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Reaching a Sense of Justice: Understanding How the Facilitation Theory of Prosecution Under Federal Criminal Law Can Be Used to Hold Hard Targets Accountable for Financial Crimes and Corporate Corruption

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Abstract

A fundamental principle of criminal law is that to hold a defendant accountable, the prosecution must prove that he culpably participated in the criminal activity. To prove culpable participation, the government can prove a defendant's direct knowledge of and active participation in the criminal conduct. However, because of the nature of financial crimes and corporate misconduct, culpable targets often are able to insulate themselves from the underlying criminal conduct and thereby, frustrate the prosecution's ability to meet this evidentiary standard. The resulting impunity undermines the public's trust and confidence in the fundamental fairness of the enforcement of the criminal laws.

This Article asserts that the facilitation theory of prosecution can be used to extend the limits of the mail and wire fraud statute to capture culpable targets for financial crimes and corporate corruption. Under the facilitation theory, a defendant culpably participates in criminal conduct when he knowingly acts to influence, enable, further, or conceal the criminal conduct.

Although there are no legal barriers to bringing financial crimes and corporate corruption in full view, it is acknowledged that there are substantial factual challenges. These cases often

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involve complex fact patterns and shifting narratives. Nevertheless, the interest of justice compel a persistent effort by prosecutors to establish real consequences for facilitating corporate criminal conduct.

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I. Introduction

A fundamental principle of criminal law is that to hold a defendant accountable, the prosecution must prove that he culpably participated in the criminal activity.[1] To prove culpable participation, the government must show that the defendant directly participated in the criminal act or that he facilitated the criminal conduct.[2] A defendant facilitates criminal conduct when he knowingly acts to influence, enable, further, or conceal the criminal activity. Although not explicitly identified in the existing

1. *See* Morissette v. United States, 342 U.S. 246, 250–51 (1952) ("A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to . . . .'").

2. *See, e.g.*, 21 U.S.C. § 843(b) (2012) ("It shall be unlawful for any person to knowingly or intentionally use any communication facility in *committing* or in *causing or facilitating* the commission of any act or acts constituting a felony . . . ." (emphasis added)).

analysis of the principles of prosecution under federal criminal law, the facilitation theory is directly incorporated into several federal criminal statutes[3] and is expressed most often through the application of the federal conspiracy and aiding and abetting statutes.[4]

The reach of the facilitation theory has not, however, been fully developed. In particular, a meaningful effort has not been made to use the facilitation theory to hold white-collar targets—executive management, third-party professionals, and others—accountable for financial crimes and corporate misconduct.[5] Prosecutors generally seek strong and substantial evidence that hard targets actively participated in or had direct knowledge of the financial crimes and corporate misconduct.[6] Because hard targets act to insulate themselves from active participation in and direct knowledge of the underlying criminal conduct, this evidentiary standard is rarely satisfied.[7] Consequently, criminal accountability for financial crimes and corporate misconduct often results in the criminal prosecution of lower level employees or the imposition of fines on shareholders.[8] Causing shareholders

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3. *See infra* notes 18–20 and accompanying text (citing multiple statutes that follow the facilitation theory).

4. *See* 18 U.S.C. § 2 (2012) (punishing those who aid, abet, or willfully cause a criminal act as if they were the principal actor); 18 U.S.C. § 371 (2012) (criminalizing any conspiracy to violate the laws of the United States).

5. *See* Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371, 374–75 (2014) ("[R]ecent and dramatic instances of corporate crime . . . have led to glaringly few prosecutions of the individuals who help the offending corporations.").

6. *See id.* at 377 ("[C]riminal law typically requires that a defendant culpably causes the conduct with which she is charged, yet corporate officers . . . may not have participated in the crimes of their corporation.").

7. *See id.* (concluding that attempts to prosecute corporate officers only when they actively participate will lead to few prosecutions, if any at all).

8. *See* David Enrich, *A Hedge Fund Manager Committed Fraud. Would the U.S. Let Him Go?*, N.Y. TIMES (Nov. 18, 2017), https://www.nytimes.com/2017/11/18/business/a-hedge-fund-manager-committed- fraud- would-the-us-let-him-go.html (last visited Jan. 31, 2018)

> After the financial crisis last decade, the federal government was expected to aggressively pursue criminal cases against top financiers: the fund managers, bankers, mortgage lenders and Wall Street executives who helped cause the global economy to crater. But prosecutions have been rare. The exceptions have been obscure or relatively junior industry players against whom it was easy to build

to pay financial penalties or putting lower level employees in jail, however, provides little sense of justice. Moreover, the failure to hold hard targets accountable furthers the public's perception of impunity for individuals who have amassed power and influence and, ultimately, undermines the public's trust and confidence in the fundamental fairness of the enforcement of criminal laws.[9]

This Article asserts that the prosecution of senior executives, third-party professionals, and others for financial crimes and corporate corruption is within the existing limits of the facilitation theory under federal criminal law.[10] By combining the facilitation theory of prosecution with existing theories of accomplice and co-conspirator liability, prosecutors can hold hard

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cases but who did not bear primary responsibility for the crisis.

(on file with the Washington and Lee Law Review); Hiroko Tabuchi & Jack Ewing, *Volkswagen to Pay $14.7 Billion to Settle Diesel Claims in U.S.*, N.Y. TIMES (June 27, 2016), https://www.nytimes.com/2016/06/28/business/volkswagen-settlement-diesel-scandal.html (last visited Jan. 31, 2018) (discussing Volkswagen's agreement to pay a fine for installing illegal engine software designed to deceive regulators) (on file with the Washington and Lee Law Review); Vikas Bajaj, *The Lesson of the General Motors Settlement*, N.Y. TIMES: TAKING NOTE (Sept. 17, 2015, 4:04 PM), https://takingnote.blogs.nytimes.com/2015/09/17/the-lesson-of-the-general-motors-settlement/ (last visited Jan. 31, 2018) (acknowledging that General Motors agreed to pay $900 million fine for failing to disclose defective ignition switch) (on file with the Washington and Lee Law Review).

9. Numerous influential legal scholars have recognized the importance of the public seeing that justice. *See, e.g.*, R v. Sussex Justices (*Ex parte McCarthy*) [1924] 1 KB 256, 259 (Lord Hewart CJ) ("[It] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395 (1906) ("The Anglo-Saxon laws continually direct that justice is to be done equally to rich and to poor, and the king exhorts that the peace be kept better than has been wont, and that 'men of every order readily submit . . . each to that law which is appropriate to him.'"); *see also* Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 108 (2005)

> The public is much more likely to support and participate in the criminal justice process and support those officials who run it when the public believes that the process is run fairly. If the American public does not perceive its criminal justice system to be fair, negative consequences can result. Diminished public support for the criminal justice system, taken to the extreme, can lead to diminished respect for the law and, thereby, less compliance with the law.

10. *See infra* Part II (discussing the facilitation theory and how it currently exists within different laws).

targets accountable for financial crimes and corporate misconduct.[11] This approach allows prosecutors to obtain convictions against hard targets by proving that they facilitated the criminal conduct rather than actively participated in or directly knew of the underlying criminal conduct.[12] The result would be a practical and meaningful theory of criminal prosecution that would establish real consequences for powerful and influential defendants who facilitate financial crimes and corporate corruption.[13]

II. The Facilitation Theory of Prosecution

The need to hold all culpable individuals accountable for criminal wrongdoing is fundamental to maintaining public trust and confidence in the criminal process.[14] Moreover, the ends of criminal justice would be defeated if these prosecutorial judgments are compromised. The principle underlying the facilitation theory of prosecution is that allowing individuals who facilitate criminal conduct to act with impunity would be an injustice. Thus, the facilitation theory requires that a defendant culpably participate in the criminal activity.[15] To prove culpable participation, the government must prove that a defendant actively participated in or facilitated the criminal act.[16] To prove that a defendant knowingly facilitated the criminal conduct, the prosecution must show that a defendant acted knowingly to

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11. *See infra* Part II (addressing the ways in which the theory can be combined with existing laws).

12. *See infra* Part II (describing how the facilitation theory will allow for a broader range of prosecutions).

13. *See infra* Part III (concluding that this theory will provide meaningful consequences for corporate violations of the law).

14. *See supra* note 9 and accompanying text (discussing the disadvantages of a lack of public confidence).

15. *See* United States v. Raza, 876 F.3d 604, 625 (4th Cir. 2017) (affirming conspiracy conviction based on evidence that defendants prepared false mortgage loan applications for bank borrowers); United States v. Harris, 576 F. App'x 265, 275 (4th Cir. 2014) (affirming wire fraud conviction based on evidence that defendant intentionally deprived investors of funds through misrepresentations and deceit).

16. *See supra* note 2 and accompanying text (addressing the requirements for culpable conduct).

influence, enable, further or conceal the criminal conduct to a degree sufficient to warrant criminal prosecution.[17]

The facilitation theory is explicitly incorporated into several federal criminal law statutes. For example, the theory is included in the federal money laundering statute, which makes it a criminal offense to launder criminal proceeds with the intent to facilitate or conceal the underlying criminal activity.[18] The federal drug trafficking statute, which makes it a crime to use a communication device to facilitate a drug offense, also incorporates the facilitation theory.[19] The principle is also included in the federal obstruction statutes that criminalize acts to intimidate witnesses and alter or destroy documents with the intent to conceal criminal activity or obstruct criminal

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17. *See supra* note 2 and accompanying text (defining facilitation of a crime).

18. *See* 18 U.S.C. §§ 1956(a)(1)(A)(i), (a)(1)(B)(i) (2012) (criminalizing money laundering based on the intent to promote the unlawful activity or conceal the proceeds of unlawful activity); *see also* United States v. Jones, 664 F.3d 966, 977–78 (5th Cir. 2011) (affirming defendants' convictions for money laundering when evidence showed that defendants had knowledge that they were improperly billing Medicare claims and that they were moving millions of dollars between account to conceal or disguise the source of the proceeds); United States v. Huezo, 546 F.3d 174, 181 (2d Cir. 2008) (determining that the evidence that brokers were used to deposit cash in small increments, money was packaged in bundled stacks, and defendant was seen in possession of the bundled stacks of money established defendant had the requisite criminal knowledge and intent to support his conviction for money laundering); United States v. Hudspeth, 525 F.3d 667, 678–79 (8th Cir. 2008) (concluding that there was sufficient evidence to establish that the defendant knowingly laundered money when he knew his customers were diverting the drugs, he deposited payments from customers into an account also used to pay his businesses' bills, and he signed every check).

19. *See* 21 U.S.C. § 843(b) (2012) ("It shall be unlawful for any person to knowingly or intentionally use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter."); *see also* United States v. Almeida-Olivas, 865 F.3d 1060, 1063 (8th Cir. 2017) (affirming defendant's § 843(b) conviction when the government presented multiple intercepted phone calls between the defendant and the initial target of the investigation discussing methamphetamine); United States v. Whitten, 706 F.2d 1000, 1006–07 (9th Cir. 1983) (affirming defendant's § 843(b) conviction when the government had presented testimony by coconspirators that the defendant often used money orders in drug sales); *United States v. Lerma,* 657 F.2d 786, 789 (5th Cir. 1981) (determining evidence of several calls between a narcotics buyer and the seller-defendant was sufficient to establish a violation of § 843(b)).

investigations or proceedings.[20] It is also included in the theory underlying the crime-fraud exception to the attorney-client privilege, which strips the protections of the attorney-client privilege when the attorney's services have been used to further criminal conduct.[21] Finally, the facilitation theory is expressed

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20. *See* 18 U.S.C. § 1510 (2012) (criminalizing the obstruction of a criminal investigation); United States v. Sterling, 860 F.3d 233, 246 (4th Cir. 2017) (affirming defendant's obstruction of justice conviction for deletion of an email relevant to criminal investigation); United States v. Lippman, 492 F.2d 314, 317 (6th Cir. 1974) (requiring the defendant have "actual knowledge that the intended recipient of the information be a criminal investigator" to be convicted of obstruction); United States v. Abrams, 543 F. Supp. 1184, 1187 (S.D.N.Y. 1982)

> Significantly, the government need not prove that a federal criminal investigation was actually taking place to prove a violation of section 1510. Nor need the government prove that the accused had actual knowledge that the obstructed party either conveyed information about the accused or was about to do so. Rather, the scienter requirement of section 1510 is satisfied by a showing of a reasonably founded belief that information had been or was about to be given.

(internal citations omitted).

21. *See In re* Grand Jury Proceedings #5 Empanelled Jan. 28, 2004, 401 F.3d 247, 251 (4th Cir. 2005) ("Both the attorney-client and work product privileges may be lost, however, when a client gives information to an attorney for the purpose of committing or furthering a crime or fraud."). The attorney-client privilege protects the disclosure of confidential communications to counsel when the client seeks legal advice. *See id.* at 250. However, the crime-fraud exception to the attorney-client privilege withdraws any protection where the client sought or employed legal representation to commit, facilitate or conceal a crime or fraud. *See id.* at 251. To breach the privilege and invoke the crime-fraud exception, the government must prove that: (1) "the client was engaged in or planning criminal or fraudulent scheme when he sought the advice of counsel" and (2) "the privileged materials bear a close relationship to the client's existing or future scheme to commit a crime or fraud." *Id*. In *In re Grand Jury Subpoenas Dated March 2, 2015*, 628 F. App'x 13, 14 (2d Cir. 2015), the court held that to invoke the crime-fraud exception the government must prove: "(1) that the client communication or attorney work product in question was *itself* in furtherance of the crime or fraud and (2) probable cause to believe that the communication with counsel or attorney work product was *intended* in some way to facilitate or to conceal the criminal activity." *See also* United States v. Gorski, 807 F.3d 451, 461 (1st Cir. 2015) (concluding that there "was a reasonable basis to believe that the attorney-client communications 'were intended by the client to facilitate or conceal the criminal or fraudulent activity'"). In *In re Grand Jury Subpoena*, 745 F.3d 681, 693 (3d Cir. 2014), the Third Circuit explained that for legal advice to be used "in furtherance" of a crime, the advice must advance the client's criminal purpose. Stated another way, the legal advice cannot merely relate to the criminal conduct; it must be intended to facilitate or conceal the criminal activity. *See id*.

most often through the use of co-conspirator liability under the federal criminal conspiracy laws or accessory or accomplice liability under the federal criminal aiding and abetting statute.[22]

A. Conspiracy to Commit Financial Crimes and Corporate Misconduct

The federal conspiracy statute incorporates the facilitation theory by allowing prosecutors to prove culpable participation with evidence that the defendant knowingly facilitated the criminal conduct. To convict a defendant of conspiracy to commit a financial crime or corporate corruption, the government must prove that a defendant knowingly participated in the conspiracy to defraud.[23] Stated another way, the government must prove: (1) an agreement to commit a financial crime or engage in corporate misconduct, (2) willing participation by the defendant, and (3) that the defendant acted to facilitate the criminal agreement.[24]

In most criminal conspiracy prosecutions, the primary obstacle to sustaining a conviction is proving that the defendant

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22. *See infra* Parts II.A–B (discussing the existence of the facilitation doctrine in conspiracy and aiding and abetting laws).

23. *See* 18 U.S.C. § 371 (2012) (requiring at least two people to conspire to commit a crime or defraud the United States and one of those persons to commit an act to affect the conspiracy); United States v. Vinson, 852 F.3d 333, 339, 351 (4th Cir. 2017) (affirming defendant's conviction for conspiracy to commit bank fraud for attempting to use various entities and shell companies to obtain funds to "salvage his floundering real estate empire"); United States v. Kuhrt, 788 F.3d 403, 414–16 (5th Cir. 2015) (affirming wire fraud conspiracy conviction of comptroller for a multi-billion dollar Ponzi scheme engineered by Allen Stanford and finding that the evidence established that defendant was involved in planning and executing fraudulent transactions and oversaw fraudulent accounting specifically designed to cover up scheme to defraud); United States v. Aloi, 511 F.2d 585, 593 (2d Cir. 1975) (affirming defendant's conviction for conspiracy to violate federal securities laws when the defendant and others arranged the sale of their automobile leasing company's stock to the public to pay off their own personal debts).

24. *See* 18 U.S.C. § 371 (2012) (criminalizing a conspiracy between two or more persons to defraud or commit any crime against the United States); United States v. Tucker, 376 F.3d 236, 238 (4th Cir. 2004) ("To prove a conspiracy under 18 U.S.C. § 371, the government must establish an agreement to commit an offense, willing participation by the defendant, and an overt act in furtherance of the conspiracy.").

knowingly participated in a criminal conspiracy. The courts have provided some practical relief to proving that a hard target knew that he was involved in a criminal conspiracy, thereby placing a case against a defendant who deliberately insulates himself from direct involvement in the criminal activity within reach.[25] First, the concert of action (the agreement) may be inferred from "all the circumstances,"[26] and the government need only prove that there was a "mutual understanding" among co-conspirators.[27] Second, knowledge of the criminal conspiracy may be inferred from "surrounding circumstances,"[28] and the government need not prove that a defendant knew all the details of the criminal conspiracy provided that he knew of its "essential object[ive]."[29] Finally, circumstantial evidence alone is sufficient to support a conspiracy conviction.[30] Therefore, the ability of the government to sustain a conspiracy conviction for participating in a financial crime or corporate misconduct will depend on the specific facts of each case and ultimately requires prosecutors to commit to following the evidence to its conclusion.

B. Aiding and Abetting Financial Crimes and Corporate Misconduct

Aiding and abetting liability arises when a person aids, abets, counsels, commands, induces, procures, or encourages the commission of a criminal offense.[31] The facilitation theory is

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25. *See* United States v. Redmond, 461 F. App'x 317, 318 (4th Cir. 2012) (finding that a defendant's intent to defraud may be inferred from totality of the circumstances and need not be proven by direct evidence); United States v. Goodwin, 272 F.3d 659, 666 (4th Cir. 2001) (finding that a defendant's intent to defraud may be inferred from circumstantial evidence).

26. United States v. Barnes, 747 F.2d 246, 249 (4th Cir. 1984).

27. United States v. Hackley, 662 F.3d 671, 679 (4th Cir. 2011).

28. United States v. Kuhrt, 788 F.3d 403, 416 (5th Cir. 2015).

29. *Hackley*, 662 F.3d at 679.

30. *Id.*

31. *See* 18 U.S.C. § 2 (2012) (detailing that the punishment for those who aid and abet is the same as the punishment for the principal); Rosemond v. United States, 134 S. Ct. 1240, 1246 (2014) ("In proscribing aiding and abetting, Congress used language that 'comprehends all assistance rendered by words, acts, encouragement, support or presence,' . . . ." (quoting Reves v. Ernst & Young, 507 U.S. 170, 178 (1993))); United States v. Cammorto, 859 F.3d 311,

incorporated within the federal aiding and abetting statute by allowing prosecutors to prove culpable participation with evidence that the defendant knowingly facilitated the criminal conduct.[32] To sustain a conviction under the federal aiding and abetting statute as an accessory to a corporate crime, the government must prove that a defendant committed an act in furtherance of the fraud with the intent to facilitate the criminal activity.[33] The statute has been broadly defined and includes all acts that influence, enable, further or conceal the criminal activity.[34]

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317 (4th Cir. 2017) (rejecting defendant's argument that he could not be liable as a principal under federal law when he encouraged the commission of the criminal offense); *see also* United States v. Kimble, 855 F.3d 604, 613 (4th Cir. 2017) (finding that aiding and abetting is not an independent crime, but rather sets forth accessory liability); United States v. Sosa, 777 F.3d 1279, 1292 (11th Cir. 2015) (restating that aiding and abetting, under 18 U.S.C. § 2 (2012), "is not a separate federal crime, but rather an alternative charge that permits one to be found guilty as a principal for aiding or procuring someone else to commit the offense").

32. *See* United States v. Danhach, 815 F.3d 228, 235 (5th Cir. 2016) (articulating that defendant aids and abets a criminal venture when "he associates with it, participates in it, and seeks by his actions to make the venture succeed"). In *United States v. Peoni*, Judge Learned Hand aptly described how the facilitation theory is incorporated into accessory liability: "[Accessory liability] demands that [the defendant] in some sort associates himself with the venture, that he participates in it as in something that he wishes to bring about, and that he seeks by his actions to make it succeed." 100 F.2d 401, 402 (2d Cir. 1938). The Supreme Court has adopted Judge Learned Hand's formulation of the necessary state of mind for aiding and abetting. *See, e.g.*, Rosemond v. United States, 134 S. Ct. 1240, 1248 (2014); Nye & Nissen v. United States, 336 U.S. 613, 619 (1949).

33. *See Rosemond*, 134 S. Ct. at 1245 (stating that an aiding and abetting conviction requires the government to prove that a defendant took an affirmative act to further the underlying criminal offense with the intent of facilitating the offense); *see also* United States v. Thompson, 501 F. App'x 347, 361 (6th Cir. 2012) ("[C]onspiracy involves an agreement to participate in a wrongful activity, while aiding and abetting can be accomplished if the defendant 'knowingly gave substantial assistance to someone who performed wrongful conduct,' even if the defendant did not necessarily agree to join in the conduct." (quoting Aetna Cas. & Sur. Co. v. Leahey Constr. Co., 219 F.3d 519, 534 (6th Cir. 2000))).

34. *See* United States v. Sosa, 777 F.3d 1279, 1292 (11th Cir. 2015) (construing the aiding and abetting statute broadly to mean that the "government must prove that the defendant in some way associated himself with the criminal venture").

Like conspiracy, sustaining an aiding and abetting conviction is a fact intensive inquiry that will depend on the specific facts of each case and requires the government to commit to following the evidence until conclusion. Facilitation theory principles ease this burden. For example, to support a conclusion that a defendant committed an act in furtherance of the underlying offense, the government may use the same evidence used to establish a defendant's participation in a conspiracy to commit a financial crime or engage in corporate misconduct.[35] Moreover, like conspiracy, intent to facilitate can be inferred from the "surrounding circumstances."[36]

C. Mail and Wire Fraud Statutes

The primary federal criminal laws used to address financial crimes and corporate misconduct are the federal mail and wire fraud statutes. The mail and wire fraud statutes prohibit the use of the mails and wires in furtherance of any scheme or artifice to defraud by means of false or fraudulent pretenses, representations, or promises.[37] The essential elements of these offenses are: (1) a scheme to defraud, (2) a defendant's culpable participation in the scheme to defraud, and (3) use of the mails or wire communications in furtherance of the scheme to defraud.[38]

A scheme to defraud would include any act of deceit to obtain money or property from the victim.[39] Therefore, there is no doubt that a scheme to defraud under the federal fraud statutes would

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35. United States v. Vinson, 852 F.3d 333, 354 (4th Cir. 2017) (quoting United States v. Burgos, 94 F.3d 849, 873 (4th Cir. 1996)).

36. *See* United States v. Lema, 909 F.2d 561, 570 (1st Cir. 1990) (discussing that the surrounding circumstances can be considered when determining if the evidence was sufficient to support an aiding and abetting conviction).

37. *See* 18 U.S.C. §§ 1341, 1343 (2012) (providing the statutory elements of mail and wire fraud).

38. *See* Unites States v. Raza, No. 16-4247, slip op. at 20 (4th Cir. Nov. 20, 2017) (stating that to sustain criminal fraud prosecution, the government must prove that defendant engaged in a plan or course of action intended to deceive the victim of money or property).

39. *See* United States v. Pinson, 860 F.3d 152, 169 (4th Cir. 2017) (describing that a scheme to defraud requires the government to prove a specific intent to deprive someone of something of value and does not include undisclosed self-dealing or breaches of fiduciary duty).

include most forms of financial crimes and corporate misconduct, such as the opening of accounts without customer consent, obtaining credit cards without customer consent, creating fake email accounts to sign up customers for unwanted banking services,[40] and installing illegal engine software designed to deceive regulators.[41]

Prosecutors have often defined a defendant's culpable participation narrowly by requiring strong and substantial evidence that the defendant actively participated in the scheme to defraud or had direct knowledge of the criminal conduct.[42] In response to recent criticism that prosecutors have failed to hold senior management accountable for financial crimes and corporate corruption, the government explained that there is often insufficient evidence to prove that these targets were aware of the underlying criminal conduct to the degree necessary to warrant criminal charges.[43] This prosecutorial judgment,

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40. *See* Michael Corkery, *Wells Fargo Fined $185 Million for Fraudulently Opening Accounts*, N.Y. TIMES (Sept. 8, 2016), https://www.nytimes.com/2016/09/09/business/dealbook/wells-fargo-fined-for-years-of-harm-to-customers.html (last visited Jan. 30, 2018) (detailing the fines that Wells Fargo paid for fraudulently opening accounts without customers' consent) (on file with the Washington and Lee Law Review); Stacy Cowley, *'Lions Hunting Zebras': Ex-Wells Fargo Bankers Describe Abuses*, N.Y. TIMES (Oct. 20, 2016), https://www.nytimes.com/2016/10/21/business/dealbook/lions-hunting-zebras-ex-wells-fargo-bankers-describe-abuses.html (last visited Jan. 30, 2018) (explaining that Wells Fargo employees admit that they intentionally set up sham accounts for immigrants, older adults, and other individuals they judged to be vulnerable) (on file with the Washington and Lee Law Review).

41. *See* Jack Ewing & Hiroko Tabuchi, *Volkswagen to Pay $14.7 Billion to Settle Diesel Claims in U.S.*, N.Y. TIMES (June 27, 2016), https://www.nytimes.com/2016/06/28/business/volkswagen-settlement-diesel-scandal.html (last visited Jan. 30, 2018) (discussing that Volkswagen agreed to pay a fine for installing illegal engine software designed to deceive regulators) (on file with the Washington and Lee Law Review); *see* Jack Ewing, Danny Hakim & Aaron M. Kessler, *As Volkswagen Pushed to Be No.1, Ambitions Fueled A Scandal*, N.Y. TIMES (Sept. 26, 2015), https://www.nytimes.com/2015/09/27/business/as-vw-pushed-to-be-no-1-ambitions-fueled-a-scandal.html (last visited Jan. 30, 2018) (reporting that Volkswagen admitted to installing illegal software to cheat emissions testing) (on file with the Washington and Lee Law Review).

42. *Too Big to Indict*, N.Y. TIMES, Dec. 12, 2012, at A38.

43. *See* Jesse Signal, *Why It's Unlikely Anyone Will Go to Jail Over Wells Fargo's Massive Fraud Scheme*, NY MAG. (Sept. 9, 2016, 2:47 PM), http://nymag.com/daily/intelligencer/2016/09/why-no-one-will-go-to-jail-over-wells-fargos-fraud-scheme.html (last visited Jan. 31, 2018) ("[A]s one former

however, ignores any meaningful effort to prove culpable participation by proving that a defendant facilitated the criminal conduct.

To prove that a defendant knowingly facilitated the criminal conduct under the mail and wire fraud statute, the prosecution must show that a defendant acted knowingly to influence, enable, further or concealed the criminal conduct.[44] Regardless of the reluctance to directly incorporate the facilitation theory into the mail and wire fraud statutes and define the conduct as falling within these limits, the federal conspiracy statute and the aiding and abetting statute clearly incorporate the facilitation theory. This allows federal prosecutors a vehicle to extend the mail and wire fraud statutes to hold senior managers, third-party professionals, and others accountable for financial crimes and corporate corruption.

D. Deliberate Ignorance

Prosecutors can also use a willful blindness instruction to overcome any factual barriers in prosecuting hard targets. To prove culpable participation under the facilitation theory, the government must prove that a defendant facilitated the criminal conduct, which requires showing knowledge. A target is aware of criminal activity when he directly participates in or has direct knowledge of the criminal activity.[45] Typically, prosecutors look for evidence that the target was present at meetings during

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government official who had been involved in money-laundering cases [said] . . . building a strong case against individuals can be difficult given how big and complicated banks are . . . .") (on file with the Washington and Lee Law Review).

44. United States v Wynn, 684 F.3d 473, 478 (4th Cir. 2012) (finding that scheme to defraud necessarily requires evidence of intent to defraud).

45. *See* United States v. Crabtree, 878 F.3d 1274 (11th Cir. 2018) (affirming fraud conviction and finding sufficient evidence that defendants were aware of the scheme to defraud); United States v Blankenship, 846 F3d 663, 679 (4th Cir. 2017) (affirming conviction of senior executive based on evidence that he knew his actions and omissions would lead to violations of mine safety laws and regulations); United States v. Redmond, 461 F. App'x 317, 318 (4th Cir. 2012) (affirming wire fraud conviction and finding sufficient evidence that defendant knew that he was engaged in a scheme to defraud).

which the wrongdoing is discussed or for evidence that the criminal conduct is disclosed in reports, memorandum, or email messages that are sent to or by the target.[46] In addition to direct evidence of knowledge, the government can prove that a defendant was aware of criminal activity by showing that he deliberately looked the other way, shut his eyes to the wrongdoing, or ignored red flags that the criminal conduct was occurring.[47] Therefore, the evidentiary burden to prove that a defendant knowingly facilitated the crime can be mitigated by showing that the target was willfully blind to the criminal activity.

Federal criminal law recognizes that there are consequences for the failure to respond to obvious signals of criminal activity. Under the willful blindness doctrine, the government may prove the knowledge element of conspiracy and aiding and abetting by establishing that a defendant deliberately shielded himself from clear evidence of criminal activity.[48] The willful blindness

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46. *See* Jack Ewing, *VW Presentation in '06 Showed How to Foil Emissions Tests*, N.Y. TIMES (Apr. 26, 2016), https://www.nytimes.com/2016/04/27/business/international/vw-presentation-in-06-showed-how-to-foil-emissions-tests.html (last visited Jan. 30, 2018) (reporting on how a top technology executive at Volkswagen prepared a PowerPoint presentation in 2006 that laid out in detail how Volkswagen could cheat on emissions tests in United States) (on file with the Washington and Lee Law Review).

47. *See* United States v. Hawkins, 796 F.3d 843, 867 (8th Cir. 2015) ("With respect to the knowledge element [of conspiracy], 'a defendant's willful blindness may serve as the basis for knowledge if, in light of certain obvious facts, reasonable inferences support a finding that a defendant's failure to investigate is equivalent to burying one's head in the sand.'"); United States v. Schnabel, 939 F.2d 197, 203–04 (4th Cir. 1991)

> A [willful blindness] instruction may be given if there is a foundation in evidence to support it. At trial, the government introduced evidence of a wide variety of fraudlent practices that took place at the the [] office . . . while [the defendant] was a vice-president there. This evidence alone could easily support the inference that if [the defendant] was unaware of what was happening around him, it was because he deliberately shut his eyes to it.

48. *See, e.g.*, United States v. Vinson, 852 F.3d 333, 357 (4th Cir 2017) ("[The] evidence suggests, 'at a minimum,' that Vinson 'deliberately failed to ask questions that might have incriminated him.' Thus, the trial court acted well within its discretion in charging the jury on willful blindness."); United States v. Ford, 821 F.3d 63, 74 (1st Cir. 2016) (concluding that willful blindness—ignoring red flags—meets the knowledge element of aiding and abetting liability); United States v. Ruhe, 191 F.3d 376, 384 (4th Cir. 1999) ("A 'willful blindness' . . . instruction 'allows the jury to impute the element of knowledge to

doctrine is not a vehicle for the government to rely on concepts of recklessness or negligence to prove knowledge, but when a defendant ignores "warning signs" of criminal activity or "deliberately insulates" himself from evidence of criminal activity, a deliberate ignorance instruction will be provided to the jury.[49]

The evidence warranting a deliberate ignorance or willful blindness instruction is not defined with precision. It requires the government to prove more than negligence or recklessness, but less than actual knowledge. It is premised on the idea that a defendant who intentionally insulates himself from proximity to or intimate knowledge of questionable corporate practices should not be allowed to escape the reach of criminal statutes that require the government to prove that a defendant acted knowingly.[50] Therefore, the critical questions are: (1) was the defendant aware of signals of criminal activity and (2) if yes, what was the reason why that the defendant ignored these "red flags." The risk that a defendant could be inadvertently convicted for his negligence or recklessness is substantially mitigated by the second element of the facilitation theory: that the government

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a defendant if the evidence indicates that he purposely closed his eyes to avoid knowing what was taking place around him.'" (quoting United States v. Schnabel, 939 F.2d 197, 203 (4th Cir. 1991))); United States v. Jinwright, 683 F.3d 471, 478 (4th Cir. 2012) ("To allow the most clever, inventive, and sophisticated wrongdoers to hide behind a constant and conscious purpose of avoiding knowledge of criminal misconduct would be an injustice in its own right.").

49. *See* United States v. St. Junius, 739 F.3d 193, 205 (5th Cir. 2013) (determining that a willful blindness "instruction is proper when the evidence shows (1) subjective awareness of a high probability of the existence of illegal conduct, and (2) purposeful contrivance to avoid learning of the illegal conduct" (quoting United States v. Jones, 664 F.3d 966, 979 (5th Cir. 2011))).

50. *See* United States v. Hale, 857 F.3d 158, 168–69 (4th Cir. 2017) (affirming trial court's decision to give a willful blindness instruction when there was ample direct and circumstantial evidence that defendant took steps to avoid knowing that over-the-counter medications and health-and-beauty aids were stolen); *Jinwright,* 683 F.3d at 478 (stating a willful blindness instruction is warranted when "evidence demonstrates that a defendant undertook an active and deliberate effort to avoid imbuing himself with the knowledge that would support a criminal conviction"); *Ruhe*, 191 F.3d at 385 (determining a willful blindness instruction was warranted where the owner of an aircraft repair facility ignored several warning signs that parts were stolen).

must prove that the defendant acted to influence, enable, further, or conceal the financial crime or corporate misconduct.[51]

For example, in *United States v. Uzoaga*,[52] the defendant-doctor was convicted of health care fraud, conspiracy to commit health care fraud, and aiding and abetting.[53] At trial, the government introduced evidence that patient files repeatedly showed that patients were undergoing excessive testing by a third-party provider, which resulted in the filing of excessive Medicare claims.[54] On appeal, the defendant claimed that the trial court erred in giving a deliberate ignorance instruction.[55] The Fifth Circuit rejected the defendant's argument, finding that the defendant's constant review of patient files proved that she was aware of the excessive treatment by the third-party service provider.[56] The court further explained that the defendant was "aware of a high probability of illegal conduct," but continued using this third-party provider for testing and treatment and failed "to inquire or investigate the treatment provider's business practices or become more involved herself in patient billing or treatment."[57] Thus, the court affirmed the trial court's ruling that the willful blindness instruction was warranted.[58]

The government has often concluded that a prosecution of a corporate target is precluded by the lack of strong and

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51. *See* United States v. Appolon, 695 F.3d 44, 57 (1st Cir. 2012) ("Willful blindness serves as an alternate theory on which the government may prove knowledge." (quoting United States v. Perez-Melendez, 599 F.3d 31, 41 (1st Cir. 2010))).

52. 680 F. App'x 343 (5th Cir. 2017).

53. *Id.*

54. *Id*. at 344.

55. *Id*. at 343.

56. *See id*. at 344 ("[H]er files were copiously detailed and well organized, especially regarding a patient's plan of care, and the files noted patient progress.").

57. *Id*.; *see also* United States v. Hansen, 791 F.3d 863, 870 (8th Cir. 2015) (upholding willful blindness instruction because defendant deliberately failed to make inquiries despite numerous red flags of criminal activity); United States v. Adorno-Molina, 774 F.3d 116, 124–25 (1st Cir. 2014) (determining willful blindness instruction was warranted because there was evidence revealing "flags" of suspicion that went uninvestigated, including the use of straw owners to purchase vehicles, the vehicles' involvement in crimes linked to a drug trafficking organization, and frequent cash transfers).

58. *See Uzoaga*, 680 F. App'x at 343.

substantial evidence that the target was aware of the criminal activity.[59] However, applying generally accepted principles of federal criminal law, the government can prove knowledge with evidence of actual knowledge or with evidence of deliberate ignorance—that the target was confronted with red flags but consciously looked the other way.[60] Therefore, the deliberate ignorance instruction allows the government to prove knowledge based on evidence that the defendant deliberately remained silent about facts of interest that indicated that the conduct was

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59. See Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES, Sept. 10, 2015, at A1

> The Obama Justice Department faced repeated criticism that it treated corporate executives leniently. After the 2008 financial crisis, no top Wall Street executives went to prison, highlighting a disparity in how prosecutors treat corporate leaders and typical criminals . . . Justice Department officials have defended their record fighting corporate crime, saying that it can be nearly impossible to charge top executives who insulate themselves from direct involvement in wrong doing . . . .

Jack Ewing, *Inside VW's Campaign of Trickery*, N.Y. TIMES, May 7, 2017, at BU1 (describing claim by former chief executive at VW that, although he received memorandum disclosing use of illegal defeat device, there was no proof that he actually read the document); William D. Cohan, *A Clue to the Scarcity of Financial Crisis Prosecutions*, N.Y. TIMES (July 21, 2016), https://www.nytimes.com/2016/07/22/business/dealbook/a-clue-to-the-scarcity-offinancial-crisis-prosecutions.html (last visited Feb. 24, 2018)

> quoting Eric Holder as follows: "[W]e have a responsibility in the Justice Department to only bring those cases where we think we have a better than 50 percent chance of winning, and if you look at the different ways in which decision-making was made in these financial institutions, we simply didn't have the ability to point to specific individuals to say that person was responsible for this specific action."

(on file with the Washington and Lee Law Review); David Ingram & Aruna Viseanatha, Justice Department Drops Goldman Financial Crisis Probe, REUTERS (Aug. 9, 2012), https://www.reuters.com/article/us-usa-goldman-nocharges/justice-department-drops-goldman-financial-crisis-probeid USBRE8781LA20120810 (last visited Feb. 24, 2018) (reporting on Justice Department decision to not bring criminal charges in response to allegations of fraud related to subprime mortgage securities based on conclusion that "the burden of proof to bring s criminal case could not be met . . . .) (on file with the Washington and Lee Law Review).

60. *See* United States v. Ford, 821 F.3d 63, 74 (1st Cir. 2016) (holding that willful blindness—ignoring red flags—meets the knowledge element of aiding and abetting liability).

criminal and that he looked the other way in order to insulate himself from accountability.

E. Using the Facilitation Theory to Overcome Factual Barriers

As a practical matter, there are no legal barriers to bringing corporate crime and corruption into full view and holding these targets accountable for their participation. The facilitation theory provides a meaningful path to sustain a criminal fraud prosecution. It should be acknowledged, however, that bringing financial corruption to light and holding hard targets accountable for financial crimes and corporate misconduct will require a sustained and persistent effort by the government to follow the evidence to its conclusion and expose the truth. These cases often involve complex fact patterns and shifting narratives. Hard targets have the power to intimidate witnesses and the resources to stonewall requests for information.[61] They have the connections to shape the media coverage of the investigation. In addition, hard targets often intentionally insulate themselves from proximity to and intimate knowledge of questionable corporate practices.[62] Regardless of the risks and frustrations, federal prosecutors have a responsibility to be aggressive in their demands for accountability.

Defendants accused of engaging in corporate corruption and financial crimes typically respond to allegations of misconduct by either admitting that they actively participated in the activity, but claiming that the conduct was not illegal, *or* by conceding that the conduct was illegal, but claiming that they were not aware of the conduct.[63] However, the wrongdoing on the scale that warrants federal criminal charges typically does not occur without the influence and support of senior management or the enabling expertise, judgment, skill and experience of third-party

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61. *See* Megan Twohey, Jodi Kantor, Susan Dominus, Jim Rutenberg & Steve Eder, *Weinstein's Complicity Machine*, N.Y. TIMES (Dec. 5, 2017) https://www.nytimes.com/interactive/2017/12/05/us/harvey-weinstein-complicity.html (last visited Feb. 1, 2018) (describing use of power to intimidate victims and shield sexual assaults by film producer Harvey Weinstein) (on file with the Washington and Lee Law Review).

62. *Id.*

63. *Infra* note 64.

professionals.[64] It also generally does not reflect an isolated instance, but rather involves a pattern and practice of questionable behavior that occurs over a significant period of time.[65] It also generally does not occur without the direct

64. *See* United States v Stein, 846 F.3d 1135 (11th Cir. 2017) (affirming fraud conviction of attorney based on evidence that he "fabricated press releases and purchase orders to inflate the stock price of his client [company]"); Jonathan Soble, *Kobe Steel Blames Plant Managers for Scandal*, N.Y. TIMES, Nov. 11, 2017, at B4 (describing internal company's conclusion that practice of falsifying data was spurred by the "pursuit of short-term profits" and "furthered by lax oversight by senior executives and an 'insular' corporate culture that discouraged employees from questioning improper but long-standing established practices"); Bill Vlasic, *Volkswagen Official Is Sentenced to 7 Years*, N.Y. TIMES, Dec. 6, 2017, at B3 (explaining that a former VW manager admitted that he concealed from government regulators the existence of software that allowed the company to cheat on emissions tests, but claimed that senior management and a "high-ranking in-house lawyer" were complicit in the scheme to defraud); Jan Wolfe & Nate Raymond, *Ex-Lawyer for Pharma Executive Shkreli Convicted of Aiding Fraud Scheme*, REUTERS (Dec. 27, 2017) https://ca.reuters.com/article/businessNews/idCAKBN1EL1KP-OCABS (last visited Feb. 1, 2018) ("Acting U.S. Attorney Bridget Rohde in Brooklyn said the verdict sent a message to lawyers that they will be held accountable when they 'use their legal expertise to facilitate the commission of crime.'") (on file with the Washington and Lee Law Review); Stacy Cowley & Jennifer A. Kingson, *Wells Fargo to Claw Back $75 Million From 2 Former Executives*, N.Y. TIMES, Apr. 10, 2017, at A1 (reporting on conclusion by Wells Fargo internal report that former chief executive "turned a blind eye" to fraudulent practices). In a Wells Fargo internal investigation memo, a manager said employees "feel they cannot make sales goals without gaming the system; the incentive to cheat is based on the fear of losing their jobs." Jennifer A. Kingson & Stacy Cowley, *At Wells Fargo, Crushing Pressure and Lax Oversight Produced a Scandal*, N.Y. TIMES (Apr. 10, 2017), https://www.nytimes.com/2017/04/10/business/dealbook/11wells-fargo-account-scandal.html (last visited Feb. 1, 2018) (on file with the Washington and Lee Law Review).

65. *See* Neal E. Boudette & Jonathan Soble, *Kobe Steel's Falsified Data is Another Blow to Japan's Reputation*, N.Y. TIMES (Oct. 10, 2017), https://www.nytimes.com/2017/10/10/business/kobe-steel-japan.html (last visited Feb. 12, 2018) (reporting that Kobe Steel has acknowledged falsifying data about the quality of aluminum and cooper it sold with possible data falsification going back ten years) (on file with the Washington and Lee Law Review); Stacy Cowley, *Wells Fargo Review Finds 1.4 Million More Suspect Accounts*, N. Y. Times (Aug. 31, 2017), https://www.nytimes.com/2017/08/31/business/dealbook/wells-fargo-accounts.html (last visited Feb. 12, 2018) (reporting that Wells Fargo employees opened 2.1 million suspect accounts from 2011 to mid-2015) (on file with the Washington and Lee Law Review); Jack Ewing, *VW Engineers Wanted O.K. From the Top for Emissions Fraud, Documents Show*, N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/business/volkswagen-muller-diesel-emissions.html (last visited Feb. 12, 2018) (reporting that Volkswagen installed illegal software in 600,000 Volkswagen,

knowledge of numerous actors and/or the deliberate ignorance of numerous others.[66] Finally, corporate crimes on the scale that warrant federal criminal charges typically do not occur without the criminal conduct, at least to some degree, being exposed in documents, memorandum, and emails.[67]

Thus, applying the facilitation theory, a target influences, enables, furthers or conceals financial crimes or corporate misconduct when he: (1) creates a toxic culture by setting unreasonable profit or sales targets to increase profits and personal bonuses, (2) creates a culture of risk by repeatedly ignoring compliance obligations, (3) creates a culture of risk by failing to "draw the line" or exercise meaningful oversight responsibilities, (4) ignores or turns a "blind eye" to the wrongdoing, exercises a passive indifference to questionable practices, or fails to investigate "red flags" that plainly indicated misconduct or fraudulent practices, or (5) acts to conceal the

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Audi, and Porsche diesel cars sold in the United States and 11 million worldwide over a period of seven years) (on file with the Washington and Lee Law Review).

66. *See* Jack Ewing, *More VW Executives Could Be Charged, Court Documents Suggest*, N.Y. TIMES (Jan. 13, 2017), https://www.nytimes.com/2017/01/13/business/volkswagen-emissions-scandal-charges.html (last visited Feb. 23, 2018) (describing that in the Volkswagen emissions scandal, court document reflect a broad conspiracy that include engine developers, software experts, quality control managers, in-house lawyers, and people responsible for emissions compliance) (on file with the Washington and Lee Law Review).; Michael Corkery, *Wells Fargo Fined $185 Million for Fraudulently Opening Accounts*, N.Y. TIMES (Sept. 8, 2016), https://www.nytimes.com/2016/09/09/business/dealbook/wells-fargo-fined-for-years-of-harm-to-customers.html (last visited Feb. 23, 2018) (explaining that the Wells Fargo scandal involved at least 5600 employees) (on file with the Washington and Lee Law Review); *see also* Christine Hauser & Maya Salam, *As Testimony Piles Up Against Doctor, Several on Gymnastics Board Resign*, N.Y. TIMES, Jan. 23, 2017, at A10 ("[M]ore than a dozen [victims] asked how the abuse could have gone on for decades, and why organizations such as the national gymnastics governing body and Michigan State University, his employer—enabled him or turned a blind eye.").

67. *See* Jack Ewing, *VW Presentation in '06 Showed How to Foil Emissions Tests*, N.Y. TIMES (Apr. 26, 2016), https://www.nytimes.com/2016/04/27/business/international/vw-presentation-in-06-showed-how-to-foil-emissions-tests.html (last visited Feb. 23, 2018) (describing how a top technology executive at Volkswagen prepared a PowerPoint presentation in 2006 that laid out in detail how the automaker could cheat on emissions tests in the United States) (on file with the Washington and Lee Law Review).

misconduct or misleads regulators by intimidating witnesses or altering or destroying documents.[68]

F. Prosecutorial Discretion

Recently, the courts have expressed concerns about the unchecked exercise of prosecutorial discretion and have questioned the use of prosecutorial discretion to define the scope of criminal conduct.[69] The effort to impose some restraints on the

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68. *See* Stacy Cowley & Jennifer A. Kingson, *Wells Fargo to Claw Back $75 Million From 2 Former Executives*, N.Y. TIMES (Apr. 10, 2017), https://www.nytimes.com/2017/04/10/business/wells-fargo-pay-executives-accounts-scandal.html (last visited Feb. 3, 2018) (describing toxic culture of setting ruthless and unrealistic sales goals, such as managers telling subordinates to sell people accounts even if they did not need them) (on file with the Washington and Lee Law Review); Jack Ewing, *Inside VW's Campaign of Trickery*, N.Y. TIMES (May 6, 2017), https://www.nytimes.com/2017/05/06/business/inside-vws-campaign-of-trickery.html (last visited Feb. 3, 2018) (describing a practice at Volkswagen to provide regulators with false and misleading or incomplete data in order to cover-up the use of the illegal software) (on file with the Washington and Lee Law Review); Jack Ewing, *Volkswagen Inquiry's Focus to Include Managers Who Turned a Blind Eye*, N.Y. TIMES (Oct. 26, 2015), https://www.nytimes.com/2015/10/26/business/international/volkswagen-investigation-focus-to-include-managers-who-turned-a-blind-eye.html (last visited Feb. 3, 2018) (reporting that former employees have asserted that there was a culture inside VW that "discouraged open discussion of problems, creating a climate in which people may have been fearful of speaking up") (on file with the Washington and Lee Law Review); Landon Thomas Jr., *Deutsche Bank Fined in Plan to Help Russians Launder $10 Billion*, N.Y. TIMES (Jan. 30, 2017), https://www.nytimes.com/2017/01/30/business/dealbook/deutsche-bank-fined-for-helping-russians-launder-10-billion.html (last visited Feb. 3, 2018) (describing practice of laundering $10 billion in questionable funds from Russia and "pervasive culture at Deutsche of skirting regulators to pad profits and personal bonuses") (on file with Washington and Lee Law Review); Bill Vlasic, *G.M. Lawyers Hid Fatal Flaw, From Critics and One Another*, N.Y. TIMES (June 6, 2014), https://www.nytimes.com/2014/06/07/business/gm-lawyers-hid-fatal-flaw-from-critics-and-one-another.html (last visited Feb. 3, 2018) (reporting that GM legal department acted to conceal product defect from regulators) (on file with the Washington and Lee Law Review); Bill Vlasic, *G.M. Inquiry Cites Years of Neglect Over Fatal Defect*, N.Y. TIMES (June 5, 2014), https://www.nytimes.com/2014/06/06/business/gm-ignition-switch-internal-recall-investigation-report.html (last visited Feb. 3, 2018) (describing an internal inquiry that revealed a culture where employees across departments neglected to repair the safety defect and issue a recall despite "a mountain of evidence that lives were at risk") (on file with the Washington and Lee Law Review).

69. *See* Maslenjak v. United States, 137 S. Ct. 1918, 1927 (2017) (reversing

prosecutorial discretion is legitimate. Prosecutorial discretion should not drive the application of the law and the government's effort to seek sanctions against individuals. On the other hand, the use of the facilitation theory to hold hard targets accountable for financial corruption is not an arbitrary effort to define criminal conduct or expand prosecutorial discretion. Rather, these prosecutions would be within the limits set by existing federal criminal statutes and established doctrines. Moreover, holding hard targets accountable furthers the interest of justice by making the application of the law fundamentally fair and not a study in impunity where the affluent and powerful are beyond the reach of accountability.

III. Conclusion

Bringing financial corruption to light and holding hard targets accountable for financial crimes and corporate corruption will require a sustained and persistent effort by the government to follow the evidence to conclusion. These cases often involve complex fact patterns and shifting narratives. Hard targets have the resources to stonewall requests for information and access to witnesses. They have the connections to intimidate and shape the media coverage of the investigation. In addition, hard targets often intentionally insulate themselves from proximity to and intimate knowledge of questionable corporate practices. Regardless of the risks and frustrations, federal prosecutors have a responsibility to be aggressive in their demands for accountability because there is a substantial cost in failing to

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immigration conviction, holding that government was required to prove connection between false statement on application and obtaining citizenship, and writing that the government's position "would give prosecutors nearly limitless leverage"); McDonnell v. United States, 136 S. Ct. 2355, 2371, 2375 (2016) (reversing public corruption conviction and adopting restrictive definition of "official act"); Elonis v. United States, 135 S. Ct. 2001, 2012 (2015) (reversing internet threat conviction and requiring the government to prove more than negligence); Bond v. United States, 134 S. Ct. 2077, 2086 (2014) (reversing chemical weapons use and possession convictions and finding that the statute was not intended to reach wholly local crime); United States v. Stevens, 559 U.S. 460, 480 (2009) (reversing conviction for the sale of dog fighting videos and refusing to uphold an unconstitutional statute on the government's promise that they will use it responsibly).

hold hard targets accountable. This failure only serves to allow the conduct to continue and establishes a culture where accountability is not valued, and individuals with power, relationships, and influence can act without consequences.[70] Moreover, failing to hold hard targets accountable will further the hard-edged populism and the perception that the criminal justice system is fundamentally unfair and disproportionately applied against targets without power and influence.[71]

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70. The continued record of corporate misconduct makes any assertion that what is in place provides a meaningful deterrence to financial crimes and corporate misconduct questionable. *See, e.g.*, Danielle Ivory, *G.M. Reveals It Was Told of Ignition Defect In '01*, N.Y. TIMES (Mar. 12, 2014), https://www.nytimes.com/2014/03/13/business/gm-reveals-it-was-told-of-ignition-defect-in-01.html (last visited Feb. 3, 2018) (reporting that General Motors admitted that it had received reports as early as 2001 of a safety defect in its cars that is now linked to 12 deaths and at least 31 accidents) (on file with the Washington and Lee Law Review); Jonathan Soble, *Kobe Steel Scandal Grows to Include Subsidiaries*, N.Y. TIMES (Oct. 13, 2017), https://www.nytimes.com/2017/10/13/business/kobe-steel-scandal.html (last visited Feb. 3, 2018) (discussing an admission by a Japanese global steel supplier that it deliberately falsified data and altered inspection certificates about quality of aluminum and copper supplier to hundreds of manufacturers including Toyota, Ford, General Motors, and Boeing) (on file with the Washington and Lee Law Review); Reuters, *Deutsche Bank and Justice Dept. Complete Deal on Mortgage Crisis*, N.Y. TIMES (Jan. 17, 2017), https://www.nytimes.com/2017/01/17/business/deutsche-bank-and-justice-dept-complete-deal-on-mortgage-crisis.html (last visited Feb. 3, 2018) (explaining that Deutsche Bank agreed to pay $7.2 billion for its sale of toxic mortgages in run-up to the 2008 financial crisis and that the bank made false and misleading representations to investors about the loans underling millions of dollars' worth of mortgages securities issues by the bank in 2006 and 2007) (on file with the Washington and Lee Law Review).

71. *See* Gretchen Morgenson, *How Letting Bankers Off the Hook May Have Tipped the Election*, N.Y. TIMES (Nov. 11, 2016), https://www.nytimes.com/2016/11/13/business/how-letting-bankers-off-the-hook-may-have-tipped-the-election.html (last visited Feb. 3, 2018)

> There are many facets to the populist, anti-establishment anger that swept Donald J. Trump into the White House in Tuesday's election. A crucial element fueling the rage, in my view, was this: Not one high-ranking executive at a major financial firm was held to account for the crisis of 2008. As millions of foreclosures and job losses followed, the failure to go after fraudsters confirmed the suspicion that the powerful got protection while those on Main Street were kicked to the curb. When Mr. Trump asserted that the system was rigged, he tapped directly into such misgivings . . . . The failure to prosecute even one or two high-profile bankers—or force them simply to pay fines and penalties out of their own pockets—left millions of Americans believing that our justice system was unjust.

(on file with the Washington and Lee Law Review).

In response to criticism that the government's prosecutorial judgment has been compromised and that federal prosecutors rarely turn their scrutiny upwards, the government has explained that a combination of factual and legal issues presents a substantial barrier to bringing cases against hard targets.[72] However, a meaningful effort has not been made to use the facilitation theory to hold executive management, third-party professionals or others accountable for corporate fraud.[73] The

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72. The lack of a meaningful effort to hold hard targets accountable for financial crimes is not the result of legal barriers and a viable legal theory of prosecution. It could be the result of the lack of skill, judgment or experience to follow a complex evidentiary narrative to conclusion. More likely, however, the failure to make a meaningful effort to follow the evidence until conclusion against hard targets is the result of a calculation of the career and ambition risks of moving against powerful and influential targets and a reticence to act in a way that will leave prosecutors with shredded careers. The injustice is compounded by the recognition that these prosecutors can suspend their ambitions and fears of stalled careers and ruined reputations to pursue the evidence to conclusion against easy targets from main street and poor neighborhoods. *See* Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES (Apr. 30, 2014), https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html?mtrref=www.bing.com (last visited Feb. 3, 2018) (discussing the numerous reasons that federal prosecutors are not seeking convictions against hard targets, including that the cases were complex to investigate, "infernally difficult" to explain to juries, and fear of losing the case) (on file with the Washington and Lee Law Review). Moreover, as long as the government looks the other way, the conduct will continue unabated, and the financial cost and the impact on the working class and poor Americans will accelerate. *See* Ben Casselman, *A Lasting Scar of Recession; 1.5 Million Workers Vanish*, N.Y. TIMES, Oct. 6, 2017, at B1 (describing the "disappearance" of workers from the economy as a result of the financial crisis last decade and asserting that many of these workers have fallen into drug addiction and poverty).

73. *See* Gretchen Morgenson, *A Bank Too Big to Jail*, N.Y. TIMES (July 15, 2016), https://www.nytimes.com/2016/07/17/business/a-bank-too-big-to-jail.html (last visited Feb. 3, 2018)

> Have you ever wondered why the 2008 financial crisis generated almost no criminal prosecutions of large banks and their top executives? Then take a moment to read the congressional report issued on July 11, [2017] titled "Too Big to Jail." Citing internal documents that the United States Treasury took three years to produce, the report shows how regulators and prosecutors turned a potential criminal prosecution of a large global bank—HSBC—into a watered-down settlement that insulated its executes and failed to take into account the full scope of the bank's violations.

(on file with the Washington and Lee Law Review).

facilitation theory of prosecution under federal criminal law can be used to extend the reach of the federal fraud statutes to hold hard targets accountable for criminal corporate conduct.[74] Prosecutors can use the aiding and abetting statute, co-conspirator liability, and willful blindness instructions to convict hard targets of financial crimes and corporate misconduct by showing that they acted to facilitate the wrongdoing. The result would be a practical and meaningful theory of criminal prosecution that would establish real consequences for facilitating corporate criminal conduct.[75]

74. In a memo by Attorney General Jeff Sessions, he mandated that prosecutors "pursue the toughest possible charges and sentences against crime suspects," highlighting drug dealing, gun crime, and gang violence. Rebecca R. Ruiz, *Sessions Tells Prosecutors to Seek Harsher Penalties*, N.Y. TIMES, May 13, 2017, at A15. It is still to be determined whether this mandate applies beyond violent crimes and drug trafficking offenses and to financial crimes and corporate corruption.

75. In conclusion, perhaps Robert Kennedy provided the most important guidance: "Every time we turn our heads the other way when we see the law flouted, when we tolerate what we know to be wrong, when we close our eyes and ears to the corrupt because we are too busy or too frightened, when we fail to speak up and speak out, we strike a blow against freedom and decency and justice." Remarks before the Joint Defense Appeal of the American Jewish Committee and the Anti-Defamation League of the B'nai B'rith (June 21, 1961).