

CRIMINALLY IGNORANT – AN INVITATION FOR BROADER EVALUATION

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A. Introduction

Alexander Sarch is to be congratulated on his scholarly and thought-provoking discussion of wilful ignorance in his monograph *Criminally Ignorant: Why the Law Pretends We Know What We Don't*¹, and more generally, on his careful arguments about how we ought to apply different culpability states in light of his theory of wilful ignorance. There is much to agree with in his fantastic book, but rather than heaping richly deserved praise it, in this piece, I want to invite Sarch to expand somewhat on his analysis in ways that might convert more readers into believers.

B. Doctrinal Divergences

Much of Sarch's doctrinal analysis comes from US statute and case law. On some key points though, English doctrine has a different approach.

For instance, Sarch focuses on the manner in which the doctrine of wilful ignorance is understood in various US jurisdictions. In general, they agree that wilful ignorance is a substantive doctrine as per which wilful ignorance is not knowledge, but is treated as being 'as good as' knowledge, on the basis of the equal culpability of being wilfully ignorant.² However, the legal position in England & Wales, is not quite as clear-cut. The leading case is *Westminster CC v Croyalgrange Ltd*³ which held that:

¹ Alexander Sarch, *Criminally Ignorant* (OUP 2109).

² Sarch (n 1) 15.

³ [1986] 1 WLR 674, 684 (Lord Bridge, HL).

...it is always open to the tribunal of fact, when knowledge on the part of a defendant is required to be proved, *to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from enquiry because he suspected the truth but did not want to have his suspicion confirmed.* [Emphasis supplied]

In *The Zamora*,⁴ Lord Sumner explained that:

...there are two senses in which a man is said not to know something because he does not want to know it. A thing may be troublesome to learn, and the knowledge of it, when acquired, may be uninteresting or distasteful. To refuse to know any more about the subject or anything at all is then a wilful but a real ignorance. *On the other hand, a man is said not to know because he does not want to know, where the substance of the thing is borne in upon his mind with a conviction that full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests. In such a case he flatters himself that where ignorance is safe, 'tis folly to be wise, but there he is wrong, for he has been put upon notice and his further ignorance, even though actual and complete, is a mere affectation and disguise.* [Emphasis supplied]

Similarly, in *R v Griffiths*⁵ it was held that:

To direct the jury that the offence is committed if the defendant, suspecting that the goods were stolen, deliberately shut his eyes to the circumstances as an alternative to knowing or believing the goods were stolen is a misdirection. To direct the jury that, in common sense and in law, *they may find that* the defendant knew or believed the goods

⁴ [1921] 1 AC 801.

⁵ (1974) 60 Cr App R 14.

to be stolen because he deliberately closed his eyes to the circumstances is a perfectly proper direction. [Emphasis supplied]

Each of these cases support the view that wilful blindness is evidence from which a jury may infer actual knowledge. Therefore, when we cannot directly prove D's knowledge of X, if we can prove that D knew of the high likelihood of X, and having reasonable means to verify X chose not to employ them, then D's proven choice to remain ignorant of the facts, in light of D's proven strong suspicion of the facts, allows us to infer that D really knew the facts. Sarch recognises that such a rule also exists in US doctrine, but says that he is interested in a version of the doctrine that goes beyond the evidentiary rule.⁶ There is little evidence that this version exists in English law,⁷ so one wishes that Sarch had offered some normative argument for the claim that we should have a substantive doctrine of wilful ignorance. Instead, Sarch's definition

⁶ Sarch (n 1) 12-13.

⁷ To be fair, at least one English case does seem to treat wilful blindness as a rule of substantive law: In *Ross v Moss* [1965] 2 QB 396 (DC), 406, where D knew that his club was systematically flouting its licensing obligations by serving drinks to non-members, he was held also to have known of breaches that occurred while he was away on holiday, on the basis that he intended for these breaches to continue to occur. This ruling though, seems to follow from the uncontroversial rule that if an offence requires knowledge as to circumstances, then D can be convicted of it based on proof of her intention that those circumstances occur. Of course, as Sarch notes at 141-42, *why* this is uncontroversial is difficult to explain without some substantive rule incorporating some form of the Equal Culpability Thesis. But that thesis is not something that one *must* trace back to the wilful blindness doctrine at least in English law. Additionally, at least one leading textbook asserts that the wilful ignorance rule is a rule of *substantive* English criminal law rather than one of English evidence law, but the cases it cites in support (the same ones cited here) seem to point away from its conclusion. *Simester & Sullivan* (7th Edn) 166.

of basic wilful ignorance assumes a substantive notion of wilful ignorance. Sarch says that to be wilfully ignorant of a proposition ‘p’⁸, D must

- (1) have a sufficiently serious suspicion that p is true (i.e. believe that there is a sufficiently high likelihood that p is true, short of practical certainty); and
- (2) deliberately (*as opposed to* negligently or recklessly) fail to take reasonably available steps to learn with greater certainty whether p is actually true.⁹

Note that the requirement at point (1) above is of a serious suspicion that falls short of knowledge. But that begs the question in respect of whether one can satisfy the legal definition of being ‘wilfully ignorant’ about p while simultaneously (actually, but not directly provably) knowing p. It forecloses discussions about whether wilfully preserving one’s ‘ignorance’ (or deliberately trying to build a case for plausible deniability) is *evidence* of the fact that really, one is not ignorant at all – one knows to a practical certainty the fact one is trying to plausibly deny knowing. Moreover, the text from the SC’s *Global-Tech* judgment that Sarch cites¹⁰ in support of this definition, does not actually support the qualifier ‘short of a practical certainty’, in point (1) of Sarch’s test.

To be sure, Sarch is aware of this. His chosen starting point is that there is a substantive notion of wilful ignorance which the judiciary applies, and his book aims to offer the best defence of

⁸ Sarch thinks that in cases of wilful ignorance, p must be true. Sarch (n 1) 18 at footnote 59. I have some reservations about this, though I will not press them here. This disagreement does make a difference though, in attempts cases.

⁹ Sarch (n 1) 18.

¹⁰ Sarch (n 1) 18 at footnote 58.

it.¹¹ This is a fair choice to make, but one that disappoints those sceptical of the substantive version of the wilful ignorance doctrine.

Later in the book, Sarch does discuss some such scepticism. Since his book is an attempt to defend a judicially applied substantive wilful ignorance doctrine (which operates despite the legislature not expressly saying that wilful ignorance is as good as knowledge), I am particularly interested in what Sarch calls ‘the practitioner’s problem’. This is the objection that it is inappropriate for the judiciary to effectively usurp legislative powers and create retroactive offences by taking it upon itself to treat wilful ignorance (which, recall, is not knowledge) as being ‘as good as’ knowledge, thereby using wilful ignorance as a basis for convicting defendants of offences requiring knowledge.¹² Sarch examines attempts to address this concern by using doctrines of interpretation premised on divining the legislature’s purpose in enacting offences, or drawing inferences from legislature’s failure to contradict judicial dicta, and concludes that even the most convincing of these fails to answer fundamental questions. He says that, ‘it remains an open question why a given legal system was justified in *beginning* the practice of taking willful ignorance to satisfy the knowledge element of particular crimes... How could courts ever permissibly *start* treating willful ignorance as a substitute for knowledge?’ [Emphasis in original].¹³ These questions go unanswered, as Sarch moves on to argue that it is defensible on substantive grounds, for the legislature to make such a rule.¹⁴ But that was not the practitioner’s problem, and Sarch ultimately offers no convincing response to the practitioner, with whom, I find myself in the unaccustomed position, of agreeing.

¹¹ Sarch (n 1) 2-3, 16.

¹² Sarch (n 1) 140, 147-55.

¹³ Sarch (n 1) 153-54.

¹⁴ Sarch (n 1) 154-61.

That said, in what follows, I will assume that there exists some good normative defence of a judicially applied substantive doctrine of wilful ignorance.

C. Sarch's Culpability Theory (And Beyond)

I now want to consider Sarch's views on culpability, and how they fit into his overall project. Sarch adopts an insufficient regard-based theory of culpability, but sees that there are some gaps in the standard insufficient regard-based theories of culpability. He shores up these theories by offering an explanation of what it is for insufficient regard to manifest in an action. Still, there are several issues on which we disagree, and that is to be expected, since I theorise culpability in terms of a theory of choice.¹⁵ But I do not want to get too side-tracked by our broader disagreements on theorising criminal culpability, because that would distract from the very important arguments made in the book. Instead, I will briefly make three points about Sarch's argument on culpability, in what I think is the ascending order of their importance.

1. Rejecting motive-sensitive theories of criminal culpability

First, Sarch's insufficient regard theory of culpability tries to explain and accommodate the view that motives generally do not matter to the criminal law, whether we are analysing prima facie offences or the availability of defences. He takes this to be the general¹⁶ or default¹⁷ view, that any good theory of culpability must accommodate.¹⁸ But back in 2014, even he used to think that motives mattered to culpability, broadly viewed.¹⁹ He has now changed his mind,

¹⁵ M Dsouza, 'Criminal Culpability after the Act' (2015) 26 KLJ 440; M Dsouza, *Rationale-Based Defences in Criminal Law* (Hart, 2017).

¹⁶ Sarch (n 1) 30.

¹⁷ Sarch (n 1) 25, 37-39.

¹⁸ Sarch (n 1) 43.

¹⁹ Sarch (n 1) 86 at footnote 4.

which I think is unfortunate. Many on this side of the Atlantic (and some on that side), would disagree, at least vis-à-vis justificatory defences. In particular, Fletcher²⁰, Gardner²¹, Simester²², Sendor²³, Husak²⁴, Eser²⁵, Gur-Arye²⁶, Greenawalt²⁷ and Baron²⁸ insist that that in order to be justified, an agent must be motivated by good subjective reasons when committing what is prima facie an offence. My own position is also aligned with these views at least on this issue.²⁹

²⁰ GP Fletcher, 'The Right Deed for the Wrong Reason: A Reply to Mr. Robinson' (1975) 23 *UCLA Law Review* 293, 320.

²¹ J Gardner, 'Justifications and Reasons' in AP Simester and ATH Smith (eds), *Harm and Culpability* (Oxford, Clarendon Press, 1996) 104-05.

²² AP Simester, 'On Justifications and Excuses' in L Zedner and JV Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice* (Oxford, Oxford University Press, 2012) 99.

²³ BB Sendor, 'Mistakes of Fact: A Study in the Structure of Criminal Conduct' (1990) 25 *Wake Forest Law Review* 707, 766.

²⁴ DN Husak, 'Justifications and the Criminal Liability of Accessories' (1989) 80 *Journal of Criminal Law and Criminology* 491, 516-17.

²⁵ A Eser, 'Justification and Excuse' (1976) 24 *American Journal of Comparative Law* 621, 621-23, 635, 637.

²⁶ M Gur-Arye, 'Legitimizing Official Brutality: Can the War against Terror Justify Torture?' (2003) [dx.doi.org/10.2139/ssrn.391580](https://doi.org/10.2139/ssrn.391580), 21.

²⁷ K Greenawalt, 'Distinguishing Justifications from Excuses' (1986) 49(3) *Law and Contemporary Problems* 89, 91-92, 102. See also Greenawalt, 'The Perplexing Borders' 1903.

²⁸ M Baron, 'Justifications and Excuses' (2005) 2 *Ohio State Journal of Criminal Law* 387, 393, 396-98. See also M Baron, 'The Provocation Defense and the Nature of Justification' (2009) 43 *University of Michigan Journal of Law Reform* 117, 124-30.

²⁹ Dsouza, *Rationale-Based Defences* (n 15).

So, there are many for whom Sarch's chosen data point is shaky. And the particular place at which I think most, if not all, of the theorists mentioned above would disagree with Sarch is on his intuitions about the EVIL TROLLEY TURNER. Here is the example:

Darryl finds himself in the classic trolley scenario. A trolley is careening toward five people tied to the tracks. It will kill them unless Darryl pulls the switch and diverts the trolley onto another track to which just one person, Vicky, is tied. If Darryl pulls the switch, only one will die, rather than five. Darryl knows all this and decides to divert the trolley onto the other track. However, his sole reason for doing this is that he hates Vicky and wants her dead. He doesn't care one whit for the five on the other track, and he wouldn't bother pulling the lever unless it would allow him to accomplish his aim of killing Vicky.

Sarch thinks that the necessity defence should be available to Darryl, but I think that this would elicit, at best, a mixed response from the aforementioned theorists. So let us set to one side arguments from appeals to intuition, and consider Sarch's other supporting arguments.

Sarch argues that institutional design considerations support the motive-insensitive approach, since it will often be difficult for courts to determine defendants' real motives in acting, and smart defendants would simply lie.³⁰ But this hardly convinces – finders of fact, be they juries, or judges, always need to evaluate the reliability of the evidence and testimony placed before them, and draw inferences from these – they never have a transcript of the mental states of the parties before them. And yet, our criminal justice system, which relies heavily on findings about subjective mental states such as intention, actual knowledge, awareness of a risk, and suspicion, works fairly well. The reason is that humans are actually very good mind-readers. We are extremely skilled at inferring what's going on in other people's minds, be it intention,

³⁰ Sarch (n 1) 74.

awareness, motivation, distraction, temerity, doubt, or confidence. One does not have to be a poker player looking for ‘tells’ to read the mannerisms and body language of others and reach a conclusion as to what they are thinking. Each of us does this all the time. Of course we get it wrong sometimes. I’m sure each of us has experienced that awkward moment when, as we approach a stranger walking in the opposite direction to us, we both dodge in the same direction, and then simultaneously correct ourselves by moving in the other direction. But these incidents stick in the memory precisely because of how exceptional they are.³¹ In the vast majority of instances, we, and strangers we have never seen before, and will probably never see again, successfully avoid bumping into each other without missing a step, or needing to think too much about it. There’s no good reason for the criminal law to be premised on doubting our ability to infer motivations, when it is quite willing to trust our ability to divine intentions, and actual knowledge. In fact, it already trusts finders of fact to reach conclusions about the motivations of defendants charged with crimes of ulterior intent.³² Moreover, we continue to be able to tweak rules about the standards and burdens of proof as appropriate in order to resolve doubtful cases as appropriate.

³¹ Moreover, if your experiences are anything like mine, then even these moments of failure are instantly followed by a spectacular feat of mutual mind-reading in which both you and the stranger see what just happened, and what the other was thinking, and crack a rueful smile at each other.

³² For instance, a criminal attempt under the Criminal Attempts Act 1981, s.1, which requires the performance of some conduct with the intent (i.e. motivation) to perform an offence; the offence of aggravated criminal damage under the Criminal Damage Act 1971, s.1(2) requires causing damage to or the destruction of property with the intention of endangering life, or being reckless as to whether life would be endangered. There are also plenty of examples of offences that become more serious offences if their commission was racially or religiously motivated. Examples include racially or religiously aggravated assaults (of varying degrees of seriousness) under the Crime and Disorder Act 1998, s.29; racially or religiously aggravated damage under the Crime and Disorder Act 1998, s.30, and so on.

Sarch has a second institutional design-based argument in favour of a motive-insensitive approach to culpability. He argues that eschewing reference to motives makes the stated law more *publicly available* as a guide to action. Action-guiding rules ought not to be too fine-grained, says Sarch, if we want them to be capable of giving useful guidance to ordinary people. Sarch continues:

Does this mean *motives* in particular should generally be left out of the description [of conduct to be avoided]? I think so. Granted, many actors are perfectly able to appreciate – provided the issue is put to them and they have time to think about it – the normative difference between eating breakfast with the motive of fortifying oneself to commit an act of terrorism and eating breakfast with [a benign] motive... Still actors often will not have the benefit of sufficient reflection. Accordingly, it is less reasonable to expect actors in the moment to be generally able to appreciate and correctly apply the distinction between (i) doing an otherwise criminally prohibited type of action with a sufficiently good motive to justify it, and (ii) doing a prohibited action with an insufficiently good motive. This is a conceptually complex distinction... [and] the distinction rests on a contested normative question on which reasonable minds might differ – namely what motives can justify otherwise criminal actions... The problem cannot be remedied by listing all the sufficiently good motives with any reasonable degree of specificity in advance. Thus... [we should] adopt motive-free descriptions of the actions whose culpability is to be assessed.³³

Again, I have several concerns with these claims. They significantly underestimate human capabilities, and significantly overestimate the difficulty of offering useful conduct guidance. I do not propose to offer a theoretical argument for why humans are capable of parsing useful

³³ Sarch (n 1) 74-75.

guidance as to motivations, and why jurisdictions are capable of offering such useful guidance. It should suffice to point out that guidance as to motivation is mundane in English criminal law,³⁴ and while English criminal law has several (perhaps ninety-nine?) problems, this sort of guidance is not one.

Sarch also offers a pro-defendant argument for a motive-insensitive conception of culpability. He says that given its investigative powers, prosecutorial discretion, and leverage in negotiating plea deals, the state enjoys significant advantages over defendants in the administration of the criminal law. Therefore, we should err in favour of the defendant whenever possible to level the playing field. He then asks us to compare cases like *EVIL TROLLEY TURNER* with similar cases in which the defendants are motivated by good reasons. So, for instance, in *GOOD TROLLEY TURNER*, Jocelyn does exactly the same thing as Darryl did in *EVIL TROLLEY TURNER*, and with the same consequences (the death of Vicky) except that she is motivated by the desire to save the five lives. Sarch says that a motive-insensitive approach to culpability would allow both Jocelyn and Darryl a defence. In that sense, it would be better for

³⁴ Such guidance is contained in offences of ulterior intent, various examples of which were mentioned previously (n 32). As far as defences are concerned, the Criminal Justice and Immigration Act 2008, s.76(7) which makes it clear that defences like self-defence, defence of property, prevention of crime, and lawful arrest are available only to persons 'acting for a legitimate purpose'. Duress is only available to defendants committing prima facie offences with the motivation of avoiding death or serious physical injury: *R v Graham* [1982] 1 WLR 294 (CA). The defence of lesser-evils necessity is underdeveloped in English criminal law, but whenever such a defence has been granted, the defendant has claimed to have been motivated in committing a prima facie offence by the desire to avert a greater evil. See *R v Pommell* [1995] 2 Cr App R 607, 609; *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 55; *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam. 147,155.

defendants in general, and is therefore a desirable, since it would help level the playing field between the state and prospective defendants.³⁵

It is undoubtedly true that a motive-insensitive approach to culpability would be better for the ill-motivated defendant. But it also sets up a worse outcome for the unfortunate victim (and/or those that survive her), as well as for the rest of society who remain exposed to a person who has already demonstrated a propensity to act in a *prima facie* criminal manner, for no good reason. It is one thing to sympathise with the puny defendant over the mighty state, but one struggles to sympathise with a badly motivated defendant over the unfortunate direct victim, everyone indirectly affected, as well as all her other potential victims. Perhaps Sarch and I just have different intuitions here again, but I do not see myself cheering on the cad who plays the system and gets off scot free! Moreover, conditioning at least defensive pleas on good motivations will hardly mean that some defendants who might otherwise have, say, diverted the trolley away from the five and towards Vicky, will now not bother. Rarely, if ever, do agents in a trolley type situation (or facing any other emergency) perform a cost-benefit analysis in which the intricacies of the rules of criminal culpability play a decisive role. And if a particularly quick-witted defendant did, then one would imagine that she would also be clever enough (or adequately well advised) to not volunteer her true motivations for acting.

In any event, although Sarch thinks that motives should ordinarily be irrelevant to culpability, he accepts that they are *sometimes* relevant.³⁶ It would therefore be helpful to have some further explanation of why we should not think that motives are (perhaps exceptionally) also relevant to the substantive criminal law doctrine of wilful ignorance.

³⁵ Sarch (n 1) 75-79.

³⁶ Sarch (n 1) 30.

2. Running theories of inculcation and exculpation together

Still, many of the foregoing objections are just clashing intuitions, and they relate mainly as to one of Sarch's hypotheticals. I do not think that a whole lot must necessarily turn on this disagreement for Sarch's project, because EVIL TROLLEY TURNER is about a claim to an exculpatory defence, and when theorising wilful ignorance, we are not in the realm of exculpation, but rather, inculcation. In principle, we could have different theories of culpability in relation to inculcation and exculpation. In fact, my own view is that inculcation and exculpation ought to be theorised separately, since different considerations apply at these different temporal stages of the criminal process.³⁷ That would allow me to just set the EVIL TROLLEY TURNER example aside and proceed.

But Sarch would resist this move. His theory of culpability applies to issues of inculcation and exculpation in the same way, and this is clear in his choice of examples. And this is our second, more structural, and therefore more important, point of disagreement. That said, at least for me as a reader, the first and second disagreements cancel out to some extent in respect of the larger project of this book. But they do contribute to my third disagreement with Sarch.

3. Resulting premature rejections of versions of the equal culpability thesis

Ultimately, whether we adopt Sarch's souped-up version of an insufficient regard theory of culpability, or a suitably qualified choice-based theory we will usually get similar liability outcomes. This is because if one accepts that wilful ignorance is a doctrine of substantive law premised on the equal culpability of knowing agents and wilfully ignorant ones, then that is compatible with any theory of culpability that incorporates some metric for comparing culpability. So does the choice of a theory of culpability matter? Sarch himself says that

³⁷ Dsouza, 'Criminal Culpability' (n 15); Dsouza, *Rationale-Based Defences* (n 15) 28-33.

generally, it should not.³⁸ Yet he spends an entire chapter setting it out. Why do this and risk putting off readers who disagree with him on culpability? Does Sarch's choice of a motive-insensitive development of an insufficient regard theory of culpability contribute in any way to his argument?

I think it does, in a way that leads to the third point I want to make about Sarch's culpability analysis. Sarch's strong commitment to jettisoning motives in his account of culpability colours his consideration of what he calls the UECT (Unrestricted Equal Culpability Thesis) and limits his consideration of the various versions of what he calls the Restricted Equal Culpability Thesis (RECT).

The UECT is that where A1 and A2 each perform the actus reus of a crime that requires knowledge of an inculpatory proposition and the only difference between A1 and A2 is that A1 acts with knowledge of this proposition, whereas A2 is wilfully ignorant (in the basic sense) of it, A2 is as culpable as A1.³⁹ Sarch accepts that this is the dominant view in US courts,⁴⁰ but rejects it.⁴¹ He uses an example he calls '*Dangerous Investigation*' to suggest that a person who acts pursuant to a choice not to investigate the truth of a proposition p, because it is dangerous, albeit not so dangerous that it is unreasonable to investigate, might nevertheless satisfy the UECT requirements without being as culpable as an agent who acts while knowing p. He also suggests that there can be some extraneous considerations (like professional obligation or duties arising out of familial relationships) that can justify a choice not to investigate, such that persons caught by the UECT might still not be as culpable as a knowing agent.

³⁸ Sarch (n 1) 76 at footnote 116; 81 at footnote 127; 86.

³⁹ Sarch (n 1) 22.

⁴⁰ Sarch (n 1) 22-23.

⁴¹ Sarch (n 1) 87.

The UECT incorporates a reference to wilful ignorance in a basic sense. Therefore, let us return to Sarch's stipulation of basic wilful ignorance,⁴² which requires (inter alia) that D deliberately (*as opposed to* negligently or recklessly) fail to take reasonably available steps to investigate the truth of an inculpatory proposition p. I have my doubts about whether the word 'deliberately' is opposed to the word 'recklessly'. Surely, one can deliberately be reckless. But perhaps Sarch's claim makes sense when we see what Sarch means by the term 'deliberately'. Sarch cites US cases that explain 'deliberately' in this context as something done with the 'purpose – the aim or intent – to preserve one's ignorance'.⁴³ He seems basically to accept this, but says that he would also widen the net to include acting 'in ways one is practically certain will preserve one's ignorance, even if this was not one's purpose or aim'.⁴⁴ Therefore, Sarch accepts generally the importance of establishing that D chose not to investigate p *in order to* preserve her ignorance. This looks like a motive-based restriction built into the fabric of wilful ignorance in the basic sense, and therefore built into the Unrestricted Equal Culpability Thesis.

When considering *Dangerous Investigation*, Sarch accepts that the more dangerous it is to investigate, the less reasonable it would be to do so, but insists that danger levels short of those required to make investigation unreasonable could still reduce A2's culpability to the point that A2 is less culpable than A1. However, perhaps owing to his overall commitment to jettisoning motives in his account of culpability, Sarch seems to ignore entirely the requirement that A2's preservation of ignorance be *deliberate* (in the sense of being aimed at preserving one's

⁴² Sarch (n 1) 18.

⁴³ Sarch (n 1) 20.

⁴⁴ Sarch (n 1) 21. This caveat is reminiscent of the way in which the rule in *R v Woollin* [1999] 1 AC 82 supplements a commonsense understanding of what amounts to 'intention'. Under the *Woollin* rule, a person who does something knowing of the practical certainty that it will bring about a certain consequence, can be found to have intended that consequence.

ignorance). It seems to me that a person who fails to investigate the truth of an inculpatory proposition *because of the dangerousness* associated with such investigation would not necessarily be doing so in order to preserve her ignorance. She would therefore, arguably not be wilfully ignorant in the basic sense: she would not be acting in the esoteric sense of the word ‘deliberately’ used in Sarch’s UECT. Hence Sarch’s counterexample to the UECT fails to convince.

As far as the argument from potential professional and familial justifications for not investigating the truth of an inculpatory proposition is concerned, if these should make a difference to D’s criminal culpability (and I am not convinced that all of the justifications that Sarch considers should), they should surely do so by exculpating D, rather than by negating inculcation. Wilful ignorance as a substantive doctrine belongs in the domain of inculcation. A theory of culpability that was sensitive to the possibility that inculcation and exculpation might need to be theorised separately could easily explain examples that Sarch finds compelling.⁴⁵

But perhaps Sarch would rather we use an anaemic sense of the word ‘deliberately’ despite US doctrinal suggestions to the contrary. Even if we did that, there Sarch’s opposition to motive-sensitive theories of culpability seems to restrict his analysis. Sarch defines the RECT as the equal culpability thesis subjected to some additional restrictions to suitably modify its scope, and considers three versions of the RECT.⁴⁶ However, RECT₁ – in which the motivation for being wilfully ignorant must be the avoidance of liability in the event of prosecution – is the only one in which the restriction relates to D’s reasons (or motivations) for remaining

⁴⁵ For one example, see Dsouza, ‘Criminal Culpability’ (n 15); Dsouza, *Rationale-Based Defences* (n 15), 28-33.

⁴⁶ Sarch (n 1) 93-106.

ignorant.⁴⁷ This option is quickly rejected, albeit for reasons that I do not always find convincing.⁴⁸ But more importantly, this is only one possible formulation of a motive-based restricted equal culpability thesis – other statements of the restricting motive are possible. It is therefore premature to infer from the failure of this one version of a motive-based restricted culpability thesis that *no* investigation into motive is appropriate. Sarch never considers the countless variations of RECT₁ involving a differently specified motivation for remaining ignorant. And at least some such variations are plausible and seem to have some foundation in US law. For instance, even if we choose to use an anaemic sense of the word ‘deliberately’ in the stipulation of basic wilful ignorance, the motive-based restriction that courts had tried to build into that word, i.e. choosing not to investigate with the ‘purpose – the aim or intent – to preserve one’s ignorance’,⁴⁹ seems a very plausible candidate for consideration. So, one version of the RECT could be that in order to be wilfully ignorant, D must refrain from taking reasonable steps to investigate the truth of a proposition that she strongly suspects to be true, with the ‘purpose – the aim or intent – to preserve [her] ignorance’. Alternatively, the qualifying motivation could also be framed in more accessible terms as ‘wanting to

⁴⁷ Sarch (n 1) 93-94.

⁴⁸ Sarch (n 1) 94-95. One reason for rejecting RECT₁ that Sarch cites is the proposition that the criminal law should not concern itself with motives. As previously stated, I find that proposition unappealing. Sarch’s second reason is that one might have appealing reasons for wanting to preserve a defence (such as wanting to prevent one’s children from being sent into foster care upon one’s arrest) and this might reduce one’s culpability even when one satisfies RECT₁. I find this example unconvincing since I doubt that this kind of reason for preserving a defence should elicit sympathy from the law, but even if it should, I think that this sort of reason goes to the availability of a justificatory or excusatory defence, rather than to the absence of mens rea (as represented by the requirement for knowledge). I do however agree with Sarch’s third reason for rejecting RECT₁, which is that it is too narrow.

⁴⁹ Sarch (n 1) 20.

console/deceive oneself into believing in one's own blamelessness' or 'not wanting to have one's fears confirmed'. Yet these possibilities slip by without consideration.

In sum, the major concern I have about Sarch's analysis is that his dispositions towards theories of criminal culpability that are both motive-insensitive, and run together the normative analyses of inculpation and exculpation, limit his argument somewhat.

D. Conclusion

Nothing I say in this short comment is meant to dispute the value of Sarch's excellent discussion of a critically undertheorised set of questions in the criminal law. For instance, although many theorists rely on the claim that an action must manifest insufficient regard to be criminally culpable, not enough attention has been paid to the issue of what such manifestation entails. Sarch's incisive discussion of this issue offers much needed clarity on this point, both for those who subscribe to insufficient regard theories of culpability, and those who do not. Similarly, although the criminal law regularly uses mens rea substitution principles, there has been conspicuously little joined-up theorising about these principles. Sarch's monograph is a valuable resource for anybody who would like to think through these principles in an intellectually rigorous and theoretically robust manner. This holds as true for those who conclude that Sarch's arguments are the last word on the topic, as for it does for those who see Sarch as firing the opening salvos in what is likely to be a very intellectually exciting conversation. I find myself somewhere between these two camps. On many points, I agree wholeheartedly with Sarch. But in these comments, I highlight points on which I hope Sarch will say more in future writing, so as to further extend the appeal of his excellent and careful arguments.