Andersen v. U.S.: Policy Implications and a Social Science Research Agenda

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Abstract: The U.S. Supreme Court overturned the conviction of Arthur Andersen, LLP for its involvement in the Enron scandal. The Court held that that the jury instructions did not accurately convey the meaning of the witness tampering statute that Andersen was charged with. Since the original trial, relevant sections of the Criminal Code were updated with the passage of the Sarbanes-Oxley Act (2002). Although Andersen was convicted under the pre-Sarbanes-Oxley statutes, the Court's ruling will likely affect enforcement of post-Sarbanes statutes, possibly limiting their scope. We discuss whether Sarbanes was an appropriate response to corporate crime and consider some other methods of punishing corporations. We also raise a number of empirical questions related to this case.

Keywords: Corporate crime, jury decision making.

INTRODUCTION

According to FBI figures, there were over 200,000 white-collar offenses[1] committed between 1997 and 1999 (Barnett, 2000). Simpson (2002) reported that data from 178 corporate offenses tried in U.S. courts in the 1980's revealed that the average cost per offense was $565,000. During that same time period the average cost per burglary was $1,000 and the average cost per larceny was $400. Additionally, there are approximately 22,000 homicides per year, a figure that is one-fifth the annual number of deaths that result from disease and injury related to work (Simpson, 2002). Thus, white-collar/corporate crime is by no means rare and is potentially the most damaging type of crime to society (Simpson, 2002). When Enron investors lost billions of dollars in 2001, the extensive media coverage of the event helped thrust the issue of corporate crime into the national spotlight (Bowman 2003). Enron's declaration of bankruptcy was the largest in U.S. history and the scandal destroyed the Enron Corporation and its accounting firm Arthur Andersen LLP. The Supreme Court decision in *Andersen v. U.S.* (2005) refocused the media and the American public on the issue of corporate crime.

In this review of the case, the authors examine the U.S. Supreme Court decision in the Arthur Andersen case in the context of the culpability of a corporation v. an individual in a criminal case. The authors examine the difficulty in prosecuting a corporate entity and the subsequent practical implications that result from prosecuting a corporation instead of individuals. The decision is also examined in the context of current research on jury instructions and future implications for court decisions based on the Sarbanes-Oxley Act.

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[1] These offenses include fraud, bribery, counterfeiting/forgery, and embezzlement.

THE CASE AGAINST ANDERSEN

On March 7th, 2002, Andersen was indicted in the Southern District of Texas on one count of witness tampering. The indictment charged that Andersen was in violation of 18 U.S.C. § 1512 (b) (2000) which defines witness tampering as "Whoever knowingly…corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to cause or induce any person to alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding…shall be fined under this title or imprisoned not more than ten years, or both", (Table **1**).

The government contended that Andersen was in violation of this statute between October 10th 2001 and November 9th 2001 due to the urgings of Andersen executives to follow the company document retention policy. The government accused Andersen of corruptly persuading its employees to destroy documents to impair their availability for use in an official proceeding.

The government supported its charge with the actions taken within the Andersen firm between those dates. The prosecution argued that the facts showed executives were planning to face some litigation prior to their notification of a U.S Securities and Exchange Commission (SEC) investigation of their Enron accounting, and they were certainly enforcing the document retention policy. However, Andersen claimed that they had no knowledge of any official proceeding until they were served with a subpoena for their documents. Andersen also claimed that prior to November 9th they were simply following the company document retention policy.

AWARENESS OF THE SEC INVESTIGATION

The first public sign of irregularity at Enron occurred on August 14, 2001 when the CEO, Jeffrey Skilling, suddenly resigned (Andersen v. U.S., Brief for the U.S. 2005), (Table **2**) for a summary timeline of key dates. His resignation led to speculation that the company may have been having financial difficulties. Two weeks later the Wall Street Journal

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Table 1. Relevant Sections of the United States Code Pre- and Post-Sarbenes-Oxley

18 U.S.C (2000)
§ 1512(b) Whoever knowingly… corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to cause or induce any person to alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding… shall be fined under this title or imprisoned not more than ten years, or both.
18 U.S.C (2002)
§ 1512(b) Whoever knowingly…corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to— (1) influence, delay, or prevent the testimony of any person in an official proceeding; (2) cause or induce any person to—(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
§ 1512(c) Whoever corruptly alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding or otherwise obstructs influences, or impedes any official proceeding, or attempts to do so
§ 1519 Whoever knowingly alters, destroys, mutilates, conceals, covers up falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the united States or any case filed under title 11 or in relation to or contemplation of any such matter or case

published a story about possible irregularities at Enron and as a result, the SEC opened an informal investigation into Enron's activities (Andersen v. U.S., Brief for the U.S. 2005). The SEC issued a letter to Enron on October 17th asking for the voluntary disclosure of information concerning transactions between Enron and other entities (Andersen v U.S. Brief for the Petitioner, 2005). Enron then forwarded that letter to Andersen on October 19th, which is when Andersen claims that they first learned of the inquiry by the SEC.

However, according to the government, high level executives at Andersen became aware of accounting irregularities at Enron in September 2001 (Andersen v. U.S., Brief for the U.S., 2005). Andersen assembled an Enron crisis-response group that met almost daily by the end of September. Andersen retained a law firm on October 8th to represent them in Enron related litigation. Additionally, an Andersen in house lawyer's notes from an October 9th meeting stated that an SEC investigation was highly probable. That same in house lawyer entered the Enron matter into the Andersen computer system used to track open legal matters. On October 10th the Andersen practice director for the Houston office began reminding employees to be sure to comply with the document retention policy. He stated:

> If a document is destroyed in the course of the normal policy and litigation is filed the next day, that's great….We've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable. (*Andersen v. U.S.,* Brief for the U.S., 2005 p. 5)

The government also provided evidence that internal e-mails were sent prior to October 19th reminding personnel at Andersen of the document retention policy. On the 16th of October Enron announced that it was taking a $1.01 billion charge to its earnings and reducing its shareholder equity by $1.2 billion. The government contended that Andersen executives redoubled their efforts to enforce the document retention policy following their receipt of the forwarded SEC letter on October 19th. The SEC issued a letter to Enron on October 30th stating that a formal investigation was under way and Andersen became aware of the investigation the following day.

AWARENESS OF THE NEED TO ISSUE A RESTATEMENT

The government and the petitioner (Andersen) disagreed on the date when Andersen personnel became aware that a restatement of Enron's earnings would be necessary. Andersen contends that the issue requiring a restatement was an Enron side deal that Andersen personnel did not even become aware of until November 2nd (*Andersen v. U.S.*, Brief for the Petitioner, 2005). Andersen investigated the issue and determined that a restatement was necessary on November 5th. The government contended that the $1.2 billion error is what required the restatement and the Andersen executives were aware of that fact on October 23rd.

The letter of notice of a formal investigation that was issued on October 30th to Enron required a response by November 8th. On the 8th Enron issued the restatement of its earnings and the SEC served both Enron and Andersen with subpoenas. On November 9th Andersen ceased shredding its Enron related documents.

TRIAL ISSUES SUPPORTING THE APPEAL

At the conclusion of the Andersen district trial the jury was instructed that the meaning of "corrupt…persuasion" was persuasion motivated by an "improper purpose" (*Andersen v. U.S.*, Brief for the Petitioner, p. 2). They were also instructed that Andersen could be found guilty even if the jury believed their conduct to be lawful. Andersen objected to these instructions, but their request was denied. In part, the charge to the jury at trial read:

> To "persuade" is to engage in any non-coercive attempt to induce another person to engage in certain conduct. The word "corruptly" means having an improper purpose. An improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding (*U.S. v. Andersen*, 2004, p. 25).

Additionally the jury was told that Andersen need not have any knowledge that a particular proceeding was pend-

Table 2. Order of Events Leading to the Indictment of Andersen

Date	Event
8/14/01	Enron CEO resigned causing speculation about the company's financial practices
8/28/01	*Wall Street Journal* published an article suggesting improprieties at Enron causing the SEC to open an informal investigation
9/01	Andersen became aware of the use of Raptors to conceal losses and assembled an Enron crisis-response team
10/8/01	Andersen hired a law firm to represent them in any Enron related litigation
10/9/01	An Andersen in-house lawyer entered the Enron matter into the company computer system for tracking open legal matters
10/10/01	The practice director for the Houston Andersen office began reminding employees to comply with the company document retention policy
10/16/01	Enron announced that it was taking a $1.01 billion charge to its earnings and reducing its shareholder equity by $1.2 billion
10/17/01	The SEC sent a letter to Enron asking them for the voluntary disclosure of documents
10/19/01	The SEC letter was forwarded to Andersen by Enron. According to the government, Andersen executives redoubled their efforts to enforce the document retention policy. According to Andersen this was their first knowledge of an SEC investigation
10/23/01	The government contends that Andersen learned on this date that the $1.2 billion error would force a restatement
10/30/01	A letter was sent to Enron informing them that the SEC had begun a formal investigation and set a deadline for a formal response from Enron of 11/8/01
10/31/01	Andersen learned of the formal SEC investigation
11/5/01	According to Andersen, they determined on this date that the Chewco deal would force a restatement of Enron's earnings
11/8/01	Enron responded to the SEC deadline by issuing a restatement of its earnings. The SEC issued subpoenas to Enron and Andersen for their documents
11/9/01	Andersen ceased shredding all Enron related documents

ing or that a subpoena was likely. Specifically, the instructions stated that "even if [petitioner] honestly and sincerely believed that its conduct was lawful, you may find [petitioner] guilty" (*Andersen v. U.S.*, 2005, p.9).

One basis for Andersen's objections to the jury instructions was that §1512 required that the jury find a close nexus between the "corrupt persuasion" and a particular government proceeding, a requirement that was clearly not reflected in the jury charge. The district court's decision on this aspect of the jury instructions seemed to follow directly from the government's argument, which was based on language from a different statute, 18 U.S.C. § 1512 (e)(1): "an official proceeding need not be pending or about to be instituted at the time of the offense" (*Andersen v. U.S.*, Brief for the U.S., p. 5a).

The jury took a total of 10 days to deliver a verdict. There is every indication that the jury had a difficult time reaching their decision. After seven days of deliberation, the jury declared that they were deadlocked. The trial judge issued an "Allen charge" (*Allen v. United States*, 1896), an instruction to return to their deliberations with a predisposition to reaching consensus. After three more days of deliberation, the jury returned a guilty verdict. The possibility that the jury instructions played a critical role in the jury's decision is an issue we will return to later in this paper.

On appeal, the Fifth Circuit decided in favor of the government. Andersen made its Fifth Circuit appeal on a variety of grounds. Of importance to the present analysis, the Fifth Circuit held that the jury instructions at trial were not improper, that there was no abuse of discretion in terms of the instructions used at trial.

The United States Supreme Court heard oral arguments on April 27, 2005, and issued a unanimous opinion, written by Chief Justice Rehnquist, on May 31, 2005. The Supreme Court overturned the Fifth Circuit, ruling that "the jury instructions failed to convey properly the elements of a 'corrup[t] persuas[ion]' conviction" (p.1). The Supreme Court held that there were two basic deficiencies in the instructions. First, the jury instructions failed to accurately communicate the requirements of "knowing…corrupt persuasion" under §1512(b). Second, the jury instructions did not convey the need for a nexus between the "persuasion" and a particular proceeding of a government agency.

Regarding the meaning of the "corruptly persuades" language in § 1512, the Supreme Court emphasized the importance of the term "knowingly" as an important modifier to the meaning of "corruptly" in §1512, differentiating the meaning of "corruptly" in that context from its meaning in §§1503 and 1505 where "corruptly" is not accompanied by "knowingly."

> The parties have largely focused their attention on the word 'corruptly' as the key to what may or may not lawfully be done…[§1512 (b)] punishes not just 'corruptly persuad[ing]' another, but '*knowingly* … corruptly persuad[ing]' another…["knowingly"] provides the *mens rea*…Only persons conscious of wrongdoing can be said to 'knowingly…corruptly persuad[e]'. (p. 8-9, emphasis in original).

The Court went on to discuss the importance of a nexus between the "knowing…corrupt persuasion" and a particular government process. "A 'knowingly…corrup[t] persuade[r]' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material." (*Arthur Andersen v. United States*, 2005, p. 11). The ruling on the nexus requirement is not altogether surprising however, considering that the Court ruled previously that there must be a close nexus between obstruction and a pending proceeding in order to prosecute under § 1503 (*U.S. v. Aguilar*, 1995).

The Supreme Court's decisions matches very closely the arguments articulated in an *Amicus Curiae* brief submitted by the Washington Legal Foundation (WLF) and the U.S. Chamber of Commerce (CC). Those organizations argued that the language in §1512 was misinterpreted by the Fifth Circuit court and by the District Court. Their reading of §1512, one quite similar to that which was later enumerated in the Court's opinion in *Andersen*, relied on identification of a clear requisite of *mens rea*, knowledge that the act was illegal, in the language of "knowing…corrupt persuasion." In their argument, they identified that element in §1512, relying on previous decisions by the Supreme Court, and by the interpretation of §1512 made by the Third Circuit (*United States v. Farrell*, 1997). In their brief, the WLF and the CC distinguished the language in §1512 from *mala prohibitum* statutes which require only acts that violate statutory language, but without any necessary element of *mens rea*. The well-known legal doctrine that "ignorance of the law is no excuse," amici argued, does not apply to statutes in which *mens rea* is enumerated as an element of the offense. Citing a long line of cases for support, the *amici* argued that:

> [I]gnorance of the law in fact may be a valid excuse *if the law itself makes knowledge of the law an element of the offense*, and by interpreting the *mens rea* elements of crimes that are *mala prohibitum* to require that the defendant know that his or her conduct was unlawful…the *mens rea* element of the statutes will be interpreted to require the government to prove that the defendant knew that his conduct was unlawful…ignorance of the law has become an excuse in such a setting (Brief of *Amici Curiae*, pp. 16-23, emphasis in original).

Clearly, the Court saw an important *mens rea* requirement in §1512, requiring that the defendant both a) knew that the persuasion was wrong, and b) that the persuasion be related to interfering with a specific government proceeding. Of course, this opinion applies most specifically too the 2001 version of §1512, which was subsequently modified in 2002. After reviewing those 2002 changes in the law, we will return to the Supreme Court's ruling in *Andersen* to see how it might influence future interpretations of the new statutes.

CHANGES TO THE STATUTES

In the wake of the Enron scandal and other corporate scandals such as WorldCom and Tyco, Congress reacted with the Sarbanes-Oxley Act, passed in 2002, which specifically addressed crimes involving document destruction; 18 U.S.C. § 1512 (2002) was supplemented with language that specifically addressed "mutilating or destroying documents" (See Table **2**, §1512). The statute includes additional language that stipulates penalties for obstructing, influencing, or impeding an official proceeding. Arguably, the revised statute is further reaching than the prior statute that did not specifically address the destruction of documents. Also, the prior statute only addressed impairing an object's availability for a proceeding. See Table **2** for a direct comparison of the statutes pre- and post-Sarbanes.

The language of the post Sarbanes statute makes it a crime, in certain circumstances, for an individual to destroy documents. One of the issues raised by Andersen was that the statute was nonsensical because it was not a crime for an individual to destroy documents, but it was a crime for someone to "persuade" another to destroy documents. The new statute does seem to address this issue, since individuals may now be prosecuted for their own acts of document destruction.

The passage of Sarbanes also included additional language in the statute to address knowledge of an official proceeding. The statute now provides a penalty for influencing the investigation of "any department or agency of the United States…in relation to or contemplation of" any proceeding (18 U.S.C. § 1519, 2002). However, the language of the new statute, "in contemplation of" matches almost exactly the language of the Supreme Court's opinion in this case. Therefore, it seems as though future prosecutions under this statute will still be required to meet the nexus requirement outlined by the Court, despite the possibility that the legislative intent in adding "in contemplation of" was to circumvent the requirement of a close nexus. In the floor debate about Sarbanes-Oxley, Senator Leahy stated that the language was to "extend to acts done in contemplation of such federal matters, so that the timing of the act in relation to the beginning of the matter or investigation is … not a bar to prosecution" (Grindler & Jones, 2004, p. 6).

Another section was added that requires any accountant who conducts an audit of an SEC regulated entity to keep all work papers associated with the audit for a period of five years (18 U.S.C. §1520, 2002). With the addition of this section Congress may have intended to prevent the destruction of documents under the guise of a document retention policy. If any work papers are destroyed before the 5 year time limit, that act could be prosecuted regardless of intent. However, after that statute was added the Public Company Accounting Oversight Board (PCAOB) ruled in 2003 that the workpapers retained need only "contain sufficient information to enable an *experienced auditor, having no previous connection with the engagement*, to understand the work that was performed, who performed it, when it was completed, and the conclusions reached" (Grindler & Jones, 2004, p. 12, emphasis in original).

The intent of congress in changing the statute was to provide for greater latitude in prosecuting corporations. Senator Leahy proclaimed statutory changes were needed to ensure that "overly technical distinctions will neither hinder nor prevent prosecution and punishment" (Grindler & Jones, 2004, p. 6). The Supreme Court's ruling in *Andersen* may mean that the new law will not be as clear and far-reaching as Congress intended.

IMPLICATIONS OF THE SUPREME COURT'S ANDERSEN RULING

The Supreme Court's ruling in *Andersen* will apply directly to §1512, and is likely to limit future prosecutions under that statute despite the changes that arose as a result of the Sarbanes-Oxley Act. Section §1512 (b) (Table **2**), still contains the term "knowingly" in reference to "corrupt persuasion." While the witness tampering statute has been expanded to include much more specific language about destroying documents, the Court's identification of a *mens rea* requirement in terms of "knowing…corrupt persuasion" will require that element for similar prosecutions in the future. The Court's ruling requiring a nexus between the "knowing…corrupt persuasion" further established the *mens rea* requirement for §1512 (b), requiring proof of knowledge about a specific government inquiry in relation to the corrupt act.

The interpretation of §1512 (c), the new language specifically pertaining to document retention which penalizes "[W]hoever corruptly alters, destroys, mutilates, or conceals a record, document, or other object" (Table **2**), is not altogether clear in light of the Court's *Andersen* ruling. It seems likely that convictions under section (c) will require a showing of a nexus between the "corrupt" behavior and a specific government investigation or proceeding. However, since §1512 (c) does not contain the modifier "knowingly," it seems to require a lower threshold of *mens rea* culpability than §1512 (b) in light of *Andersen*.

CHARGING AN ENTITY WITH A CRIME

The language of "knowingly" and "corruptly" are typically attributed to a person, however, Andersen is a corporation that was convicted of a criminal charge of witness tampering. The question that quickly arises is: how does a corporation face criminal sanctions?

There exists in the law, precedent for holding corporations criminally liable. The first time in which this was upheld by the court was in the case of *New York Central and Hudson River Railroad Company v. United States* (1909). One of the assistant traffic managers for the railroad gave rebates to certain customers. This made the shipping rate less than the mandated rate for some customers, which was a violation of the Elkins Act (Dressler, 2002). The court stated that

> We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents (New York Central, 1909, p. 8).

Even though the corporation did not authorize the transaction, it was held criminally liable for the actions of one of its agents.

The case of the Ford Pinto exhibits the dilemma between punishment of the corporation and punishment of the acting individual within the corporation. Lee Iacocca, president of Ford Motor Company in the 1970s, gave engineers three stipulations for the Pinto: it had to be in showrooms within 25 months, it had to weigh 2,000 pounds or less, and it could cost no more than 2,000 dollars. However, when the car was rear ended the gas tank would rupture, the doors would jam shut, and the car would eventually catch fire. Internal memos showed that Ford executives were aware of the problem. Ford Motor Company was later put on trial for reckless homicide for the deaths of three teenage girls who burned to death when they were hit in their Ford Pinto. Ford was not convicted of these charges, however, there are suspicions that the judge and one of Ford's attorneys were working together behind closed doors (Mokhiber, 1988). This case did affirm though, that a corporation can be considered a person for purposes of criminal law (Green, 1997).

In another example, in 1991 the Consumer Product Safety Commission (CPSC), a government watchdog for product safety, sued seven major toy companies for selling toys that had lead paint (Green, 1997). As seen in these examples, someone is clearly responsible for the harm caused by the products. As Coleman (1975) stated, a better policy might be to punish the individuals within the corporation rather than the corporate entity. Applying that logic to the above examples, it would arguably have been more appropriate to hold individuals responsible for the deaths, including people at Ford such as Mr. Iacocca and the engineers who knew of the problem and did not speak up, and the toy executives who distributed the lead paint in the CPSC case. Cressy (cited in Green, 1997) argued that all criminal acts by corporations can be reduced to the acts of human beings.

As a result of the conviction at the district level, Andersen was sentenced to a $500,000 fine and 5 years probation (Chase, 2003). The corporation also lost the ability to audit companies on the national stock exchanges and as a result Andersen lost many clients and personnel. As it exists today, Andersen is no more than 200-300 employees who handle the remaining litigation, a far cry from its former 28,000 employees. The law was effective in disbanding a corporation; however, the individuals who were behind the acts of the corporation are free to practice accounting elsewhere. It seems plausible that the diffusion of the Andersen employees could make thousands of accounting firms now criminal where they may not have been before.

One can assume that since the document retention policy of the firm was at the heart of the indictment that the corporation was charged instead of an individual or individuals. However, individuals still had to enforce that corporate policy with the intent of evading an investigation. Perhaps the ruling might have been different had the Andersen executives been facing the charges rather than the corporation. Would the *mens rea* requirement established in the Supreme Court's analysis of the term "knowingly" have been easier to assign to an individual? Would it have been easier to prove that a specific individual was contemplating the SEC investigation and criminal charges thus corruptly persuading others to destroy documents? These empirical questions are worthy of investigation in terms of future policy implications and the deterrence of corporate crime.

WAS THE SARBANES-OXLEY ACT THE APPROPRIATE RESPONSE?

Sarbanes-Oxley was passed in haste and some senators regretted the fact that there was a lack of a debate on whether the punishment focus should be criminal or civil (Bowman, 2003). According to Simpson (2002) criminal sanctions

against corporations have proven to be largely ineffective in deterring corporate crime. Criminal law is not applied to corporations with enough regularity to deter. Even if it were, corporations easily evade prosecution because criminal acts within a corporation are difficult to detect. When a corporation is tried in a criminal court it is considered a person under the law. As such, a corporation is afforded all of the constitutional safeguards of ordinary citizens. However, unlike ordinary citizens the balance of power is in favor of the defendant at the outset rather than the government, due to the vast financial resources of the corporate defendant that can provide for a top notch defense team and a myriad of experts and other professionals. Additionally, corporations are not at risk of loss of life or liberty as is an individual. Therefore, these constitutional protections and the high standard of proof in criminal court can make convicting a corporation difficult. If the government is successful in convicting the corporation, the entity will often be punished with a fine. If the fine that a corporation suffers is less than the amount gained by the criminal act then by cost benefit analysis, the corporation made a wise business decision in violating the law (Simpson, 2002).

Sarbanes-Oxley has also been criticized because the call from the Justice Department was for increased funds for investigation and prosecution, not for an increase in sentences (Bowman, 2003). The budget of the Justice department for antitrust violations has been estimated to be one fifth of the advertising budget of Proctor and Gamble (Simpson, 2002). Bowman (2003) argued that the new, arguably weak legislation may have resulted from the fact that it is cheaper to increase sentences than to provide funds for prosecution and investigation. This approach may also allow the government to appear to take a tough stance on corporate crime without actually catching any more corporate criminals. Bowman (2003) speculated that by increasing criminal sanctions, big business may be protected from a potentially damaging civil regulatory system.

Simpson (2002) presented empirical studies that both support and refute the notion that a civil regulatory system can produce specific deterrence. It is likely that punishment of corporations under a civil system would make sanctions more certain by reducing procedural safeguards and lowering the burden of proof. Also, civil proceedings can levy more severe economic sanctions against corporations which will have a greater likelihood of deterrence. Simpson (2002) also suggested that civil sanctions would be more effective for punishing corporate executives because juries are reluctant to impose criminal sanctions for crimes that are not seen as traditionally morally blameworthy in our society. Rather, corporate crime is seen as illegitimate because it is prohibited by law. The effectiveness of the law and deterrence then rests on the public perceived legitimacy of the law. However, executives may avoid penalties under a civil system because actions might be taken against corporations more often than individuals, since damages might be more likely to be recovered in lawsuits against deep-pocketed corporations than in lawsuits against individuals (Simpson, 2002).

THE INFLUENCE OF POLITICS

The difficulty in holding corporations responsible for criminal violations has been recognized by scholars for more than half a century. This problem was first noted by Sutherland (1949/1983) in his book, *White Collar Crime*. Sutherland (1949/1983) stated that government is less critical of business than street criminals, because government officials are very similar to business men/women. Families even cross the boundaries, having some family members in business and some family members in government. Also, business men/women and government officials are often friends. Many business men/women enter government from business, and many government officials plan to go to the private sector after retiring from government work. Finally, businesses are very influential and can help or hurt government programs as well as contribute to campaign funds (Sutherland, 1949/1983). Cullen and Dubeck (1985) painted a grim picture for deterrence and punishment of corporate crime with this statement:

> The collusion between the state and business interests in a capitalist society precludes both the formulation and application of laws that would limit the public's victimization at the expense of reducing corporate profits. In this context thoughts of deterrence are difficult to sustain. (p. 6)

Sutherland's observations of the collusion of government and business can certainly be evidenced today. The world's largest retailer, Wal-Mart, faced a law suit brought by two former employees charging that the corporation violated the whistleblower protection clause of the Sarbanes-Oxley Act. The act prohibits any retaliation against an employee after they report wrongdoing. Wal-Mart claims that the employees filing suit were not fired because they filed reports of wrongdoing but rather for misconduct. To represent them in this matter, Wal-Mart has hired Eugene Scalia, son of Supreme Court Justice Antonin Scalia. Eugene Scalia has a record of weakening protection for workers. During his time as lead attorney at the Department of Labor he was responsible for deciding how the department would implement the whistleblower protection. His record shows that his actions were designed to weaken the protection (Leonard, 2005).

JURY INSTRUCTIONS

As noted above, the charge to the *Andersen* jury may have played a critical role in their decision. There are three inter-related empirical questions that arise in this context:

1) Did the *Andersen* jury understand the instructions they were given?

2) If the *Andersen* jury did not understand very well their charge, would increased comprehension have made any difference in terms of their decision making?

3) If the *Andersen* jury had been instructed differently regarding the *mens rea* element of the law (and they had understood their instructions), would that have made any difference in their decision?

In this section, we briefly review the extensive body of research on comprehensibility of jury instructions, and the relatively sparse findings regarding the importance of instruction comprehension in terms of jury decisions. Later in the paper, we explore some possibilities for future research related to these jury instruction issues.

A wealth of research has demonstrated the incomprehensibility of judicial instructions to the jury. The extant research suggests, generally, that jury comprehension of instructions is poor (see, e.g., Elwork, Sales & Alfini, 1982; Lieberman & Sales, 1997; Greene & Bornstein, 2000; Rose & Ogloff, 2001). Research also suggests that instruction comprehension can be improved by employing some basic psycholinguistic principles (see, e.g., Diamond and Levi, 1996; English & Sales, 1997; Tanford, 1990; Wiener, Pritchard, & Weston, 1995; Wiener *et al*., 1998).

If the jury members do not understand their charge, on what basis do they make their decisions? If jurors do not understand the instructions presented to them at trial, it is likely that they are using their own criteria to determine the defendant's fate (Costanzo & Costanzo, 1992). This theory finds strong support in the results of a survey of actual capital jurors in Florida where 35 out of 54 jurors attributed little or no weight to the list of aggravating and mitigating factors in their penalty decisions (Geimer & Amsterdam, 1988). In another study of actual jurors who served in capital cases, the list of aggravating and mitigating factors "engendered confusion and inconsistent application" (Haney, Sontang, & Costanzo, 1994). Does comprehension of instructions matter in terms of jury decisions? Unfortunately, there has been very little empirical research on the relationship between comprehension and decision making, and what research exists relates mostly to penalty decisions in capital cases. Findings from one study conducted by Wiener and colleagues (1998) suggests that juror misunderstanding of rules regarding the use of mitigating circumstances is related to higher certainty of imposing the death penalty. In addition, several studies suggest that higher comprehension of the procedural aspects of capital penalty phase instructions leads to more life sentences (Wiener *et al*., 1998; Wiener, Pritchard, & Weston, 1995).

FUTURE RESEARCH ON JURY INSTRUCTIONS

The Supreme Court decision in *Andersen* clearly states that the jury had been improperly instructed with regard to the legal requirement of "knowing…corrupt persuasion," especially with regard to the legal requirement of a nexus between the corrupt persuasion and knowledge of a particular government investigation. Would the *Andersen* jury have made a different decision if they had been instructed in a manner consistent with the Supreme Court's interpretation of the statute? This is a question that can be explored with future empirical research. Future research should examine the comprehensibility of these instructions, and the degree to which changing those instructions is likely to change jury decisions. While the facts suggest that the jury had a very difficult time in reaching a verdict in the *Andersen* case and that they may well have acquitted Andersen if their charge had been different, it is not necessarily the case that different instructions to the jury would have altered their decision. Empirical research can, in part, inform our understanding about the degree to which jury instructions influence decision outcomes.

FUTURE RESEARCH ON CORPORATE CRIME

Grindler and Jones (2004) proposed that the section of Sarbanes-Oxley that was likely to have the most impact was the penalty provision. It is true that sentences for crimes such as document destruction were raised from 5 or 10 years to 20 years. However, now that the Andersen case has been reversed and other cases such as Scrushy (former CEO of HealthSouth) (Fox News, 2005) have been decided in favor of business, one must wonder if the penalties do in fact weigh on the decision to destroy documents. In fact, Sarbanes-Oxley may not have had an appreciable difference on the way in which business is conducted in the United States. Information about the impact of Sarbanes-Oxley on corporate practices could prove to be highly valuable when forming new corporate crime legislation.

One factor that is likely to affect the impact of the law is the rate at which it is being enforced. Benson, Cullen, and Maakestad (1990) found that many local prosecutors lack adequate resources to prosecute corporations. In addition, only 3.6% of urban prosecutors and .4% of rural prosecutors saw corporate crime as a serious problem. Most of those in their sample prosecuted less than one case per year. However, most of the prosecutors in the sample (60%) wanted tougher penalties for corporate offenders. Obviously, this research is now outdated, but it would be beneficial to update these findings, especially now that prosecutors have new legislation at their disposal to aid them in prosecuting corporate offenders.

According to the Sourcebook of Criminal Justice Statistics (2003), the number of cases filed for fraud in U.S. district courts has remained fairly constant since Sarbanes. In a ten-year period from 1994-2003 the number of cases filed ranges from 7,098 in 1994 to 8,342 in 1998. The numbers of cases filed for embezzlement and antitrust were also constant before and after Sarbanes. Of course, these numbers can not be relied upon as the sole source of information about the impact of Sarbanes or the attitude of federal prosecutors in light of Sarbanes, but these data do suggest that the effect of the Sarbanes-Oxley Act may be minimal. Future research on corporate practices, such as surveys of attorneys and executives, can help to more accurately gauge current practices and would be informative in terms of future legislation.

CONCLUSION

The Supreme Court decision in *Andersen* will almost surely limit the scope of Sarbanes beyond what seems to be intended by the legislature. Whether Sarbanes was even an appropriate response to corporate crime or not remains open for debate. However, the Sarbanes statutes are the current laws pertaining to corporate crime and as such researchers would do well to determine their effectiveness. Additionally, research on juror comprehension of instructions with regard to corporate statutes may serve to inform the language of future statutes. Research of this nature may enhance accurate application of the law. With the recent increase in corporate trials, it seems as though the breadth of cases a jury may encounter is expanding. Social scientists would do well to respond to with an increased research effort in this area.

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