

When Leaders Bury Their Heads in the Sand and Fail to Investigate Red Flags

Are Ostriches Criminally Culpable?

By Kenneth R. Chadwell

FBI agents executing a federal search warrant on all computers and files is the last thing a CEO wants to learn about at 8 a.m. Monday morning. How can companies avoid such an event? Leaders simply must know, or find out, all material facts to protect their organizations and themselves from criminal (and civil) liability when unethical and illegal behavior occurs in their midst. Better still, why not proactively discover misconduct before the government does it for you, root out miscreants regardless of rank, and turn wrongdoers in to the proper authorities? Truth seeking¹ is the best course for protecting an organization and it is what is expected by prosecutors, judges, and juries.

No one sympathizes with the “I didn’t know” defense

Let’s be clear. If you are in leadership of an educational institution, company, charity, governmental office, or other organization, no one wants to hear about how you would have fixed the problem if you had only known. You are supposed to know. That is why you are in charge.

One’s level of knowledge, or mens rea, is highly relevant to one’s exposure to civil and criminal responsibility. Depending upon the crime (or tort), a finding of liability might require proof of specific intent (willfulness), general intent (knowledge), recklessness, or

negligence. Knowledge is the most common mens rea required to establish a crime. This is usually understood to mean that a person is aware of the relevant facts, but there are different ways to prove knowledge. One particularly frightening way when it comes to someone who has been placed in charge is presenting evidence that the person at the helm deliberately avoided knowing what was going on. In many cases, such proof can support a finding of knowledge.

Leaders must not ignore red flags without risking an inference of culpable knowledge

While not commonly discussed with respect to organizations, the notion of equating deliberate ignorance with knowledge is not new or obscure. Proving guilty knowledge in this manner dates back at least 150 years to English common law² and, more recently, was reflected in the Model Penal Code.³ The commentary to the MPC explained that the expanded definition of knowledge targeted “the case of the actor who is aware of the probable existence of a material fact but does not determine whether it exists or does not exist.”⁴

Similarly, “in the federal courts, willful blindness instructions — sometimes called ‘deliberate ignorance’ or ‘conscious avoidance’ or ‘ostrich’ instructions — are now commonly given and commonly upheld.”⁵ Every federal circuit has approved an ostrich instruction for a variety of criminal offenses based upon varying rationales.⁶ The U.S. Court of Appeals for the Sixth Circuit has recognized a deliberate ignorance instruction in criminal cases to the effect that “the deliberate avoidance of knowledge” constitutes proof of knowledge. A precondition for giving this instruction is “evidence to support an inference ‘that the defendant

acted with reckless disregard of [the high probability of illegality] or with a conscious purpose to avoid learning the truth.’”⁷

This type of instruction would also be appropriate if someone “deliberately chose not to inform himself” of critical information.⁸ Failure to investigate potential wrongdoing could fall into this category, at least in instances where leadership has reason to seek more information. Direct evidence of willful blindness need not be established to give rise to an ostrich instruction; circumstantial evidence of avoiding the truth may be enough. As the U.S. Court of Appeals for the First Circuit has explained, “what is needed are sufficient warning signs that call out for investigation or evidence of deliberate avoidance of knowledge.”⁹ Such evidence may be used to establish criminal culpability on the part of management personnel aware of red flags that should have resulted in a comprehensive investigation of potential wrongdoing but didn’t.

Sentencing guidelines credit and accommodate objective internal investigations, compliance and ethics programs, and full cooperation in prosecuting bad actors

The federal government has guidelines in place for judging the culpability of companies and other entities. Organizations are considered less culpable if they have compliance and ethics programs that are “generally effective in preventing and detecting criminal conduct.”¹⁰ To expect understanding or leniency from federal judges, organizations must “exercise due diligence to prevent and detect criminal conduct” and “promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”¹¹ Businesses are rewarded for reporting crimes to the government in a

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timely manner and fully cooperating with criminal investigations, and punished for not doing so. Federal guidelines allow companies a reasonable amount of time to conduct their own internal investigations into potential criminal conduct without incurring a higher culpability score.¹²

The U.S. Department of Justice (DOJ) has published its own standards for determining when an organization should be criminally prosecuted. These are publicly available in the U.S. Attorney's Manual under the title "Principles of Federal Prosecution of Business Organizations."¹³ Among the considerations examined by federal prosecutors are:

- 1) the pervasiveness of wrongdoing within the organization, *including whether management was complicit* (emphasis added);
- 2) the company's willingness to cooperate;
- 3) the adequacy of the corporation's compliance program;
- 4) the entity's timely and voluntary disclosure of criminal violations; and
- 5) the business's remedial actions such as termination of employees, including managers.¹⁴

The obvious alternative to these ethical safeguards is a federal indictment of the corporation and its culpable employees.

An organization as vaunted as the FBI ignored red flags — with grave results

The cautionary tale of FBI special agent Robert Hanssen is instructive. Hanssen was with the FBI for 25 years and, during much of that time, was one of the Soviet Union's most important spies. He was finally caught in 2001, convicted of espionage, and sentenced to life imprisonment — but not before he did untold damage to U.S. national security. In the words of DOJ's Office of Inspector General:

"Hanssen gave the KGB thousands of pages of highly classified documents and dozens of computer disks detailing U.S. strategies in the event of nuclear war, major developments in military weapons technologies, information on active espionage cases, and many other aspects of

the U.S. Intelligence Community's Soviet counterintelligence program."¹⁵

The sad thing is that the most damaging spy in FBI history could have been stopped long before 2001 had someone been paying attention to basic ethics and proper workplace behavior. As is true with many serious perpetrators, there were many red flags surrounding Hanssen. One such incident occurred in 1993 inside the FBI headquarters in Washington, D.C., when Hanssen physically assaulted a female support employee,¹⁶ knocking her to the ground and dragging her by the arm down a hallway.¹⁷ He had also been sexually harassing that same woman.¹⁸ Rather than termination and criminal prosecution, the FBI let Hanssen off with a five-day suspension. Management's failure to protect a single employee from physical assault and sexual harassment allowed Hanssen to carry out another eight years of espionage — the very thing the FBI is supposed to prevent.

Conclusion

Leaders of businesses, educational institutions, and other organizations must proactively prevent, detect, and eliminate misconduct and unlawful activity in their midst through established ethics and compliance programs for the good of the organization and themselves. When red flags arise, objective and timely internal investigations should be conducted to learn all critical facts. Where appropriate, prosecutors, judges, and juries will expect remedial steps, terminations, and the voluntary reporting of criminal violations to law enforcement. Otherwise, management can expect accusations of knowledge and complicity resulting in civil or criminal proceedings. Such ostriches are increasingly being exposed and held to account. ■

Kenneth R. Chadwell served as an assistant attorney with the U.S. Department of Justice for nearly 30 years, where he investigated and prosecuted criminal RICO cases, national security matters, terrorist financing, fraud, narcotics and money-laundering conspiracies, tax evasion, and other complex federal crimes. A recipient of the U.S. Attorney General's Award for Distinguished Service, Chadwell is a partner at Mantese Honigman in Troy.

ENDNOTES

1. Prominently displayed in the lobby of the Central Intelligence Agency is the following quotation from John 8:32: "Ye shall know the truth, and the truth shall make you free." Seeking out the truth could very well mean freedom from lawsuits, freedom from public scorn, and freedom from criminal indictment.
2. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J Crim L & Criminology 191, 196 (1990), available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6659&context=jclc> [https://perma.cc/KVB2-XDPA]. All websites cited in this article were accessed July 30, 2021.
3. Model Penal Code § 2.02(7) ("[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes it does not exist.").
4. *Id.*, § 2.02, Comment 9.
5. *United States v Alston-Graves*, 435 F3d 331, 338; US App DC 219 (DC Cir, 2006).
6. *Id.*
7. *United States v Mitchell*, 681 F3d 867, 876 (CA 6, 2012) (quoting *United States v Seelig*, 622 F2d 207, 213 (CA 6, 1980)) and Pattern Criminal Jury Instruction 2.09 "Deliberate Indifference," United States Court of Appeals for the Sixth Circuit (2019), available at <https://www.ca6.uscourts.gov/pattern-jury-instructions> [https://perma.cc/X65R-2GM4].
8. *United States v Geisen*, 612 F3d 471, 487-488 (CA 6, 2010) (rejecting argument that supervisor relied in good faith on information from those with first-hand knowledge).
9. *United States v Azubike*, 564 F3d 59, 66 (CA 1, 2009).
10. US Sentencing Guideline § 8B2.1(a) "Effective Compliance and Ethics Program," United States Sentencing Commission (2018). This and other sentencing guidelines are available at <https://guidelines.uscc.gov/gl/%C2%A78B2.1> [https://perma.cc/NS28-D5DX].
11. *Id.*, § 8B2.1(a)(1), (2).
12. *Id.*, § 8C2.5, Application Note 10.
13. Justice Manual §§ 9-28.010-9-28.1500 "Principles of Federal Prosecution of Business Organizations," US Dept of Justice. This and other sections are available at <https://www.justice.gov/jm/justice-manual> [https://perma.cc/SSDW-JWC6].
14. US Attorney's Manual § 9-28.300.
15. *A Review of the FBI's Performance in Detering, Detecting, and Investigating the Espionage Activities of Robert Philip Hanssen* (Unclassified Executive Summary), US Dept of Justice, Office of Inspector General (August 2003), p 1, available at <https://fas.org/irp/agency/doj/oig/hanssen.pdf> [https://perma.cc/779W-MKEV].
16. *Id.* at p 5.
17. Wise, *Spy: The Inside Story of How the FBI's Robert Hanssen Betrayed America* (New York: Random House, 2003), pp 154-156.
18. *Id.* at pp 153-154.