Review of Alexander Sarch's *Criminally Ignorant*
Craig K. Agule
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Charles Jewell and a friend were drinking in a bar in Tijuana when a stranger offered to sell them marijuana, which they declined.[1] The stranger then made a second proposal: he had a car which needed to be driven into the United States, and he would pay them to handle that for him. Jewell's friend was suspicious, wanting no part in the arrangement. Jewell, however, examined the car cursorily, did not see anything worrisome, and agreed to the transaction. He suspected something might have been amiss, but he figured that if he hadn't found anything, neither would law enforcement. Jewell's prediction was wrong: customs agents found 110 pounds of marijuana hidden between the trunk and the rear seat. Jewell was arrested and charged with knowingly possessing a controlled substance. The case presents a puzzle. The stranger did not tell Jewell there was marijuana in the car, and Jewell did not see the hidden marijuana. Could Jewell rightly be convicted of *knowingly* possessing marijuana?

In *Criminally Ignorant*, Alexander Sarch defends the practice of convicting deliberately ignorant wrongdoers of crimes requiring knowledge. As Sarch's subtitle puts it, if we (as defendants) purposefully shield ourselves from learning inculpatory facts, "the law pretends we know what we don't." Sarch argues for this legal pretense on principled grounds, urging us to see that deliberately ignorant wrongdoings and knowing wrongdoings can be equally culpable, manifesting the same degree of insufficient regard toward the same legally protected interests. Sarch's core argument is as follows: In cases of deliberately ignorant wrongdoing, there are two wrongs the law should recognize. There is the primary wrongdoing, e.g., Jewell recklessly driving across the border aware of the risk that he was transporting contraband. There is also a secondary wrongdoing, the violation of the duty to reasonably inform oneself of the risks one creates. This duty is a narrow, conditional duty: if an agent realizes that her intended action will pose risks to legally protected interests, the agent has a duty to investigate those risks. When Jewell planned to drive across the border, he created a risk to the legal interests (such as they are) protected by the laws against transporting controlled substances, and so he had a duty to investigate the possibility that there was contraband in the car, a duty he violated by his deliberate ignorance. Because of the intimate relationship between the two violations, and because the two violations transgress against the same legally protected interests, the culpability generated by the two violations may properly be aggregated. And in some cases, e.g., where the potential investigation would have been easy and where there is no legally recognized reason not to investigate, this aggregation will confer sufficient extra culpability to make up the gap between the culpability of merely reckless wrongdoing and the culpability of knowing wrongdoing.

[1] This narrative is taken from the seminal culpable-ignorance case United States v. Jewell, 532 F. 2d 697 (9th Cir. 1976).

Sarch's defense of imputing knowledge to deliberately ignorant wrongdoers is creative and thorough. Readers will benefit from his substantial work on the manifestation of ill will in criminal wrongdoing, on our epistemic duties with regard to the risks we create and impose, on the justification of imputation principles in the criminal law, and on other mens-rea imputation principles his argument tempts us to consider. This is a valuable and instructive text.

The Principle of Lenity at the center of Sarch's account of the manifestation of ill will in criminal wrongdoing is especially promising. On that principle, a criminal wrongdoing "manifests *the least amount* of insufficient regard for legally protected interests or values … needed to explain why a rational and otherwise well-motivated person would do" the wrong (p. 51).[2] Sarch shows how his Principle of Lenity captures a number of features of our criminal law practice. For example, Sarch has us imagine a deeply malevolent vandal, so eager to cause harm that he would have committed an act of violent terrorism if given the opportunity. If culpability were to track the full extent of the wrongdoer's actual wayward psychology, then the vandal seems fit for a severe punishment. However, we punish the vandal only for vandalism, and Sarch's account of culpability captures this. Even though this vandal would have done far worse, it takes only a small amount of deviant disregard to allow an otherwise well-motivated agent to commit vandalism. Sarch's idealized account gets us the right result.

In this instance, as in many others, we should recognize the tight connection between the criminal law and our interpersonal responsibility practices. Accordingly, I suspect that many of Sarch's arguments for his Principle of Lenity within the criminal law extend comfortably to interpersonal morality and to the ethics of blame. Sarch argues that incorporating the Principle of Lenity within the criminal law is a means for legislatures to display generosity, kindness, and mercy and that adhering to the Principle of Lenity will help with social bonding and cohesion. The Principle of Lenity is also a nicely restrained principle, guiding agential evaluation without requiring invasive investigations of other's mental states and the sorts of evidence that might bear on those mental states and without calling for off-putting, imperious verdicts on others internal mental states, verdicts sure to be ill-fitting given just how complex our mental states actually are. I can imagine analogs of arguments like these applying nicely to interpersonal morality.

Extending the Principle of Lenity to interpersonal morality can help explain the contours of our interpersonal blaming practices. I suspect that the Principle of Lenity might help buttress our confidence in two ways that interpersonal blame (like criminal punishment) seems imperfectly sensitive to the particulars of a wrongdoer's character. First, as in the criminal law, we blame each other for the wrongs we do commit, not for all the wrongs we might commit if given the opportunity and the notion. Sarch's example of the vandal who might have done far worse given the opportunity extends nicely here. Accordingly, we often blame each other to a degree less than might be warranted by a more direct assessment of character or quality of will. Second, we are ordinarily comfortable blaming a wrongdoer even when their wrongdoing is out of character. That a person is generally honest is no defense to being blamed for a lie they do tell (even if the

[2] Unless otherwise indicated, all references are to *Criminally Ignorant*.

out-of-character liar might deserve less blame than the unrepentant and regular liar). Accordingly, we often blame each other to a degree more than might be warranted by a more direct assessment of character or quality of will. The Principle of Lenity can help us understand both of these phenomena. Our blame does not function as a report on our underlying moral psychology, and thus our wrongdoing is not to be treated as mere imperfect evidence of that psychology. Instead, the Principle of Lenity makes clear that we care about the manifested quality of will, not the underlying psychology, and that manifested quality of will can be understood in an idealized sense. Both phenomena are thus nicely captured by Sarch's principle—and I expect more study by moral philosophers will reveal other virtues of including a Principle of Lenity in our moral philosophy.

I now want to raise two objections. First, I want to push an objection relating to institutional design. Granting Sarch's argument that culpably ignorant wrongdoing can be culpable in the same way and to the same degree as knowing wrongdoing, why should the law's response be to include an element of pretense? Why not just treat the wrong at issue as culpable under its own description? In Jewell's case, for instance, why not think that the right response would have been to convict Jewell of an aggravated case of reckless transportation of controlled substances? American criminal law provides many mechanisms for incorporating aggravating factors into the determination of sentencing. There are statutory mechanisms, regulatory mechanisms, and discretionary mechanisms. Moreover, supposing that the sentencing ranges for reckless and knowing wrongdoings overlap, these ordinary aggravating mechanisms could serve to perfectly capture the equivalent culpability Sarch describes. (And insofar as the sentencing ranges do not overlap, that revision of the law seems more straightforward than the imputation principle Sarch calls for). So, supposing that the reckless behavior is itself criminal, it is not clear why we should prefer an imputation principle over an aggravation provision that more honestly describes the wrongful behavior.

But the supposition that the reckless behavior is itself criminal is not always warranted. For example, Jewell was convicted under 21 U.S.C. § 841(a) (1). Section 841(a)(1) makes it a crime "knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." As far as I can tell, there is no analogous recklessness or negligence crime. (Do not take this as legal advice. I am not your lawyer.) But for an imputation principle, it seems that Jewell would have escaped conviction altogether.

Imputing knowledge in the absence of a recklessness crime raises concerns related to the principle of legality.[3] As Sarch explains, under the principle of legality, "it is not legally permitted

[3] Then-judge Anthony Kennedy raised this legality concern in his dissenting opinion in Jewell. As Sarch notes, Douglas Husak and Craig Callender (1994) address the legality concern by calling for criminalizing the failure to satisfy the epistemic duty. Such a reform would substantially abate the challenge here, as it would avoid pretending from the outset. Sarch addresses the legality concern by inviting legislative reform, but that solution is only partial. Insofar as the legislative reform preserves the pretense, aspects of the legality concern remain.

to penalize someone without a law prohibiting that conduct." The principle of legality is appealing: If the law is to guide us, then it must offer clear instructions, and it seems an ambush to first appear to permit some behavior and later to punish the behavior anyway. Of course, Sarch is not calling for prosecutions in the absence of a law prohibiting the conduct. On Sarch's account, conduct like Jewell's would have been prohibited by a combination of the proscription of the knowing wrong and the augmentation of the imputation principle. But the concern about legality is driven in large part by concern for fair notice. Sarch's scheme involves technical jargon: Given his culpable-ignorance rule, "knowledge" in the criminal code means something different than "knowledge" means to the rest of us. That jargon undermines fair notice. And the law's guidance should be especially clear as to the distinction between permissible and impermissible behavior. If the law is functioning well, we should imagine that criminals are often disappointed to have been caught but rarely surprised by the court's interpretation of law. However, it is easy to imagine Jewell being caught off guard in this way.

Sarch's imputation rule, at least as applied in Jewell's case, can be distinguished from other familiar imputation rules. For instance, consider the doctrine of transferred intent in homicide. If a defendant intends to and attempts to kill A but accidentally kills B instead, the doctrine of transferred intent in homicide permits us to convict the defendant of intentional homicide. A second example is the felony-murder rule. If a defendant's conduct during the commission of a felony brings about an unintended death, the felony-murder rule permits us to convict that defendant of murder. Finally, consider the Pinkerton doctrine, from Pinkerton v. United States, 328 U.S. 640 (1946). Under that doctrine, a defendant in a criminal conspiracy may be held responsible for the substantive crimes other conspirators commit in furtherance of the conspiracy. In all of these cases, the defendant was already guilty of some other crime: attempted murder in the first case, the underlying felony in the second, and criminal conspiracy in the third.[4] By contrast, neither Jewell's reckless transportation of his controlled substance nor his failure to satisfy the duty to be reasonably self-informed were themselves crimes. Jewell was convicted of a knowledge crime despite lacking knowledge (as knowledge is ordinarily understood, Sarch stipulates) and despite neither of the grounds for imputation being themselves crimes.

Accordingly, Sarch's account faces a dilemma. Either there is a recklessness crime, and then it is not clear why we should not prefer an aggravated sentence to a pretending, or there is not a recklessness crime, and then pretending raises serious legality concerns. Either way, the pretense involved in the culpable-ignorance imputation rule is unattractive.

My second objection is to Sarch's culpability-aggregation claim. At the heart of Sarch's argument is the claim that culpably ignorant recklessness can be culpable in the same way and to the same degree as knowing wrongdoing. That equivalence claim is grounded in aggregation. There are two component wrongs in culpable ignorance cases: the intentional preservation of ignorance

[4] Sarch also considers the voluntary-intoxication doctrine, which could be understood as an exception to this pattern. I express skepticism about the voluntary-intoxication doctrine elsewhere (2016).

and then the reckless ultimate wrong. We are to look at the compound wrong composed of the two of them, and we are to ask how much culpable disregard that compound wrong manifests. As Sarch writes:

> For this imputation to be justified on my theory, it must be the case that (i) + (ii) [the combination of the intentional preservation of ignorance and the reckless ultimate wrong] manifests at least as much insufficient regard for the very same set of protected interests, values, and rights as (iii) [the comparable knowing wrong] does. (p. 168, emphasis omitted)

We are not identifying the culpability manifested separately by the two component wrongs and then somehow summing those results; rather, we are identifying the compound wrong and identifying the one manifestation of culpability by the single, aggregate wrong.

Why should we think that the aggregate wrong manifests more culpability than the worst of its components? Sarch argues that the aggregate wrong is more culpable than the worst of its component wrongs because one who commits an aggregate wrongdoing has "misse[d] two opportunities to help assure oneself that one won't bring about" the harm (p. 169). In another context, Sarch explains that "sometimes the only way to account for the fact that an offender repeatedly commits a given crime is that he has *even less* regard for his victims than it would take to get him to do the same crime just *once*" (pp. 185-186). Given Sarch's Principle of Lenity, increasing the number of missed opportunities to act rightly results in increased culpability. Accordingly, aggregate wrongs should be more culpable than the worst of their components.

I was moved by this argument, but it is too powerful. There are many cases where wrongdoers have multiple opportunities to avoid committing their ultimate harm. Consider a different path Jewell might have taken. Imagine that Jewell and his friend had wanted a Mexican vacation a little further from the border and had gone to Ensenada instead of stopping in Tijuana. There, as before, they meet a stranger in a bar. Again, Jewell has some suspicions, but he does not even think to inspect the car (or, perhaps, he does, but it becomes apparent that anything there is hidden beyond his ability to uncover it). He is ignorant, but not deliberately or intentionally so. Jewell drives the car over 100 kilometers to the American border. Along the way, he thinks several times about the high likelihood that the car contains contraband, but he continues driving. What should we say about Jewell in this case?

My intuition, consistent with Sarch's aggregation principle, is that the extended drive does manifest greater culpability than a short drive would. It plausibly does take more disregard to keep at the wrongdoing for nearly two hours than for just a few minutes. However, it seems that Sarch's argument would also allow us to convict this reckless Jewell of a knowledge crime, even though there is no culpable ignorance in this case, just extended recklessness. Finding greater culpability in the doggedly reckless Jewell seems correct. Indeed, I am comfortably accepting that some especially doggedly committed reckless Jewell might manifest more culpability than an impulsive knowing Jewell, so I accept that extended recklessness regarding the ultimate harm could yield equivalent or even greater culpability than mere knowing wrongdoing. However, convicting the extended-reckless wrongdoer of a knowledge crime seems too much. And yet it is not clear that Sarch has principled grounds to distinguish the two sorts of imputation.

Perhaps Sarch can retell this story to make it more palatable to convict extended-reckless wrongdoers of knowledge crimes. But I suspect that the better course is to reject this result by pointing to some deeper connection between culpable ignorance and knowledge. It isn't just that there are multiple opportunities to avoid doing wrong. Culpable ignorance and knowledge are both epistemic phenomena, and I suspect that if the imputation principle is to be justified, that connection will have to be made more central.

Both of these objections should be understood as inviting Sarch to continue his valuable project so that we can learn more about institutional design and whether there is something special about the epistemic nature of culpable ignorance. But those further questions do not denigrate the work before us. Sarch's book is full of rich material on criminal culpability, on lenity within culpability, and on the culpability of failing to investigate. I think his work has excavated and made clearer many of the issues within imputation. I remain undecided—open but skeptical—regarding his ultimate conclusion, but Sarch's book is a great pleasure and well worth reading and studying.[5]

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[5] My comments are developed from comments I offered during an Author-Meets-Critics session on *Criminally Ignorant* at the American Philosophical Association's Eastern Division Meeting in January 2020. I participated in that session with Alexander Sarch, Emad Atiq, Mihailis Diamantis, and Robert Hughes. I thank them and our audience for a productive and lively conversation about Sarch's text.