

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

1-1-2006

Crime, War & Romanticism: Arthur Andersen and the Nature of Entity Guilt

David N. Cassuto

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Business Organizations Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

David N. Cassuto, Crime, War & Romanticism: Arthur Andersen and the Nature of Entity Guilt, 13 Va. J. Soc. Pol'y & L. 179 (2006), <http://digitalcommons.pace.edu/lawfaculty/295/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

CRIME, WAR & ROMANTICISM:
ARTHUR ANDERSEN AND THE NATURE OF ENTITY GUILT

David N. Cassuto *

“Our law has not gone so far in accepting that any antisocial attitude is sufficient to justify criminal punishment.”¹

“Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?”²

In 2002, Arthur Andersen, LLP stood trial for obstruction of justice. The prosecution offered several theories as to who at the firm had committed the crime but no one theory satisfied all twelve jurors. In an attempt to break its deadlock, the jury asked whether it could convict if some jurors thought Person A at Andersen had done it and some thought it was Person B. Following argument, the judge ruled that it could convict.

This article argues that the court’s response to the jury’s query was wrong as a matter of law and policy. The ruling misconstrues the nature of corporate criminal intent and effectively treats a domestic corporate entity as if it were a rogue nation facing trial for war crimes. Part I offers a brief history of Andersen’s rise and fall. Part II examines Andersen’s association with Enron and the events that led to Andersen’s indictment and trial. Part III analyzes the court’s

* Associate Professor of Law, Pace University School of Law, B.A., Wesleyan University, J.D., University of California – Berkeley, Boalt Hall School of Law, PhD, Indiana University. Thanks go to Bridget Crawford, Don Doernberg & Ben Gershman for their insights and comments. Jessica Astrof, Bill McNamara and Brenna Zortman provided stellar and invaluable research assistance, as did Emily Collins. My beloved, Elizabeth Downes, made this article both possible and better. If this is any good, it is because she is so wonderful. Finally, my son and most appreciative reader, Jesse Yates Cassuto, makes it all worth doing.

¹ Sanford Kadish & Stephen Schulhofer, Case of Lady Eldon’s French Lace

² Edward, First Baron Thurlow, Lord Chancellor of England

ruling on the jury's question and situates it within the nature of entity guilt. Part IV contextualizes the dispute over collective responsibility within a larger cultural context, including the "War on Crime." The Conclusion and Postscript offer some thoughts on the dangers – both present and future – of our national obsession with war.

INTRODUCTION

The War on Crime has wrought considerable collateral damage. Arthur Andersen, LLP ("Andersen"), former accounting giant and scandal-rocked auditor of scandal-rocked corporations, hardly qualifies as an innocent victim. A storied member of the "Big Five,"³ Andersen was Enron's auditor, providing both auditing, and consulting services to the giant, Texas-based energy company. When Enron collapsed amidst massive accounting fraud, Andersen faced investigation and public exorcism. When it was later revealed that a group of people at Andersen had engaged in a massive shredding operation, and that millions of Enron-related documents had been destroyed, the firm faced criminal charges. This hardly seems like a resume for victimhood.

Yet, the firm's 2002 trial for criminal obstruction of justice was marred by serious procedural errors. The jury instructions contained several crucial flaws, only one of which was addressed on appeal.⁴ It is another major procedural error that forms the focus of this article. Though it did not ultimately affect the verdict, the error nevertheless has

³ The "Big Eight," global accounting firms had compressed to five following a string of mergers. When Andersen imploded, the remaining firms became known as "The Final Four." See John P. Lucci, *Enron—The Bankruptcy Heard Around the World and the International Ricochet of Sarbanes-Oxley*, 67 ALB. L. REV. 211, 214 (2003).

⁴ While Andersen's conviction was overturned by the Supreme Court in May, 2005, the reversible error differs from the issue treated herein. *Arthur Andersen, LLP v. United States*, 125 S. Ct. 2129 (2005). According to the instructions, jurors did not have to believe that the guilty agent consciously knew that her corrupt persuasion amounted to an act of wrongdoing. The Court held that this instruction fundamentally misinterpreted the statute. In my view, the Court correctly found that the jury was improperly instructed as to how to interpret the phrase "knowingly" in conjunction with "corruptly persuade" in 18 U.S.C.A. 1512 (2005). *Andersen*, 125 S. Ct. at 2135-36. However, this article focuses on the related but discrete issue of whether the jury was properly instructed that it did not need to unanimously agree on the identity of the guilty corporate agent. As a practical matter, the Court's decision amounted to little more than a pyrrhic victory for the company, which had long since ceased to operate in any significant capacity.

far-reaching implications for future criminal prosecutions of corporations.

The error arose in response to the jury's query as to whether it had to unanimously agree upon the identity of the Andersen agent who obstructed justice. The court ruled that it did not. That ruling effectively negated the requirement for jury unanimity that is the right of every federal criminal defendant.⁵ It further revealed a fundamental misapprehension by both the judge and the prosecution regarding the nature of corporate criminal intent. As a result, Andersen found itself facing the possibility of a criminal conviction without a unanimous verdict. Though this prospect was averted by the jury's eventual consensus, the ruling created a disturbing precedent for future corporate prosecutions and for due process in general.

This article argues that the court's response to the jury's question was wrong as a matter of law and policy. It consists of four parts. Part I offers a brief history of Andersen. Part II examines the circumstances leading up to the trial and the events of the trial itself. Part III focuses on Jury Note # 9, which requested the court's guidance on unanimity. Part IV contextualizes the dispute over the jury's query within a larger discussion of collective responsibility and its role in the "War on Crime." The Conclusion and Postscript offer some thoughts on the dangers—both present and future—of our national obsession with war.

⁵ See FED. R. CRIM. P. 31 (stating that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element of the crime); see *Johnson v. Louisiana*, 406 U.S. 366, 369 (1972) (Powell, J., concurring) ("[T]he Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of *federal* jury trial."); *Andres v. United States*, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply").

The willingness of the prosecution and the court to treat Andersen, the incorporeal legal entity,⁶ as an entified, malevolent actor and its agents like automata made strategic sense at the time. It also fits within the rhetoric of war, which tends to entify nations and attribute to them a malevolence that can only truly be found within the minds of individuals. This bellicose rhetoric depicts the opponent as not just a defendant but an enemy threatening the motherland. And, when dealing with enemies of state, the niceties of due process often dwindle in importance.

Personifying ideas and/or corporate entities in this manner resembles the phenomenon of Associated Will—Rousseau’s characterization of the process by which a single entity is abstracted from a group of individuals, usually citizens of a nation.⁷ One most often encounters Associated Will in times of war and, indeed, much of international criminal law is based on the notion of national identity and collective guilt.⁸ As discussed below, Associated Will plays an important role in wars between nations and international adjudications but has (or should have) little applicability to internal conflicts. Incorporating it into domestic criminal prosecutions undermines the rights and safeguards that protect society against excesses of state vigilance.

⁶ Though Andersen was organized as a limited partnership rather than a corporation, prosecutors treated it, for all intents and purposes, as a corporation. This approach is congruent with the United States Code, 1 U.S.C. § 1 (2000), the Federal Sentencing Guidelines, U.S. SENTENCING GUIDELINES MANUAL § 8A1.1 n.1 (1991), and legal precedent; see *United States v. AP Trucking Co.*, 358 U.S. 121, 123 (1958). See also Sterling P.A. Darling, Jr., Note, *Mitigating the Impressionability of the Incorporeal Mind: Reassessing Unanimity Following the Obstruction of Justice Case of United States v. Arthur Andersen, L.L.P.*, 40 AM. CRIM. L. REV. 1625, 1642-3 & n.109 (2003) (noting same). Indeed, Andersen, the legal entity, fits within the broader definition of a corporation as “[A] group or succession of persons established in accordance with legal rules into a legal or juristic person that has legal personality distinct from the natural persons who make it up. . . .” BLACK’S LAW DICTIONARY 365 (8th ed. 2004).

⁷ See GEORGE P. FLETCHER, ROMANTICS AT WAR 36-37 (2002); George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1509 (2002). This article owes a tremendous intellectual debt to Professor Fletcher. My attempt in Part IV to describe the theory of collective guilt that emerged from the Andersen trial as the product of a rhetorical strategy derived from a neo-Romantic worldview draws heavily on Fletcher’s elegant contrast between the Romantic and Liberal visions of selfhood and their respective relationships to the notion of collective guilt.

⁸ See MARCELLUS DONALD A.R. VON REDLICH, THE LAW OF NATIONS 14 (1937) (The law of nations, is concerned only with States, and not with the individual citizens or subjects thereof and these States are considered to have “rights” and “duties.”).

I. A BRIEF HISTORY OF ANDERSEN

A. THE EARLY YEARS

Arthur Andersen founded the firm with partner Clarence DeLany in 1913. DeLany left in 1918 and was replaced by Andersen's brother, Walter, who departed in 1932. During the firm's early years, Arthur Andersen, the individual, emerged as a powerful voice for probity and candor in public accounting. The firm's burgeoning reputation as a company that placed duty to the public above all else derived primarily from the personality and pronouncements of its founder.

Stories about Arthur Andersen's uncompromising honesty became legend, told and retold for decades following his death in 1947. One oft-repeated story related how a client had demanded that Andersen alter its audit certification to cover up the client's distortion of his company's earnings. Andersen refused, replying: "There is not enough money in the city of Chicago to induce me to change the report."⁹ Other stories abounded, each testifying to Andersen's rigid allegiance to the highest business ethics. As the firm emerged as the gold standard for integrity among public auditing companies, its fame (and that of its founder) eclipsed even that of Jake "Greasy Thumb" Guzik, Chicago's other famous accountant, whose notoriety derived primarily from his principal client, Al Capone.¹⁰

One of Arthur Andersen's signature innovations was to indoctrinate people into the firm early in their careers. The goal was to turn them into "Androids"—as they later became known—for life. The firm recruited people right out of college and trained them at an Andersen training facility, schooling them in how to live as well as initiating them into the accounting profession. It instructed them on what to wear, where to eat, how to behave, and most importantly, how to conduct public audits in the Andersen way.¹¹

⁹ Arthur Andersen quoted in SUSAN E. SQUIRES, ET AL., *INSIDE ARTHUR ANDERSEN: SHIFTING VALUES, UNEXPECTED CONSEQUENCES* 32 (2003).

¹⁰ See BARBARA LEY TOFFLER, *FINAL ACCOUNTING: AMBITION, GREED AND THE FALL OF ARTHUR ANDERSEN* 14-15 (Broadway Books 2003). Andersen's reputation also received a major boost when he and his firm were hired to audit the books of the legendary utilities magnate, Samuel Insull. See DAVID SKEEL, *ICARUS IN THE BOARDROOM* 88 (2005). Insull, who had started out as Thomas Edison's amanuensis, rose to become one of the most powerful businessmen in the country. *Id.* at 81. As it turned out, much of the fuel for his rapid rise lay in sketchy business practices that led to his downfall. *Id.* at 88. Andersen's brilliant and forthright job of auditing Insull's companies in the aftermath of their collapse solidified his and the firm's reputation for integrity. *Id.*

¹¹ See TOFFLER, *supra* note 8, at 25-33.

The idea was that companies would hire Arthur Andersen, LLP, not individuals at the firm. It did not matter who actually conducted the audit; every member of the firm performed audits in the same way. The quality of service, like the color of employees' shirts, was uniform throughout the world. In addition, when Androids left the firm, they retained a powerful institutional loyalty that created new relationships throughout the business world.¹²

For most of the firm's existence, Arthur Andersen, LLP stood proudly atop the auditing world as a paragon of business ethics and rigid adherence to law. The firm was also famous for its strong hierarchy and insular culture that demanded conformity to secure advancement. Over time, however, the firm devolved into a profit-driven, unscrupulous enterprise that privileged client satisfaction and revenue generation over safeguarding the public trust.

B. ARTHUR ANDERSEN "WORLDWIDE"

1. Business Consulting Comes Into Its Own

As Andersen grew into a worldwide partnership and the largest of the public accounting firms, the Android tradition began showing signs

¹² For example, "[f]rom 1989-2001, eighty-six people left Andersen to work for Enron. Andersen alumni at Enron included . . . its chief accounting officer; . . . Enron's treasurer; and Sherron Smith Watkins, the vice president who unsuccessfully tried to blow the whistle on Enron's aggressive accounting." Matthew J. Barrett, *Enron and Andersen—What Went Wrong and Why Similar Audit Failures Could Happen Again*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 155, 160 (Nancy B. Rapoport & Bala G. Dharan eds. Foundation Press 2004) (footnote omitted). This was typical of Andersen's relationships with its clients. The continual exchange of personnel between audit firms and their clients has been partially addressed by the Sarbanes-Oxley Act, which bars audit firms from performing audit services for any public company whose "chief executive officer, controller, chief financial officer, chief accounting officer, or any person serving in an equivalent position for the issuer, was employed by that registered independent public accounting firm and participated in any capacity in the audit of that issuer during the 1-year period preceding the date of the initiation of the audit." 15 U.S.C. § 78j-1(l) (2002).

However, while the Act also requires that the lead auditor on audit engagements rotate every five years (15 U.S.C. § 78(j-1)), it does not (and arguably cannot) address the unconscious bias that auditors likely feel for companies staffed by their alumni. See SKEEL, *supra* note 8, at 188 (citing study showing that when a company chooses an auditor, the auditor's judgment is distorted if she considers the company to be her client; auditors were 30% more likely to find that a company's accounting conformed with GAAP if they believed that the company rather than a third party had hired them to do the audit).

of strain. A schism emerged in the 1950s between the firm's consulting group, which helped companies organize their financial and accounting systems, and the firm's auditors, who determined whether a company's accounting systems were accurate and trustworthy. The resulting tension was both financial and philosophical.

Simply juxtaposing the two groups' respective missions highlights their inevitable conflict. For an audit firm pledged to impartially evaluate the finances of public companies to help those same companies design their financial management systems makes the firm both author and evaluator of its clients' accounting systems. All of the major accounting firms wrestled with this embedded conflict and it became a potent source of contention with the SEC. By openly and vociferously opposing the efforts of the SEC to rein in consulting services offered by audit firms,¹³ Andersen and its sister firms successfully blocked meaningful reform of the auditor/client relationship until the passage of the Sarbanes-Oxley Act in 2002.¹⁴

In the view of the Andersen partnership, the chief conflict between audits and consulting lay in the parceling of profits. By the 1970s, the consulting wing of the firm was generating more profits per partner than the audit branch.¹⁵ Much haggling ensued as the firm acclimated to a new era where audits no longer formed the firm's profit center.¹⁶ Adapting to this new reality required a seismic shift in the firm's self-image and culture. Ultimately, that shift proved too much and, in 1997, Andersen Consulting (later, "Accenture") separated from Andersen in an

¹³ See SQUIRES, ET. AL, *supra* note 7, at 115-18; TOFFLER, *supra* note 8.

¹⁴ See Sarbanes-Oxley Act of 2002, Pub. L. No. 107204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, 29 U.S.C.A. (West Supp. 2003)). Among other reforms, the Act bars accounting firms from performing consulting and audit work for the same client. The effectiveness of the Act has yet to be fully assessed, although many commentators feel that it did not do enough to change the systemic problems within the public accounting sphere. For detailed analysis of the both the law and its implications, see Lucci, *supra* note 1.

¹⁵ See TOFFLER, *supra* note 8, at 73.

¹⁶ This shift in revenue generation was not solely an Andersen phenomenon; it was occurring industry-wide. SKEEL, *supra* note 8, at 166.

In 1976, more than 70% of the major accounting firms' revenue came from profits. By 1998, this number had plummeted to 38%. Accounting firms that had achieved prominence by developing an international reputation for their audits . . . started to look like consulting companies that did a little auditing on the side.

Id.

acrimonious split that catapulted the firm from the largest in the Big 5 to the smallest and least profitable.¹⁷

As Andersen scrambled to recreate its in-house business consulting arm, revenue issues became more and more urgent. Cross-selling services and maximizing billables became a mandatory part of every partner's client relations.¹⁸ Partners were rewarded with points, which translated into money, regardless of the risky nature of the client services they sold.¹⁹

Disaster did not tarry long in coming. By the late 1990s, the headlines regularly featured Andersen clients engulfed in major fraud investigations.

2. Andersen Clients Embroiled in Accounting Fraud

During the period surrounding the turn of the millennium, Andersen's clients seemed to follow one another into high-profile collapse. Some examples include:

Baptist Foundation of America

Baptist Foundation of America ("BFA"), a non-profit charitable organization and Andersen client, imploded in 1999. Thousands of elderly investors lost millions of dollars in savings. Despite multiple warnings that the organization was operating an enormous Ponzi scheme, Andersen had continued to endorse BFA's accounting.²⁰ In 1996, one of BFA's accountants even wrote the CEO that he "[did] not believe that our Lord and Savior, Jesus Christ, would have us conduct His business in a manner that withholds important information from our investors."²¹ Approximately 13,000 elderly investors lost \$590 million in retirement savings. For its failure to properly manage the company's

¹⁷ See John R. Kroger, *Enron, Fraud & Securities Reform: An Enron Prosecutor's Perspective*, 76 U. COLO. L. REV. 57, 89-90 (2005) ("By 1999, Andersen had the smallest auditing business of the Big Five accounting firms, with the slowest rate of growth.").

¹⁸ See generally TOFFLER, *supra* note 8, at 123-24.

¹⁹ See *id.* at 111-12.

²⁰ The same Andersen partner responsible for BFA had also supervised audits of one of Charles Keating's failed savings and loans in the late 1980s, an engagement for which Andersen paid a \$24 million dollar settlement. See TOFFLER, *supra* note 8, at 153.

²¹ See *id.* at 152-53.

audits, Andersen paid a civil penalty and \$217 million to settle lawsuits brought by defrauded investors.²²

Sunbeam Corporation

“Chainsaw Al” Dunlap took over Sunbeam Corporation (“Sunbeam”) in 1996 ostensibly to restructure the business and restore it to profitability. According to the SEC, Dunlap created an illusion of success through fraudulent accounting.²³ Sunbeam restated its earnings for 1997 and 1998 and reduced its earnings from \$109.4 million to \$38.3 million. Sunbeam’s stockholders filed suit against several company officials as well as an Andersen partner who had managed the account.

According to Deloitte & Touche, which did the forensic accounting following the restatements, Dunlap overstated Sunbeam’s losses in 1996 and then overstated the company’s gains in 1997-98. The SEC opined that Andersen should never have signed off on Sunbeam’s flawed financial statements—statements which in its view amounted to fraud.²⁴ Andersen maintained that it had acted appropriately. The firm settled civil claims with Sunbeam shareholders by agreeing to a \$110 million dollar settlement.²⁵

Waste Management, Inc.

Waste Management, Inc. (“WMI”), a rollup collection of garbage disposal companies was a blue chip corporate success story during the 1970s and 1980s. Andersen had served as the company’s auditor since before it went public in 1971.²⁶ Over time, WMI overextended itself and began inflating the value of its assets and undervaluing expenses. Andersen auditors suggested but did not insist that the company correct its accounting errors. WMI declined.

A subsequent SEC investigation in 1997-98 led WMI to restate \$1.5 billion in revenues. At the time it was “the largest earnings restatement

²² See SQUIRES, ET. AL, *supra* note 7, at 118.

²³ See Jennifer G. Hill, *Deconstructing Sunbeam—Contemporary Issues in Corporate Governance*, 67 U. CIN.L.REV. 1099, 1124-25 (1999).

²⁴ See Cease-and-Desist Order, Accounting & Audit Enforcement Act Release No. 1393, 2001 WL 616627 (May 15, 2001); see also Ira L. Konel et al., *The Interplay Between Intellectual Property (IP) and Sarbanes-Oxley*, 824 PRACTISING LAW INST. 477, 619 (Mar. - May, 2005).

²⁵ See SQUIRES ET AL., *supra* note 7, at 119-20.

²⁶ See TOFFLER, *supra* note 8, at 145.

in history.”²⁷ WMI’s restatement badly tarnished Andersen’s reputation. The firm’s public image was further sullied when Andersen’s records revealed that members of the firm knew of WMI’s accounting problems even as Andersen was endorsing WMI’s fraudulent financial statements.²⁸

In June of 2001, Andersen entered into a consent decree against the firm and three of its partners. It admitted no wrongdoing but was “enjoined from further violations of the securities laws and fined \$7 million.”²⁹ An injunction of this nature might have provided a sobering reality check for Andersen and engendered an overdue review of its policies. Sadly, it did not.

Instead, Andersen’s response to the WMI debacle was to draft a document retention policy that later played an important role in the Enron debacle. The policy aimed to ensure that potentially incriminating documents were not preserved unnecessarily.³⁰ One of the policy’s authors was a former member of the WMI engagement team.³¹

The parade of headline grabbing corporate scandals involving Andersen clients did not end with WMI. In addition to Enron, Global Crossing, Qwest Communications, and WorldCom all collapsed, as did numerous other companies.³² This litany makes clear that the propensity to overlook major accounting irregularities at Enron was far from an isolated anomaly. It formed part of a larger problem of business ethics that infused the entire firm, slowly eroding its reputation and ability to

²⁷ Kurt Eichenwald, *Andersen Misread Depths of the Government's Anger*, N.Y. TIMES, Mar. 18, 2002, at A1.

²⁸ See Barry Tarlow, *RICO Report*, CHAMPION 51, 52-54 (June 2005).

²⁹ *United States v. Arthur Andersen LLP*, No. H-02-121, 2002 U.S. Dist. LEXIS 26870, at *5 (S.D. Tex. May 24, 2002). The injunction against further violations played a key role in later plea negotiations regarding Enron. Andersen simply could not admit to another violation of securities laws without endangering its license to audit public companies.

³⁰ See Tarlow, *supra* note 26, at 52-54. See generally SQUIRES ET AL., *supra* note 7, at 120-22.

³¹ See TOFFLER, *supra* note 8, at 149.

³² SQUIRES, *supra* note 7 at 123.

service public companies.³³ Nowhere were the firm's systemic problems more evident than in its relationship with Enron.

II. ENRON AND ANDERSEN

A. THE PRELUDE

Enron's bankruptcy filing on December 2, 2001 was the largest in the history of the United States.³⁴ It came on the heels of Enron's disclosure that it had overstated its profits for the previous five years by

³³ Both TOFFLER, *supra* note 8, *passim*, and SQUIRES ET AL., *supra* note 7, *passim*, give blow by blow descriptions of the collapse of the firm's ethics. Andersen's culture and its involvement in so many of the worst accounting scandals in history played a significant role in the government's decision to indict the firm. For a view from a prosecutorial perspective, see Kroger, *supra* note 15, at 87-88 (2005). Kroger minces no words in his indictment of Andersen's recent history leading up to and subsequent to Enron:

Andersen's failure to protect Enron investors was not an isolated incident. . . . From 1992 to 1997, for example, Andersen helped Waste Management . . . improperly inflate its earnings by \$1 billion. . . . Andersen was also involved in deceptive accounting at McKesson-HBOC (earnings inflated by \$300 million), Qwest (earnings inflated by \$1.2 billion), and WorldCom (earnings inflated by \$9 billion) as well. This pattern of misconduct . . . suggests that Andersen's failures in the Enron case were . . . the result of a pervasive firm culture that repeatedly valued the interest of management in positive earnings statements over the interest of the shareholders and investing public in accurate information.

Id.

The Department of Justice was cognizant of Andersen's checkered history. In announcing the firm's indictment, Deputy Attorney General Thompson stated that the "firm's history of wrongdoing" was a factor in the decision to indict.

See JOAN MCPHEE & PETER L. WELSH, THE DEPARTMENT OF JUSTICE'S GUIDELINES FOR THE PROSECUTION OF BUSINESS ORGANIZATIONS AND RELATED ISSUES 3 (2003), http://www.ropesgray.com/files/tbl_s20News%5CFileUpload116%5C267%5CArticle_June%205%202003_The%20Department%20of%20Justices%20Guidelines%20for%20the%20Prosecution%20of%20Business%20Organizations%20and%20Related%20Issues_McPhee_Welsh.pdf; see also Memorandum from Larry D. Thompson, Deputy Attorney Gen., Dep't of Justice, to Heads of Department Components and United States Attorneys, Dep't of Justice, Principles of Federal Prosecution of Business Organizations 2003, http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (noting that "[a] corporation, like a natural person is expected to learn from its mistakes. A history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, such conduct . . .").

³⁴ *In re Enron Corp.*, 284 B.R. 376 (S.D.N.Y. 2002). Claims against the corporation exceeded \$400 billion. However, WorldCom's bankruptcy in 2002 surpassed even Enron's. See *In re WorldCom, Inc.*, No.02-13533, 2003 Bankr. LEXIS 1401 (S.D.N.Y. Oct. 31, 2003). Ironically, Andersen had served as WorldCom's auditor as well.

nearly \$600 million.³⁵ Andersen was Enron's auditor, providing both auditing and consulting services. Among its other duties, it had annually certified that Enron's financial disclosures complied with Generally Accepted Accounting Principles, or "GAAP."³⁶ Consequently, the fallout from Enron's collapse amid allegations of massive fraud and deceptive business practices quickly enveloped Andersen as well.

The scandal metastasized in January 2002 when Andersen disclosed that members of its Houston office (which serviced Enron) had ordered employees to shred a great deal of information related to the firm's dealings with Enron. Worse still, much of the shredding took place when federal investigations of Enron had already commenced and when Andersen had reason to know that an investigation of its own role in Enron's collapse was imminent.

Andersen's involvement in Enron's financial mismanagement became a secondary matter as both Congress and the United States Department of Justice ("DOJ") investigated Andersen's potential criminal liability for the shredding. The activities of Andersen and Enron during the latter part of 2001 and the first third of 2002, which led up to Andersen's subsequent criminal trial, are chronicled briefly below.

1. A Problem in Houston

On August 20, 2001, Sherron Watkins, a former Andersen employee and current Enron executive, called an Andersen partner named Jim Hecker to discuss her concern that Enron was improperly booking some of its transactions.³⁷ Specifically, Watkins worried that the company was using third party special purpose entities to inflate its earnings and

³⁵ Richard A. Oppel, Jr. & Andrew Ross Sorkin, *Enron Admits to Overstating Profits by About \$600 Million*, N.Y. TIMES, Nov. 9, 2001, at C1.

³⁶ GAAP prohibits auditors from "expressing an opinion or stating affirmatively that financial statements or other financial data 'present fairly . . . in conformity with generally accepted accounting principles,' if such information contains any departures from accounting principles promulgated by a body designated by the AICPA [American Institute of Certified Public Accountants] Council to establish such principles." See Federal Accounting Standards Advisory Board, *Generally Accepted Accounting Principles*, <http://www.fasab.gov/accepted.html> (last visited Jan. 30, 2006) (quoting the AICPA Code of Professional Conduct).

³⁷ Memorandum from James A. Hecker, Partner, Arthur Andersen, to David B. Duncan et al., Arthur Andersen 4 (Aug. 21, 2001), <http://news.findlaw.com/hdocs/docs/enron/andersen082102memo.pdf>. [hereinafter Hecker memo].

disguise the magnitude of its debt.³⁸ Following their conversation, Hecker wrote a memo to the files that he also forwarded to David Duncan, the lead partner on the Enron audit engagement.³⁹ Shortly thereafter, the firm formed a special group tasked with sorting out possible concerns arising from the firm's involvement with Enron. That group included Nancy Temple, an in-house attorney in Andersen's Chicago office, who had only recently joined the firm.

In October 2001, Andersen learned that Enron intended to report charges against income of approximately \$1.2 billion in its third quarter financial statements. On October 9, prior to Enron's public announcement, Temple wrote in her notes that a Securities and Exchange Commission ("SEC") investigation was "highly probable."⁴⁰ On October 12, Enron sent Duncan a draft press release describing the losses as "non-recurring." Duncan noted in a memo to the files that he had advised against such language because investors could either misconstrue or misunderstand it.⁴¹ He sent a draft of his memo to Temple with a request for comments.⁴²

2. Andersen Attempts Damage Control

On October 12, Temple sent the first in a series of emails that were to loom very large during the trial. In an email to David Duncan, Temple recommended that he "consider reminding the Engagement Team of [the firm's] document and retention policy. It will be helpful to make sure that we have complied with the policy."⁴³ Prosecutors

³⁸ See William C. Powers, Jr. et al., *Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp.* 172-174 (Feb. 1, 2002), <http://news.findlaw.com/hdocs/docs/enron/sicreport/sicreport020102.pdf>. The document is commonly known as the "Powers Report."

³⁹ See Hecker memo *supra* note 35.

⁴⁰ W. Amon Burton, Jr. & John S. Dzienkowski, *Reexamining the Role of In-House Lawyers After the Conviction of Arthur Andersen* in *ENRON: CORPORATE FIASCOS & THEIR IMPLICATIONS* 689, 695 (Nancy B. Rapoport & Bala G. Dharan, eds. Foundation Press 2004).

⁴¹ Memorandum from David B. Duncan to The Files on Enron Press Release Discussion, <http://news.findlaw.com/hdocs/docs/enron/dncn2files101501mem.pdf> (last visited Aug. 1, 2005).

⁴² E-mail from Nancy A. Temple to David B. Duncan (Oct. 16, 2001 8:39 PM), <http://news.findlaw.com/hdocs/docs/enron/tmpl2dunc101601eml.pdf> (last visited Aug. 2, 2005). [hereinafter, Memo to the Files on Enron Press Release Discussion].

⁴³ Temple's email is included as an appendix to Burton & Dzienkowski, *supra* note 38 at 750.

claimed that the timing of the email indicated that Temple's language amounted to a coded directive to shred as many documents as possible.⁴⁴

Temple's reply email to Duncan on October 16 regarding Enron's draft press release also became central to the disposition of the case. In it, Temple made a number of suggestions with respect to Duncan's memo, including:

- deleting any reference to Temple or consultations with the legal group so as to preserve the attorney-client privilege and to reduce the likelihood that she (Temple) "might be a witness, which [she] prefer[ed] to avoid."
- deleting language that "might suggest that we [Andersen] have concluded the release is misleading..." and
- noting that she would consult further with Andersen's legal group to see if the firm should take other measures to protect itself from potential liability.⁴⁵

Enron overrode Duncan's concerns and included the phrase "non-recurring" in the final version of the press release.⁴⁶ Meanwhile, from October 12 through November 9, 2001, Andersen employees shredded millions of Enron-related documents in its files. On November 8, Andersen received a subpoena from the SEC requesting all documents relating to its work on behalf of Enron. The following day, Duncan directed his assistant to send out a mass email to all employees working on Enron matters. The subject line of the email read, "No more shredding."⁴⁷

In January 2002, Andersen hired the law firms of Davis Polk & Wardwell and Mayer, Brown, Rowe & Maw to help sort out the partnership's responsibilities stemming from the Enron debacle. It quickly became apparent that many documents, emails and other information that were potentially responsive to the SEC subpoena were missing and likely destroyed. Andersen publicly disclosed this

⁴⁴ *Id.* at 696-97.

⁴⁵ See Memo to the Files on Enron Press Release Discussion, *supra* note 40.

⁴⁶ See *id.*

⁴⁷ Burton & Dzienkowski, *supra* note 38, at 696-97. However, Duncan's assistant, Shannon Adlong testified that the email and its heading were her idea. See Tom Fowler, *Duncan Aide Tearfully Tells of Boss's Firing*, HOUSTON CHRON., June 15, 2002, available at <http://www.chron.com/cs/CDA/ssistory.impl/special/andersen/1434968> (last visited Aug. 9, 2005).

information in a press release dated January 10, 2002. Five days later, Andersen fired David Duncan.

At this point, it began to look like Andersen might be indicted on criminal charges for obstruction of justice. Protracted plea negotiations with the DOJ eventually broke down and, on March 7, the firm was indicted by a federal grand jury in Houston. On April 6, David Duncan pled guilty to felony obstruction of justice charges.⁴⁸ In his plea, Duncan admitted knowing that the SEC might have been interested in the documents that he ordered destroyed.⁴⁹ He also admitted personally destroying some of the documents.⁵⁰

Andersen's case was set for trial for May 7, 2002. The firm faced charges of criminal obstruction of justice under 18 U.S.C. §1512, specifically section (b) (2), the witness tampering provision, which states in relevant part:

- (b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to
 - (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

⁴⁸ See Cooperation Agreement, *United States v. David Duncan* (S.D.T.X. 2002), <http://news.findlaw.com/hdocs/docs/enron/usduncan040602agr.pdf> (last checked Aug. 9, 2005).

⁴⁹ See *id.* See also, Tom Fowler, *Ex-Andersen Auditor Pleads Guilty*, HOUSTON CHRON., Apr. 9, 2002, available at <http://www.chron.com/cs/CDA/ssistory.mpl/special/andersen/1434968>.

⁵⁰ See *id.*

use in an official proceeding . . . shall be [guilty of a crime].⁵¹

In order to convict, prosecutors had to show that someone at Andersen had either attempted or actually had “corruptly persuaded”⁵² another person to tamper with material relevant to an official proceeding. The narrowness of the charge presented a challenge to prosecutors. They had to prove more than just corporate malfeasance; they instead had to show that a specific Andersen agent committed a specific act—corruptly persuading—and that said act caused or intended to cause another person to impede official access to material relevant to the investigation.⁵³

B. THEORIES OF CORPORATE CRIMINAL LIABILITY

Prosecuting and convicting corporations poses many challenges, including obvious hurdles to successfully imputing intent and actions to incorporeal legal entities. Over the years, several methods have arisen

⁵¹ 18 U.S.C. § 1512 (b)(2) (2005). Following the raft of accounting scandals of the last several years, Congress revised §1512 as part of the Sarbanes Oxley Act. 18 U.S.C. § 1512(c) now includes a provision prohibiting individuals from corruptly altering, destroying, or concealing a document with the intent to impede its use in an official proceeding. See 18 U.S.C. § 1512(c)(1). Section 1512(c)(2) is even more sweeping. It prohibits individuals from corruptly obstructing, influencing or impeding any official proceeding or attempting to do so. 18 U.S.C. § 1512(c)(2). The broad scope of this language seems to cover virtually any interference with official proceedings. See Keith Palfin & Sandhya Prabhu, *Obstruction of Justice*, 40 AM. CRIM. L. REV. 873, 899 (2003). The amendments to §1512 (and Sarbanes-Oxley in general) have received mixed reviews. One commentator notes that the law was enacted so quickly and with so little discussion that the end result is a disorganized hodgepodge that amounts to little more than political grandstanding. See Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN'S L. REV. 671, 672 (2002).

⁵² Courts have struggled with the meaning of “corruptly persuade.” See, e.g., *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (defining corrupt persuasion as persuasion with “improper purpose”); *United States v. Farrell*, 126 F.3d 484, 489 (3d Cir. 1997) (defining “corruptly” as for “improper purposes” renders the term superfluous when statute already has intent requirement); *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998) (following *Thompson* to find “corruptly persuading” means persuade for improper purposes and phrase is not unconstitutionally vague or overbroad). In reversing Andersen’s conviction, the Supreme Court noted that “corruptly” is commonly associated with “wrongful, immoral, or depraved” behavior but declined to explicitly define the term, observing that “[t]he outer limits of this element need not be explored here because the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing.” *Arthur Andersen, LLP v. United States*, 125 S. Ct 2129, 2136 (2005).

⁵³ The jury instructions, which lay out the prosecution’s burden can be found *infra* at note 82.

for prosecuting collective entities, including *respondeat superior* and the “collective knowledge” doctrine.⁵⁴ Each doctrine is examined briefly below.

Most corporate criminal liability stems from the notion of *respondeat superior*; a doctrine holding corporations liable for the actions and intentions of their agents.⁵⁵ Courts interpret this to mean that a corporate entity is responsible for criminal acts carried out by an agent if that agent was acting within the scope of employment and with the intent to benefit the corporation.⁵⁶ This principle is generally read broadly to include actions taken by agents in specific contravention to the instructions of their superiors but which nonetheless aimed to further the good of the corporation.⁵⁷

The “collective knowledge” doctrine is a more recent and controversial method for obtaining criminal convictions.⁵⁸ Under this principle, entity intent may be divined through imputing to the corporate

⁵⁴ Other methods for determining intent include willful blindness as well as methods relating to conspiracies, liability following mergers and dissolutions, and misprision of felony. Since these are not relevant to the Andersen case, I do not discuss them here.

⁵⁵ See e.g., *New York Cent. & Hudson R. R. Co. v. United States*, 212 U.S. 481, 495 (1909) (holding that corporations may be “held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them.”).

⁵⁶ See, e.g., *United States v. A&P Trucking Co.*, 358 U.S. 121, 126 (1958) (finding partnership liable for acts committed by its agents acting within the scope of their employment); *In re Hellenic, Inc.*, 252 F.3d 391, 395 (5th Cir. 1991) (holding an agent’s knowledge may be imputed to a corporation where “agent is acting within the scope of his authority and where the knowledge relates to matters within the scope of that authority”). For further discussion, see Annie Geraghty, *Corporate Criminal Liability*, 39 AM. CRIM. L. REV. 327 (2002); Jonathan C. Poling & Kimberly Murphy White, *Corporate Criminal Liability*, 38 AM. CRIM. L. REV. 525 (2001).

⁵⁷ See *United States v. Portac, Inc.*, 869 F.2d 1288, 1293 (9th Cir. 1989) (affirming corporation’s conviction although the agent who committed the crime was expressly advised by supervisor that the corporation did not countenance illegal behavior); *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985) (finding that the fact employees’ actions were illegal and contrary to corporate policy “does not absolve [defendant] of legal responsibility for their acts”); see also Dan K. Webb, et. al., *Understanding and Avoiding Corporate and Executive Criminal Liability*, 49 BUS. LAW 617, 624 (1994) (“[E]ven when an employee acts contrary to compliance program policies and specific directives, the corporation can be held criminally liable.”)

⁵⁸ See, e.g., PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* 1 (1984) (“The idea of collective, let alone corporate responsibility has been frequently and loudly decried as a vulgarism and red-lined from residency in the better moral neighborhoods.”).

entity the sum of the knowledge of all of its employees.⁵⁹ Corporations often evade liability by compartmentalizing responsibility. This strategy prevents any one person from knowing the full extent of the criminal activity. Therefore, no one employee attains the requisite *mens rea* for the crime alleged. To combat this tactic, courts have reasoned that “[t]he aggregate of those components represents the corporation’s knowledge of a particular operation.”⁶⁰ If no one employee had the necessary intent or knowledge for a given criminal act but each had the intent to carry out part of the crime, then their respective intents and actions can be aggregated into one collective intent and action for which the corporation may be prosecuted.

In the Andersen case, the judge specifically excluded collective knowledge as a means of convicting the firm.⁶¹ Consequently, prosecutors had to rely solely on *respondeat superior*. This meant that the jury needed to unanimously conclude that a particular agent knowingly and corruptly persuaded others to obstruct justice. Nevertheless, following a query from the jury,⁶² prosecutors sought to inject a novel interpretation of collective knowledge into the jury deliberations. And, despite her earlier instructions and a highly questionable legal rationale, the judge permitted it.

The judge’s ruling, as well as the prosecution’s rationale, constituted a radical departure from traditional theories of corporate criminal liability. Appreciating the controversial nature of the ruling requires contextualizing it within the trial. The next section reviews the events leading up to the jury’s query.

⁵⁹ United States v. Bank of New England, 821 F.2d 844 (1st Cir. 1987); *see also* United States v. Farm & Home Sav. Ass’n, 932 F.2d 1256, 1259 (8th Cir. 1991) (holding that when multiple employees participate in illegal activities, knowledge of those activities may be imputed to employer); United States v. Penagaricano-Soler, 911 F.2d 833, 843 (1st Cir. 1990) (imputing various employees’ knowledge gained during course of employment to employer). Other methods for determining intent irrelevant to the Andersen case are not discussed here.

⁶⁰ Bank of New England, 821 F.2d at 856.

⁶¹ Transcript of Proceedings at 6343, *reprinted in* Brief for the Petitioner, Jury Instructions 2005 WL 474013 at * 212 [hereinafter Transcript of Proceedings]. *See also infra* note 125 and accompanying text.

⁶² *See infra* note 84 and accompanying text.

C. ANDERSEN ON TRIAL

1. The Government's Case

The government's case featured David Duncan as its star witness.⁶³ Prosecutors believed that Duncan's guilty plea and subsequent admissions demonstrated the firm's intent to thwart the SEC investigation and thereby obstruct justice.⁶⁴ Duncan's behavior following the Enron revelations, as well as the behavior of other partners at the firm, showed knowing and corrupt persuasion. It also showed that the firm's intent to obstruct justice began much earlier than the document destruction order.⁶⁵

In their opening statement, prosecutors described how a group of partners at Andersen decided to shred documents when they realized an SEC inquiry was inevitable. According to Assistant U.S. Attorney Matt Friedrich, "There was a day when a . . . small group of partners at Arthur Andersen knew that the law was going to come knocking at their door, asking a lot of questions about their firm. They made a choice to do what they could while they thought that nobody was looking." Andersen "knew the SEC was coming," he continued, "Nancy Temple wrote it down."⁶⁶

The government's case focused on Duncan but devoted significant time to Temple as well. Duncan's corrupt persuasion consisted of instructing his staff to destroy thousands of Enron-related documents to keep them from investigators.⁶⁷ Prosecutors suggested that Temple's emails had also corruptly persuaded Andersen employees to shred.⁶⁸

⁶³ David Ivanovich and Mary Flood, *Andersen Faces Fire In Court This Week: Conviction Could Spell End of Firm*, HOUSTON CHRON., May 6, 2002, available at <http://www.chron.com/cs/CDA/printstory.mpl/special/enron/1398224>.

⁶⁴ Kurt Eichenwald, *Early Inquiry Fear Seen at Andersen*, N.Y. TIMES, Apr. 22, 2002, at A1.

⁶⁵ *Id.* Eichenwald describes the prosecution's "collective knowledge" argument: "In essence, the actions of a wide array of Andersen officials can be used to argue that the firm, as a whole, was anticipating an inquiry and had a criminal intent when the shredding began."

⁶⁶ See Kurt Eichenwald, *Enron's Many Strands: The Trial; Judge Says Andersen's Past Can Be Evidence*, N.Y. TIMES, May 8, 2002, at C6. Transcript of Proceedings at *51, *United States v. Arthur Andersen, LLP*, 2002 Extra LEXIS 454 (S.D. TX May 8, 2002) (No. CR.A. H-02-0121) [hereinafter Trial Transcript].

⁶⁷ See Tom Fowler, *Duncan Sentencing Delayed and Given to Another Judge*, HOUSTON CHRON., Aug. 2, 2002, available at <http://www.chron.com/lcs/cda/ssistory.mpl/special/andersen/1518581> (last visited Aug. 9, 2005).

⁶⁸ See Trial Transcript, *supra* note 64, at *21.

They pointed as well to a videotape of Michael Odum from October 10, 2001—two days prior to his receipt of Temple's email to Duncan—giving instructions to firm employees about destroying documents and noting that (hypothetically speaking) it would be "great" if records were shredded up to the day the firm learned of a lawsuit.⁶⁹

Another damning fact lay in Andersen's billing records. They showed the firm billing Enron for over \$700,000 during the period of October through November 2001, for time spent dealing with the SEC investigation of Enron.⁷⁰ The records indicated that multiple Andersen partners knew of the inquiry at the same time Andersen personnel were destroying relevant documents.⁷¹ Thus, prosecutors asserted, the jury could plausibly find either that Duncan, Temple or Odum formed the "corrupt persuader" behind the firm's obstruction of justice.

2. Andersen's Defense

By contrast, Andersen maintained that the government's case collapsed under the weight of its internal contradictions. As Rusty Hardin, Andersen's lead trial attorney argued, "This is a document-destruction charge by the government based on evidence and documents that we [Andersen] preserved and gave them. Is there some irony in that?"⁷² He compared the government's case to the children's book, *Where's Waldo*, recommending that the jurors continually ask themselves, "Who are the corrupt persuaders?"⁷³

In the defense's view, the much ballyhooed emails and memos from Nancy Temple were little more than standard legal advice on document retention for audit clients. Several Andersen partners testified that they did not view Temple's email about the firm's document retention policy as anything other than prudent lawyering,⁷⁴ a view later echoed by some

⁶⁹ See Eichenwald, *supra* note 64. Specifically, Odum stated that, "'if [documents are] destroyed in the course of 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.'" United States v. Arthur Andersen, LLP 374 F.3d 281 (5th Cir. 2004).

⁷⁰ Burton & Dzienkowski, *supra* note 38, at 701.

⁷¹ *Id.*

⁷² Trial Transcript, *supra* note 64, at *68.

⁷³ See *id.* at *78.

⁷⁴ See Kurt Eichenwald, *Ex-Andersen Partner Says He Knew Data Would Be Destroyed*, N.Y. TIMES, May 14, 2002, at C4.

in the legal community.⁷⁵ Andersen gave even less credence to the argument that Michael Odum's narrative on the training video amounted to criminal behavior. Hardin told the jury to start by asking themselves "if he is on this videotape telling people to do something wrong, why is he doing it on a videotape?"⁷⁶

Duncan's testimony emerged as surprisingly problematic as well. The government contended that his actions and subsequent guilty plea demonstrated the company's guilt. However, Andersen used Duncan's own testimony to undermine the notion that he had acted with the requisite criminal intent. Unfamiliar with the firm's document retention policy and ignorant of the legalities relating to document destruction, Duncan admitted that he did not know at the time that he was acting illegally. He testified that at the time he ordered the documents shredded he did not believe he was committing a crime. He had thought it legal to destroy documents until the firm actually received a subpoena from the SEC.⁷⁷

Furthermore, when Duncan directed subordinates to destroy documents, he instructed them to follow the firm's document retention policy. The policy required the destruction of all records that were not necessary to explain the accounting decisions reflected in the primary work papers.⁷⁸ Duncan told them to go no further than the policy allowed. He also acknowledged directing the Enron engagement team to

⁷⁵ See, e.g., Stephen Gillers, *The Flaw in the Andersen Verdict*, N.Y. TIMES, June 18, 2002, at A23. Commentators differ as to whether Temple's email was appropriate, although many agree that it was "skating very close to the line." Tom Fowler, *Lawyers Fear Legal Impact of Andersen*, HOUSTON CHRON., June 25, 2002, available at <http://www.chron.com/cs/CDA/ssistory.mpl/special/andersen/1468838> (last visited Aug. 9, 2005).

⁷⁶ See Eichenwald, *supra* note 64; Trial Transcript, *supra* note 64, at *84.

⁷⁷ Kurt Eichenwald, *Andersen Auditors Knew About Federal Inquiry, Records at Trial Show*, N.Y. TIMES, May 15, 2002 at C10. Duncan was mistaken as to the policy's requirements. The policy specifically states that "[i]n the event . . . AA . . . is advised of litigation or subpoenas regarding a particular engagement, the related information should not be destroyed." Andersen Policy Statement, entitled *Practice Administration: Client Engagement Information – Organization, Retention and Destruction, Statement No. 760, Feb. 2000*, Section 4.5.4, available at <http://news.findlaw.com/legalnews/lit/enron> (last visited Aug. 1, 2005). The policy goes on to state that "[r]easons for extended retention might include regulatory agency investigations (e.g. by the SEC), pending tax cases, or other legal action in connection with which the files would be necessary or useful. In such cases, material in the files cannot be altered or deleted." *Id.* at 4.7.1.

⁷⁸ See Andersen Policy Statement, *Practice Administration: Client Engagement Information – Organization, Retention and Destruction, Statement No. 760*, Section 2.0(4) (Feb. 2000), available at <http://news.findlaw.com/legalnews/lit/enron>.

retain copies of a draft memorandum that laid out the evolution of Enron's accounting problems.⁷⁹

According to Duncan, Temple directed that both the incorrect and the corrected version of the memorandum regarding Enron's press release be retained in the files.⁸⁰ Duncan also testified that he deliberately retained documents discussing Sherron Watkins' allegations. These documents included potentially damaging statements about Enron and its relationship with Andersen.⁸¹ Such actions seem uncharacteristic of a firm seeking to cover-up wrongdoing and to erase its paper trail.

In general, Duncan's testimony proved less helpful to the government's case than prosecutors had hoped.⁸² He appeared to admit that he lacked the requisite intent for the crime to which he had pled guilty. Given this apparent absence of intent, portraying Duncan as the "corrupt persuader" that the statute requires became increasingly difficult. If Duncan did not have the *mens rea* for the crime, then it could not be imputed to the firm through him. This placed the government's case in considerable peril.

Nevertheless, Duncan's testimony was not an unalloyed positive for the defense. Both sides found themselves in uncomfortable positions. Andersen had to argue that, irrespective of his guilty plea, Duncan had not committed any crime. For its part, the prosecution found itself reassuring the jury that, despite new evidence to the contrary, their star witness was in fact a criminal.⁸³

⁷⁹ Kurt Eichenwald, *Trial Judge and Lawyer for Andersen Tangle in Houston Courtroom Shouting Match*, N.Y. TIMES, May 17, 2002, at C7.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See Tom Fowler, *Duncan Testimony Pleases Defense*, HOUSTON CHRON., May 19, 2002, available at <http://www.chron.com/cs/CDA/ssistory.mpl/special/enron/1416644>.

⁸³ See Burton & Dzienkowski, *supra* note 38, at 701.

3. The Jury Instructions

After both sides rested, Judge Harmon instructed the jury that to convict under 18 U.S.C. § 1512(b)(2), it must unanimously find that Andersen, *through an agent* or employee:

- acted knowingly with corrupt intent
- to cause or persuade one of Andersen's employees
- to withhold a document from an official proceeding,
- or alter, destroy or conceal an object
- with intent to impair its availability in an official proceeding⁸⁴

⁸⁴ See Trial Transcript, *supra* note 64, at *7-33. The instructions read in relevant part:

In order to prove Andersen's guilt . . . the Government must prove each of the following two elements beyond a reasonable doubt:

First, that . . . the Andersen firm through its agents corruptly persuaded or attempted to corruptly persuade another person or persons; and second, that Andersen through its agents acted knowingly or with intent to cause or induce another person or persons to, A, withhold a record or document from an official proceeding or, B, alter, destroy, mutilate, or conceal an object with intent to impair the object's availability for use in an official proceeding.

The word, quote, corruptly, close quote, 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.

Thus, if you find beyond a reasonable doubt that an agent, such as a partner, of Andersen acting within the scope of his or her employment induced or attempted to induce another employee or partner of the firm or some other person to withhold, alter, destroy, mutilate, or conceal an object and that the agent did so with the intent, at least in part, to subvert, undermine, or impede the fact-finding ability of an official proceeding, then you may find that Andersen committed the first element of the charged offense.

The second element of the charged offense . . . is that Andersen, through its agents, acted knowingly and with the intent to cause or induce another person to withhold a record or a document from an official proceeding or to alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding.

An act is done with the intent to impair the integrity or availability of a document or object only if it is undertaken with the specific purpose of making the document or object unavailable for use in an official proceeding.

However, the Government is not required to prove that Andersen's sole or even primary intent was to cause another person to make a document or object unavailable for use in an official proceeding. You may find that this intent element has been established if you conclude that Andersen acted, at least in

The judge explained that the prosecution did not need to prove that the illicit acts of Andersen agents or employees were approved by the partnership or accorded with its policies. A partnership is responsible for actions taken by agents within the scope of their employment regardless of whether the agent acted contrary to instructions and/or against company policy.⁸⁵

D. THE LEGAL BATTLE OVER JURY NOTE #9

After seven days of deliberation, the jury reported that it was deadlocked. The judge gave an *Allen* charge⁸⁶ and instructed jurors to continue deliberating. Shortly thereafter, the jury sent out Note #9, which asked:

If each of us believes that one Andersen agent acted knowingly and with corrupt intent, is it [necessary] for all of us to believe it was the same agent.

Can one believe it was agent A, another believe it was agent B, and another believe it agent C.⁸⁷

part, with the intent to cause another person to make a document or object unavailable for use in an official proceeding.

...

[I]t is not necessary for the Government to prove that Andersen knew that its conduct violated the criminal law. Thus, even if Andersen honestly and sincerely believed that its conduct was lawful, you may find Andersen guilty if you conclude that Andersen acted corruptly and with the intent to make documents unavailable for an official proceeding.

Moreover, the Government is not required to prove that Andersen was successful or likely to succeed in subverting, undermining, or impeding the fact-finding ability of an official proceeding. Nor is the Government required to prove that Andersen was successful or likely to succeed in making documents unavailable for that proceeding. It is Andersen's purpose and intent, not the success of its effort that the Government must prove as elements of the charged offense.

Id. at *24-29.

⁸⁵ *See id.*

⁸⁶ *See Allen v. United States*, 164 U.S. 492, 501 (1896). An “Allen” charge urges jurors to put aside their differences and come to a verdict. Also known as a “dynamite charge,” the instruction aims to overcome or “explode” the reservations of holdout jurors. *See* Stephen Landsman, *Death of An Accountant: The Jury Convicts Arthur Andersen of Obstruction of Justice*, 78 CHI.-KENT L. REV. 1203, 1218 (2003).

⁸⁷ Jonathan Weil et al., *Dramatic Question From Jury Could Shape Andersen's Fate*, WALL ST. J., June 14, 2002, at A1.

This query presented an issue of first impression for the court. In fact, as subsequently became clear, no court anywhere had ever addressed a question even similar to it.

Unsurprisingly, the two sides took opposite positions. Following preliminary arguments, the parties briefed the issue and then argued it again the next day. Andersen argued that the jurors must unanimously agree on the actor/agent of the corporation who committed the crime while the government maintained that the law did not require jury unanimity on this point.

Judge Harmon ruled in favor of the prosecution. She informed the jury that “[t]o find Andersen guilty as charged you must find beyond a reasonable doubt that at least one agent of Andersen acted with the required knowledge and intent, but you need not all agree unanimously that it was the same agent of Andersen who acted with the required knowledge and intent.”⁸⁸

Eventually, the jury broke its deadlock and returned a verdict of guilty. It did not have to rely on the court’s answer to Note # 9 because it managed to reach consensus on the identity of the responsible Andersen agent. According to post-verdict interviews, the jury concluded that Nancy Temple’s email to Duncan suggesting the deletion of “some language that might suggest we have concluded the [Enron press] release is misleading” showed that she was the “corrupt persuader.”⁸⁹ The news of the jury’s theory of guilt shocked virtually everyone involved with the case because neither side had focused on that email during the trial.⁹⁰

III. A CLOSER LOOK AT THE RULING ON NOTE #9

A. THE RULING VIOLATES PRECEDENT AND MAKES BAD POLICY

While I believe the Supreme Court correctly overturned the verdict,⁹¹ the jury’s decision is not my focus here. The Court reversed

⁸⁸ See Transcript of Proceedings, *supra* note 59 at *6343.

⁸⁹ Burton & Dzienkowski, *supra* note 38, at 704. See also Mary Flood, *Decision By Jurors Hinged on Memo*, HOUSTON CHRON., June 19, 2002, available at <http://www.chron.com/cs/CDA/ssistory.mpl/special/andersen/1456547>.

⁹⁰ See Mary Flood & Tom Fowler, *Jury Finds Andersen Guilty, Says Shredding Meant Nothing*, available at HOUSTON CHRON., June 15, 2002, <http://www.chron.com/cs/CDA/ssistory.mpl/special/enron/1455557>.

⁹¹ See *supra* note 2.

because the jury had been improperly instructed regarding the nature of the required *mens rea*.⁹² As a result, it did not have to conclude that the guilty agent *knew* she was acting wrongfully.⁹³ This article focuses on a related but distinct issue—the trial judge’s ruling on Jury Note # 9. Judge Harmon decreed that the jury did not need to agree on who at Andersen possessed the culpable *mens rea* or on who acted upon it. Though mooted for purposes of the trial, the ruling remains important as the sole judicial pronouncement within an unsettled area of law.

A finding that juries need not unanimously agree on the identity of the bad actor within a corporation gives wide latitude to prosecutors. Under this rationale, prosecutors can present multiple theories involving any number of potential bad actors. All they need to do is convince the jury that someone did something rather than that a particular person did a particular thing.

Allowing jurors this leeway violates the foundational principle of federal law that juries must unanimously convict in criminal trials.⁹⁴ It also allows prosecutors to offer multiple theories of guilt, not in the hopes that the jury will settle on one, but rather than it will settle on *some* of them. This scattershot jurisprudence will markedly shift the dynamics of criminal trials and will almost certainly spur challenges by the defense bar.⁹⁵

The ruling erred on a more subtle, rhetorical level as well. By validating the government’s position, the court adopted a stance that strips agents of agency while attributing consciousness to a legal

⁹² See *Arthur Andersen, LLP v. United States*, 125 S. Ct 2129, 2131-32 (2005) (“We hold that the jury instructions failed to convey properly the elements of a ‘corrup[t] persuas[ion]’ conviction under § 1512(b) and therefore reverse.”) (alteration in original).

⁹³ See *id.* at 2136 (“The instructions . . . diluted the meaning of ‘corruptly’ so that it covered innocent conduct.”).

⁹⁴ See *supra* note 3 and accompanying text.

⁹⁵ See David M. Zornow & Christopher J. Gunther, *After Andersen, Can Companies Get a Meaningful Jury Trial?* N.Y. L.J., Jul. 8, 2002, at 9.

fiction.⁹⁶ Understanding the full dimensions of the error and its implications requires a close analysis of the issues raised by Note # 9.

Recall that the question the jury presented to the judge involved whether it could convict Andersen if all the jurors agreed that *someone* at the entity had acted knowingly and with corrupt intent but could not agree as to exactly who. They wished to know whether it was permissible for some of them to believe that the wrongdoer was Agent A, others to believe it was Agent B, and so forth.⁹⁷

B. THE PARTIES' POSITIONS

1. Andersen: Unanimity Is Required

Andersen argued that the jury must unanimously agree on the actor who committed the crime. Otherwise, the jury could not possibly agree on intent, a crucial element of the crime.⁹⁸ The entity can be found to have a particular state of mind only if one of its partners or employees had that state of mind.⁹⁹ Intent cannot be disaggregated among multiple actors.

Corporations act through their agents. To commit a crime, those agents must possess criminal intent. It follows that to convict, the jury must agree on the identity of the agent who intended to commit the crime. "[T]he jury can find that Andersen had a particular intent only if the jurors unanimously find that a *particular person* at the firm had that state of mind. Absent that finding, the jury simply cannot conclude that

⁹⁶ As Chief Justice Marshall observed in *United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809), a corporation is "certainly not a citizen," it is rather an "invisible, intangible, and artificial being . . . [a] mere legal entity." Marshall reasoned that corporations could not, therefore, invoke diversity jurisdiction. Less than fifty years later, in *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 327-28 (1853), the Court reconsidered, holding that corporations may invoke diversity jurisdiction despite the fact that they are "invisible" and "intangible" on the basis that their stockholders are presumed to hold citizenship in the state of incorporation. One commentator observes that this decision effectively meant that "corporations gained entry into the federal judicial system as participants equal in standing to individuals" in civil disputes. Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 835 (2000). Fifty years later, the Court ushered in what Friedman described as "the modern era of corporate criminal liability." *Id.*

⁹⁷ See *supra* note 84 and accompanying text.

⁹⁸ Brief of Andersen at 1, *United States v. Arthur Andersen*, No. CP.A. H-02-0212 (S.D. TX. June 14, 2002).

⁹⁹ *Id.* at 2.

Andersen, as an entity, had *any state of mind at all*.”¹⁰⁰ And, without the required *mens rea*, there can be no guilty verdict.

2. *Prosecution: Identity is Not an Element and Unanimity is Not Required*

The government sought to cast the issue solely as one of identity, which it argued was not an element of the crime and therefore did not require jury unanimity. In its view, “the identity of a specific corporate actor is *not* an element of the offense, but rather a method and means by which a corporation can be found guilty of a crime.”¹⁰¹ To find otherwise would hamstring corporate criminal prosecutions and shield corporations from liability.¹⁰²

According to this view, corporate actors are merely the method and means through which the entity commits crimes.¹⁰³ The act and intent lie within the corporation itself. Agents are tools, nothing more. As the prosecution argued, the Andersen agents were analogous to guns used in a robbery: “All [the jury has] to agree on is that a gun was used, not the same gun Just think of (Andersen partners) as guns.”¹⁰⁴ Similarly, the jury did not have to agree which Andersen agent obstructed justice, just that the firm itself committed the crime.

C. *THE JUDGE SIDES WITH THE PROSECUTION: IDENTITY AS MEANS*

The judge’s ruling in favor of the government implicitly accepted the premise that the identity of the corrupt persuader forms a means rather than an element of the crime of obstruction of justice. By this reasoning, the elements of the crime as enumerated in the statute include *mens rea* (“knowingly . . . corruptly”) and *actus reus* (persuading another person to “alter destroy mutilate, or conceal an object with intent to impair . . . an official proceeding . . .”).¹⁰⁵ Identity is not explicitly set forth in the statute and therefore forms a mere means of the crime’s commission. Since it is settled law that unanimity is not required when

¹⁰⁰ *Id.* at 3.

¹⁰¹ Brief of Gov’t at 5, *United States v. Arthur Andersen*, No. CP.A. H-02-0212 (S.D. TX. June 14, 2002).

¹⁰² See generally, *id.* at 4.

¹⁰³ *Id.* at 5.

¹⁰⁴ Greg Farrell, *Andersen Jury May Be Leaning Toward Guilty*, USA TODAY, June 13, 2002, available at <http://www.usatoday.com/money/energy/enron/2002-06-13-andersen-jury-deliberations.htm>.

¹⁰⁵ 18 U.S.C. §§ 1512(b) (2002).

determining the means of a crime,¹⁰⁶ the jury need not reach consensus regarding the identity of the guilty agent.

By way of illustration, consider a case where the defendant allegedly used the threat of force to carry out a robbery (threat of force comprising an element of the crime of robbery). The jury need not unanimously agree on the nature of the threat.¹⁰⁷ Some jurors might believe that the defendant used a knife while others might think he used a gun. The law does not require consensus on the manner or means in which the defendant satisfied the element; it requires only that all agree that the element itself—using the threat of force—be satisfied.¹⁰⁸

In the instant case, Arthur Andersen, LLP – not individual agents of the firm—was standing trial. Consequently, the jury needed to unanimously find that the firm had the requisite *mens rea*. It did not need to unanimously agree on how the firm came by that *mens rea* and in whom it resided. If some jurors felt that one agent possessed criminal intent and other jurors believed the intent lay with another, that difference of opinion was immaterial for purposes of conviction.¹⁰⁹

D. IDENTITY IS NOT AN ELEMENT BUT IT IS ALSO NOT THE ISSUE

1. Identity Can Be Crucial to Determining the Intent and the Act

While the prosecution's reasoning has a surface allure, it does not withstand close scrutiny. According to the prosecution's logic, the issue reads as follows:

- The jury is uncertain as to the identity of the corrupt persuader within Andersen;
- Identity is not an element of 18 U.S.C. § 1512;
- Therefore the jury need not agree on the identity of the corrupt persuader within Andersen.

¹⁰⁶ See *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991) (plurality opinion) (“We have never suggested that in returning general verdicts . . . the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone.”)

¹⁰⁷ See *id.*; *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring).

¹⁰⁸ See *Richardson v. United States*, 526 U.S. 813, 817 (1999).

¹⁰⁹ Brief of Gov't, *supra* note 99, at 2.

The flaw in this reasoning lies with the conflation of means and *mens rea*. Contending that the question hinges on whether identity is a means or an element of the statute steers the court into an area of unsettled law—distinguishing between means and elements¹¹⁰—rather than toward the uncontroversial and long-settled principle that jury unanimity is required on the issue of *mens rea* itself.¹¹¹ In addition, even assuming identity is not an element of the crime, the court still erred in its ruling.

Assume, *arguendo*, that identity is a means rather than an element of the crime. There is some basis for such an assumption in the corporate context.¹¹² In large corporations, one can hide one's doings beneath layers of bureaucratic camouflage, sometimes rendering it impossible to identify culpable individuals definitively. If identity were a nonnegotiable prerequisite for prosecution, it would severely hamper efforts to rein in corporate crime.¹¹³ Instead, it would seem sensible to permit convictions of the corporate entity while allowing the identity of the guilty agent[s] to remain obscure.¹¹⁴

Consider the following fictional example:

A memo from the Legal Department of Beelzebub, Inc. dated January 9, 2005 orders the shredding of all records relating to the last three quarterly earnings statements. A day after the accounting department complies, the SEC subpoenas the now destroyed records as part of an ongoing fraud investigation. Based on these facts, it appears that one or more people at Beelzebub violated 18 U.S.C. § 1512 (b)(2) by corruptly persuading other employees to destroy evidence.¹¹⁵ However, it is not

¹¹⁰ See *Schad*, 501 U.S. at 634-35 (citing cases “deriving primarily from” *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977)).

¹¹¹ See *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978) (“[E]xistence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. Intent generally remains an indispensable element of a criminal offense.”) (internal citation omitted); *but see Schad*, 501 U.S. at 639-40 (holding that a jury need not unanimously agree whether a defendant is guilty of 1st degree murder under premeditated murder or felony murder, which have different *mens reas*, so long as all jurors believe one of the two.)

¹¹² Brief of Gov’t, *supra* note 99, at 5-7.

¹¹³ See *id.* at 5.

¹¹⁴ See *id.*

¹¹⁵ Under the revised statute, the actions would violate 18 U.S.C. § 1512 (c) (2002) as well since the agent corruptly obstructed an official proceeding.

clear precisely who did it. Beelzebub's Legal Department has over 700 members. Even assuming the offender actually belonged to that department, locating him or her remains nearly impossible.

Though diligent investigation fails to conclusively identify the responsible parties, the government indicts anyway and the case goes to trial. The defense moves for a directed verdict, arguing that the jury could not reasonably convict because it cannot identify the bad actor within the corporation. The judge denies the motion and the case goes to the jury. Can the jury convict on these facts?

Yes, it likely could. Because Beelzebub, Inc. is on trial and not an individual, a jury could reasonably conclude that an agent of Beelzebub obstructed justice while never knowing the actual identity of the agent.¹¹⁶ Knowing the agent's name is not necessary to believing that s/he was an agent of the corporation who knowingly and corruptly persuaded other employees to tamper with evidence. Convicting Beelzebub on this basis would not sound any of the procedural alarms raised by Jury Note # 9. Understanding why this is so requires that we recognize the distinctions between the Beelzebub example and the Andersen case.

2. *There Was No Unanimity Regarding Either the Mens Rea or Actus Reus*

In the above example, the jury unanimously concluded that a particular unnamed agent (who we'll call "Lucifer") at Beelzebub did a particular thing (sent a memo directing that relevant documents be destroyed) at a particular time (January 9, 2005). The jury further

¹¹⁶ While no case law speaks definitively to this issue, there are cases suggesting that knowledge of the culpable agent's identity is not a prerequisite to a corporation's conviction. *See, e.g.,* *United States v. Gen. Motors Corp.*, 121 F.2d 376, 411 (7th Cir. 1941) (detailing how a corporation was convicted of conspiracy though all defendant officers and agents were acquitted; court concluded that unnamed co-conspirators could have been responsible for the company's actions); *President Coolidge (Dollar S.S. Co.) v. United States*, 101 F.2d 638 (9th Cir. 1939) (involving steamship company convicted of discharging waste—a strict liability offense—though responsible crewmember was not known); *see also* Stacey Neumann Vu, Note: *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 104 COLUM. L. REV. 459, 472-73 (2004) (discussing related phenomenon of inconsistent verdicts where agents are acquitted and corporation is nevertheless convicted).

concluded that Lucifer knew an investigation was imminent and intended to corruptly persuade other employees to tamper with evidence. All of the elements of the crime are therefore satisfied. The jury unanimously agreed on the nature of the bad act and the intent of the actor. Though the specific identity of the actor/agent remains unknown, the jury is satisfied that she exists and that her actions and intent violated the law.

Contrast the Beelzebub scenario with the Andersen case. In Andersen, the prosecution presented competing theories of the *actus reus* of corrupt persuasion. It suggested that it could have been Duncan's directing subordinates to shred, Temple's emails regarding the document retention policy or the wording of a memo, or Odum's video presentation encouraging the destruction of audit workpapers up to the day the firm learns of a lawsuit.

These actions were carried out by different people on different days. For any of them to be criminal, the responsible individual must have had guilty intent.¹¹⁷ The *act* of knowing corrupt persuasion is inseparable from the *intent* to do so. One cannot innocently yet corruptly persuade¹¹⁸ nor can the intent to corruptly persuade reside with someone other than the persuader.

If six jurors believed Nancy Temple corruptly persuaded, then those same jurors by definition must have believed that she *intended* to corruptly persuade as well. If six other jurors believed that David Duncan was the corrupt persuader, then those jurors similarly believed that Duncan intended to corruptly persuade. If six believed that Temple did it and six that Duncan did it, then they jury lacked consensus as to

¹¹⁷ For purposes of 18 U.S.C. § 1512 (2002), the requisite guilty intent is knowledge.

¹¹⁸ The Supreme Court faulted the judge's failure to adequately explain that knowing corrupt persuasion necessarily involves knowing of the wrongfulness of the act. See *Arthur Anderson LLP v. United States*, 125 S.Ct 2129, 2136 (2005) ("Only persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuad[e].'"") (citing *United States v. Aguilar*, 515 U.S. 593, 602 (1995)). I am making a different point. I submit that regardless of one's knowledge of the legality of the act, it is self-evident that one cannot knowingly corruptly persuade without knowing one is doing so.

the existence of a corrupt persuader. Conviction was therefore impermissible.¹¹⁹

If the jury were to conclude (as it ultimately did) that Temple corruptly persuaded other employees to obstruct justice, then the jury also had to believe that she intended to do so. The same would hold true for Duncan or Odum. It follows that when the jury deadlocked, the disagreement involved more than just the identity of the corrupt persuader. The deadlock arose because some jurors believed that Person X committed Crime A and some believed that Person Y committed Crime B. This amounts to a disagreement not just over identity but over the nature of the crime itself.

By way of further illustration, consider the following two analogous hypotheticals.

Jane Smith is standing trial for armed robbery. Prosecutors offer two different scenarios for her guilt: 1) that she robbed a convenience store on July 4 and, 2) that she robbed a bank on July 14.¹²⁰ When the case goes to the jury, half of the jury believes that she robbed the convenience store but not the bank while the other half believe that she robbed the bank but not the convenience store. Though all the jurors agree that she committed armed robbery, they do not agree as to when, where or how. Under these circumstances, it would be manifestly unconstitutional to convict her because the jury has not unanimously concluded that she committed any crime. All the jurors feel she is guilty of *something*, but they disagree as to what.¹²¹

¹¹⁹ Those jurors who subscribed to one theory of guilt (i.e., that Temple did it) must not have believed that anyone else was also guilty. If, for example, the jurors who thought that Temple obstructed justice thought that Duncan obstructed justice as well, and the six other jurors thought that Duncan and no one else obstructed justice, then there would have been unanimity on the issue of Duncan's guilt. That would have obviated any deadlock.

¹²⁰ Though useful as an illustration, this scenario could not actually take place. Indictments must clearly specify the nature of the crime alleged. See Fed. R. Crim. P. 7(c)(1).

¹²¹ See *McKoy v. North Carolina*, 494 U.S. 433, 450 (1990) ("Th[e] rule does not require that each bit of evidence be unanimously credited or entirely discarded, but it does require unanimous agreement as to the nature of the defendant's violation, not simply the fact that a violation has occurred.").

Now change the defendant from Jane Smith to Beelzebub, Inc.

Beelzebub faces trial for dumping hazardous waste into waterways in violation of the Clean Water Act.¹²² The prosecution presents evidence that Mephisto, Beelzebub's senior vice president, dumped dry cleaning solvent into the Hudson River in 2004. The prosecution also argues that Sammael, Beelzebub's CFO, dumped biowaste into the Gulf of Mexico in 2003, also in violation of the Clean Water Act.¹²³ When the case goes to the jury, half of the jurors believe beyond a reasonable doubt that Mephisto dumped into the Hudson. The other half is dubious about Mephisto but fervently believes that Sammael dumped into the Gulf. Even though everyone on the jury believes that someone at Beelzebub did something illegal, they disagree about what actually happened.

Here again, the jury should not convict for either crime. There is no agreement as to the act, actor, or intent. The jury does not agree on anything other than that at some time in the past, someone committed a crime of some sort and that that person worked at Beelzebub, Inc. That is a flimsy hook on which to hang a conviction.

Yet, in *United States v. Andersen*, the judge allowed the jury to hang its verdict on this very hook. The jury did not agree on the actor (Temple, Duncan or Odum), or the action (directing subordinates to shred, sending an email suggesting shredding, or making a videotape encouraging employees to destroy evidence). It follows that the jury similarly lacked consensus on the presence of intent. If it could not agree on the nature of the crime or the person who committed it, the jury could not possibly have agreed on whether whoever committed the crime intended to do so.

To convict amidst all this uncertainty would be manifestly wrong. A shared belief that someone did something illegal is not the same as a

¹²² See, e.g., 33 U.S.C. §§ 1319 (c)(1)-(2).

¹²³ See *id.*

shared belief that a particular person committed a particular crime. Only the latter enables conviction.¹²⁴

F. THE GOVERNMENT'S POSITION IS SELF-UNDERMINING

The government's case founders on other bases as well. In arguing that the jury could convict without knowing the identity of the corrupt persuader, prosecutors maintained that the identity of the guilty corporate agent was immaterial. The agent formed merely the method and means through which the entity, Andersen, committed the crime.¹²⁵ The actual person or people who perpetrated the act were comparable to the weapon(s) used in a robbery; they were mere tools acting at the behest and under the control of the entity.¹²⁶

This position directly contradicts the jury instructions, which required the jury to determine which *agent* at Andersen acted knowingly with corrupt intent to cause or persuade another employee to alter or destroy evidence.¹²⁷ Maintaining that the agent is fungible and that her identity is irrelevant to the entity's guilt negates the requirement that the jury decide who within the company acted as the corrupt persuader. On that basis alone, the government's argument should have failed.

The government's position is also inconsistent as a matter of statutory exegesis and common sense. One cannot logically contend that agents of a corporation have no intent while simultaneously maintaining that those same agents were knowing corrupt persuaders. The two propositions are mutually exclusive.

On the one hand, prosecutors contended that the guilty agent at Andersen knowingly and corruptly persuaded other employees to obstruct justice. On the other hand, prosecutors argued that agents at Andersen either have no *mens rea* of their own or that their *mens rea* is immaterial because they are mere pawns of the entity. According to the latter thesis, the guilty intent resides with the corporation and the identity of the agent/actor is therefore irrelevant.

¹²⁴ As Justice Scalia observes in his concurrence in *Schad*, "We would not permit . . . an indictment charging that defendant assaulted either X on Tuesday or Y on Wednesday, despite the "moral equivalence" of the two acts." 501 U.S. at 651 (Scalia, J., concurring).

¹²⁵ See Brief of Gov't, *supra* note 99, at 5.

¹²⁶ See *id.* at 6.

¹²⁷ Transcript of Proceedings, *supra* note 59, at *212.

These two positions cannot coexist. Either the agent had the intent to corruptly persuade and did corruptly persuade or she did not. If the former, then under these facts, the jury must agree as to the agent's identity. If the latter, then, per the judge's instructions, the jury must acquit.¹²⁸

Not only does the prosecution's argument strip the people making up the corporation of any will or intent of their own, it transposes that will or intention on to the corporate entity—a legal fiction created by the law as a matter of social convenience.¹²⁹ To attribute intent to such a creation is to bring an incorporeal entity to life, a feat surpassing even that of Dr. Frankenstein. Frankenstein at least worked with a body that was once alive.¹³⁰ The government, on the other hand, wished to enliven something that never actually existed outside the printed page.

¹²⁸ See *id.*; see also Darling, *supra* note 4, at 1651 (“Because knowing conduct and intent are an essential element [sic] of obstruction of justice, and because entity intent can be established only by reference to the intent of one or more agents, direct imputation of intent makes the identity of the corrupt persuader an essential element and disagreement on this element should be fatal to the government’s case.”). Darling goes on to argue that entities themselves can serve as corrupt persuaders. See *id.* at 1651-54. This position seems to impart overmuch agency to incorporeal entities. Even accepting the phenomenon of corporate intent as distinct from that of individual agents, the idea of distinct corporate actions remains problematic.

¹²⁹ A multiplicity of views exists as to the nature and origin of corporate “personhood,” which attribute varying degrees of agency to the entity. The “Reality Theory,” propounded by Otto von Gierke, argues that the law cannot create its subjects but rather can only recognize preexisting societal facts which meet its requirements. By this reasoning, recognizing corporate personhood involves the law simply acknowledging the existence of societal facts that create the corporate phenomenon and they meet the criteria for juristic personhood.

Gierke’s theory, though intriguing, begs the question of the nature of corporate personhood; it avers that since the law can’t create persons, it couldn’t have created corporate personhood. Furthermore, if we accept the common conception of a juristic person (that is to say, a person for purposes of the law) as something that is the subject of a right, legal personhood bears little relation to intentionality. The dispositive issue for purposes of agency lies in whether one “administers” those rights to which one is subject. This poses a question that is less legal than sociological. See FRENCH, *supra* note 56, at 38. The above discussion relies heavily on French’s much fuller and highly lucid analysis of the issue. See *id.* at 34-38.; see also Friedman, *supra* note 94, at 846 (“While a corporation’s possession of . . . rights suggests a separate identity . . . that identity may represent nothing other than the sum of the rights the organization possesses in aid of its business and enjoys at the sufferance of the legislature.”)

¹³⁰ See MARY SHELLEY, FRANKENSTEIN (Henry Colburn & Richard Bentley eds., London 1831)

Furthermore, maintaining that the firm's agents were merely tools in the nefarious grip of a malevolent corporate entity expands the notion of corporate criminal liability to an unprecedented and unsustainable extreme. The bankruptcy of this reasoning becomes clear if we apply it to the crime of homicide. If a corporate employee kills someone on the orders of his employer, one can scarcely imagine a prosecutor arguing that the employee bears no responsibility, that she was merely an extension of the gun, and that the corporation pulled the trigger. Yet, the government made almost precisely this argument in the Andersen trial, explicitly comparing corrupt persuaders within the firm to guns.¹³¹

G. THE GOVERNMENT RATIONALE – FROM GESTALT TO GUILT

The roots of this novel legal approach lie within the collective knowledge doctrine, wherein corporate criminal intent is aggregated from a group of agents.¹³² No one person at the entity intends to commit the entire criminal act. Instead, each actor intends to do a portion of the act and collectively, they intend to commit the crime even if they are not aware of each other.¹³³ Since corporate intent aggregates agents' intentions, the entity acquires an intention that does not exist at any individual level—a form of mental *gestalt*. However, even if the Andersen jury had been permitted to consider collective knowledge as a theory of guilt—which it was not—the prosecution's position barely resembles a typical collective knowledge premise.

No one contended that the aggregated intents of Duncan, Odum, and Temple amounted to a “knowing” *mens rea*. Rather, the prosecution claimed that it did not matter what Duncan, Odum, or Temple might have intended because they were mere tools. By extension, it also did not matter that they committed entirely different acts. Subscribing to this logic strips all agency from agents. It relocates that agency in a

¹³¹ See Brief of Gov't *supra* note 99, at 6.

¹³² See FRENCH, *supra* note 56.

¹³³ See e.g., U.S. *ex rel.* Harrison v. Westinghouse Savannah River Co., 352 F3d 908, 918 (4th Cir. 2003) (holding the collective knowledge doctrine “allow[s] a plaintiff to prove scienter by piecing together scraps of “innocent” knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing. . .”)

liminal space wherein corporations gain intelligence, intention, and the power to act separate and apart from their agents.¹³⁴

By the government's lights, Arthur Andersen, LLP – rather than any person at the firm – intended to (and did) corruptly persuade an employee to obstruct justice. As is now clear, this premise is incoherent for purposes of corporate criminal prosecution. However, there are circumstances where attributing a singular will to a collective is appropriate. The practice has roots in longstanding principles of international law, particularly the laws of war.

The fact that prosecutors successfully injected this international vision of entity guilt into a domestic case is cause for alarm. International laws of war do not safeguard civil liberties in the ways that our Constitution requires. Adjudicating a peacetime criminal prosecution in this manner bodes ill for due process. A fuller discussion of the implications of this version of collective responsibility forms Part IV of this article.

IV. ENTITY IDENTITY

A. ENTITIES POSSESS DISCRETE IDENTITIES

Disembodied legal fictions possessing criminal intent separate and apart from human agents is not as odd a concept as it might appear.¹³⁵

¹³⁴ Though theorists of corporate responsibility vary in the amount of intention they ascribe to the corporate entity—French, for example, ascribes a great deal—I know of none who maintain that agents of the corporation lack any agency whatever. See FRENCH, *supra* note 56. That position is both unique to the Andersen prosecution and, I believe, logically insupportable. For detailed discussions of the various theories of corporate responsibility and their efficacy, see Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641, 650-709 (2000); Annie Geraghty, *Corporate Criminal Liability*, 39 AM. CRIM. L. REV. 327, 328-336 (2002); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?* 109 HARV. L. REV. 1477 (1996); see also Friedman, *supra* note 94, at 833-858.

¹³⁵ See, e.g., Friedman, *supra* note 94, at 847 (“The modern corporation has an identifiable persona, to which we ascribe expressive conduct as a matter of course. [This means] a presence in the community quite apart from that of its owners, manager and employees.”); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1123 (1991) (arguing that a corporation’s ethos, the “abstract and intangible, character of a corporation [that is] separate from the substance of what it actually does,” distinguishes it from its component members).

The concept of a collective entity having its own discrete identity enjoys wide acceptance in everyday speech and thought, both legal and colloquial. Consider: "The 5th Circuit upheld the ruling," "Ford discontinued the Thunderbird," or "the jury reached a verdict."¹³⁶

The Philadelphia Orchestra changes members frequently but its identity remains constant. Rock groups often continue to perform though few if any original members remain with the band.¹³⁷ In each instance, membership in the collective shifts over time while the entity's identity stays static.¹³⁸ Collectives' ability to retain their identity amidst multiple personnel shifts amounts to an implicit cultural recognition of their independent identities.¹³⁹

B. NATIONAL IDENTITY AND THE BANALITY OF EVIL

Acknowledging the ability of a collective to acquire a social identity distinct from the simple aggregation of its agents is a long way from advocating for criminal conviction on that basis. In the past, entity guilt of this sort has been confined to international law where nations, not just their citizens, can be held responsible for crimes.¹⁴⁰ For

¹³⁶ Fletcher offers this intriguing example related by Bernard Williams: "The Fifth Army feinted toward the Rhine and then fell to looting and raping." The example contains instances of a group acting both collectively and individually. The army as a whole feinted toward the Rhine but individual soldiers committed the subsequent crimes. This is a useful illustration that collective identity can exist without eliminating individual capacity for intent and action. FLETCHER, *ROMANTICS AT WAR*, *supra* note 5 at 71.

¹³⁷ For example, the Rolling Stones changed guitarists twice and bassists once. Original guitarist Brian Jones died in 1969 and was replaced by Mick Taylor, who left the band in 1974 and was replaced with Ron Wood. Bill Wyman, the bassist for almost three decades, left the band in 1991. Similarly, The Who endured the death of drummer Keith Moon in 1978 and the death of bassist John Entwistle in 2002, but the band continues to record and tour.

¹³⁸ Not every collective consists of fungible members. George Harrison famously declared that there will be no Beatles reunion "as long as John Lennon remains dead." See Nora Meany, *They Can Work it Out, But Why?*, THE SIMON, (2000), http://www.thesimon.com/magazine/articles/old_issues/0097_they_work_out_but_why.html (last visited July 23, 2005). Prior to his death, Lennon also opined on the collective phenomenon that was the Beatles, observing that, "I'm not the Beatles. I'm me. Paul isn't the Beatles. The Beatles are the Beatles. Separately, they are separate—I don't believe in Beatles. I just believe in me." *Id.*

¹³⁹ See FRENCH, *supra* note 56.

¹⁴⁰ See Steve Sheppard, *Passion and Nation: War, Crime, and Guilt in the Individual and the Collective*, 78 NOTRE DAME L. REV. 751, 755-56 (2003) (noting that, the Charter of the United Nations and the Statute of the International Court of Justice as well as subsequent international military tribunals and the International Criminal Court sought to "hold not only states accountable for war but also, effectively, the individuals whose orders and actions are the means of a state's prosecution of the war.").

example, some crimes like genocide are predicated on entity responsibility.¹⁴¹ However, there are crucial differences in the circumstances of international criminal trials as opposed to the domestic prosecution of corporations.

When nations and/or their citizens are tried by an international tribunal, it is because the social and legal system of the offending nation sanctioned behavior unacceptable to the international community.¹⁴² The citizens who committed the wrongful acts acted with the imprimatur of their legal system and might well have believed they were behaving appropriately. This leads to the infamous “banality of evil” phenomenon described by Hannah Arendt.¹⁴³

1. *The Eichmann Example*

Banality of evil refers to the experience of morally repugnant behavior becoming legally and culturally acceptable.¹⁴⁴ The reification of this phenomenon is Adolf Eichmann, an unexceptional man who, following a mediocre scholastic career drifted into the SS and emerged as one of the chief administrators of the Final Solution.¹⁴⁵ His anti-Semitism was no more virulent than that of millions of his fellow citizens, yet his actions enabled the murder of millions of Jews.

¹⁴¹ See FLETCHER, ROMANTICS AT WAR, *supra* note 5, at 69-70.

¹⁴² The notion of justice is, of course, subject to interpretation and can vary from nation to nation. However, certain values are pan-national and have been codified in various international conventions and treaties. See Sheppard, *supra* note 138, at 755-56. John Rawls posits that the starting point for all laws inheres in certain foundational axioms upon which all people could theoretically agree. See JOHN RAWLS, A THEORY OF JUSTICE 31 (1999). These reflect an “overlapping consensus” which people with a diversity of viewpoints can endorse because their values are incorporated within them. See JOHN RAWLS, POLITICAL LIBERALISM 9-11, 58-66, 65 (1993). This overlapping consensus arguably leads to the norms that form the basis for international law. See, e.g., MARTHA NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW 57 (2004) (“[T]he tyranny of the majority over minority opinion is a major danger in political life, and . . . one of the great strengths of the classical liberal tradition is its respect for spheres of freedom within which individuals choose the goals that they think most important.”). Nussbaum contrasts this view with that of Amitai Etzioni, whose communitarian value system privileges homogeneity as the unifying factor within society. In this “monochrome society,” citizens identify with what they have in common rather than what renders them distinct. Nussbaum further notes that neither classical liberals nor communitarians would embrace a legal regime that chooses the norms society should value. *Id.* at 56-57.

¹⁴³ HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 287 (Penguin Classics 1994) (1963).

¹⁴⁴ See *id.* at 135.

¹⁴⁵ *Id.* at 20-21.

Eichmann viewed his behavior as law-abiding and therefore just. He felt “free of all guilt,” secure in the knowledge that his superiors knew and approved of his actions.¹⁴⁶ He even believed that his actions harmonized with the Kantian Categorical Imperative.¹⁴⁷

Ascribing a duty of blind obedience to the Categorical Imperative completely misinterprets Kant’s teachings.¹⁴⁸ Kant perceived the human condition as a struggle to transcend sensual impulses and to act according to the dictates of pure reason. The laws of reason are independent of and need not bear any resemblance to the constructed laws of human society.¹⁴⁹

Eichmann’s misinterpretation is relevant here because his belief that the legality of his actions under German law relieved him of responsibility for his behavior bears directly on the notion of collective criminal intent. It is certainly possible to argue, as Eichmann did, that

¹⁴⁶ *Id.* at 114.

¹⁴⁷ Arendt has little patience for Eichmann’s reliance on Kantian reason, declaring it “outrageous” to presume Kant would have approved of blind obedience. *See* ARENDT, *supra* note 141, at 135.

¹⁴⁸ To suggest that living in a nation of unjust laws absolves one of all moral responsibility is to claim that one is morally bound to obey unjust laws, an ethically bankrupt position. To borrow a phrase often attributed to Aquinas, “*lex iniusta non est lex*” (“an unjust law is not a law”). Though he never said precisely these words, the maxim does reflect Aquinas’s thinking and, as a philosophical precept, has significant practical value. *See generally*, Norman Kretzmann, *Lex Iniusta Non Est Lex: Laws on Trial in Aquinas’ Court of Conscience*, 33 AM. J. JURIS. 99 (1988). Karl Jaspers argues that we are accountable for the way we are governed, even if we live under a repressive regime and that we are accountable for our actions, regardless of the duress involved, if the act could be avoided. *See* FLETCHER, ROMANTICS AT WAR, *supra* note 5, at 78-79. John Rawls also provides some useful insight, observing that political legitimacy (from which would follow “legitimate law”) requires a sincere belief that “the reasons we would offer for our political actions—were we to state them as government officials—are sufficient, and [that] we also reasonably think that other citizens might also reasonably accept those reasons.” JOHN RAWLS, *THE LAW OF PEOPLES WITH THE IDEA OF PUBLIC REASON REVISITED* 137 (1999).

¹⁴⁹ Kant declares that the concept of freedom is “the keystone of the whole architecture of the system of pure reason.” IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 118 (1949). Henry Allison notes that the concept of transcendental freedom—“an explicitly indeterminist . . . conception (requiring an independence of determination by all antecedent causes in the phenomenal world)” is at the heart of all of Kant’s major writings. HENRY ALLISON, *KANT’S THEORY OF FREEDOM* 1 (1990). Rousseau also attributes the change from creature of impulse to one who obeys the laws of a civil society as a transition from enslavement to one’s appetites to “moral liberty,” which “makes man truly the master of himself.” JEAN JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT: DISCOURSE ON THE ORIGIN OF EQUALITY, DISCOURSE ON POLITICAL ECONOMY*, 27 (Donald A. Cress trans.,) (1983).

not he but the German State intended to commit the atrocities for which he stood accused.¹⁵⁰ The issue then becomes the degree of responsibility individuals must bear for reprobate conduct when their nation sanctions and even requires such behavior.

2. Responsibility and First and Second Order Desires

Harry Frankfurt offers a useful heuristic for analyzing free will through which we can examine the influence of one's surroundings on the ability to self-evaluate conduct. Frankfurt breaks the process of conscious action into first and second order desires. First-order desires include temptations to commit criminal acts—from shoplifting to serial rape. Second-order desires involve deciding whether to act on one's first order desires.¹⁵¹ Second-order desires are a prerequisite for “personhood” in Frankfurt's schema.¹⁵² Free will involves integrating one's behavior with one's second-order desires.¹⁵³

When the prevailing cultural milieu encourages behavior that deviates from commonly held norms, it inhibits second-order judgment. People cannot assess the suitability of their first-order desires because the better options are illegal and/or censored. Responsibility for any resulting criminal intent is therefore mitigated.¹⁵⁴ Under these

¹⁵⁰ As Michael Ignatieff observes, Hitler's Germany as well as Stalinist Russia were structured to eliminate the idea that government violence was problematic. “Far from being evils, Hitler's . . . acts of extermination were heralded as necessary to the creation of a utopia . . .” MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 16 (2004).

¹⁵¹ See Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, in *FREE WILL* 322 (Gary Watson ed., Oxford Univ. Press 2003). Frankfurt's construct resembles the principle of first and second order observation in cybernetics. First order observation involves observing something and second order observation involves observing one's observation. Since observation constitutes a form of participation, second order observation validates the Uncertainty Principle. One can never know the degree to which one's participation (through observation) affects an experiment.

¹⁵² See *id.* at 323-24. (“No animal other than man . . . appears to have the capacity for reflective self-evaluation that is manifested in the formation of second-order desires.”).

¹⁵³ See *id.* at 330. (“It is only because a person has volitions of the second order that he is capable both of enjoying and of lacking freedom of the will.”).

¹⁵⁴ See FLETCHER, *ROMANTICS AT WAR*, *supra* note 5, at 175-76 (“By . . . restricting the range of morally appealing options, the state deprives its citizens of . . . the possibility of critical moral self-assessment. . . . It betrays its duty to create circumstances of moral action, and it bears part of the guilt for the crimes that result.”).

conditions, the agency of the citizen-agents is compromised, though not eliminated.¹⁵⁵

Frankfurt's scheme offers a compelling argument for mitigating the guilt of actors who live in nations with a system of laws that encourage aberrant behavior. However, his framework does not work in a domestic legal context where, for example, a corporation stands accused of violating normatively acceptable national laws.¹⁵⁶ As Fletcher observes, an immoral climate "require[s] teachers, religious leaders, politicians, policies of the state, and a network of supportive laws."¹⁵⁷ Even then "the people constituting the society bear some of the guilt."¹⁵⁸

3. *The Nature of the "We-Intention"*

In the corporate context, a culture of lawlessness can exist within the entity, as was arguably the case with Andersen,¹⁵⁹ but most of Frankfurt's other criteria, especially the policies of state and the network of supportive laws, are missing. In smaller collectives, which are subject to laws that are presumably just (rather than creators of laws that are

¹⁵⁵ See *id.* at 176 ("The crimes [committed by Eichmann, among others] expressed not only their personal guilt but also the collective guilt of those who deprived the offenders of their second-order critical sensibilities."). Fletcher inexplicably includes Timothy McVeigh among those whose sensibilities were thus constrained, an assertion which does not seem to comport with the logic of his argument.

¹⁵⁶ The notion of normative acceptability is both fluid and problematic since norms vary from nation to nation and do not stay static over time. However, in this context I am referring to what Hugo Grotius called the rules of Reason, which limit what governments can legitimately do and how they may act toward one another. Rules based on Reason are natural rather than positive and binding even in the absence of any God. See BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 71 ((1996)). Robert George offers the useful phrase "moral ecology" to describe the normative system of the community. See ROBERT GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 1 (1993) (suggesting that laws should "preserve the moral ecology in which people make their morally self-constituting choices").

¹⁵⁷ Fletcher, *ROMANTICS AT WAR*, *supra* note 5, at 175.

¹⁵⁸ *Id.* Fletcher is discussing rationales for mitigating the guilt for living in a nation that encourages the banality of evil. I adapt his argument for a related purpose—to show that the above-described constraints on second-order decision-making as well as the national approbation of illicit acts do not exist in a domestic criminal context.

¹⁵⁹ See generally, TOFFLER *supra* note 8; SQUIRES ET AL., *supra* note 7, at 115-118. Both books discuss the firm's metamorphosis from a paragon of virtue in the industry to a place where fraud and conflicts of interest were viewed as inevitable parts of doing business; see also *supra* note 7 and accompanying text. See also ARIANNA HUFFINGTON, *PIGS AT THE TROUGH: HOW CORPORATE GREED AND POLITICAL CORRUPTION ARE UNDERMINING AMERICA* 191-94 (2003) (describing how Andersen's firm culture led it on a "long road to ruin.").

unjust), second-order decision-making is not fatally compromised. Individuals must take responsibility for their actions and so too must the collective.¹⁶⁰ The reason for the collective responsibility in this instance lies with what John Searle calls “we-intention.”

Searle believes that collective intentions are a product of self-conscious interdependence. If there exists a reciprocal understanding within a group as to what the group will do—be it playing a game or passing a law—then any ensuing actions are collective in nature and result from a collective will.¹⁶¹ That collective will—or “we-intention”—is distinct from the aggregated will of the group members because of the interdependence of the decisional process.¹⁶²

The corporate “we-intention” differs markedly from its national counterpart. A firm’s culture might encourage illegal behavior but the laws of the nation assumedly do not.¹⁶³ There is ample opportunity for corporate agents to recognize that they are acting wrongfully. Consequently, their ability to knowingly intend their behavior is unaffected by their corporate affiliation. The distinction between a

¹⁶⁰ Even those who advocate most strongly for collective responsibility as a morally distinct phenomenon acknowledge that collective actions result from individual initiatives. The end result of those aggregated initiatives, however, is an entity consciousness that is distinct from the sum of its parts. See, e.g. LARRY MAY, *THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM AND CORPORATE RIGHTS* 3 (1987) (arguing that “social groups should be given a moral status different from that of the discrete individual persons who compose them” but acknowledging that while the “relationships [within a social group] make for different acts, intentions, and interests than would exist outside the group, nonetheless they are relationships of individual persons.”) (emphasis in original). See also FRIEDMAN, *supra* note 94, at 852 (“[A]s a matter of law, corporations have the capacity to express judgments and attitudes that may be entirely unrelated to the personal views of their owners, managers and employees Consequently, the corporation *qua* corporation can suffer moral condemnation for its wrongdoing through criminal conviction and punishment . . .”).

¹⁶¹ JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 23-26 (1995); see also Daniel R. Fishel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 323 (1996) (describing corporations as “webs of contractual relationships consisting of individuals who band together for their mutual economic benefit.”).

¹⁶² See SEARLE, *supra* note 159, at 24-25 (“The crucial element in collective intentionality is a sense of doing . . . something together, and the individual intentionality that each person has is derived from the collective intentionality that they share.”)(emphasis in original).

¹⁶³ For evidence of this, one need look no further than 18 U.S.C. § 1512 (2002), the statute under which Andersen was prosecuted.

national culture of evil and a corrupt corporate culture is examined more fully below.¹⁶⁴

4. *Romanticism, Individualism & Associated Will*

Collective national guilt is predicated on Associated Will, wherein a nation becomes entified through the collective will of its populace. The nation emerges as more than just the aggregated wills of the citizenry; it is an actor itself, born of a national *gestalt*.¹⁶⁵ Professor Fletcher contends that though the phenomenon of Associated Will predates Romanticism, it is nevertheless a quintessentially Romantic construct. He contrasts it with the prevailing vision of liberal individualism that predominates within our legal system.

Romantics view the individual as the fount of genius, the source of transformative emotions and the transcendence of the human condition. Each individual is unique and wondrous. Liberal individualists, by contrast, see equality as the governing principle of the human condition. "Liberals from Adam Smith to Immanuel Kant thought about individuals as created in much the same form. . . . [T]he crowning achievement of the eighteenth century Enlightenment was Thomas Jefferson's effort to bring all individuals under a single formula of moral equality."¹⁶⁶

According to Fletcher, Romantics tend toward expansionist thinking; liberal individualists are reductionist.¹⁶⁷ A liberal would view the Iraq War as a conflict between two nations with divergent interests while a Romantic might see it as a struggle for democracy in the Middle East. Similarly, a Romantic might view bread as the staff of life, rich with history and portent whereas a liberal would see a grain-based chemical phenomenon that is extraordinary for its marriage of ingredients and the chemical reaction that merged them.¹⁶⁸

Romantics view collective identity as the transcendence of self and the apotheosis of the human condition.¹⁶⁹ They embrace movements as

¹⁶⁴ See *infra* note 172 and accompanying text.

¹⁶⁵ See Fletcher, *Storrs Lectures*, *supra* note 5.

¹⁶⁶ FLETCHER, ROMANTICS AT WAR, *supra* note 5, at 35-36; Fletcher, *Storrs Lectures*, *supra* note 5 at 1507-08. Thomas Jefferson's pronouncement in the Declaration of Independence that "all men are created equal" exemplifies the liberal vision moral equality.

¹⁶⁷ Fletcher, *Storrs Lectures*, *supra* note 5, at 1508-09.

¹⁶⁸ See *id.* at 1508.

¹⁶⁹ FLETCHER, ROMANTICS AT WAR, *supra* note 5, at 36 ("Romantics are drawn to movements, to crusades, and finally to armed conflicts.").

the expression of mass identity and are drawn to armed conflict as the means through which to ennoble humanity.¹⁷⁰ Lord Byron's passionate adoption of the struggle for Greek independence, a cause that eventually cost him his life, epitomizes this Romantic worldview.

Associated Will is the expression of this unified collective identity. It gains meaning through a shared culture and sense of purpose and has substantial functionality as a means of expressing entity responsibility in the international context. If national culture fosters and permits behavior that violates international norms, then the nation-as-collective may also be judged.¹⁷¹

Necessarily, entity prosecutions of this type are external – one nation is called to account by other nations in an international forum. Nations can neither prosecute themselves nor indict their citizens for obeying the country's own laws. Only in extra-ordinary legal times, as with the Eichmann case, could a citizen be called to account by an international court for crimes allegedly committed in his home country.¹⁷²

C. NATIONAL VS. CORPORATE COLLECTIVE GUILT

It makes sense to treat nations as actors on the international stage and to treat citizens acting according to the national will as representatives of that will. It likewise seems sensible at the domestic level to treat partnerships and corporations as entities that exist separate and apart from the aggregated wills of their agents.¹⁷³ This is the essence of corporate identity.

Corporate identities do not change with a shifting membership. Their behavior must be viewed in the context of what French calls the "Corporation's Internal Decision Structure," or "CID," which subordinates individual intentions within the corporate decisional

¹⁷⁰ *Id.* at 36.

¹⁷¹ See ARENDT, *supra* note 141.

¹⁷² Eichmann's case was made all the more extraordinary for the circumstances of his arrest and trial. He was kidnapped by the Israeli Secret Service and handed over to the War Crimes Tribunal. The fact that a foreign national could be treated in this manner is itself testimony to the fact that prosecution takes precedence over typical civil liberties when dealing with war crimes. See *id.* at 240. See also United States Holocaust Museum Archive, <http://www.ushmm.org> (last visited Sep. 19, 2005).

¹⁷³ See *supra* note 81 and accompanying text.

matrix.¹⁷⁴ Nonetheless, the differences between nations and corporations and their respective milieus are stark and have important legal consequences.

Nations enact laws that bind the populace. Assuming an autocratic government, citizens have little opportunity to amend or object to those laws. They must obey or face punishment. If adherence to the nation's laws violates international norms, then the juridical response to that violation must be international as well.

Crimes committed under such a regime are endemic to the nation and exemplify the banality of evil. They arise from a culture of evil buttressed by a supportive legal system. Individual responsibility is mitigated by the nation's collective accountability for forcing its citizens to choose between obeying unjust laws and facing potentially catastrophic penalties.¹⁷⁵ Any prosecution must acknowledge the nation's complicity in the wrongful conduct. To do otherwise would ignore the fact that the defendant could not fully exercise her second order decision-making faculties and that she faced punishment for disobedience to the nation's laws.

Even if one accepts that in a culture of evil the nation bears some responsibility for its citizens' actions, citizens nevertheless retain a level of accountability.¹⁷⁶ Free will survives even under adverse conditions.¹⁷⁷ One can, after all, choose not to obey—accepting the consequences as preferable to obeying unjust laws. International law recognizes this premise. For example, the Nuremburg Court rejected Eichmann's

¹⁷⁴ See FRENCH, *supra* note 56, at 39-41. French argues that the CID demonstrates that corporations must be viewed as intentional actors and that actions done in conformity with corporate policy fulfill the corporation's desires. See *id.* at 44.

¹⁷⁵ See Fletcher, *Storrs Lectures*, *supra* note 5, at 1541-44.

¹⁷⁶ See Frankfurt, *supra* note 14, at 167-76. ("[B]eing coerced does not exclude being morally responsible. . . . [C]oercion affects the judgment of a person's moral responsibility only when the person acts as he does because he is coerced to do so — i.e., when the fact that he is coerced is what accounts for his action." Frankfurt's thesis is that there are many circumstances (and Eichmann's may be among them) where a person is required to do something he would have done anyway. In those circumstances the coercion plays little or no part in the decision to act, regardless of the lack of alternatives. At such times, the actor is no less morally responsible than if the coercive circumstances did not exist. Frankfurt does not reject the possibility that coercion *can* mitigate moral responsibility—just that it need not always do so.

¹⁷⁷ See *id.*

defense and convicted him.¹⁷⁸ Subsequent international treaties hold individuals accountable as well.¹⁷⁹

The only instance where a nation potentially bears full responsibility for individual actions involves the behavior of soldiers. Soldiers who disobey orders face court martial, imprisonment, and/or death. As Foucault observes, soldiers are trained to become “political puppets, small scale models of power.”¹⁸⁰ The methods of training, discipline and coercion make “possible the meticulous control of the operations of the body, which assured the constant subjection of its forces and imposed upon them a relation of docility-utility”¹⁸¹ On the battlefield, soldiers who refuse orders face penalties up to and including summary execution.¹⁸² Unlike corporate actors or private citizens living under an illegal regime, soldiers’ obedience is involuntary and any resulting actions are attributable to the nation that conscripted them.¹⁸³

Clearly, Andersen employees did not face such draconian consequences for failing to adhere to corporate standards. At worst, they faced dismissal. However, the culture at Andersen did play a large role in its downfall. The firm had a distinct identity that transcended the

¹⁷⁸ See ARENDT, *supra* note 141, at 245, 257.

¹⁷⁹ The international consensus on this issue has shifted over the last century. The 1921 Treaty of Leipzig allowed the existence of superior orders to negate the guilt of the subordinate who followed them. Thus, for example, the crew of U-Boat that sank a hospital ship during WWI was acquitted of wrongdoing because they were following their captain’s orders. The tribunals of the 1940s rejected this defense and convicted the crew of a WWII era U-Boat that machine-gunned the survivors of a steamer it had torpedoed to prevent them from revealing the whereabouts of the submarine. The 1998 Rome Treaty governing the new International Criminal Court, which rejects the notion that orders from a superior form a defense to guilt but allows that ignorance of the illegality of the conduct can mitigate punishment. See Sheppard, *supra* note 138, at 763-64 and n.53-54; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, art. 33, U.N. Doc. A/CONF. 183/9 (1998), available at <http://www.un.org/law/icc/statute/romeofra.htm> (last visited Sept. 11, 2005) (stating same).

¹⁸⁰ MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 136 (Alan Sheridan trans., Vintage Books 1979) (1975).

¹⁸¹ *Id.* at 137.

¹⁸² See PAUL F. BOLLER, JR., PRESIDENTIAL CAMPAIGNS 45 (1984). (detailing the execution of six militiamen for desertion, with General Andrew Jackson’s approval, during the Creek War in 1813).

¹⁸³ According to Rousseau, “[w]ar is not . . . a relationship between one man and another, but a relationship between one state and another.” ROUSSEAU, *supra* note 147, at 21. Soldiers at war cease to function as citizens of the society and become its defenders. They act not as individuals but as servants of the state. *Id.*

aggregate of its individual employees and created a milieu with its own norms and guidelines.

Nevertheless, the phenomenon of corporate identity remains distinct from Associated Will. A corporation's rules of employment must be subordinate to and in compliance with the laws of the nation. Corporate individuality therefore exists only within normative parameters established by the incorporating nation. Nations, as the societal law-making body, do not have any such constraints. Consequently, national identity/Associated Will is a discreet phenomenon from that of a corporation. Understanding how the two concepts differ is crucial to comprehending the nature of the government's error in the Andersen trial, as well as the dangers that the error poses going forward.

D. CORPORATE IDENTITY AS DISTINCT FROM ASSOCIATED WILL

Andersen had a distinct corporate identity. Its identity grew out of its founder's personality and evolved into something he scarcely would have recognized. The firm's culture exercised powerful influence over its employees (hence the term, "Androids") and created an atmosphere that tolerated and even seemed to encourage illegal behavior.

In this sense, the culture at Andersen resembled Associated Will.¹⁸⁴ Its identity, though distinct from the individuals that made up the collective, was inseparable from their aggregated will. Nevertheless, there are important reasons why the Andersen culture differs from Associated Will. Those differences become especially significant when assessing entity guilt in domestic criminal prosecutions.

1. Corporations Do Not Make Law

Corporations are products of the legal system of the nation where they reside.¹⁸⁵ They exist because of the society's laws and are likewise bound by them.¹⁸⁶ Unlike nations, corporations cannot legislate and have no legal authority over their agents. When an employee pledges allegiance to a corporate employer, it is because the two entities (the individual and the corporation) share a common goal. The corporation's success theoretically redounds to the employee's benefit. If an employee did not share this view she presumably would seek other

¹⁸⁴ See *supra* note 169 and accompanying text.

¹⁸⁵ BLACK'S LAW DICTIONARY 365 (8th ed. 2004).

¹⁸⁶ *Id.* at 341 (citing *Trustees of Dartmouth College v. Woodward* 17 U.S. 518, 636 (1819) (Marshall, J.)).

employment. Enlisting in the corporation and subordinating individual goals for the good of the corporation is voluntary. Merging individual will with that of the corporate entity exemplifies self-conscious interdependence rather than a constraint on free will.

Consequently, when an agent acts anti-socially but in compliance with corporate desires, both agent and corporation are responsible. The agent's culpability is self-evident; she acted with intention. Even as she subsumed her individual goals to those of the collective, she retained free will and agency and chose to act as she did.

Corporate responsibility stems from the fact that the agent's actions aimed to fulfill corporate desires.¹⁸⁷ When an act undertaken by an agent or agents of the corporation instantiate or implement a corporate policy, then it follows that the act was done for corporate reasons. One could then extrapolate that the act fulfilled a corporate desire.¹⁸⁸ It follows that the corporation intended the act.¹⁸⁹

However, the best interests of the corporation remain discreet from the best interests of the agent who acted on the corporation's behalf. That their respective interests align (in the sense that if the corporation does well, the employee also benefits) does not make them identical. Instead, the employee has subordinated her personal desires to the collective desire of the corporation. Because corporate desires provided the impetus for her action, the corporation shares responsibility for its consequences.

2. Corporations Are Subject to the Law

Corporate desire can sometimes appear more culpable than the action itself. In 1980, Ford Motor Company was tried in Indiana for reckless homicide stemming from a fatal car crash.¹⁹⁰ Prosecutors claimed that the automaker had failed to warn consumers that the placement of the Ford Pinto's fuel tank behind the rear axle posed a severe fire hazard in the event of a rear end collision. The case foundered when a document from the civil trial was ruled inadmissible. The document allegedly showed that the company calculated the costs of retrofitting the vehicle (\$137 million) outweighed the benefits in human

¹⁸⁷ I use the term "corporate desire" in the same manner that French does – to denote a product of the CID. FRENCH, *supra* note 56, at 44.

¹⁸⁸ *See id.*

¹⁸⁹ *See id.* at 52.

¹⁹⁰ *State v. Ford Motor Co.*, 47 U.S.L.W. 2514 (Ind. Super. 1979).

lives saved (calculated at \$49.5 million with an average life valued at \$200,000).¹⁹¹

Ultimately, Ford was acquitted largely because the prosecution could not introduce a document crucial to demonstrating the company's criminal intent. Similarly, Andersen's conviction was overturned because the jury could not properly assess the firm's criminal intent.

In the end, neither Andersen nor Ford was found criminally liable, with each case turning on the prosecution's inability to demonstrate intent. That neither prosecution succeeded is indicative more of how difficult it is to prove collective intent than that such intent does not exist. It does not necessarily point to any deficiency with the methodology for proving corporate guilt.

While corporations can be held accountable for their agents' actions, entity responsibility does not diminish the agency of individual agents. Guilt at the corporate level is not a zero-sum equation. This contrasts with the national phenomenon wherein anti-social behavior is legal and/or required, creating a culture of evil wherein people lack sufficient data to inform their behavior. Under such circumstances, individual responsibility is mitigated commensurate with the responsibility of the nation.¹⁹²

E. ENTITY GUILT – SECOND VS. FIRST ORDER DECISION MAKING

We can differentiate between corporate collective responsibility and Associated Will by applying Frankfurt's first and second order decision-making model.¹⁹³ At the national level, a culture of evil impedes (but does not abrogate) citizens' ability to engage in second-order decision-making which involves evaluating temptations that arise from first-order

¹⁹¹ The prosecution was unsuccessful, likely due in large part to the State's inability to introduce the offending document. Ford retains the dubious distinction of being the first and only corporation in American history to face criminal prosecution for homicide. Revisiting the case a decade later, Gary Schwartz argues that the document is not nearly as damning as is widely believed. In his view, a closer analysis of both the documentary evidence and the context in which it was prepared casts at least some doubt on the idea that the company recklessly disregarded the potential human costs that could result from the car's design. See Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1016-23 (1991).

¹⁹² In this way, according to Sheppard, "the individual and the nation both remain morally responsible, and the values of the Enlightenment are not altogether extinguished by application of the Romantic ethic." Sheppard, *supra* note 138 at 764.

¹⁹³ See Frankfurt, *supra* note 149 and accompanying text.

desires. Without the normative compass that a just legal system provides, citizens lack an important means through which to assess temptation and determine a proper course of action. Even if they understand that complying with the law would be normatively wrong, they nevertheless face criminal penalties for failing to do so.

By contrast, corporate corruption leads to increased *first-order* temptations. When a corporation pressures an employee to behave illicitly, the increased first-order temptation complicates the second-order evaluation process. However, the employee's world is not confined to her corporate affiliation. She remains bound by society's laws—the same laws binding the corporation. When considering whether to act on her first-order desires, she can and should evaluate their conformity with prevailing law. If she does, she will realize that the contemplated behavior is illegal and that she should refrain.

The crucial difference between corporate culture and Associated Will, then, is that a corporation cannot create a culture of evil. Corporations are subject to the laws of the incorporating nation. So long as the nation's laws do not condone illegal behavior, there exists no systemic illegality. Therefore, though corporate employees may face increased first-order temptations, they have no excuse for not engaging in the second-order evaluation that ought to inhibit acting on first order desires. If they act anyway, they must bear responsibility for doing so. The corporation must likewise accept responsibility for its desires having created the first-order temptation.

F. ANDERSEN'S ENTITY GUILT & ITS RIGHT TO DUE PROCESS

Andersen was a corporate entity functioning within a society, rather than a society functioning within an international community. Andersen employees therefore retained their second order faculties. Though a discrete entity under the law, the firm did not and could not function separately from its agents.¹⁹⁴

When facing criminal trial, Andersen was entitled to the same legal protections enjoyed by other legal "persons," including due process and jury unanimity. The issue posed in Note # 9 dealt with the nature of corporate criminality and entity due process. Faced with jury skepticism as to the responsible Andersen agent, the court retooled corporate

¹⁹⁴ Brief of Anderson, *supra* note 96, at 1-2.

criminal law to enable conviction without consensus.¹⁹⁵ As a result of the judge's ruling, the jury was permitted to consider convicting without having agreed on the crime, much less the responsible agent. Even if each member of the jury had believed that a different person did a different thing, they still could have convicted Andersen of obstruction of justice.

The judge apparently accepted the prosecution's argument that Andersen's entity responsibility should be expanded and its agents' agency contracted. The ruling effectively treated Andersen as a rogue nation facing an international tribunal rather than as a corporate citizen in a United States court. As such, it violated Andersen's due process rights and set a disturbing precedent for future trials.

CONCLUSION & POSTSCRIPT

1) In the Andersen trial, the collective guilt rationale advanced by the prosecution and allowed by the judge in response to Jury Note # 9 was constitutionally and logically wrong. Jury unanimity is required for conviction. This means that the jury must agree on the intent and the act. Note # 9 showed that the jury had not agreed on either one.

2) The trial judge made a serious error when she permitted the jury to deliberate with the understanding that it did not need to reach consensus regarding the nature of the crime. Attributing responsibility for an agent's actions to a domestic corporate entity is unworkable, unnecessary, and violates due process.

3) Andersen's culture was dysfunctional and led to myriad instances of its ill-serving the public. Andersen the entity must bear some responsibility for its wrongdoing. Nonetheless, the wrongful acts committed by Andersen were carried out by agents acting consciously and manifesting their own intent. The firm's complicity neither negates nor replaces agent responsibility.

4) The prosecution's response to the jury's query inappropriately injected a component of international entity prosecutions into a domestic criminal trial. Only nations can create societies and systems of laws that sanction criminal behavior. Under such systems, free will is critically compromised.

¹⁹⁵ Landsman, *supra* note 84 and accompanying text.

A. SOME THOUGHTS ON WHY IT HAPPENED

It is worth considering why, when faced with such formidable legal barriers, Andersen prosecutors employed the strategy they did as well as why the judge embraced it. They effectively propounded a theory of guilt based on Associated Will. Does this mean that the prosecutors at the Department of Justice and a sitting federal judge have turned into Romantics? In a sense, perhaps they have — not personally, but rather as representatives of a government that favors large-scale movements, appeals to patriotism, and crusades against evil.¹⁹⁶

The court's ruling epitomizes a willingness to sacrifice basic liberties for the perceived greater good of public safety. This mindset normally occurs during national emergencies, especially during wartime. However, the nation is not at war in the traditional sense. Instead, it has declared war on an array of incorporeal forms and notions, including terrorism, drugs, crime, illiteracy, and poverty.¹⁹⁷

The widespread use of the rhetoric of war—a tendency that has intensified in the wake of the September 11, 2001 attacks—creates an atmosphere wherein procedural safeguards become de-emphasized in the name of public safety. This policy is self-undermining and dangerous, particularly since the nation is no more at war with crime than with any other abstraction.¹⁹⁸

¹⁹⁶ See *supra* note 5 and accompanying text.

¹⁹⁷ That is not to say that the United States has been reluctant to *wage* war on defined entities such as nations. In the last quarter-century alone, the US has been involved in military actions in Grenada, Panama, Somalia, Bosnia, Afghanistan, and Iraq. Nonetheless, the “declaration of war” as a method of formalizing hostilities between nations appears to have lost currency in recent years. As discussed *infra*, the declaration of war once served as a formal signal that transformed the status of a country, both within and without, from the rules of peace to the rules of war. See Fletcher, ROMANTICS AT WAR *supra* note 5, at 46-48. Though global conflicts are no less frequent today, one sees fewer and fewer declarations of war between nations. For example, the United States has not formally declared war on any nation since 1941. Ironically though, on the domestic front, the US declares war so often that the term has lost much of its meaning. Between the wars on poverty, drugs, illiteracy, crime and terrorism, among others, the nation is either in a state of constant belligerence or delusion.

¹⁹⁸ See Leonard Cassuto, *The Power of Words*, The Chron. Rev., Sept. 28, 2001, at B13.

The American obsession with war¹⁹⁹ has assumed enormous political and legal importance in the wake of the September 11, 2001 attacks. Nowhere is this more evident than in the conjoined “wars” on crime and terror.²⁰⁰ The nation has entified and made enemies of sociological phenomena.²⁰¹

This rhetoric of war has wrought considerable changes on the American legal landscape, including increased obstacles to death penalty appeals²⁰² “three strikes and you’re out” laws²⁰³ and the use of the military to interdict and participate in the ancillary “War on Drugs.”²⁰⁴

¹⁹⁹ See generally, ANDREW J. BACEVICH, *THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR* (2005). As Tony Judt observes in his review essay of Bacevich’s book, the United States spends more on defense than the entire rest of the world combined, it is the only country where soldiers are omnipresent in political photo ops, movies and television, and civilians queue up to buy expensive faux military vehicles. Tony Judt, *The New World Order*, 52 N.Y. REV. OF BOOKS 12, 16 (2005) (reviewing ANDREW J. BACEVICH, *THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR* (2005)).

²⁰⁰ There is considerable irony in the fact that for the past sixty years—years during which the nation has engaged in at least seven military conflicts on foreign soil—the only wars the United States has actually declared have been on domestic social ills.

²⁰¹ The propensity to declare war against ideas and social ills is over half a century old and arguably started with the “Cold War” against the spread of communism. In his farewell address to the nation in 1953, President Truman, speaking of the Cold War, said “I have had hardly a day in office that has not been dominated by this all-embracing struggle—this conflict between those who love freedom and those who would lead the world back into slavery and darkness.” The President’s Farewell Address to the American People, 1952-1953, in Bruce Ackerman, *Response: This is Not a War*, 113 YALE L.J. 1871, 1872 at n.2 (2004). Ackerman also cites presidential speeches from the 1960s (declaring the “unconditional war on poverty”) and the 1980s (declaring war on drugs and organized crime, respectively). *Id.*

None of the “enemies” in these “wars” show any sign of conceding. David Frum wryly observed that the late Daniel Patrick Moynihan “was an officer in the War on Poverty, the War on Drugs, the War on Crime [and] the War on Cancer . . . a series of debacles beside which the military history of Italy begins to look impressive.” David Frum, *The Tory From New York*, AM. SPECTATOR, Nov. 1996, at 74.

²⁰² Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

²⁰³ See, e.g., 18 U.S.C. § 355(9)(c) (1995); Ark. Code Ann. § 5-4-501(d)(1) (2005); Cal. Penal Code § 999e (Deering 2005).

²⁰⁴ Following Randolph Bourne, who observed that war is the health of the state (he was speaking of World War I), David Kopel and Paul M. Blackman observe that “[t]he drug war has been the health of the military state, and may in the long run be the death of the Constitution.” David Kopel & Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of American Law Enforcement*, 30 AKRON L. REV. 619, 656 (1997).

Following September 11, a new front was opened and the war(s) intensified.²⁰⁵

War now infuses all aspects of American society, both international and domestic. Internationally, the “Global War on Terror” informs every aspect of American foreign policy—even though it is a war against no known enemy and has no foreseeable end. It follows that if the United States continues on its present course, it will remain on a war footing with most of the world indefinitely.

Not only do these “concept wars” involve no defined enemy, they also do not involve the laws of war. The body of rules that govern during wartime is known as “*jus in bello*” and differs markedly from the laws that govern a democracy during peacetime.²⁰⁶ The state of war involves its own normative structure and rules.²⁰⁷ As Fletcher observes, the peacetime legal system where citizens enjoy many rights against the state and few reciprocal duties is replaced with a war regime where citizens, like soldiers, have many duties and few rights.²⁰⁸

The United States currently seeks to have it both ways. It has assumed a permanent war footing but does not treat the purported enemy as a wartime foe. For example, captured prisoners in Guantanamo Bay and elsewhere are “unlawful combatants” lacking the rights afforded

²⁰⁵ The rhetoric of a “War on Terror” is not new. It dates at least as far back as 1984, when President Reagan described the United States’ counter-terrorism policy as a “war against terrorism.” See Sheppard, *supra* note 138 at 753 n.10. However, the government response to the September 11 attacks transformed the endeavor into a full scale military operation.

²⁰⁶ See MICHAEL WALZER, *JUST AND UNJUST WARS*, 21 (3rd ed. Basic Books 2000) (1977); FLETCHER, *ROMANTICS AT WAR*, *supra* note 5 at 47.

²⁰⁷ For example, the Enemy Alien Act, 50 U.S.C §§ 21-24 (2002) gives the government special powers over aliens during wartime. In *Ludecke v. Watkins*, 335 U.S. 160 (1948), the Court upheld the Act and in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court held that enemy aliens captured on the field of battle had no right to challenge their subjection to military trial. However, as David Cole notes, “the ‘enemy alien’ rule applies only in a time of *declared war* and only to *citizens of the country with which we are at war*.” DAVID COLE, *ENEMY ALIENS* 12 (2003) (emphasis in original). Recent jurisprudence has made clear that the scope of presidential authority has been greatly expanded through Congress’s enactment of the Authorization for Use of Military Force Joint Resolution (AUMF), Pub. L. No. 107-40 2(a), 115 Stat. 224 (2001). See also *infra* note 208.

²⁰⁸ FLETCHER, *ROMANTICS AT WAR*, *supra* note 5 at 47.

under international law.²⁰⁹ Yet, they were captured as part of a military operation and detained because they pose a threat to national security.

Domestically, the impact has been equally drastic, including indefinite detention of American citizens, laws permitting increased domestic surveillance provisions,²⁰⁸ and other initiatives designed to safeguard public safety at the expense of personal freedoms. The upshot is that though the United States is currently engaged in military action in two foreign countries, it does not adhere to the accepted *jus in bello*. Yet, it shows no similar compunction about invoking the exigencies of wartime to justify suspending or lessening domestic civil liberties.

Amidst this hodgepodge of war and peace, it should not surprise that a tactic of war crime prosecutions has found its way into a domestic criminal trial. In a sense, the illogic of the Andersen prosecution amounts to a tacit indictment of the “wars” on crime and terror. The American legal system is a delicate equipoise of rights and obligations. Importing rhetoric that deprives rights threatens the system’s core function.

War is quintessentially a political act whose goal is to effectuate systemic political change through force of arms. It presupposes a foe dedicated to opposing that change. Crime is both a creation of law and combated by the forces of law. Those who would make war on crime do not wish fundamental change but rather to strengthen the *status quo*. Criminals similarly seek only to improve their situation within the social system; they do not seek wholesale systemic change. A war on crime is therefore incoherent by definition.

If recourse to the laws of society is possible, then the conflict involves law enforcement rather than war.²⁰⁹ If there is no war, then there is no entity/Associated Will whose allegiance to a foreign set of

²⁰⁹ See *Padilla v. Hanft*, 423 F.3d. 386, 390-91 (4th Cir. 2005) (holding the President possesses authority pursuant to the Authorization for Use of Military Force to detain an enemy combatant). See also *Hamdi v. Rumsfeld*, 542 U.S. 507 519 (2004) (“There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”).

²⁰⁸ See, e.g., Pub. L. No 107-56, §, 215 (2001) (enabling the FBI to demand a patron’s borrowing records at the library under the Patriot Act).

²⁰⁹ See Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM.J. INT’L L. 444, 491 (1990) (“Real war permits—sometimes requires—relaxation of restraints on governmental action; law enforcement—investigation, arrest, trial, sentence, punishment—is law, not war, and therefore a reflection of our values—our peacetime, abiding values.”).

laws and norms makes it the enemy. The rules of engagement that govern during an armed conflict are therefore neither necessary nor relevant.²¹⁰

A war on “terror” has marginally more coherence because terrorism constitutes an attack on politics itself. It aims at effectuating systemic change through random violence. However, though society must defend itself against terrorists, it remains impossible to make war on terror, an amorphous concept that spans national and political allegiances. Terrorism, like crime, lacks a unifying consciousness against which to focus hostilities. Without agents who self-identify, declare allegiance to a means or ideal, and attempt to carry out actions aimed at accomplishing those ideals, terrorism remains an abstraction.

Terrorists, once identified, constitute an enemy, but this only begins a complex analysis. What if the terrorist acts alone, or with a few accomplices? Is the nation at war with a couple of people? How many terrorists must band together before they become a collective entity against whom a nation can wage war? The answers to such questions are far from obvious.²¹¹

Agents carrying out terrorist actions against the state are belligerents of a type. However, they occupy a limbic space between domestic and war criminals. The mechanics of their prosecution, including a determination of the types of rights to which they are entitled, presents

²¹⁰ General Richard B. Myers, Chairman of the Joint Chiefs of Staff recently complained that the phrase “war on terror” was counterproductive because it presupposed a military solution. Shortly thereafter, on Aug. 3, 2005, President Bush emphatically declared that it was a “war,” using the word thirteen times in a forty-seven minute speech that was primarily on domestic initiatives. Richard W. Stevenson, *President Makes It Clear: Phrase is ‘War on Terror,’* N. Y. TIMES, Aug. 4, 2005, at A12; Dan Froomkin, *War: The Metaphor*, WASH. POST, Aug. 4, 2005, <http://www.washingtonpost.com/wp-dyn/content/blog/2005/08/04/BL2005080400971.html> (last visited Aug. 8, 2005) (chronicling the Administration’s struggle with the phrase “war on terror” coupled with its unwillingness to bear the political cost of abandoning the rhetoric).

²¹¹ One commentator suggests viewing the war on terror as a “condition” rather than a war. A condition refers to a more or less permanent state of affairs during which citizens should make every effort to lead a normal life. This perspective fits with the Bush Administration’s recommendations that people get on with their lives and refuse to live in a constant state of fear. If the struggle to suppress terrorism is, in fact, a condition to which we should become accustomed, then “war-as-condition is a normal state of affairs, not an emergency in which extraordinary measures might be appropriate. And the normal constitutional rules ought to apply in normal conditions.” Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties In Wartime*, 2003 WIS. L. REV. 273, 280 (2003).

an ongoing challenge. But, similar to the Andersen case, it is impossible to prosecute terrorism, much less wage war upon it, without identifying the specific individuals whose will and actions give it shape.²¹²

The conclusions of this article are twofold. First, the Andersen prosecution and the trial judge erred when they respectively the idea that the jury could treat the firm as an entity capable of its own intent, separate and apart from the intentions and actions of its agents. One can prosecute nations or individuals for national crimes in times where typical civil liberties and constitutional protections are suspended. That was not, nor should it have been, the case here.

Second, the Andersen trial occurred during a time of unprecedented erosion of civil liberties and the placement of the country on a permanent war footing. The events of the trial are serious in their own right as an issue of due process. But they also form part of a larger, far more serious issue.

James Madison wrote in 1795 that “no nation can preserve its freedom in the midst of continual warfare.”²¹³ Madison’s admonition has little traction today. In 2004, President Bush declared that: “[t]his country must go on the offensive and stay on the offensive.”²¹⁴ The impacts of this ongoing state of war now permeate the legal system.²¹⁵

²¹² Bruce Ackerman offers the sobering observation that making war on amorphous ideas will inevitably lead to increased wars on sovereign states: “[O]nce the public is convinced that a larger ‘war on terrorism’ is going on, these separate wars can be repackaged as mere ‘battles.’” Ackerman, *supra* note 199, at 1876.

²¹³ JAMES MADISON, *POLITICAL OBSERVATIONS, LETTERS AND OTHER WRITINGS OF JAMES MADISON*, VOL. IV 491 (1795).

²¹⁴ Judt, *supra* note 197. The idea of a constant offensive was not new to the Bush Administration. As far back as 1987, the Congressional Office of Technology Assessment had this to say about the “war on Drugs”: “If the war on drugs is to be successful, the character of that war will need to be broadly understood. Perhaps the most important thing to recognize is that there will be no clean, clear victory. The enemy will not surrender, fold his tent and return home.” OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESSIONAL BOARD, NTIS ORDER #PB87-184172, *THE BORDER WAR ON DRUGS* 17 (March, 1987), http://govinfo.library.unt.edu/ota/Ota_3/DATA/1987/8702.PDF.

²¹⁵ In his Farewell Address, George Washington reminded the nation that “overgrown military establishments are . . . particularly hostile to republican liberty.” See Greg Guma, *Addicted to War: An Insider Examines the Seductive Myths of Militarism*, COMMON DREAMS NEWS CENTER, June 24, 2005, <http://www.commondreams.org/views05/0624-26.htm> (last visited Aug. 12, 2005).

The resulting danger to liberty is real and worsening. The Allies in World War I aspired to “make the world safe for democracy.” The current and ongoing state of war is having the opposite effect; it is making democracy unsafe.