Excerpt from *Criminally Ignorant: Why the Law Pretends We Know What We don’t (OUP, 2019)*

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Introduction:

The CEO of CarCo suspects that while the cars the company manufactures emit more CO2 than legally permitted, middle management is doctoring the emissions tests to hide the violations. His advisers offer to carry out a large internal investigation to determine whether this is true. But the CEO tells them to not to bother—the money should go to finishing up the fancy new corporate headquarters instead. He orders them to not mention this to him ever again, and they should avoid discussing the matter with any engineers or scientists who might have knowledge of the issue. Actually, the CEO’s suspicions were correct: the emissions tests were fraudulent.

The CEO has been willfully ignorant. He deliberately preserved his ignorance of the fact that company employees were engaged in fraud. Were the CEO charged with aiding the fraud, his willful ignorance would be no defense. Insisting that he didn’t actually know the fraud was occurring (he merely suspected it) would do him no good.

This might seem puzzling. After all, ignorance of essential facts generally *does* have exculpatory force in the criminal law. If I start punching what I genuinely believe to be a pillow and don’t realize until it was too late that this was no pillow but a person, then I might avoid conviction for assault.[[1]](#footnote-1) If I genuinely didn’t know that the fancy new laptop my friend gave me was stolen, I might avoid a conviction for receipt of stolen property.[[2]](#footnote-2) So if ignorance is usually exculpatory, why are things different for willful ignorance?

One way to start to see the answer is that there would be grave dangers if ignorance always did exculpate. If ignorance always precluded conviction, there would be clear incentives to commit crimes in a state of obliviousness. It would allow us to get the benefits of criminal activity without facing liability in the event of prosecution. Judicial tools are therefore needed to counteract the incentives to preserve one’s ignorance about the wrong-making features of what we do.

The willful ignorance doctrine is just such a tool. It says courts may treat the deliberate attempt to remain ignorant of the criminal nature of your conduct as a basis for punishing you *as if* you knew what you were doing. Thus, the CEO of CarCo could be punished *as if* he knew of the emissions fraud. Similarly, Judge Jed Rakoff observed that in the run-up to the 2008 financial meltdown, a “top-level banker…confronted with growing evidence…that mortgage fraud was increasing, might have inquired…[but] if…the executive failed to make such inquiries, might it be because he did not want to know what such inquiries would reveal?”[[3]](#footnote-3) The willful ignorance doctrine allows convicting such bankers of crimes requiring knowledge—like aiding and abetting or conspiracy to commit fraud. Indeed, Judge Rakoff argues that, given the willful ignorance doctrine, prosecutors shouldn’t have been so reluctant to prosecute the executives at the heart of the meltdown.

In this book, I investigate the deeper principles behind the intuitive idea that willful ignorance is equivalent to knowledge, such that courts may pretend that actually ignorant defendants possessed the knowledge required by statute. What is the principled explanation for why a court may treat those who kept themselves in the dark *as if* they knew what they were doing?

The traditional answer offered by courts is a hypothesis about culpability: Deliberately turning a blind eye to the facts that make one’s conduct criminal is equally culpable as acting with knowledge thereof. This so-called *equal culpability thesis* is often invoked by courts, but rarely examined. Still, it raises fundamental questions about the criminal law. What sense of culpability is at issue here? Why is deliberately preserving one’s ignorance culpable in this sense? Does self-induced ignorance always make one’s conduct as culpable as knowing misconduct, or only sometimes? If the latter, when? Can *any* sufficiently culpable conduct—like cheating on spouses or taxes—suffice for treating one as if one possessed the knowledge required for just any crime, like fraud or possessing drugs? Certainly not—but why, exactly? What limits are there on the law’s pretense that we know what we don’t? Why does equally culpable willful ignorance support *pretending* that defendants had knowledge when in reality they didn’t? Can we make sense of this legal fiction?

These are the questions this book aims to answer. The overarching ambition is to defend a theory of when and why the criminal law may legitimately impute mental states on the basis of equal culpability. This helps place the existing willful ignorance doctrine on a more secure normative foundation. At the same time, the theory reveals the pressing need for doctrinal reforms: The willful ignorance doctrine must be restricted to avoid punishing defendants more than they deserve.

My project is not limited to willful ignorance, however. The normative idea behind the willful ignorance doctrine—that we may impute missing mental states to defendants on equal culpability grounds—is surprisingly fertile, and, if taken seriously, grounds an array of further imputation principles. Thus, I defend several new rules, which allow certain forms of culpable but not-quite-willful ignorance (like recklessly or negligently preserved ignorance) to substitute for higher mental states like knowledge or recklessness. I also defend corporate analogs of certain imputation principles. Still, because equal culpability imputation is such potent idea, it must be reigned in by setting appropriate limits on its use. What’s needed is a theory that places the idea of equal culpability imputation on a solid theoretical foundation, while also demarcating its proper boundaries.

The willful ignorance doctrine thus serves as my window into a broader set of questions about the criminal law. By generalizing from willful ignorance, I seek to justify the imputation of mental states on equal culpability grounds *in general*. This, in turn, requires elucidating the notion of criminal culpability that underwrites such imputation. Imputing mental states on the basis of equal culpability amounts to a legal fiction, and thus carries inherent risks. But not all legal fictions are unjustified—particularly if used within proper limits. Courts must be more cognizant of the theoretical foundations of such imputation principles to avoid applying them in unjust ways. My theory of when and why equal culpability imputation is a justifiable way to promote the aims of the criminal law shows how to do just this. It provides the basis for a restrained and defensible use of equal culpability imputation. While my primary focus throughout the book is US federal law, my normative project has clear implications for analogous rules in state law and other common law jurisdictions like the UK and Canada.

The book is divided into three Parts—one about the conceptual foundations of criminal liability, one about the existing willful ignorance doctrine, and the third about rules that go beyond willful ignorance. More specifically, Part I starts by introducing key concepts in Chapter 1, and then defends a theory of criminal culpability in Chapter 2, which anchors the theoretical arguments in later chapters.

Part II examines the normative basis for the existing willful ignorance doctrine for individuals. Chapter 3 argues against the most prominent attempts to justify some version of the doctrine. Instead, Chapter 4 defends a more principled account of when and why willful ignorance actually is as culpable as knowing misconduct. This reveals the proper limits within which courts should give willful ignorance jury instructions, and I show how such normatively improved jury instructions can be formulated in workable ways.

Part III then moves beyond willful ignorance. In Chapter 5, I extract from the willful ignorance doctrine a general theory of equal-culpability-based mental state imputation. This theory lies at the core of the book. The theory not only completes my defense of the legitimacy of allowing willful ignorance to substitute for knowledge, but also helps evaluate and reform numerous other criminal law doctrines—including the felony murder, transferred intent, intoxication, and Pinkerton rules. I then proceed to use this theory to examine other forms of ignorance that are not strictly speaking willful. Chapter 6 argues that repeatedly recklessly preserving one’s ignorance can also substitute for knowledge provided the conditions of equal culpability are met. However, there are inherent limits to equal-culpability-based imputation. Thus, Chapter 7 argues that no form of culpable ignorance is itself sufficient for treating defendants as *purposeful* wrongdoers. By contrast, Chapter 8 argues that another form of sub-willful motivated ignorance, where one is not fully aware of the risks of one’s conduct, justifies treating some negligent actors as if they were reckless.

Finally, Chapter 9 considers corporations. It is not only culpable to preserve one’s own ignorance, but the same is true for preserving the ignorance of others. Accordingly, I argue that when corporate employees culpably preserve the ignorance of others within the corporation, the missing knowledge of the relevant inculpatory facts can be imputed *to the corporation*. I extend my theory of criminal culpability to corporate actors, and argue that culpably interfering with the information flow within the corporation can justify imputing knowledge to the corporation itself.

In this way, I not only seek to place the existing willful ignorance doctrine on a more secure normative foundation, but also to delineate the proper boundaries of equal culpability imputation in general. The result is a comprehensive account of when the criminal law may legitimately impute missing mental states on the basis of equal culpability.

Chapter 1:

Criminal Law Basics and the Willful Ignorance Doctrine

This chapter sets the stage. My starting point is the willful ignorance doctrine, since it is the source from which I will eventually extract my general theory of equal culpability mental state imputation. After explaining some core criminal law concepts, I introduce the willful ignorance doctrine and the normative claim it is premised on—the *equal culpability thesis*. Situating the doctrine in the broader criminal law context reveals the questions to be tackled in the book, and the chapter ends by indicating the sorts of answers I will develop.

[…]

1. The Basic Notion of Willful Ignorance

Evaluating the equal culpability thesis requires elucidating the notions of both criminal culpability and willful ignorance. Culpability is the primary focus of Chapter 2, where I defend a particular version of the popular *insufficient regard theory* of criminal culpability. Its basic thought is that one is culpable for an action to the extent it manifests insufficient regard for the interests of others that are properly protected by the law.[[4]](#footnote-4)

Here, let’s focus on willful ignorance. To start, it is widely agreed that willful ignorance is not just a subspecies of criminal law knowledge. As seen, knowledge in the criminal law consists in high subjective certainty (or belief) plus truth.[[5]](#footnote-5)The consensus among courts[[6]](#footnote-6) and commentators[[7]](#footnote-7) is that willful ignorance is not knowledge thus understood. This familiar point bears emphasizing because one might have thought the equal culpability thesis could be maintained just by defining knowledge so that willful ignorance counts as a type of knowledge. In that case, anyone who does the actus reus in willful ignorance would trivially be as culpable as one who does it knowingly, since the willfully ignorant defendant would herself be a knowing actor. Indeed, this is arguably the strategy employed by the Model Penal Code.[[8]](#footnote-8)

However, this strategy fails.[[9]](#footnote-9) As some scholars convincingly argue, one can be willfully ignorant of a proposition without having a particularly high degree of confidence in its truth.[[10]](#footnote-10) Perhaps one merely sees the proposition’s truth as *somewhat* probable—though not probable enough to be *practically certain* of it—and then goes on to deliberately avoid acquiring more information about it. This would be a case of willful ignorance that falls outside the criminal law definition of knowledge as practical certainty. (Indeed, as Husak and Callendar argue, some cases of willful ignorance would not fit within *any* plausible definition of knowledge.[[11]](#footnote-11))

If willful ignorance is not just a form of knowledge, what *is* it? On the most basic understanding, willful ignorance involves two components. Glanville Williams noted that a person is willfully ignorant if he “has his suspicions aroused but then deliberately omits to make further enquiries.”[[12]](#footnote-12) Likewise, the Supreme Court recently observed that most courts agree on “two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.”[[13]](#footnote-13) Given the broad agreement that at least these two prongs are required, I adopt the following as my *basic account* of willful ignorance:

**Basic Willful Ignorance**: To be willfully ignorant of an inculpatory proposition *p* (which let’s suppose is true[[14]](#footnote-14)), one must

1. have sufficiently serious suspicions that *p* is true (*i.e*. believe that there is a sufficiently high likelihood that *p* is true, short of practical certainty[[15]](#footnote-15)), and
2. deliberately (as opposed to negligently or recklessly) fail to take reasonably available steps to learn with greater certainty whether p actually is true.

Unless otherwise indicated, this is the sense of willful ignorance I use. As Chapter 3 notes, one might add further requirements to this basic account to restrict it to cases of willful ignorance that seem particularly bad. For example, some federal circuits insist one’s motive for remaining ignorant must be to preserve a defense against liability in the event of prosecution.[[16]](#footnote-16) (Chapter 3 discusses but rejects this restriction.) Still, the basic account of willful ignorance yields the broadest version of the equal culpability thesis that is at least plausible. So this is my starting point.

Before proceeding, several clarifications are necessary. First, on the basic account, performing the actus reus of a crime in willful ignorance always makes one qualify as *at least* reckless. As Alexander and Ferzan emphasize, “[t]he prototypical willfully ignorant actor is, of course, reckless. The risk he is taking—of, say, smuggling drugs—is an unjustifiable one.”[[17]](#footnote-17) This follows from prong (1) of the account of basic account. It states that willful ignorance requires harboring suspicions that the inculpatory proposition for the crime is true (*e.g*. that the substance one is transporting is drugs). Thus, if one proceeds to do the actus reus in the face of these suspicions, one at least counts as reckless as to that proposition. The question we will ultimately have to confront, then, is what could raise the willfully ignorant defendant’s culpability up from the level of mere recklessness to that of knowing misconduct.[[18]](#footnote-18)

Not all theorists agree that suspicions of p are needed to be willfully ignorant of p. Some think one can be willfully ignorant of p without any awareness of a risk that p. [[19]](#footnote-19) On this view, if one merely should have been aware of such a risk, but then went on—perhaps unconsciously—to block oneself from obtaining more information about whether p, one might count as “willfully ignorant” in a broad sense. Admittedly, this might be appropriate terminology for moral evaluation. Perhaps I display a morally objectionable form of “willful” ignorance if I *should* realize my salad dressing might contain traces of seafood, but my dislike of one guest with a seafood allergy subconsciously affects me so this possibility ceases to be salient and I don’t check whether the salad dressing contains seafood before serving it. This broad notion of “willful” ignorance is a species of negligence (as discussed in Chapter 8).

Nonetheless, this broad notion is not the concept of willful ignorance that the criminal law employs, and the criminal law is my primary concern here. Willful ignorance matters to the law because courts allow it substitute for knowledge of the inculpatory proposition. But to serve this function, willful ignorance must at least rise to the level of recklessness. While it is plausible that an especially egregious form of recklessness (“recklessness plus”) can make the defendant culpable enough to merit treatment as a knowing wrongdoer, it is doubtful that any form of mere negligence could. Accordingly, in this book, I understand willful ignorance as criminal law does.

Next, prong (2) is necessary to distinguish willful ignorance from other forms of culpable ignorance. Self-caused ignorance, after all, is not always willful or deliberate—it might be merely reckless or negligent. Suppose one is uncertain about some question, and while one meant to investigate, one simply forgot or was distracted from doing so. This clearly makes one count as ignorant, but one’s ignorance does not seem *willful*—just inadvertent or negligent. For ignorance of some fact to be truly willful, one must deliberately decline—or, equivalently, consciously choose not—to acquire additional information about the matter. This is the law’s position, and I follow this assumption too.[[20]](#footnote-20) Prong (2) in the basic account captures this.

Lastly, what does “deliberately” as used in (2) mean? I take this term from the Supreme Court in *Global-Tech*.[[21]](#footnote-21) Paradigmatically, to deliberately fail to investigate involves acting with *purpose*—the aim or intent—to preserve one’s ignorance. Most courts adopt this meaning of “deliberately preserving one’s ignorance.”[[22]](#footnote-22) However, some courts suggest that even when the defendant did not have purpose to remain in ignorance, a *merely knowing* failure to investigate (*i.e*. doing what one knows will prevent one from learning the truth, but not intending this) can also suffice for willful ignorance. This is suggested especially by statements that willful ignorance requires “conscious avoidance” of inculpatory knowledge.[[23]](#footnote-23) On this view, one could also count as willfully ignorant if one acted in ways one merely is *practically certain* will preserve one’s ignorance, even if this was not one’s purpose or aim. (Some courts aren’t consistent on this point and slide between these two views.[[24]](#footnote-24)) For clarity, I favor the second, wider approach. Still, to avoid needless controversy, I generally focus on the first, more familiar type of willful ignorance. I’ll explicitly note where this wrinkle makes a difference.

1. Clarifying The Equal Culpability Thesis

As noted, the normative foundation for the willful ignorance doctrine—its “substantive justification”[[25]](#footnote-25)—is the equal culpability thesis. It claims, roughly, that misconduct done in willful ignorance in the basic sense is just as culpable as knowing misconduct. However, there are two ways to unpack this claim. One, it turns out, is far superior.

First, the equal culpability thesis might be understood as the claim that whenever a defendant D does the actus reus of knowledge crime C in willful ignorance, *there is some possible person directly guilty of C who D is just as culpable as*. This amounts to saying that a willfully ignorant D can be convicted of C as long as D is as culpable as the *least culpable* *knowing actor* who could legitimately be found guilty of C.

Nonetheless, this version of the equal culpability thesis—the “Indeterminate Counterpart” interpretation—raises concerns. Even if true, it would not be a defensible basis for allowing willful ignorance to substitute for knowledge. The logic of this version of the thesis suggests that anyone who does the actus reaus of C can be convicted of C solely because she attains the *minimum level of culpability* required for C. However, it is unclear how to even begin determining what this minimum culpability level is for any particular crime. I doubt there is any such level for particular crimes.

Moreover, since most crimes can be committed under circumstances that do not render one very culpable, the logic of grounding the willful ignorance doctrine on the Indeterminate Counterpart thesis implies that even *very slightly negligent* actors could in principle be convicted of serious knowledge crimes. Consider a secretary bullied into doing things she knows will help her domineering boss commit fraud. While the abuse and pressure she faced greatly reduces her culpability for assisting the fraud, assume it stops just short of constituting the defense of duress to the crime of aiding and abetting fraud (a crime that requires knowledge of the underlying offense). But accountants, lawyers or bankers in everyday life who are only slightly negligent, lazy or incompetent can very easily attain the same level of culpability in dealing with clients who actually are perpetrating frauds. By the logic of the Indeterminate Counterpart interpretation of the equal culpability thesis, this would allow the slight negligence of these accountants, lawyers or bankers to substitute for full knowledge of their clients’ fraud. But this is an implausible basis for imposing aiding and abetting liability.

Thus, a different interpretation of the equal culpability thesis is needed. Instead, it should be understood as the claim that willfully ignorant misconduct is as culpable as *the analogous knowing misconduct*. The idea is to focus on the willfully ignorant defendant’s *similarly situated* knowing counterpart, as follows:

**Unrestricted Equal Culpability Thesis (“UECT”)**: Suppose A1 and A2 each perform the actus reus of a given crime that requires knowledge of an inculpatory proposition, p. A1 and A2, and their respective actions, are identical in every respect except one: while A1’s action is performed with knowledge of p, A2’s action is performed in willful ignorance of p in the basic sense. On these suppositions, A2 is (at least) as culpable for her action as A1 is for his.

This version provides a more plausible basis for the willful ignorance doctrine. It does not face the problems of the Indeterminate Counterpart interpretation. First, it does not require determining each crime’s minimum culpability level. Moreover, it is unlikely that only slightly negligent actors will be as culpable as their *exactly analogous* knowing counterparts. Accordingly, I take UECT to be the simplest formulation of the equal culpability thesis that at least is *plausible* as a basis for the willful ignorance doctrine.

Most federal courts accept UECT, insofar as they allow willful ignorance in the basic sense (not some restricted form of willful ignorance that requires bad motives for not investigating) to suffice for giving willful ignorance jury instructions. Most notably, the Ninth Circuit adopted the unrestricted approach in *United States v. Heredia*.[[26]](#footnote-26) The court held that a “two-pronged instruction”—requiring only that the defendant suspected “drugs were in the vehicle…and deliberately avoided learning the truth”[[27]](#footnote-27)—was adequate.[[28]](#footnote-28) Other circuits resemble the Ninth Circuit in allowing willful ignorance in the basic sense to suffice—including the Second,[[29]](#footnote-29) Third[[30]](#footnote-30) Fifth,[[31]](#footnote-31) Sixth[[32]](#footnote-32) and Seventh Circuits.[[33]](#footnote-33) (At least two circuits—the First and Fourth—have issued conflicting decisions on whether willful ignorance in the basic sense suffices.[[34]](#footnote-34)) Moreover, it is plausible that the Supreme Court favors the unrestricted approach. After all, in its recent *Global-Tech* decision, when sketching the willful ignorance doctrine, the Court only mentioned the two prongs of the basic account. Indeed, some courts have cited *Global-Tech* in support of the claim that the Supreme Court does not favor the restricted motive approach some circuits favor (as discussed in Chapter 3).[[35]](#footnote-35) Nonetheless, it is not clear how much to make of this, since *Global-Tech* did not expressly confront whether further restrictions to the concept of willful ignorance should be imposed.

1. The Questions To Be Answered

We’ve seen what willful ignorance is and how to understand the courts’ traditional rationale for this doctrine—the equal culpability thesis. My aim in this book is not only to examine the justification and scope of the willful ignorance doctrine, but to use the theoretical framework we get out of this examination to investigate a range of foundational questions about the criminal law that the doctrine implicates. What are they?

Starting narrowly and working outwards, one question we’ve already seen is that of when the willful ignorance doctrine may legitimately be applied. Trivially, this will be when the equal culpability thesis is true. But when is that? Answering this question reveals when willful ignorance grounds the imputation of knowledge as needed for conviction. Chapters 3 and 4 build an account of when willful ignorant misconduct is as culpable as analogous knowing conduct.

This inquiry, in turn, requires understanding the nature of criminal culpability. To explain when willfully ignorant defendants are as culpable as their knowing counterparts, a theory of culpability is needed. But what concept of culpability does the criminal law employ? Is it just the moral concept of culpability? Or is it a simplified version of the moral concept? Is it something entirely different? Chapter 2 develops a theory of criminal culpability, which grounds the rest of the arguments in the book.

Broader questions about the criminal law lurk nearby. The willful ignorance doctrine is a mens rea imputation principle,[[36]](#footnote-36) which allows willful ignorance to stand in for knowledge. What justifies such imputation? Doesn’t this amount to allowing defendants to be convicted of knowledge crimes although they don’t literally satisfy all the required elements—*i.e*. don’t possess the knowledge these crimes actually require? Such imputation principles may seem to conflict with the *principle of legality*, under which defendants cannot be legitimately convicted unless it’s proven beyond a reasonable doubt (following applicable procedures) that they satisfy all elements of the crime charged. Given the centrality of this principle to the rule of law, one might reject the willful ignorance doctrine as an intolerable threat to rule of law norms.

However, this would be a mistake. Chapter 5 discusses several arguments courts have used to defend the legality of the willful ignorance doctrine, and where they fall short, statutory reforms can preserve the willful ignorance doctrine. Nonetheless, this leaves an important normative question: When, if ever, would such statutory reforms codifying the willful ignorance doctrine be normatively justified? This is a serious challenge that extends beyond the willful ignorance doctrine. It can arise for any equal culpability imputation principle. When is the legislature justified in codifying any particular equal culpability imputation principle into the criminal law?

To answer this challenge, Chapter 5 defends a general theory of equal culpability imputation. The theory explains why it is justified for courts to impute missing elements to a defendant simply on the ground that she is as culpable as if she had literally satisfied those elements. Such substitution, I contend, is justified when, but only when, the defendant’s culpability is identical in type and degree to the culpability the legislature sought to defend against when specifying the core elements of the relevant crime. This theory of equal culpability imputation not only vindicates a restricted version of the willful ignorance doctrine, but justifies other equal culpability substitution principles like the transferred intent rule and some applications of the infamous *Pinkerton* doctrine. But it also shows other controversial doctrines—like the felony murder rule—to be unjustifiable on equal culpability grounds.

By doing all this—explaining why and to what extent willful ignorance is culpable, outlining the proper scope of the willful ignorance doctrine, and explaining how the willful ignorance doctrine and related rules can be justified as legitimate equal culpability imputation—I aim to provide a more solid theoretical basis for imputation rules like the willful ignorance doctrine than the literature currently provides. In addition, this inquiry provides a window into further questions about criminal law. Some views of willful ignorance assume one’s motives for remaining ignorant affect culpability. However, we’ll see that this conflicts with the default rule in the criminal law that motives don’t matter for culpability. Who is right? Those who assert that motives impact the culpability of the willfully ignorant, or those who support substantive criminal law doctrine’s general disinterest in motives? My theory of culpability in Chapter 2 sheds light on the issue. While capable of capturing both sides of this debate, the theory favors the view that motives shouldn’t matter to the notion of culpability that is relevant at the guilt stage of criminal proceedings (as opposed, perhaps, to sentencing).

Lastly, I go on in later chapters to argue that my theory of equal culpability imputation, which provides the normative foundation for the willful ignorance doctrine, also supports going *beyond willful ignorance* to cover other forms of culpable, but non-willful ignorance. I argue courts should recognize additional *non-willful ignorance substitution principles* for the same reasons they recognize the existing willful ignorance doctrine. Zooming out and appreciating the full sweep of the equal culpability rationale behind the willful ignorance doctrine gives reason to adopt new equal culpability imputation principles. First, I argue in Chapter 6 that we should allow egregious recklessly preserved ignorance to substitute for knowledge. However, I also explain in Chapter 7 why no form of culpable ignorance should by itself substitute for purpose. Still, I contend that legitimate equal culpability imputation extends further in other ways. Chapter 8 argues that equal culpability licenses treating certain egregious forms of blanket unawareness of risks as a basis for imputing *recklessness*, while Chapter 9 argues that some kinds of culpable ignorance in corporate settings grounds the attribution of knowledge to corporations themselves.

In all these ways, investigating the foundations of the willful ignorance doctrine prove a fertile endeavor. It not only helps sharpen our understanding of existing doctrinal tools and the normative considerations they are based on, but also helps us improve those doctrinal tools and fashion new ones to fill the gaps where the current options fall short.

1. Model Penal Code (“MPC”) § 211.1 (defining assault); MPC § 2.04(1) (defining “mistake of fact” defense). [↑](#footnote-ref-1)
2. MPC § 223.6. [↑](#footnote-ref-2)
3. Jed Rakoff, *The Financial Crisis: Why Have No High Level Executives Been Prosecuted?*, N.Y. Rev. Books (Jan. 9, 2014). [↑](#footnote-ref-3)
4. *See, e.g*., Larry Alexander and Kimberly Ferzan, Crime and Culpability 67-68 (2009) (“insufficient concern [is] the essence of culpability”); Peter Westen, *An Attitudinal Theory of Excuse*, 25 L. & Phil. 289, 373-74. [↑](#footnote-ref-4)
5. *See supra* note 10. [↑](#footnote-ref-5)
6. United States v. Svoboda, 347 F.3d 471, 477-78 (2d Cir. 2003) (willful ignorance instruction “permits a finding of knowledge even where there is no evidence that the defendant possessed actual knowledge” (internal quotation marks omitted)); United States v. Freeman, 434 F.3d 369, 378 (5th Cir. 2005) (“deliberate indifference charge permits ‘the jury to convict without finding that the defendant was aware of the existence of illegal conduct’”); *Global-Tech*, 131 S. Ct. at 2072 (Kennedy, J., dissenting) (“[w]illful blindness is not knowledge”). [↑](#footnote-ref-6)
7. Robbins, *supra* note 12 at 226 (“deliberate ignorance is not knowledge”); Deborah Hellman, *Willfully Blind for Good Reason*, 3 Crim. L. & Phil. 301, 302 (2009) (“contrived ignorance itself is not a form of knowledge”); Husak and Callender, *supra*,note 46 at 51 (arguing that “wilfully ignorant defendants do not possess knowledge”). [↑](#footnote-ref-7)
8. The MPC commentary explains its definition of knowledge in “[p]aragraph [2.02](7) deals with the situation British commentators have denominated ‘wilful blindness’ or ‘connivance.’” MPC 129-30 (Tent. Draft No. 4, 1955). *See also* Marcus, *supra* note 8 at 2231-32. [↑](#footnote-ref-8)
9. Here’s why. MPC § 2.02(7) states that “[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 that it does not exist.” While this covers some instances of willful ignorance, it clearly doesn’t cover all. As argued in the main text, one might have serious suspicions about a fact (*e.g*. there are drugs in the suitcase) and deliberately preserve one’s ignorance thereof, but still not believe this fact has a “high probability” of obtaining. Perhaps one only believes it has a 30-40% chance of obtaining. This clearly is enough for willful ignorance, but falls outside the expanded MPC definition of knowledge in MPC § 2.02(7). Thus, MPC § 2.02(7) is too narrow to fully capture the phenomenon of willful ignorance.

   Here’s a second problem. MPC § 2.02(7) also ropes in cases that *neither* fit the core definition of knowledge as practical certainty *nor* involve any kind of willful ignorance. Suppose the defendant thinks there is a high probability (perhaps 60%) that there are drugs in the suitcase. However, investigating might not be feasible and he makes no effort to preserve his ignorance. MPC § 2.02(7) would implausibly count this as knowledge too. The case actually is neither knowledge in the sense of practical certainty nor willful ignorance, as defined below. Instead, it is mere recklessness as to the fact of drugs in the suitcase. As my account in Chapter 4 makes clear, there is no normative basis for equating *mere recklessness*, without the effort to preserve one’s ignorance, with knowledge. This is a second way MPC § 2.02(7) goes wrong. [↑](#footnote-ref-9)
10. Husak and Callender, *supra* note 46 at 37-38. [↑](#footnote-ref-10)
11. *Id*. at 51 (offering a persuasive argument to this effect). [↑](#footnote-ref-11)
12. Glanville Williams, Criminal Law: The General Part, 2d ed., 157 (1961). [↑](#footnote-ref-12)
13. *Global-Tech,* 131 S. Ct. at 2070. [↑](#footnote-ref-13)
14. It’s unclear whether a person can be willfully ignorant of a proposition that is false. However, this needn’t concern us, since (barring abuses) one is not likely to be charged with a knowledge crime unless the inculpatory proposition is plausibly true. (Granted one might still be charged with the *attempt* to do the knowledge crime. But since the mens rea for attempt is intent, not knowledge, willful ignorance won’t figure into many attempt prosecutions.) [↑](#footnote-ref-14)
15. Plausibly, what counts as a “sufficiently high probability” may vary depending on features of the context—like the amount of harm at stake. [↑](#footnote-ref-15)
16. United States v. Willis, 277 F.3d 1026, 1032 (8th Cir. 2002) (requiring that one “purposely contrived to avoid learning all of the facts in order to have a defense’ against subsequent prosecution”); United States v. Delreal-Ordones, 213 F.3d 1263, 1268 (10th Cir. 2000) (same); United States v. Puche, 350 F.3d 1137, 1149 (11th Cir. 2003) (same). *Cf. Heredia*, 483 F.3d at 920 (explicitly rejecting this “motive prong” in defining willful ignorance). [↑](#footnote-ref-16)
17. Alexander & Ferzan, *supra* note 53 at 34. (Hellman criticizes their pure recklessness view of willful ignorance, but acknowledges that Alexander & Ferzan can respond. *See* Hellman *supra* note 57 at 311.) [↑](#footnote-ref-17)
18. Note that this question also arises for Alexander and Ferzan’s account. They are correct that the willfully ignorant are at least reckless. But some cases of willful ignorance are especially culpable—indeed, as culpable as the analogous knowing misconduct. We want to know what it is, precisely, about opting to remain in ignorance about the risks of one’s conduct that could increase one’s culpability from the level of mere recklessness to that of knowing wrongdoing. This is the question my account in Chapter 4 seeks to answer. So it can be seen as fleshing out Alexander and Ferzan’s claim that willful ignorance is a form of recklessness. [↑](#footnote-ref-18)
19. *See*, *e.g*., Jan Willem Wieland, *Willful Ignorance*, 20 Ethical Theory and Moral Practice 105, 115 (2017) (arguing “we need not add a suspicion or awareness requirement on willful ignorance. The latter is compatible with suspicions, but there’s also willful ignorance without them”). [↑](#footnote-ref-19)
20. For example, *Jewell* says willful ignorance requires “conscious *purpose* to disregard the nature of that which was in the vehicle, with a conscious *purpose* to avoid learning the truth.” 532 F.2d at 700 (emphasis added). *See infra* note 71 and accompanying text.

    In principle, one might argue the law’s definition should be expanded, thus making willful ignorance instructions more widely available. I discuss similar moves in Chapters 6 and 8. However, for reasons of clarity and transparency, I don’t advocate altering the definition of willful ignorance. Instead, I take the legal definition as fixed, and argue that we should go beyond the existing willful ignorance doctrine in certain ways. I contend we should recognize new doctrines that allow egregious kinds of non-willful ignorance to substitute for higher mental states. I take this tack because it’s clearer and less likely to invite needless definitional fights. But nothing of substance hangs on it. We could reach the same results by changing the definition of willful ignorance, if one prefers that route. [↑](#footnote-ref-20)
21. 131 S.Ct. at 2070. [↑](#footnote-ref-21)
22. *See*, *e.g.*, *Jewell* 532 F.2d at 700 (requiring “a conscious purpose to avoid learning the truth”); *Heredia*, 483 F.3d at 918 (“when Congress made it a crime to ‘knowingly...possess with intent to…distribute…a controlled substance,’…it meant to punish…also those who *don’t know because they don’t want to know*”) (emphasis added). *See also* Williams, *supra* note 61 at 157 (willful ignorance requires that one “*deliberately* omits to make further enquiries *because he wishes to remain in ignorance*”) (emphasis added). [↑](#footnote-ref-22)
23. United States v. Ferrarini, 219 F.3d 145, 155 (2d Cir. 2000) (concluding “the jury was properly instructed that conscious avoidance could…be used to infer knowledge of the conspiracy’s unlawful objectives”). [↑](#footnote-ref-23)
24. *Compare* United States v. Svoboda, 347 F.3d 471, 480 (2d Cir. 2003) (willful ignorance instruction warranted when evidence “establish[es] the defendant’s purposeful contrivance to avoid guilty knowledge”) (internal quotation marks and citations omitted) *with* *id*. at 479 (“factfinder may…rely on conscious avoidance to satisfy at least the knowledge component of intent to participate in a conspiracy”). [↑](#footnote-ref-24)
25. *See supra* note 47. [↑](#footnote-ref-25)
26. 483 F.3d 913, 920 (9th Cir. 2007) (en banc). [↑](#footnote-ref-26)
27. *Id*. at 917. [↑](#footnote-ref-27)
28. *Id*. at 920-21. [↑](#footnote-ref-28)
29. United States v. Ferrarini, 219 F.3d 145, 154 (2d Cir. 2000) (willful ignorance requires “aware[ness] of a high probability [of the inculpatory fact] and consciously avoided confirming that fact”). [↑](#footnote-ref-29)
30. United States v. Flores, 454 F.3d 149, 155 (3d Cir. 2006) (willful ignorance requires “defendant ‘was [subjectively] aware of the high probability of the fact in question,’ and ‘could have recognized the likelihood of illicit acts yet deliberately avoided learning the true facts’”) (internal citation and alteration omitted). [↑](#footnote-ref-30)
31. United States v. Mendoza-Medina, 346 F.3d 121, 132-33 (5th Cir. 2003) (recognizing “two-pronged test” willful ignorance instruction, requiring that “(1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct”). [↑](#footnote-ref-31)
32. United States v. Geisen, 612 F.3d 471, 485-86 (6th Cir. 2010) (“a deliberate ignorance instruction is warranted to “prevent[ ] a criminal defendant from escaping conviction merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct”). [↑](#footnote-ref-32)
33. United States v. Tanner, 628 F.3d 890, 904 (7th Cir. 2010) (“ostrich instruction” warranted “when (1) a defendant claims a lack of guilty knowledge and (2) the government presents evidence that suggests that the defendant deliberately avoided the truth”) (quotation marks omitted); United States v. Ramsey, 785 F.2d 184, 190 (7th Cir. 1986) (Easterbrook, *J*.) (rejecting motive-to-avoid-liability element and adopting unrestricted approach instead). [↑](#footnote-ref-33)
34. *Compare* United States v. Anthony, 545 F.3d 60, 64 (1st Cir. 2008) (endorsing two-pronged unrestricted approach) *with* United States v. Brandon, 17 F.3d 409, 452 (1st Cir. 1994) (adopting motive-prong for willful ignorance instructions). *Compare* United States v. Jinwright, 683 F.3d 471, 479 (4th Cir. 2012) (adopting unrestricted approach) *with* United States v. Ebert, 178 F.3d 1287 *opinion amended on denial of reh'g*, 188 F.3d 504 (4th Cir. 1999) (adopting motive-prong). [↑](#footnote-ref-34)
35. United States v. Yi, 704 F.3d 800, 804-05 (9th Cir. 2013) (endorsing two-pronged, unrestricted approach to willful ignorance, citing *Global–Tech*,131 S.Ct. at 2070). [↑](#footnote-ref-35)
36. Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 Ohio St. J. Crim. L. 545, 551 (2012) (describing willful ignorance doctrine as a “mens rea substitution principle”); Robinson, *supra* note 49. [↑](#footnote-ref-36)