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Rollin M. Perkins

"Knowledge" as a Mens Rea Requirement

By ROLLIN M. PERKINS*

During the growth of the common law a word used to represent a certain concept sometimes, over the course of years, developed a meaning of its own. The word "break" offers a good example. Common-law burglary, by definition, is the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony.[1] But the word "breaking" in the law of burglary does not have its usual meaning. It may well have in very ancient days, but in time it came to include much more. "It is not necessary that splinters fly to have a breaking," said one court[2] to emphasize the point, adding that "opening a closed door, effecting an entrance thereby, is a breaking."[3] Even broader is the significance of the word in the civil law of trespass. "Passing an imaginary line is a 'breaking of the close,' and will sustain an action of Trespass *quare clausum fregit*."[4] Hence it is a mistake to assume that a word, long used in the common law for a certain purpose, must necessarily have its customary meaning.

A word requiring particular attention in this regard is "knowledge," or its equivalent "knowingly" or "knowing," used to represent the mens rea requirement of certain offenses, such as receiving stolen property knowing it to be stolen, knowingly uttering a forged instru-

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* Connell Professor of Law Emeritus, UCLA; Professor of Law Emeritus, The University of California, Hastings College of the Law.

1. "A burglar . . . is by the Common law a felon, that in the night breaketh and entreth into the mansion house of another, of intent to kill some reasonable creature, or to commit some other felony . . . ." 3 COKE, INSTITUTES *63.

2. United States v. Evans, 415 F.2d 340, 342 (5th Cir. 1969).

3. *Id. Accord,* Luker v. State, 552 P.2d 715, 718 (Okla. Crim. App. 1976) ("opening of a closed door in order to enter a building may constitute a breaking").

4. State v. Boon, 35 N.C. 244, 246 (1852).

ment, designedly and knowingly obtaining the property of another by false pretenses, receipt of a deposit by a banker knowing his bank is insolvent, transporting a stolen motor vehicle in interstate commerce knowing it to have been stolen, or knowingly transporting a female person in interstate commerce for the purpose of prostitution or other immoral purpose.

"Absolute knowledge can be had of very few things," said the Massachusetts court,[5] and the philosopher might add, "if any." Hence we may be sure that not so much will be required for the mens rea of any offense. There is a trace of authority for the objective test of "knowledge" where this is required for guilt. That is, that one is regarded to have known what should have been known because a reasonable person in like circumstances would have known. Thus it has been said that

> the word "knowing" in its relation to receiving stolen goods means that, if a person has information from facts and circumstances which should convince him that property has been stolen, or which should lead a reasonable man to believe that property had been stolen, then in a legal sense he knew it.[6]

This is quite unsound. It may be within the legislative power to provide for the punishment of one who receives stolen property knowing it is stolen, or having reasonable cause to believe it is stolen,[7] but it is not proper to give this interpretation to a statute which speaks only in terms of "knowledge" or "knowing."[8] As said by Judge Learned Hand:

> The receivers of stolen goods almost never "know" that they have been stolen, in the sense that they could testify to it in a court-room. The business could not be so conducted, for those who sell the goods — the "fences" — must keep up a more respectable front than is generally possible for the thieves. Nor are we to suppose that the thieves will ordinarily admit their theft to the receivers: that would much impair their bargaining power. For

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5. Story v. Buffum, 90 Mass. (1 Allen) 35, 38 (1864).

6. Pettus v. State, 200 Miss. 397, 410, 27 So.2d 536, 540 (1946). The clear weight of authority is otherwise. *See* State v. Aschenbrenner, 171 Or. 664, 671, 138 P.2d 911, 914 (1943) (citing cases).

7. *E.g.*, Holmes v. State, 568 P.2d 316 (Okla. Crim. App. 1977); Hutton v. State, 494 P.24 1246 (Okla. Crim. App. 1972). *But see* People v. Johnson, ___ Colo. ___ 564, P.2d (1977) (such a statute unconstitutional).

8. State v. Beale, 299 A.2d 921 (Me. 1973).

> this reason, some decisions even go so far as to hold that it is enough, if a reasonable man in the receiver's position would have supposed that the goods were stolen. That we think is wrong; and the better law is otherwise, although of course, the fact that a reasonable man would have thought that they had been stolen, is some basis for finding that the accused actually did think so.[9]

This emphasizes both that "knowledge" or its equivalent as a mens rea requirement must be determined by a subjective test and also that it does not require what is ordinarily meant by the word. Both points were emphasized also by the Massachusetts Supreme Court in reversing a conviction based on the objective test. It said:

> The infraction of this statute is not proved by negligence nor by failure to exercise as much intelligence as the ordinarily prudent man. The statute does not punish one too dull to realize that the goods which he bought honestly and in good faith had been stolen . . . . The knowledge or belief of the defendant must be personal to him and our statute furnishes no substitute or equivalent.[10]

In other words, it is not sufficient that one who receives stolen property does so under circumstances which should make him realize that it has been stolen, but if he receives it under the belief that it has been stolen, he has "knowledge" of this fact within the common-law interpretation.[11] The second point has been emphasized in various ways. "It is sufficient if the facts are such as to cause an actual belief that the property was stolen."[12] "That guilty knowledge, or its equivalent,

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9. United States v. Werner, 160 F.2d 438, 441-42 (2d Cir. 1947) (footnotes omitted).

10. Commonwealth v. Boris, 317 Mass. 309, 315, 58 N.E.2d 8, 12 (1944). *Accord,* Schaffer v. United States, 221 F.2d 17, 23 (5th Cir. 1955).

11. The question is what did the defendant know or believe. State v. Ebbeler, 283 Mo. 57, 222 S.W. 396 (1920).

12. Lewis v. State, 81 Okla. Crim. 168, 172, 162 P.2d 201, 203 (1945). *See also* Camp v. State, 66 Okla. Crim. 20, 23, 89 P.2d 378, 380 (1939). "[I]t is sufficient if the circumstances accompanying the transaction be such as to make the accused believe the goods had been stolen." People v. Rife, 382 Ill. 588, 596, 48 N.E.2d 367, 372 (1943). "Proof of actual or direct knowledge is not required, but facts and circumstances must be proved sufficient to create in the mind of the accused a belief that the goods were stolen." People v. Kohn, 290 Ill. 410, 418-19, 125 N.E. 293, 297 (1919). In a charge of receiving property stolen from interstate commerce, it was held to be reversible error to charge that it was not necessary to prove that the defendant "actually knew" it was stolen property. United States v. Fields, 466 F.2d 119 (2d Cir. 1972). But this was to insist on the subjective test of knowledge rather than what is included within the term.

guilty belief, is of the gist of this offense, has been declared by many decisions . . . ."[13] And the same is true in case of other offenses having "knowledge" as the mens rea requirement. Thus one "knowingly" obtained property by false pretenses if he knew or believed that his representation was false;[14] knowledge "or belief of the counterfeit character of the money is an essential element of the crime of passing counterfeit money . . ."[15] and belief of the forgery is sufficient for guilt of uttering a forged document.[16]

A recent Colorado case is of particular interest. A statute providing punishment for receiving property knowing it to be stolen was amended to read, "A person commits theft by receiving when he receives . . . anything of value of another knowing or believing . . . said thing had been stolen . . . ." This was held to authorize conviction of one who received property, believing it was stolen, although it never had been stolen.[17] The holding is quite logical. If it had been desired to punish the receiver who believed the property was stolen, only when it actually was stolen, no change in the statute was needed.

The holding that "knowledge," as a mens rea concept, includes a guilt belief, does not exhaust its meaning. Circumstances sometimes cause a person to realize that what he plans to do may bring about a result which the law seeks to prevent. If he wilfully goes ahead with his plan, while deliberately refusing to find out about this, he is deemed at common law to have knowledge of what he would have known had he not made it a point not to know.[18] Such conduct has been designated in various ways, such as a "wilful shutting of the

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13. Meath v. State, 174 Wis. 80, 83, 182 N.W. 334, 335 (1921). The "question is whether from the circumstances *he* — not some other person — believed they had been stolen." State v. Alpert, 88 Vt. 191, 204, 92 A. 32, 37 (1914) (emphasis in original).

14. State v. Pickus, 63 S.D. 209, 230, 257 N.W. 284, 294 (1934).

15. Marson v. United States, 203 F.2d 904, 906 (6th Cir. 1953).

16. 1 HALE, PLEAS OF THE CROWN, *684-85.

17. People v. Holloway, ___ Col. ___, 568 P.2d 29 (1977).

18. The rule is that "if a party has his suspicion aroused but then deliberately omits to make further enquiries . . . he is deemed to have knowledge." G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 57, at 157 (2d ed. 1961). "Moreover, if a defendant did not learn what the substance was because he deliberately chose not to learn so he could assert his ignorance if he was discovered with the substance in his possession, he is chargeable with knowledge." United States v. Moser, 509 F.2d 1089, 1092-93 (7th Cir. 1975).

eyes,"[19] "deliberate ignorance,"[20] "studied ignorance,"[21] "purposely abstaining from all inquiry as to the facts,"[22] "avoidance of any endeavor to know,"[23] "a conscious purpose to avoid learning the truth,"[24]

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19. "The jury have not found, either that the prisoner knew that the goods were Government stores, or that he wilfully shut his eyes to the fact." Regina v. Sleep, 8 Cox C.C. 472, 480 (1861). "We repeat also that lawyers cannot 'escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen.'" United States v. Frank, 494 F.2d 145, 152-53 (2d Cir. 1974) (quoting United States v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964)). "A banker receiving deposits of money cannot shut his eyes to his own financial status, and he is required to investigate conditions which are suggested by circumstances already known to him." State v. Drew, 110 Minn. 247, 250, 124 N.W. 1091, 1092 (1910). "He could not shut his eyes to information in his bank and falsely represent a fact with the intention to defraud and cheat . . . ." State v. Linter, 141 Kan. 505, 509, 41 P.2d 1036, 1038-39 (1935). "If you find . . . either that the defendant knew that she was helping a cocaine transaction, or that she had a conscious purpose to avoid finding out the identity of the substance so as to close her eyes to the facts, you could find sufficient evidence to find her guilty . . ." was a proper instruction. United States v. Dozier, 522 F.2d 224, 226 (2d Cir. 1975). It "is recognized that one may not deliberately close his eyes to what otherwise would have been obvious to him." United States v. Squires, 440 F.2d 859, 864 (2d Cir. 1971). "The element of knowledge may be satisfied by proof that a defendant deliberately closed his eyes to what otherwise would have been obvious to him." United States v. Jacobs, 475 F.2d 270, 287 n.37 (2d Cir. 1973). "We think . . . the Government can meet its burden by proving that a defendant deliberately closed his eyes to facts he had a duty to see . . . ." United States v. Benjamin, 328 F.2d 854, 862 (2d Cir. 1964). "No person can intentionally avoid knowledge by closing his eyes to facts which prompt him to investigate . . . ." United States v. Grizaffi, 471 F.2d 69, 75 (7th Cir. 1972), *quoted in* United States v. Joyce, 499 F.2d 9, 23 (7th Cir. 1974). "[T]he purpose in cases such as this was to prevent an individual . . . from circumventing criminal sanctions merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct." United States v. Sarantos, 455 F.2d 877, 881 (2d Cir. 1972). "Construing 'knowingly' in a criminal statute to include wilful blindness to the existence of a fact is no radical concept in the law." United States v. Thomas, 484 F.2d 909, 913 (6th Cir. 1973).

20. United States v. Jewel, 532 F.2d 697, 702 (9th Cir. 1976).

21. "[T]hose who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled." Turner v. United States, 396 U.S. 398, 417 (1970) (footnotes omitted). "Appellant concedes that 'studied ignorance' of a fact may, under decisions of the Supreme Court and of this court, constitute an awareness of so high a probability of the existence of the fact to justify the inference of knowledge of it." United States v. Joly, 493 F.2d 672, 675 (2d Cir. 1974) (quoted with approval in United States v. Dozier, 522 F.2d 224, 227 (2d Cir. 1975)).

22. State v. Rupp, 96 Kan. 446, 449, 151 P. 1111, 1112 (1915).

23. People v. Sugarman, 216 App. Div. 209, 215, 215 N.Y.S. 56, 63 (1926), *aff'd*, 243 N.Y. 638, 154 N.E. 637 (1926).

24. United States v. Sarantos, 455 F.2d 877, 882 (2d Cir. 1972); United States v. Egenberg, 441 F.2d 441, 444 (2d Cir. 1971); United States v. Abrams, 427 F.2d 86, 91 (2d Cir. 1970).

and "deliberately chose not to learn."[25] Whatever the particular form of expression, the intent is to make clear that, within the present context, the common law holds that one knew what he would have known if he had not deliberately avoided knowing.

Deliberate avoidance of knowledge may also take another form. One having a silver candlestick he desires to sell, might realize that he does not have the slightest notion whether it is solid silver or merely a plated article. But desiring to obtain a very substantial sum for it, he takes pains not to find out, and desiring to forestall any investigation, he assures the purchaser that it is solid sterling silver. If it turns out to be a cheap plated article, he is held to have knowingly and designedly obtained money by false pretenses.[26] As said in a similar case:

> Ethically there appears to be little difference when a man makes a false representation for the purpose of inducing another to act for his benefit between the quality of conduct of the man who knows or believes his representation is false and that of the man who has neither knowledge nor belief concerning it, but nevertheless makes the representation, neither knowing nor caring whether it be true or false.[27]

In one case it was held that the "jury need only find that the defendant acted 'with reckless disregard of whether the statement . . . was true' or that appellant 'acted with a conscious purpose to avoid learning the truth.' "[28] No doubt the court was thinking of a situation comparable to our hypothetical seller of the silver candlestick,[29] but the word

25. United States v. Moser, 509 F.2d 1089, 1092-93 (7th Cir. 1975). United States v. Llanes, 374 F.2d 712, 716 (2d Cir. 1967) ("conscious purpose to avoid learning the source of the heroin.") "While negligence is not sufficient to charge a person with knowledge, one may not wilfully and intentionally remain ignorant of a fact, important and material to his conduct, and thereby escape punishment." Griego v. United States, 298 F.2d 845, 849 (10th Cir. 1962) (footnote omitted).

26. *See* Edwards, *The Criminal Degrees of Knowledge*, 17 MOD. L. REV. 294 (1954).

27. State v. Pickus, 63 S.D. 209, 230, 257 N.W. 284, 294 (1934).

28. United States v. Egenberg, 441 F.2d 441, 444 (2d Cir. 1971). "These matters, with other evidence in the case, made a question for the jury whether defendant uttered such representations, knowing them to be false, or (which is tantamount to knowledge of falsity) recklessly and without information justifying a belief that they were true." People v. Cummings, 123 Cal. 269, 271-72, 55 P. 898, 899 (1899). *Accord*, Rand v. Commonwealth, 176 Ky. 343, 355, 195 S.W. 802, 808 (1917).

29. In a later case the court did not disapprove of the instruction in *Egenberg*, stating that the two clauses mean the same thing. It said it would have been better if the connective had been "and" rather than "or." United States v. Sarantos, 455 F.2d 877, 882 (2d Cir. 1972).

"reckless" added an element of inconsistency, at least to the extent of possibly leading the jury to believe that guilt could be established on a negligence basis, which is improper when "knowledge" is required. In place of "reckless" it would have been better if the court had used "wilful." In any event the court should make clear that it is referring to one who purposely purports to know what he realizes he does not know. That would be deliberate deception.[30] In a case which probably has the best-reasoned opinion on the point, the court reversed a conviction based on what was in substance a "reckless disregard" instruction.[31]

Although "knowledge" as a mens rea concept of the common law includes guilty belief and a guilty avoidance of knowledge, much less is included under the provisions of the Model Penal Code. It provides:

> A person acts knowingly with respect to a material element of an offense when:
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> (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.[32]

It is further provided: "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."[33]

The obvious lack here is compensated for to some extent in dealing with receiving stolen property by referring to the receipt of such property "knowing that it has been stolen, or believing that it has

30. If "he created the impression that he believed something to be true, when in fact he had no such belief on the subject, he has deceived . . . ." MODEL PENAL CODE § 206.2, comment (Tent. Draft No. 2, 1954).

31. State v. Pickus, 63 S.D. 209, 257 N.W. 284 (1934). The instruction was: "But making a statement that is in fact false recklessly without information to justify a belief in its truth is equivalent to making a statement knowing it to be false." *Id.* at 221, 257 N.W. at 289-90. The court said, "Just what the court may have meant or just what the jury may have understood by the word 'recklessly' in the instruction offers an almost unlimited field for speculation and conjecture." *Id.* at 228, 257 N.W. at 293.

32. MODEL PENAL CODE § 2.02(2)(b) (Proposed Official Draft, 1962).

33. *Id.* § 2.02(7).

probably been stolen."[34] This does not cover the case of one who has no belief one way or the other but realizes this fact and takes pains not to find out. This incomplete coverage with reference to receiving stolen property emphasizes the extreme fault with those sections of the Code which fail to make even such a provision. The Code provides, for example, for guilt of one who "utters any writing which he knows to be forged"[35] with no reference to one who believes it has been forged or one who realizes that it may be forged and utters it without having made any effort to determine the fact.[36]

"Wilful blindness," a term that has been used chiefly in England, recently made its appearance in a federal case, *United States v. Jewell.*[37] *J* was tried under an indictment which charged him in count one with knowingly or intentionally importing a controlled substance[38] and in count two with knowingly or intentionally possessing, with intent to distribute, a controlled substance.[39] It was undisputed that a package of 110 pounds of marijuana was contained in a secret compartment of the car *J* drove into the United States from Mexico. Other evidence included the following: while *J* and a companion were in Mexico a stranger, without identifying himself, offered to sell them marijuana and when they declined asked if they wanted to drive a car back to Los Angeles for $100. The companion "wanted no part of driving the vehicle" because "it didn't sound right to me."[40] *J* admitted that "he thought there was probably something wrong and something illegal in the vehicle, but he checked it over. He looked in the glove box and under the front seat and in the trunk, prior to driving it." When he looked into the trunk, he saw the secret compartment but did not investigate further. His explanation was: "He didn't find anything, and, therefore, he assumed that the people at the border wouldn't find anything either."[41] There was even evidence from which the jury could have concluded that *J*'s purpose in going to Mexico was to drive back with a load of marijuana.[42] The judge

34. *Id.* § 223(6).
35. *Id.* § 224(1).
36. Express provision for guilty belief in one section interferes with its implied inclusion in sections in which it is not mentioned.
37. United States v. Jewell, 532 F.2d 697, 701 (9th Cir. 1976).
38. *See* 21 U.S.C. §§ 952(a), 960(a)(1) (1970).
39. *See* 21 U.S.C. § 841(a)(1) (1970).
40. 532 F.2d at 699 n.2.
41. *Id.* (emphasis omitted).
42. *Id.* at n.1.

instructed the jury that *J*'s guilt would be established if the proof showed beyond a reasonable doubt that, if *J* was not actually aware of the presence of the marijuana, "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."[43] The jury returned a verdict of guilty on both counts and judgment of conviction followed.

On J's appeal the court of appeals very properly upheld the conviction, but there was a very disturbing dissent. The dissent speaks of "the wilful blindness doctrine recognized primarily by English authorities."[44] This particular label has been primarily English, but the doctrine, which is well established in this country, is the same as that known by other labels, as shown above. One suggestion of the dissent is really fantastic. The dissent stated: "One problem with the wilful blindness doctrine is its bias towards visual means of acquiring knowledge."[45] "Wilful blindness" like its counterpart "wilfully shutting the eyes" has always been employed as a metaphor to indicate a deliberate effort to avoid knowing, by whatever method knowledge might be available. "Wilful blindness" has no more bias towards visual means of acquiring knowledge than does "deliberate ignorance," another term used to express the same idea. Another statement in the dissent is "that the English authorities seem to consider wilful blindness as a state of mind distinct from, but equally culpable, as 'actual' knowledge."[46] This is a misconception. Without doubt it was the fact that they were regarded as equally culpable which caused both to be included under the term "knowledge," but it is not true that they are regarded as distinct mens rea concepts.

The dissent refers to the pertinent section of the Model Penal Code[47] which, as shown above, covers much less than "knowledge" as it has been interpreted as a mens rea requirement in the common law and then deals with the Code provision as existing law – which of course it is not, except where it has been adopted by statute. The dissent also says: "It is not culpable to form 'a conscious purpose to

43. *Id.* at 700.
44. *Id.* at 705.
45. *Id.* The statement continues, "We may know facts from direct impressions of other senses or by deduction from circumstantial evidence, and such knowledge is nonetheless 'actual.' Moreover, visual sense impressions do not consistently provide complete certainty." *Id.* at 705-06 (footnote omitted).
46. *Id.* at 706.
47. *Id.* (referring to MODEL PENAL CODE § 2.02(7)).

avoid learning the truth' unless one is aware of facts indicating a high probability of that truth."[48] This will not stand examination. To support it, an illustration is given of a small boy who is handed a wrapped package by his mother in Mexico and who takes it into this country without the slightest notion that anything improper was contained. But suppose *X* went to *D*'s store with a diamond necklace which he offered to sell. He said the necklace had been in the family for generations, but all female members of the family were now dead. He had no use for it and needed money. Assume that nothing about *X*'s appearance or manner would give any reason to doubt his statement, but a jewelry store had been broken into a few nights before and several items stolen. The police had distributed a circular describing the stolen items, and one of these descriptions unquestionably represented the necklace offered by *X*. One of the circulars, moreover, had been delivered to *D* shortly after the larceny. Assume further that under all the circumstances *D* realized that there was a fifty percent chance that the necklace offered by *X* would be found described in the circular. But *D* did not want to risk what he might see if he looked. He had started to reach for the circular in his desk but changed his mind and bought the necklace without looking at the circular.

It is not true that *D*'s conduct was not culpable because from what he knew there was an equal chance that the necklace might or might not be stolen. An honest person would have looked. And because of *D*'s deliberate avoidance of looking at the circular, he is held to have known what he would have known if he had looked. He had the mens rea which has traditionally been included under the label "knowledge."

It is not enough, it should be emphasized, that the police had handed *D* a circular unmistakenly identifying this necklace as stolen. Had he overlooked the circular, even under circumstances amounting to criminal negligence, that would not constitute "knowledge" even under the broad meaning assigned to the term as one type of mens rea. On the other hand assume, in a neighborhood bar, *D* had boasted of his "presence of mind" in refusing to look at the circular. He would not be entitled to an instruction that even under such facts he must be found not guilty.

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48. *Id.* at 707.

Unfortunately the dissenters in *Jewell* succeeded in imposing upon the majority their notion that there is no culpability in deliberately avoiding knowledge of the truth without awareness "of facts indicating a high probability of that truth." Thus the same court, in a later case, held that the goverment can meet the burden of proving knowledge that a prohibited substance was contained in the vehicle by proving "beyond a reasonable doubt that the defendant acted with a conscious purpose to avoid learning the truth of the contents of the vehicle."[49] The conviction was reversed, however, because the court held: "A deliberate avoidance of knowledge is culpable only when coupled with a subjective awareness of high probability," and the jury was not so instructed.[50]

Suppose two were employed to drive a car across the border. When one opened the trunk to put in his luggage, he noticed what appeared to be a secret compartment between the trunk and the back seat. He was about to pry into that compartment but desisted when the other said: "Don't do that. There's a fifty-fifty chance you might find it full of cocaine." Assume the circumstances known to them indicated no more than a fifty percent chance of finding any contraband in the compartment, although the drug was actually there. It would be absurd to suggest that they could drive that cocaine-loaded car into the country without culpability. It is not meant to suggest, moreover, that so much as a fifty percent probability would be required to make their conduct culpable. If circumstances known to them caused them to realize the *possibility* that the compartment might contain cocaine and the possibility was sufficient to cause them anxiously to avoid finding out for fear of finding its presence, this was culpable conduct. No honest person would *deliberately fail* to find out the truth *for fear of learning* that what he was thinking of doing would violate the law. No doubt the thought of unlawfulness might enter one's mind under circumstances which made it too utterly remote to be entitled to serious consideration. But this would not induce any fear of learning the truth.

Those who drafted the Model Penal Code apparently acted on the assumption that there never would be direct evidence of wilful avoidance of the truth. And if we are to permit such a finding without direct evidence, it should be limited to cases in which the person

49. United States v. Valle-Valdez, 554 F.2d 911, 914 (9th Cir. 1977).
50. *Id.*

is aware of a high probability of unlawfulness.[51] The assumption, however, is quite unwarranted. The cases posed are hypothetical, but by no means out of the normal experience. The common law would permit the jury to take notice of the receiver's boast of his "presence of mind" in not looking at the circular. In the other case the fact may have been admitted by the parties, or there may have been witnesses to the fact that one would have opened the compartment had he not been warned by his partner that there was the risk of finding cocaine inside. And where there is direct evidence of a deliberate plan to avoid knowing the truth, the degree of probability is unimportant. The common law regards such a person as knowing what he would have known if he had not deliberately avoided knowing. And this should not be changed by statute.

The notion that it is not culpable to form "a conscious purpose to avoid learning the truth" unless one is aware of facts indicating a high probability of that truth results from a failure to distinguish culpability from proof. Whenever the need to investigate is recognized, culpability is established by a conscious effort to avoid learning the truth for fear of learning that contemplated action would be unlawful. But without awareness of facts indicating a high probability of unlawfulness, the need to investigate may be overlooked. And there is no conscious purpose to avoid learning the truth when the risk of unlawfulness has not been realized. In other words, without either other evidence or awareness of facts indicating a high probability of unlawfulness, there is no basis for an inference that the need to investigate had been recognized, and there could be no wilful avoidance without such recognition. Hence discussions in this area should place the emphasis on proof rather than culpability.[52]

51. The Supreme Court dealt with the issue of high probability in Barnes v. United States, 412 U.S. 837 (1973). "The evidence established that petitioner possessed recently stolen Treasury checks payable to persons he did not know, and it provided no plausible explanation for such possession consistent with innocence. On the basis of this evidence alone common sense and experience tell us that petitioner must have known or been aware of the high probability that the checks were stolen . . . . Such evidence was clearly sufficient to enable the jury to find beyond a reasonable doubt that petitioner knew the checks were stolen." *Id.* at 845-46.

52. Thus a defendant's driving a car containing contraband into the country and the prosecution's proving beyond a reasonable doubt that the defendant acted with a conscious purpose to avoid learning the truth of the contents of the vehicle would establish his culpability. He would not have acted with a conscious purpose to avoid learning the truth about the contents of the vehicle unless he was afraid he would discover that driving the vehicle across the border would violate the law. No honest person avoids an investigation because of such a fear.

The problem is comparable to the situation in which poison rather than unlawfulness is involved. If the need to investigate for poison in food is recognized, it is not a question of the degree of probability. If it is one's own food and he is not bent on suicide, he will make the investigation or he will not risk the eating. At the same time, in the absence of facts indicating a "high probability" of poison, some person might fail to recognize the need for an investigation. No doubt many have died as a result of having failed to realize the need to investigate for possible poison; but it is doubtful that many have died as a result of a wilful failure to make an indicated investigation for fear of finding the presence of poison in the food. Likewise if the risk is unlawfulness, some person may overlook the need to investigate if "high probability" is lacking. And there is no "wilful blindness" where the need to investigate is overlooked. But whenever the need is recognized, and the risk is assumed by wilfully failing to make an investigation for fear of discovering that contemplated action will bring about a result which the law seeks to prevent, the conduct is culpable. It is not the conduct of an honest person. Instead of the statement: "it is not culpable to form 'a conscious purpose to avoid learning the truth' unless one is aware of facts indicating a high probability of that truth," the statement should be: "the unintentional failure to realize the need of making an investigation is not culpable unless one is aware of facts indicating a high probability of unlawfulness in contemplated action."

Section 2.02(7) of the Model Penal Code should be amended in some form such as the following:

> Whenever knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person believes that it probably exists. And one is deemed to have knowledge of what he would have known if he had not deliberately avoided knowing. Deliberate avoidance of knowledge may be established by direct proof, or by proof that a person is aware of a high probability of the existence of the fact unless he actually believes that it does not exist.

As has been carefully stated: "One acts with knowledge of facts when the person has information which would put a reasonable person on inquiry as to such facts, but acts without making a reasonable inquiry."[53]

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53. IOWA CRIMINAL CODE § 715.3 (1978).

The Model Penal Code made an outstanding contribution to criminal law that has not been matched in modern times. The drafters did not claim perfection, however, and there should be no hesitation in taking notice of the few weak points to be found therein.[54] It is to be hoped that any state preparing to adopt a new penal code, if inclined to follow the Model Penal Code at this point, will do so with some such change as mentioned above and that states having already adopted new codes including this section will make some appropriate amendment. Never to be forgotten is the fact that one important function of the criminal law is to aid in teaching the difference between right and wrong.

54. *See* Perkins, *Some Weak Points in the Model Penal Code,* 17 HASTINGS L.J. 3 (1965).