a bad light. The fact that neither the friend nor the doctor reasons in a manner aimed at arriving at truth may be justified by the goods that friendship and the role of doctor, so defined, provide.

Compare the following two cases. In each case, a person offers another a large sum of money to carry a package from a drug-producing country into the U.S. In the first, the offeree is a person whose judgment is clouded by the desire to make money. Though he is a competent reasoner, he really is unaware that the package he is asked to carry may contain drugs. He is unaware because his desire to believe the business proposition is legitimate makes him more likely to search for alternative explanations for facts that point to this as drug dealing, more disposed to believe the best of the person who offered him this job. In the second, the offeree is a friend of the offeror and her judgment of her friend is clouded by her desire to believe the best of her friend. Though she is a competent reasoner, she really is unaware that the package she is asked to carry by her friend may contain illegal drugs. She is unaware because her desire to believe the best of her friend makes her more likely to search for alternative explanations for damaging facts, more disposed to believe the best of her friend. According the view I propose,


26 These are the sorts of factors identified by Stroud as making up the epistemic partiality of friendship. Stroud (2006).
the first actor is culpable because his blindness is not justified while the second may not be because the value of friendship justifies the epistemic partiality it entails.

The blindness at issue in these cases clearly is not willful or contrived, or at least not in any straightforward sense. Perhaps then it ought not be considered a form of contrived ignorance at all. Interestingly, in the most well-known of the prosecutions of physicians treating chronic pain patients, that of Dr. William Hurwitz of Virginia, defense counsel challenged the inclusion of willful blindness instructions because the prosecution had not alleged that the doctor took or refrained from any actions that would have verified his suspicions of client drug diversion. Instead, the prosecution alleged only that the doctor failed to draw the obvious inference from the known facts. Because willful blindness is now being used to refer to this sort of inferential blindness, it is important to consider whether this ignorance is also culpable blindness. Moreover, the judge in this case and others may not be misguided in considering this a possible case of culpable blindness. The manner in which mental states are arrived at is also relevant to judgments of culpability.

The obvious objection to this view would question whether we should judge an actor culpable for doing these actions (importing drugs, for example) if he isn’t even aware that he risks doing so. Awareness does matter but rather than assess it at the time the actor does the prohibited action, we must instead ask whether the actor is aware of this risk when he a) decides not to investigate or b) cultivates the epistemic partiality that leads to his latter blindness.

An actor is culpably blind then if his blindness is unjustified. Blindness is justified when the reasons to remain ignorant outweigh the reasons to investigate, all things considered. Availability is one of the factors that affect justification on this view. If one is suspicious of the relevant fact and decides not to investigate, this is to deliberately choose blindness. If there are no good reasons for doing so, this blindness is culpable. Where one is not suspicious of the relevant fact, the analysis is more complicated. It may well be that lack of suspicion is exonerating, but not always. Where the actor earlier cultivates an attitude of epistemic partiality with regard to this kind of information, this belief-formation process can also be examined as a form of contrived ignorance. Where this epistemic partiality is justified by professional role or good reason, the blindness is not culpable. But where it is not justified, the contrived ignorance is culpable blindness.

This last case may well describe the elaborate corporate structures that are designed to ensure that those at the top never receive certain information generated by workers down below. As David Luban describes, explaining why the MPC’s requirement that an actor be aware of a

27 Hurwitz’s lawyers argued to the trial court that this divergence from the classical notion of willful blindness made the giving of such instructions inappropriate: “[w]illful blindness requires affirmative steps to avoid knowledge … not merely the defendant’s failure to see that which is ‘obvious.’” Hurwitz’s Willful Blindness Brief at 2.

28 In that case, the government argued that the willful blindness instruction was appropriate because Hurwitz “repeatedly, and deliberately, ignored the obvious implications of what he learned about his patients.” Government’s Willful Blindness Brief/Hurwitz at 1.
high probability of the relevant fact will fail to capture the contrived ignorance of the sophisticated corporate executive:

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

If awareness of possible wrongdoing is necessary for culpable blindness, then these actors lack it. But if instead we ask whether the cultivation of blindness, here a corporate analogue to the epistemic partiality discussed above, is justified, we conclude no. The result, this contrived ignorance is also culpable blindness.

Let me end by noting that although professional role obligations are perhaps the most clearly defined type justification for blindness that an actor might assert because there are often codes of professional conduct one can appeal to, they are not the only obligations that can justify an actor’s contrived ignorance. Other special relationships give rise to obligations that may also call for blindness. For example, what should we say about parents who fail to investigate signs that their troubled teens are becoming dangerous because they decide that good parents ought not to invade their teenage children’s privacy or because they have cultivated an attitude toward their children that leads them to see their children in the best light? These are compelling reasons. But where great harm is at stake, they may not be strong enough. I take it that a case such as this raises difficult and controversial questions.

References


29 Luban (1999) at 962.


