

# The Significant Meaninglessness of *Arthur Andersen LLP v. United States*

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Although I hate to begin a serious article on an important Supreme Court case this way, the Court's recent decision in *Arthur Andersen LLP v. United States*<sup>1</sup> reminds me of nothing so much as the old Woody Allen line that "[s]ex without love is an empty experience . . . but as empty experiences go, it's one of the best."<sup>2</sup> This is because for all practical purposes, *Andersen* is a meaningless decision, but as meaningless decisions go, it's one of the most significant. The Supreme Court's reversal of Andersen's conviction cannot revive the now-defunct firm, and the obstruction of justice statute that the Court is interpreting<sup>3</sup> has, in all ways relevant to Andersen's conviction, been superseded by the Sarbanes-Oxley Act of 2002.<sup>4</sup> And yet, by interpreting the language of the statute to require consciousness of wrongdoing, the Court may be indicating an important change of direction in the way it deals with the federal law of white collar crime. If so, *Andersen* may turn out to be a very important meaningless decision.

## I. The Decision

In 2001, Arthur Andersen provided accounting, auditing, and consulting services to Enron Corporation, Andersen's largest single

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<sup>1</sup>125 S. Ct. 2129 (2005).

<sup>2</sup>Love and Death (Metro-Goldwyn-Mayer 1975).

<sup>3</sup>18 U.S.C. § 1512(b).

<sup>4</sup>See 18 U.S.C. § 1519 (prohibiting the destruction, alteration, or falsification of records).

account. At the end of August, the Securities and Exchange Commission (SEC) opened an informal investigation of Enron in response to newspaper reports of financial improprieties at the company. On October 16, Enron announced third quarter results that included a \$1.01 billion charge to its earnings. On October 17, the SEC notified Enron that it had opened an investigation and requested various documents. On October 19, Enron forwarded that notification to Andersen. On October 30, the SEC opened a formal investigation of Enron and sent Enron a letter requesting accounting documents. On November 8, the SEC served both Enron and Andersen with subpoenas for documents. Therefore, between the end of August and November 8, Andersen had reason to know that the SEC may have wanted to examine documents in its possession relating to its audits of Enron.<sup>5</sup>

On October 10, Michael Odom, an Andersen partner, encouraged ten members of Andersen's Enron "engagement team" to comply with the firm's document retention policy. This policy instructed employees to retain "only that information which is relevant to supporting our work,"<sup>6</sup> but also stated that "in cases of threatened litigation . . . no related information will be destroyed."<sup>7</sup> On October 12, Nancy Temple, one of Andersen's in-house counsel, sent an e-mail to Odom recommending that he remind the Enron engagement team of Andersen's document retention policy. On October 16, Temple sent David Duncan, the head of the Enron engagement team, an e-mail responding to his draft memorandum concerning an Enron press release that characterized certain charges as non-recurring. In the e-mail, Temple recommended that he delete "language that might suggest that we have concluded the release is misleading."<sup>8</sup> On October 19, Temple sent an e-mail to a member of the Enron engagement team with the document retention policy attached, and on October 20, she instructed the members of Andersen's crisis-response team to follow the policy during a conference call. Following this call, Duncan instructed all members of the engagement

<sup>5</sup>For a summary of the chronology of the SEC's investigation of Arthur Andersen, see 125 S. Ct. at 2131–33.

<sup>6</sup>*Id.* at 2132.

<sup>7</sup>*Id.* at 2133 n.4.

<sup>8</sup>*Id.* at 2133 n.5.

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team to comply with the policy. From then until November 9, the engagement team destroyed large numbers of both paper and electronic documents.<sup>9</sup>

Because, at the time, altering or destroying documents under such circumstances did not constitute obstruction of justice,<sup>10</sup> Andersen was not and could not be indicted for its employees' acts of document destruction and alteration. Instead, Andersen was indicted for and convicted of witness tampering in violation of 18 U.S.C. § 1512(b)(2), which prohibits "knowingly . . . corruptly persuad[ing] another person . . . with intent to cause or induce any person to (A) withhold testimony, or a record, document, or other object from an official proceeding; [or] (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding."<sup>11</sup> Thus, Andersen's offense consisted not in the alteration or destruction of documents, but in the efforts of its agents to persuade other employees to alter and destroy documents.

In defining what was required for one person to "corruptly persuade" another, the trial court instructed the jury that "[t]he word 'corruptly' means having an improper purpose. An improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding."<sup>12</sup> The court continued,

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

<sup>9</sup>For a full summary of Arthur Andersen's internal response to the SEC investigation, see *United States v. Arthur Andersen LLP*, 374 F.3d 281, 284–87 (5th Cir. 2004), and *Arthur Andersen*, 125 S. Ct. at 2131–33.

<sup>10</sup>See *United States v. Aguilar*, 515 U.S. 593, 599 (1995).

<sup>11</sup>Interestingly, despite the government's (and media's) focus on Andersen's document retention policy and the large amount of documents that were shredded pursuant thereto, Andersen's conviction appears to have been based solely upon Nancy Temple's recommendation to David Duncan to alter his draft memorandum. See Andersen's Motion for Judgment of Acquittal or a New Trial, *United States v. Arthur Andersen LLP*, Cr. No. H-02-121 (S.D. Tex. 2002), reprinted in Julie R. O'Sullivan, *Federal White Collar Crime* 449–52 (2d ed. 2003).

<sup>12</sup>Court's Instructions to the Jury, *United States v. Arthur Andersen LLP*, Cr. No. H-02-121 (S.D. Tex. 2002), reprinted in O'Sullivan, *supra* note 11, at 447.

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.<sup>13</sup>

Further, in defining what was required for one to act with the intent to impede an official proceeding, the court stated,

The government need only prove that Andersen acted corruptly and with the intent to withhold an object or impair an object's availability for use in an official proceeding, that is, a regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served.<sup>14</sup>

This instruction did not require the jury to find that the person who altered or destroyed documents had any particular proceeding in mind when he or she did so.

The Supreme Court granted certiorari because of a circuit split over the correct interpretation of what it means to knowingly corruptly persuade someone. The Second and Eleventh Circuits had adopted the interpretation given by the trial court that identified "corrupt" persuasion with persuasion motivated by an improper purpose.<sup>15</sup> The Third Circuit, in contrast, had explicitly rejected this interpretation,<sup>16</sup> holding that "more culpability is required for a statutory violation than that involved in the act of attempting to discourage disclosure in order to hinder an investigation."<sup>17</sup> Hence, the mens rea requirement<sup>18</sup> for § 1512(b) was in serious doubt.

In *Andersen*, the Supreme Court came down squarely on the side of the Third Circuit. It began its reasoning with the recognition that persuading someone to withhold testimony or documents from a government proceeding "is not inherently malign,"<sup>19</sup> illustrating this

<sup>13</sup>O'Sullivan, *supra* note 11, at 447.

<sup>14</sup>*Id.* at 447–48.

<sup>15</sup>See *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir.1996); *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998).

<sup>16</sup>See *United States v. Farrell*, 126 F.3d 484, 490 (3d Cir. 1997).

<sup>17</sup>*Id.* at 489.

<sup>18</sup>The mens rea requirement limits the state to punishing those who acted intentionally or recklessly. See *infra* note 50 and accompanying text.

<sup>19</sup>*Arthur Andersen LLP v. United States*, 125 S. Ct. 2129, 2134 (2005).

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with the examples of a mother who persuades her son to exercise his Fifth Amendment right, a wife who persuades her husband not to disclose marital confidences, and an attorney who persuades a client to invoke his or her attorney-client privilege.<sup>20</sup> The Court then characterized the act of a manager who persuades his or her employees to comply with a valid document retention policy as a similarly benign form of persuasion, even though the policy may have been designed to keep information out of the hands of the government.<sup>21</sup> The Court continued by ruling that § 1512(b) did not criminalize such potentially benign forms of persuasion, but only “‘knowingly . . . corruptly persuading’ another.”<sup>22</sup> In doing so, it rejected the government’s contention that “‘knowingly’” did not modify the phrase “‘corruptly persuades’” and held that the statute required the accused to act with the knowledge that he or she was engaging in an act of corrupt, as opposed to benign, persuasion.<sup>23</sup> The Court then completed its reasoning by interpreting the words “‘knowingly’” and “‘corruptly’” according to what it considered their “‘natural meaning.’”<sup>24</sup> Because “‘knowingly’” is “‘normally associated with awareness, understanding, or consciousness,’” and “‘corruptly’” with “‘wrongful, immoral, depraved, or evil,’” the Court held that “[o]nly persons conscious of wrongdoing can be said to ‘knowingly . . . corruptly persuade.’”<sup>25</sup> Because the trial court’s instructions to the jury did not require it to find that Andersen’s agents acted with such consciousness of wrongdoing, the Court held that they were fatally defective.

This did not constitute the only problem with the jury instructions, however. The Court also held that the trial court improperly neglected to inform the jury that it must find that the persuader acted with a particular official proceeding in mind. This requirement traced back to the Court’s previous holding in the case of *United States v. Aguilar*,<sup>26</sup> in which the Court held that there must be a nexus

<sup>20</sup>*Id.* at 2135.

<sup>21</sup>*Id.*

<sup>22</sup>*Id.* (emphasis in original).

<sup>23</sup>*Id.* at 2135–36.

<sup>24</sup>*Id.* at 2135.

<sup>25</sup>*Id.* at 2135–36.

<sup>26</sup>515 U.S. 593 (1995).

between the act of obstruction and a particular official proceeding.<sup>27</sup> Thus, because “a ‘knowingly . . . corrupt persuader’ cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material,” and because the trial court’s instructions did not inform the jury of this, the Court again found the jury instructions to be defective, and on the basis of these defects, overturned Andersen’s conviction.<sup>28</sup>

## II. Its Meaninglessness

The *Andersen* decision is, of course, virtually meaningless to the human beings who once comprised the accounting firm. Prior to its indictment, Andersen was a \$9 billion “big five” accounting firm with hundreds of partners and more than 28,000 employees.<sup>29</sup> This company ceased to exist long before its conviction as, even before its trial, its clients fled and the firm was forced to slash its workforce and sell off its component services in response. At present, the company consists of approximately 200 people employed to process the claims filed against it.<sup>30</sup> The reversal of its conviction cannot restore the partners’ investment or the employees’ jobs. The most it can do is add the \$500,000 criminal fine to the pot of money available to pay Andersen’s civil settlements and judgments and somewhat reduce the prospects of success for the civil litigants with suits against Andersen still outstanding. This is small consolation to those who saw their livelihoods destroyed.

The decision is also virtually meaningless with regard to the government’s ability to pursue its campaign against white collar crime. The government charged Andersen with witness tampering only

<sup>27</sup>*Id.* at 599–600, cited in *Andersen*, 125 S. Ct. at 2137.

<sup>28</sup>125 S. Ct. at 2137.

<sup>29</sup>John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 *Cornell L. Rev.* 269, 281 (2004) (profiling Andersen’s value); Greg Farrell, *A Posthumous Victory*, *USA Today Online* (June 1, 2005), [http://www.usatoday.com/money/industries/banking/2005-05-31-andersen-cover\\_x.htm](http://www.usatoday.com/money/industries/banking/2005-05-31-andersen-cover_x.htm).

<sup>30</sup>See Farrell, *supra* note 29.

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because, at the time, it was not an offense to alter or destroy documents that may later be sought by the government. In effect, Andersen was charged with corruptly persuading its employees to do something that was not itself against the law. The Court's decision in *Andersen* means that one cannot be convicted of such an offense unless the government can establish that the persuader acted with consciousness of wrongdoing. This result might have been significant if the law had remained unchanged. However, long before the Court handed down its decision in *Andersen*, Congress had passed the Sarbanes-Oxley Act,<sup>31</sup> which rendered the point essentially moot.

In the first place, Sarbanes-Oxley added § 1512(c) to the witness tampering statute, punishing “[w]hoever corruptly (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding; or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so.”<sup>32</sup> This section renders the underlying act of document destruction or alteration a crime, making it unnecessary to go after a corrupt persuader to obtain a conviction. In any future case involving document destruction or alteration similar to that engaged in by Andersen’s employees, the government may now indict the company for the destruction or alteration directly under § 1512(c). This, of course, makes any question regarding the mental state of those who encouraged the destruction or alteration entirely irrelevant. In addition, although § 1512(c) requires that one act corruptly, it does not require that one act knowingly, so the Court’s holding that § 1512(b) requires consciousness of wrongdoing does not apply to § 1512(c). And despite thus having a weaker mens rea requirement than § 1512(b), § 1512(c) nevertheless carries twice the maximum penalty,<sup>33</sup> making its use even more attractive to the government.<sup>34</sup>

<sup>31</sup>Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of titles 11, 15, 18, 28, and 29 of the U.S. Code).

<sup>32</sup>18 U.S.C. § 1512(c).

<sup>33</sup>Violation of § 1512(c) is punishable by twenty years imprisonment, violation of § 1512(b) by ten. See 18 U.S.C. §§ 1512(b), (c).

<sup>34</sup>It could be argued that *Andersen* is still significant in that it requires consciousness of wrongdoing with regard to the portions of 18 U.S.C. § 1512(b) that do not concern document destruction or alteration, such as corruptly persuading someone not to testify (§ 1512(b)(1)), to evade legal process (§ 1512(b)(2)(c)), or not to communicate to a law enforcement officer (§ 1512(b)(3)). However, it is unlikely that *Andersen* has even this level of significance. The second clause of § 1512(c) criminalizes efforts to

Even more significantly, however, Sarbanes-Oxley added § 1519 to the United States Code, which subjects “[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter” to twenty years imprisonment.<sup>35</sup> In contrast to §§ 1512(b) and (c), § 1519 does not require the defendant to have acted corruptly. It requires only that one knowingly destroy documents with the intent to impede a federal investigation. Further, § 1519 seems specifically designed to eliminate or at least attenuate the *Aguilar* nexus requirement that the Court affirmed in *Andersen*, since it does not require the document destruction to be closely tied to a pending official proceeding, but merely to be done “in contemplation of” any such proceeding. Thus, § 1519 allows prosecutors to visit twice the penalty on those who destroy or alter documents without having to establish either corrupt motivation or a close connection to an official proceeding.

Given the greater power, lower requirements of proof, and increased penalties of §§ 1512(c) and 1519, it is not surprising that prosecutors have put § 1512(b) into mothballs. For all intents and purposes, Sarbanes-Oxley has rendered it a dead letter. As a result, the Court’s decision in *Andersen* requiring proof of consciousness of wrongdoing for a conviction under § 1512(b) is without practical effect. Since the government no longer needs § 1512(b) to pursue its campaign against white collar crime, strengthening § 1512(b)’s mens rea requirement can put no crimp in the campaign. *Andersen* makes it more difficult to obtain a conviction for an offense with which it is unlikely anyone will be charged, a textbook example of a meaningless decision.

### III. Its Significance

*Andersen* is not entirely devoid of practical effect. It may be crucially important to Frank Quattrone (and anyone else who was convicted under § 1512(b) and whose appeal is still pending). Quattrone

“otherwise obstruct[], influence[], or impede[] any official proceeding” (§ 1512(c)(2)). This catch-all provision would subsume the other types of obstructive conduct covered by § 1512(b), again relieving the government of the burden of proving consciousness of wrongdoing.

<sup>35</sup>18 U.S.C. § 1519.

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was a high-profile investment banker for Credit Suisse First Boston Corporation (CSFB) in December 2000 when CSFB was under investigation for its practices in allocating shares in initial public offerings. On December 5, he forwarded another CSFB employee's e-mail suggesting that CSFB's employees comply with the company's document retention policy and "catch up on file cleaning" with the added injunction, "having been a key witness in a securities litigation case in south texas [sic] i [sic] strongly advise you to follow these procedures."<sup>36</sup> On the basis of this conduct, he was convicted of witness tampering under § 1512(b) and two other counts of obstruction of justice.<sup>37</sup> Because Quattrone's trial court failed to instruct the jury that the government must prove that Quattrone was conscious of wrongdoing in sending the e-mail, *Andersen* could have great significance to Quattrone, who is appealing his conviction.<sup>38</sup>

But apart from this effect on the fate of Frank Quattrone (and others similarly situated), is there any reason to believe that the *Andersen* decision has any further significance? Standing alone, perhaps not. If *Andersen* is not an isolated decision, however, but an indication that the Court intends to subject the provisions of federal criminal law to a higher level of scrutiny than done previously, then *Andersen* may prove to be as significant to the jurisprudence of white collar crime as *United States v. Lopez*<sup>39</sup> was to the jurisprudence of

<sup>36</sup>Indictment at 27–28, *United States v. Quattrone*, No. 03 Cr. 582 (S.D.N.Y. 2003).

<sup>37</sup>In addition to witness tampering, Quattrone was convicted of violating 18 U.S.C. §§ 1503 and 1505.

<sup>38</sup>In fact, the jury instructions in Quattrone's trial appear to be more defective than those the Court rejected in *Andersen*. As in *Andersen*, the trial court in Quattrone's case defined corrupt persuasion as persuasion motivated by an improper purpose; Trial Transcript at 2446, *United States v. Quattrone*, No. 03 Cr. 582 (S.D.N.Y. 2003), specifically instructed the jury that the government did not have to prove that Quattrone knew his conduct violated the law, Transcript, *supra*, at 2446–47; but failed to instruct it that the government had to prove that he acted with consciousness of wrongdoing. However, in Quattrone's case, the court went further and specifically instructed the jury that it did not have to find a nexus between Quattrone's conduct and any federal proceeding, Trial Transcript, *supra*, at 2450.

It is worth noting, however, that the reversal of Quattrone's conviction for witness tampering would not necessarily mean that his convictions on the other two counts of obstruction of justice would be reversed because neither § 1503 nor § 1505 require knowingly corrupt conduct.

<sup>39</sup>514 U.S. 549 (1995). Of course, given the limited application of the *Lopez* decision to date, especially in light of the Court's recent decision in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), this may be an ill-chosen analogy. On the other hand, given that

the Commerce Clause. To appreciate this possibility, however, we must take a moment to consider the nature of white collar crime.

*A. The Difficulty of Enforcing White Collar Criminal Law*

The common law evolution of criminal law produced a body of law designed to suppress actions that either directly harm or violate the rights of others or are inherently immoral (the so-called morals offenses or victimless crimes). This body of law, which is the subject of the typical first-year law school course on criminal law, is exemplified by offenses such as murder, rape, kidnapping, and theft, as well as prostitution, use of illegal narcotics, and, somewhat famously, taking a girl under the age of sixteen out of the care of her parents without their consent.<sup>40</sup> This is the “traditional” criminal law, which is prohibited by state law and, when the offenses transcend state boundaries or violate a federal interest, by federal law.

Over the course of the last century, Congress created a set of new federal offenses beyond those recognized by the traditional criminal law. These new offenses were designed to police the business environment for honest dealing and regulatory compliance. Thus, where a conviction for fraud under the traditional criminal law required proof that the “defendant obtained title or possession of money or personal property of another by means of an intentional false statement concerning a material fact upon which the victim relied in parting with the property,”<sup>41</sup> a conviction for the new federal offense of mail fraud required only proof that the defendant participated in a “deliberate plan of action or course of conduct by which someone intends to deceive or to cheat another.”<sup>42</sup> This set of new offenses, which includes the federal fraud offenses,<sup>43</sup> the Racketeer Influenced and Corrupt Organizations Act (RICO),<sup>44</sup> the currency

significant changes in the Court’s direction rarely occur suddenly or rapidly, perhaps it is entirely appropriate.

<sup>40</sup>See, e.g., *Regina v. Prince*, [1875] 2 L.R. Cr. Cas. Res. 154.

<sup>41</sup>*People v. Drake*, 462 N.E.2d 376, 377 (N.Y. 1984).

<sup>42</sup>Kevin F. O’Malley et al., *Federal Jury Practice and Instructions* § 47.13 (5th ed. 2000).

<sup>43</sup>18 U.S.C. §§ 1341, 1343–44, 1346–48.

<sup>44</sup>18 U.S.C. §§ 1961–63.

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reporting<sup>45</sup> and money laundering<sup>46</sup> offenses, making false statements to federal investigators,<sup>47</sup> obstruction of justice,<sup>48</sup> and the violation of myriad specific federal regulations, may be somewhat imprecisely referred to as the law of white collar crime.<sup>49</sup>

The problem with this new body of criminal law is that it is impossibly difficult to enforce under the rules that governed the traditional criminal law. Having evolved in the context of the conflict between Parliament and the Crown for power and the struggle to preserve the “rights of Englishmen” against the prerogatives of the King, the traditional criminal law contains many civil libertarian features. Three such features that reside within the substantive criminal law are the mens rea requirement, which limits the state to punishing those who acted intentionally or recklessly,<sup>50</sup> the absence of vicarious criminal liability, which permits punishment only for an individual’s own actions,<sup>51</sup> and the principle of legality, which requires that a criminal offense be clearly enough defined to give citizens adequate notice of what conduct is prohibited and to establish clear guidelines governing law enforcement.<sup>52</sup> The traditional criminal law also contained many procedural protections for liberty. The most famous of these are the twin requirements that the accused be presumed innocent until proven guilty and that the state establish the accused’s guilt beyond reasonable doubt. The presumption of innocence placed the burden on the state to introduce evidence sufficient to establish every element of a criminal offense,<sup>53</sup> while

<sup>45</sup>31 U.S.C. §§ 5313, 5316, 5322, 5324; 26 U.S.C. § 6050I(a).

<sup>46</sup>18 U.S.C. §§ 1956–57.

<sup>47</sup>18 U.S.C. § 1001.

<sup>48</sup>18 U.S.C. §§ 1503, 1505, 1510, 1512, 1519, 1520.

<sup>49</sup>For a fuller description of the distinction between traditional and white collar crime, see John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 *Am. U. L. Rev.* 579, 585–87 (2005).

<sup>50</sup>See Arnold N. Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 *Minn. L. Rev.* 665, 668 (1969). Of course, over the course of the twentieth century the mens rea requirement has been loosened to permit punishment for criminal negligence as well.

<sup>51</sup>See Francis B. Sayre, *Criminal Responsibility for the Acts of Another: Development of the Doctrine Respondeat Superior*, 43 *Harv. L. Rev.* 689, 702 (1930).

<sup>52</sup>See Joshua Dressler, *Understanding Criminal Law* 115 (3d ed. 2001).

<sup>53</sup>See, e.g., Model Penal Code § 1.12(1).

the requirement of proof beyond a reasonable doubt set the bar that the state must surmount to establish these elements exceedingly high. Also highly significant are the attorney-client privilege<sup>54</sup> and the Fifth Amendment right against self-incrimination,<sup>55</sup> both of which place accurate and potentially incriminating information beyond the reach of the government. The latter is especially important because it helps ensure that the government honors the presumption of innocence by “forc[ing] the government not only to establish its case, but to do so by its own resources [rather than] simply calling the defendant as its witness and forcing him to make the prosecution’s case.”<sup>56</sup>

These inherent civil libertarian features of the traditional criminal law, when transferred to white collar crime prosecutions, rendered the white collar criminal law virtually unenforceable. Consider the effect of the presumption of innocence and the requirement of proof beyond reasonable doubt. White collar crime typically consists in deceptive behavior that is intentionally designed to be indistinguishable from non-criminal activity. Unlike traditional crime, there is no *corpus delicti* or smoking gun to introduce into evidence. As a result, considerable investigation may be required merely to establish that a crime has been committed, and even then, a great deal of legal and/or accounting sophistication may be required to unravel the deception. Under these circumstances, compliance with procedural rules that require “the government not only to establish its case, but to do so by its own resources”<sup>57</sup> can be extremely expensive. The assets that the government must expend to satisfy such liberal safeguards in each case it brings greatly reduces the total number of cases it can afford to bring, significantly reducing the deterrent value of white collar criminal statutes.

Further, in the absence of vicarious liability, the *mens rea* requirement means that to obtain a conviction, the government must show that a defendant intentionally or recklessly engaged in or authorized dishonest business practices or the violation of regulations. But in

<sup>54</sup>See *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (describing the attorney-client privilege as one of the oldest recognized rights).

<sup>55</sup>U.S. Const. amend. V.

<sup>56</sup>Jerold H. Israel & Wayne R. LaFare, *Criminal Procedure* 26 (1985).

<sup>57</sup>*Id.*

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the corporate context in which decision-making responsibility is diffused, this can be extraordinarily difficult, if not impossible, to do. Because “[c]orporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components,”<sup>58</sup> they frequently take actions that were never explicitly known to or authorized by any identifiable individual or individuals within the firm. This renders the mens rea requirement a significant impediment to conviction in white collar criminal cases.

In addition, the principle of legality requires that criminal offenses be defined clearly enough to give citizens adequate warning of what conduct is prohibited and, thus, that criminal statutes be narrowly construed. But the more definite the law’s proscriptions, the more guidance it provides to “the ever-inventive American ‘con artist’” in his efforts to come up with “new varieties of fraud” that are not technically illegal.<sup>59</sup> This narrow construction of criminal statutes, in effect, creates “loopholes” in the fabric of the white collar criminal law through which con artists can squeeze dishonest practices, putting them beyond the reach of the government.

Finally, the attorney-client privilege and the right against self-incrimination create serious obstacles to the successful prosecution of white collar criminal offenses. Because such offenses consist primarily in crimes of deception, the evidence upon which conviction for a white collar offense must rest will be almost entirely documentary in nature and will consist predominantly in the business records of the firm for which the defendant works. But to the extent that these records are in the personal possession of the defendant, contain communications between the defendant or other members of the firm and corporate counsel, or are the work product of corporate counsel, the right against self-incrimination and the attorney-client privilege render them unavailable to the government. Thus, to a much greater extent than in traditional criminal prosecutions, the evidence necessary to convict for a white collar offense will be in the hands of those who cannot be compelled to produce it.

It is apparent that a federal prosecutor charged with enforcing the law of white collar crime within these constraints would be in an unenviable position. Effective enforcement clearly requires

<sup>58</sup>United States v. Bank of New England, M.A., 821 F.2d 844, 856 (1st Cir. 1987).

<sup>59</sup>United States v. Maze, 414 U.S. 395, 407 (1974) (Burger, C.J., dissenting).

escaping the civil libertarian bonds inherent in the traditional criminal law.

*B. The Judicial Response to the Difficulty of Enforcement*

For the past century, the federal judiciary has been cognizant of the difficulty the government faces in enforcing the white collar criminal law. Its response has been to erode the liberal constraints of the traditional criminal law when dealing with white collar crime. Consider, as a first illustration, the judicial creation and interpretation of the concept of corporate criminal liability. Nearly one-hundred years ago, the Court removed the bar to vicarious criminal liability when, in *New York Central & Hudson River Railroad Co. v. United States*,<sup>60</sup> it ruled that corporations, and hence their owners/shareholders, could be criminally punished for the actions of their employees.<sup>61</sup> The Court justified the abandonment of this liberal constraint purely on enforcement grounds, declaring that if “corporations may not be held responsible for and charged with the knowledge and purposes of their agents . . . many offenses might go unpunished.”<sup>62</sup> Recognizing that maintaining the bar to vicarious criminal liability “would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at [by the white collar criminal law],”<sup>63</sup> the Court simply abandoned the bar.

Once the Supreme Court endorsed vicarious corporate criminal liability, federal courts expanded and interpreted the concept to further curtail the effect of the liberal features of the traditional criminal law. Thus, they created an especially strict form of vicarious liability by holding corporations criminally liable for the conduct of their employees even when such conduct contravened official corporate policy and was contrary to explicit instructions directed to the employee himself or herself.<sup>64</sup> Further, they held that corporations could be charged with “the sum of the knowledge of all of

<sup>60</sup>212 U.S. 481 (1909).

<sup>61</sup>*Id.* at 493.

<sup>62</sup>*Id.* at 494–95.

<sup>63</sup>*Id.* at 495–96.

<sup>64</sup>See *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972).

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[their] employees.”<sup>65</sup> Under this collective knowledge doctrine, corporations could be convicted of a criminal offense even though no single employee had the requisite knowledge. Hence, the corporation could be guilty even though no individual member of the firm had committed a crime.

By allowing the criminal punishment of corporate entities, the courts not only abandoned the bar to vicarious criminal liability, but also greatly undermined the protections afforded by the presumption of innocence, the mens rea requirement, and right against self-incrimination. The respondeat superior/collective knowledge standard of corporate criminal liability reversed the presumption of innocence by conclusively presuming the firm to be guilty not only of any crime committed by any of its employees, but also of any crime that could have been committed if the firm had assembled the requisite collective knowledge, whether it did so or not. This standard effectively conscripted firms into becoming deputy law enforcement agencies because the only way for them to avoid criminal liability was to monitor the behavior of its employees to ensure both that none of them violates the law individually and that no laws are unintentionally violated as a result of employees’ ill-informed or poorly-coordinated actions. It also eliminates the burden of establishing corporate mens rea in the form of a collective, corporate intention to engage in criminal activity by imputing the intention of any of its agents to the corporation even when the agent is acting contrary to corporate policy or instructions. Indeed, because the collective knowledge doctrine converts the unintentional and uncoordinated actions of the firm’s individual employees into the intentional action of the firm, it essentially eliminates the mens rea requirement entirely. Finally, because corporations have no Fifth Amendment rights, corporate criminal liability creates a class of defendants shorn of the right against self-incrimination,<sup>66</sup> opening the door to evidence

<sup>65</sup>United States v. Bank of New England, 821 F.2d 844, 855 (1st Cir. 1987).

<sup>66</sup>The Court ruled that the Fifth Amendment right against self-incrimination did not apply to corporations in the 1906 case of *Hale v. Henkel*, 201 U.S. 43, 70 (1906). This made perfect sense at the time since, coming as it did three years before *New York Central, supra*, corporations were not then subject to criminal punishment. There would be no point in holding that an entity that could not be prosecuted had a right against self-incrimination. The situation changed when, three years later, corporations became liable to the criminal sanction. The point of extending the Fifth Amendment privilege to corporations would then be precisely the same as it is with regard to individuals, to preserve the liberal character of the criminal law embodied in the

that would otherwise be constitutionally unavailable to the government.<sup>67</sup>

Next consider the expansive reading the federal courts have given to the statutes directed against white collar crime. The federal fraud statutes, for example, prohibit devising “any scheme or artifice to defraud.”<sup>68</sup> The courts have interpreted this to require neither that the victim rely on any statement of the defendant nor suffer any loss, ruling that “[b]y prohibiting the ‘scheme to defraud,’ rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted.”<sup>69</sup> Further, the defendant is not required to make any misrepresentation of fact, since, under the fraud statutes:

it is just as unlawful to speak ‘half truths’ or to omit to state facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading. The statements need not be false or fraudulent on their face, and the accused need not misrepresent any fact, since all that is necessary is that the scheme be reasonably calculated to deceive persons of ordinary prudence and comprehension.<sup>70</sup>

Indeed, the U.S. Court of Appeals for the Second Circuit itself recently declared the potential reach of the federal fraud statutes to be “virtually limitless.”<sup>71</sup>

RICO, which was enacted explicitly for the purpose of enhancing federal law enforcement power,<sup>72</sup> supplies another example. Taking

presumption of innocence that “prohibits the state from easing its burden of proof by simply calling the defendant as its witness and forcing him to make the prosecution’s case.” Israel & LaFave, *supra* note 56, at 26. The Court, however, never revisited the issue with this in mind, but simply continued to cite *Hale* for what became known as the collective entity rule—the proposition that “for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals.” *Braswell v. United States*, 487 U.S. 99, 104 (1988).

<sup>67</sup>For a fuller treatment of the effects of the doctrine of corporate criminal liability, see Hasnas, *supra* note 49, at 597–600.

<sup>68</sup>18 U.S.C. § 1341.

<sup>69</sup>*Neder v. United States*, 527 U.S. 1, 25 (1999).

<sup>70</sup>*United States v. Townley*, 665 F.2d 579, 585 (5th Cir. 1982).

<sup>71</sup>*United States v. Rybicki*, 287 F.3d 257, 264 (2d Cir. 2002).

<sup>72</sup>Congress stated in its findings that it enacted RICO to remedy

defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in orga-

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Congress at its word, the Supreme Court has held that “RICO is to be read broadly. This is the lesson not only of Congress’ self-consciously expansive language and overall approach, but also of its express admonition that RICO is to ‘be liberally construed to effectuate its remedial purposes.’”<sup>73</sup> Thus, the Court interpreted RICO to be applicable not merely to the efforts of organized crime to infiltrate legitimate businesses, but to any association of individuals that pursues criminal purposes.<sup>74</sup>

Further, the courts were willing to interpret regulatory offenses as requiring either no mens rea at all or mere negligence. Thus, for “public welfare offenses”<sup>75</sup> for which the penalty is relatively small, the Court dispensed with the mens rea requirement on the ground that to do otherwise would “impair[] the efficiency of controls deemed essential to the social order as presently constituted.”<sup>76</sup> And even in cases in which the penalties are more substantial, the courts have been willing to uphold the convictions of individuals *and their supervisors* for acts of ordinary, as opposed to criminal, negligence.<sup>77</sup>

Courts gave a similarly broad interpretation to the “secondary” offenses that Congress enacted, offenses that consist entirely in actions that make it more difficult for the government to prosecute other substantive criminal offenses. Consider, for example, the money laundering statutes. 18 U.S.C. § 1956 makes it illegal to engage in financial transactions with the proceeds of unlawful activity with the knowledge that the transaction is intended to conceal information about the funds.<sup>78</sup> The courts have interpreted the language of this statute to mean that purchasing just about anything with money known to be the proceeds of unlawful activity will constitute a transaction designed to conceal information about the funds. Thus,

nized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970). Thus, it is fairly clear that RICO was enacted to overcome the liberal impediments to prosecution embedded in the traditional criminal law.

<sup>73</sup>*Sedima v. Imrex Co.*, 473 U.S. 479, 497–98 (1985) (citation omitted).

<sup>74</sup>*United States v. Turkette*, 452 U.S. 576 (1981).

<sup>75</sup>*Morisette v. United States*, 342 U.S. 246, 256 (1952).

<sup>76</sup>*Id.* at 256.

<sup>77</sup>*United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999).

<sup>78</sup>See 18 U.S.C. § 1956(a)(1)(B)(i).

in *United States v. Jackson*,<sup>79</sup> the U.S. Court of Appeals for the Seventh Circuit upheld the money laundering conviction of an alleged drug dealer for writing checks to purchase cell phones and pay his rent, and for cashing checks for small amounts at his local bank.<sup>80</sup> Similarly, 18 U.S.C. § 1957 makes it illegal to engage in monetary transactions of more than \$10,000 involving the proceeds of unlawful activity, regardless of the purpose for which the transaction is undertaken.<sup>81</sup> Several federal circuits have interpreted this statute to cover the withdrawal of more than \$10,000 from any account that contains at least \$10,000 in unlawful proceeds, regardless of how much untainted money the accounts also contain.<sup>82</sup> This interpretation of the statute criminalizes the use of more than \$10,000 of one's own money, regardless of its source, once it has been commingled with illegal proceeds. This rendered the statute so broad in effect that it had to be amended in 1988 to permit criminal defendants to pay their attorneys.<sup>83</sup>

As another example, consider the offense of making false statements to a federal investigator. 18 U.S.C. § 1001 makes it a felony to lie to or otherwise deceptively conceal material information from officials investigating any matter within the jurisdiction of the federal government. The Supreme Court has interpreted this statute broadly enough to allow for conviction when one does no more than deny one's guilt of an offense.<sup>84</sup> In upholding the false statements conviction of a union official for responding "no" to two FBI agents who came to his home and asked him whether he had received unlawful cash payments, the Court was clear about the breadth of the statute's application, stating, "[b]y its terms, 18 U.S.C. § 1001 covers 'any' false statement—that is, a false statement 'of whatever kind.' The word 'no' in response to a question assuredly makes a 'statement.'"<sup>85</sup>

And, of course, the breadth with which the courts have interpreted the obstruction of justice statutes is illustrated by the facts of the

<sup>79</sup>935 F.2d 832 (7th Cir. 1991).

<sup>80</sup>*Id.* at 841.

<sup>81</sup>See 18 U.S.C. § 1957(a).

<sup>82</sup>See *United States v. Moore*, 27 F.3d 969, 976 (4th Cir. 1994); *United States v. Johnson*, 971 F.2d 562, 570 (10th Cir. 1992).

<sup>83</sup>See 18 U.S.C. § 1957(f)(1).

<sup>84</sup>*Brogan v. United States*, 522 U.S. 398 (1998).

<sup>85</sup>*Id.* at 400 (citation omitted).

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*Andersen* and *Quattrone* cases themselves. A statute that allows criminal conviction for recommending that a co-worker revise a *draft* memorandum or for forwarding a co-worker's suggestion that employees "catch up on file cleaning" is one that has been broadly interpreted indeed.

The willingness of the federal judiciary to expansively interpret white collar criminal statutes went a long way toward eliminating the enforcement impediments posed by the principle of legality, the *mens rea* requirement, and the twin requirements of the presumption of innocence and proof beyond reasonable doubt. The broad interpretation of the substantive offenses such as the federal fraud offenses and RICO greatly ameliorated the inconveniences arising from the principle of legality's requirement that criminal offenses be definitely defined and narrowly construed. Because it is a feature of the common law, the principle of legality may be overridden by statute as long as the legislation is not unconstitutionally vague. And since the courts themselves determine when a statute is void for vagueness, it is unsurprising that their broad interpretations of white collar criminal statutes have passed constitutional muster.<sup>86</sup> Further, the judicial endorsement of public welfare offenses either eliminated the *mens rea* requirement outright or reduced it to insignificance, since allowing criminal conviction for ordinary negligence, which requires only the violation of the objective, reasonable person standard, eliminates the need for the government to introduce any

<sup>86</sup>On the other hand, the federal fraud statutes are so broadly defined that some of the federal judiciary appear to be ready to declare that they cross the constitutional boundary. Consider, for example, the recent dissenting opinion of Judge Jacobs in *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003), suggesting that the vagueness issue may be ripe for consideration by the Supreme Court because:

the vagueness of the statute has induced court after court to undertake a rescue operation by fashioning something that (if enacted) would withstand a vagueness challenge. The felt need to do that attests to the constitutional weakness of section 1346 as written. And the result of all these efforts—which has been to create different prohibitions and offenses in different circuits—confirms that the weakness is fatal. Judicial invention cannot save a statute from unconstitutional vagueness; courts should not try to fill out a statute that makes it an offense to "intentionally cause harm to another," or to "stray from the straight and narrow," or to fail to render "honest services."

*Id.* at 163–64 (Jacobs, J., dissenting).

evidence of what was actually in the defendant's mind. Most significantly, however, the courts' broad interpretation of the secondary offenses greatly reduces the government's burden of proof. Because conviction for a secondary offense does not require proving that the defendant is guilty of any underlying substantive offense, the government may use the secondary offenses as vehicles to punish those whom they suspect, but cannot convict, of substantive crimes. Thus, as two federal prosecutors themselves point out,

[i]n addition to higher sentences in white collar cases, there are other advantages to federal prosecutors in pursuing money laundering charges against defendants, including: . . . the ability to prosecute a wrongdoer when there is either insufficient evidence of the underlying criminal conduct or insufficient evidence connecting the wrongdoer to the underlying criminal conduct . . . [T]he money laundering statutes allow prosecutors to prosecute wrongdoers who very probably were involved in the underlying crime without enough evidence of this involvement to prosecute it directly. Thus evidence of the underlying crime which may be insufficient to prove all the elements of the underlying crime may still be enough to show that a specified unlawful activity occurred—leading to a money laundering conviction even if the defendant is acquitted of the underlying crime.<sup>87</sup>

Indeed, in *United States v. Jackson*,<sup>88</sup> the defendant's conviction on money laundering charges was upheld despite the fact that he was acquitted on the underlying substantive charge of drug trafficking.<sup>89</sup> That the false statements and obstruction of justice statutes may used for the same purpose is amply illustrated by the recent conviction of Martha Stewart for both offenses despite the fact that, as one who was neither an insider nor had misappropriated confidential information, she could not be charged with the underlying offense of insider trading.

<sup>87</sup>B. Frederick Williams, Jr. & Frank D. Whitney, *Federal Money Laundering: Crimes and Forfeitures* 14–16 (1999). Other advantages the authors mention include the ability to introduce potentially prejudicial evidence of wealth and "big spending" at trial and the ability to avoid the statute of limitations on the underlying offense by charging a defendant with a recent monetary transaction. *Id.* at 15.

<sup>88</sup>983 F.2d 757 (7th Cir. 1993).

<sup>89</sup>*Id.* at 766–67.

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### *C. Andersen as a Harbinger of Change?*

Against this background, *Andersen* appears to buck a nearly century-old judicial trend of reducing the burden on the prosecution in white collar cases. For decades, the federal courts have been steadily reducing the level of mens rea required by such offenses. Yet, in *Andersen*, the Court rejected the government's interpretation of § 1512(b) to require only knowledge that one was impeding an official proceeding in favor of an interpretation that required knowledge that one was acting wrongfully in doing so.<sup>90</sup> For decades, the federal courts have been interpreting white collar criminal statutes expansively. Yet, in *Andersen*, the Court specifically held that *Aguiar's* nexus requirement applied to § 1512(b).<sup>91</sup> What is the significance of this? Is there any evidence to suggest that *Andersen* is not simply an isolated, aberrant decision, but an indication of a judicial change of direction?

The honest answer to this question would be, "Some, but not much." Although a frank assessment would probably conclude that, in the context of white collar crime, the erosion of the liberal elements of the traditional criminal law is likely to continue, there is some reason to believe that the pro-prosecution tide has turned. Having thus admitted that the evidence is thin, let me nevertheless try to make the case that *Andersen* presages an increasing level of judicial scrutiny of the government's efforts to suppress white collar crime.

In 1995, the Court held in *United States v. Lopez*<sup>92</sup> that the Gun-Free School Zones Act of 1990<sup>93</sup> was unconstitutional because it exceeded the scope of power invested in Congress by the Commerce Clause.<sup>94</sup> In so ruling, the Court recognized that if the conduct the Act outlawed, possessing a firearm in a school zone, was not beyond the reach of the Commerce Clause, nothing was.<sup>95</sup> In effect, the Court

<sup>90</sup>125 S. Ct. 2129, 2136 (2005).

<sup>91</sup>*Id.* at 2137.

<sup>92</sup>514 U.S. 549 (1995).

<sup>93</sup>Pub. L. No. 101-647, title 17, § 1702, 104 Stat. 4844-45 (1990).

<sup>94</sup>514 U.S. at 567-68.

<sup>95</sup>In justifying its holding, the Court stated,

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . . To [so rule] would require us to conclude that the Constitution's enumeration of powers does not presuppose something not

found itself with its back against the wall. It either had to find some limit to Congress' power under the Commerce Clause or forthrightly declare that there was none. Faced with this choice, and unwilling to abandon the conception of the federal government as one of enumerated powers, the Court departed from its seventy year old practice of reading the Commerce Clause ever more expansively.

It may be that over the course of the past decade, the Court has come to believe that a similar point has been reached in its expansion of the federal government's power to combat white collar crime. The Court may now feel that it has relaxed the liberal safeguards of the traditional criminal law to such an extent that to continue to do so would be to essentially invest federal prosecutors with plenary power. As was the case in *Lopez*, the Court may again have its back against the wall in that it must either reinvigorate some of the libertarian protections of the traditional criminal law or forthrightly declare that the public's only protection against the federal government's power to police the business environment lies in the good faith of the prosecutors themselves.

The first glimmering that this may be the case can be found in the Court's decision in *United States v. Aguilar*.<sup>96</sup> In that case, a United States district judge had been convicted of obstructing a grand jury proceeding in violation of § 1503 by lying to two FBI agents.<sup>97</sup> In affirming the circuit court's reversal of this conviction, the Court held that a conviction under § 1503 required that the government demonstrate a "nexus" between the defendant's conduct and a judicial proceeding—that is, "a relationship in time, causation, or logic with the judicial proceedings [such that the conduct has] the 'natural and probable' effect of interfering with the due administration of justice."<sup>98</sup> Contrary to its prior practice of interpreting white collar criminal statutes broadly so as to ease the government's burden of proof,<sup>99</sup> in *Aguilar* the Court created a new hurdle for the government

enumerated and that there never will be a distinction between what is truly national and what is truly local.

*Id.* (citations omitted).

<sup>96</sup>515 U.S. 593 (1995).

<sup>97</sup>*Id.* at 595.

<sup>98</sup>*Id.* at 599 (citations omitted).

<sup>99</sup>See, for example, the discussion of the federal fraud offenses at *supra* notes 68–71 and accompanying text.

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to overcome. Apparently, the Court was not willing to invest federal prosecutors with the power to indict anyone who acted in a way that merely *might* later impede a judicial proceeding.

A second reason to suspect that change is in the offing can be found in the Court's decision in *Neder v. United States*.<sup>100</sup> In that case, the defendant appealed his convictions for mail, wire, and bank fraud on the ground that the trial court did not require the jury to find that any of his false statements were material.<sup>101</sup> Despite its recognition that "based solely on a 'natural reading of the full text,' materiality would not be an element of the fraud statutes,"<sup>102</sup> the Court nevertheless rejected the government's argument that "by punishing, not the completed fraud, but rather any person 'having devised or intending to devise a scheme or artifice to defraud,'"<sup>103</sup> Congress intended "criminal liability [to] exist so long as the defendant *intended* to deceive the victim, even if the particular means chosen turn out to be immaterial, *i.e.*, incapable of influencing the intended victim."<sup>104</sup> In holding "that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes,"<sup>105</sup> the Court again departed from its prior practice of interpreting the federal fraud statutes broadly and saddled the government with an additional element of proof. And again, the Court was apparently unwilling to invest prosecutors with the power to indict a citizen for doing *anything* with an intent to deceive.

Additional support can be found in the Court's recent decision in *United States v. Hubbell*.<sup>106</sup> In 1976, the Court held in *Fisher v. United States*<sup>107</sup> that the Fifth Amendment privilege against self-incrimination does not prevent the government from introducing the contents of documents acquired from a defendant pursuant to a subpoena duces tecum into evidence against him or her.<sup>108</sup> Rather, with regard

<sup>100</sup>527 U.S. 1 (1999).

<sup>101</sup>*Id.* at 6.

<sup>102</sup>*Id.* at 21 (citations omitted).

<sup>103</sup>*Id.* at 24.

<sup>104</sup>*Id.* (emphasis in original).

<sup>105</sup>*Id.* at 25.

<sup>106</sup>530 U.S. 27 (2000).

<sup>107</sup>425 U.S. 391 (1976).

<sup>108</sup>*Id.* at 414.

to voluntarily created documents, the Fifth Amendment protects only the testimonial aspects of the act of producing them. Specifically, it protects only the tacit communications that the defendant makes by producing the documents—i.e., communications that the documents exist, that they are in the possession or control of the defendant, and that the defendant believes the documents in his or her possession or control to be those described by the subpoena—and then, only when these communications are not “forgone conclusion[s].”<sup>109</sup> In *Hubbell*, the defendant had been compelled to turn over a large number of business documents pursuant to a subpoena duces tecum and a grant of immunity for his act of producing them. The government argued that as long as it made no use of Hubbell’s tacit assertions that the documents existed, were in his possession, and were those described in the subpoena, it could introduce the contents of the documents into evidence against him without violating his grant of immunity. The Court rejected this argument and held that use of the contents of the document under such circumstances constituted an immunized derivative use.<sup>110</sup>

Given the importance of documentary evidence to the successful prosecution of white collar crime, the Court had been whittling away at citizens’ ability to use the Fifth Amendment to keep such evidence out the hands of prosecutors for decades.<sup>111</sup> In *Hubbell*, the Court was confronted with a situation in which to reduce the scope of the privilege even further would be to render it vacuous. Just as in *Lopez*, the Court either had to reverse its direction or openly declare that the Fifth Amendment did not protect documents. And just as in *Lopez*, the Court was not ready to declare that there were no constitutional limits on the government’s power to gather documentary evidence against its citizens. Thus, in *Hubbell*, the Court indicated that it was unwilling to invest federal prosecutors with the unchecked power to sift through citizens’ records in search of evidence of criminal activity.

Against the backdrop of *Aguilar*, *Neder*, and *Hubbell*, it is possible to read the Court’s unanimous decision in *Andersen* as an indication

<sup>109</sup>*Id.* at 411.

<sup>110</sup>530 U.S. at 40, 45–46.

<sup>111</sup>In addition to *Fisher*, see, e.g., *Doe v. United States*, 487 U.S. 201, 218 (1988); *Braswell v. United States*, 487 U.S. 99, 108–10 (1988).

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of an institutional change of direction in its construction of white collar criminal statutes. Recognizing that these statutes could not be effectively enforced within the civil libertarian confines of the traditional criminal law, the Court has been loosening these restrictions for nearly a century. Perhaps it has now recognized that in doing so, it has crossed the line from facilitating effective law enforcement to undermining the rule of law.

The federal courts have largely dispensed with the principle of legality in order to give white collar criminal statutes the broad interpretations necessary to “close the loopholes” in the law against dishonest business conduct.<sup>112</sup> In doing so, however, they have invested federal prosecutors with exceedingly broad discretion to determine what constitutes a criminal offense. The Court cannot help but be aware, for example, that Martha Stewart was recently charged with securities fraud for publicly proclaiming her innocence of trading stocks on non-public information.<sup>113</sup> Similarly, the courts have created an inescapably strict form of corporate criminal liability in order to permit the resource-effective prosecution of white collar offenses.<sup>114</sup> But in doing so, they have invested federal prosecutors with vast powers to coerce desired behavior from corporations with the threat of criminal indictment. It cannot be lost on the Court that the Department of Justice now regularly demands that corporations fire certain executives, waive their attorney-client privilege, refrain

<sup>112</sup>See *supra* text accompanying note 59.

<sup>113</sup>In its indictment, the government alleged that because “Martha Stewart’s reputation, as well as the likelihood of any criminal or regulatory action against Stewart, were material to Martha Stewart Living Omnimedia, Inc. (‘MSLO’) shareholders because of the negative impact that any such action or damage to her reputation could have on the company which bears her name” (Indictment ¶ 57, United States v. Stewart, No. 03 Cr. 717 (S.D.N.Y. June 4, 2003), available at <http://news.findlaw.com/hdocs/docs/mstewart/usmspb60403ind.pdf>), she had committed fraud by attempting to

stop or at least slow the steady erosion of MSLO’s stock price caused by investor concerns [by making or causing] to be made a series of false and misleading public statements during June 2002 regarding her sale of ImClone stock on December 27, 2001 that concealed that Stewart had been provided [non-public] information . . . and that Stewart had sold her ImClone stock while in possession of that information.

*Id.* at ¶ 60.

<sup>114</sup>See *supra* text accompanying notes 61–67.

from reimbursing their employees' legal fees, refuse to enter into joint-defense agreements with employees, and otherwise fully cooperate with the government in its prosecution of the firm's employees if the corporation wishes to avoid indictment, which, as the *Andersen* case demonstrates, can itself be a corporate death sentence.<sup>115</sup> Under these circumstances, it is not unreasonable to read the *Andersen* case as indicating that the Court believes that the pendulum has swung too far in favor of the prosecution.

Additional supporting evidence can be found within *Andersen* itself. After decades of weakening the mens rea requirements for conviction of white collar offenses, the Court was willing to adopt what it admits is "an inelegant formulation"<sup>116</sup> of the language of § 1512(b) to interpret the statute as requiring consciousness of wrongdoing. The Court justified this strengthened mens rea requirement on the ground that thus "limiting criminality to persuaders conscious of their wrongdoing sensibly allows § 1512(b) to reach only those with the level of 'culpability . . . we usually require in order to impose criminal liability.'"<sup>117</sup> The use of the word "usually" in this statement is quite suggestive. For, although consciousness of wrongdoing is the level of culpability that is usually required for liability under the *traditional* criminal law, it assuredly is not the level usually required under the white collar criminal law. Here, then, is another reason to read *Andersen* as indicating that the Court intends to realign the government's burden in white collar prosecutions with what it had been under the traditional criminal law.

This represents the evidence that can be marshaled in support of the proposition that *Andersen* foreshadows an increasing level of judicial scrutiny of the federal government's campaign against white collar crime. As I admitted at the outset, it is a bit thin. However, if what it suggests is, in fact, the case, if *Andersen* is a bellwether of the Court's revival of some of the libertarian features of the traditional criminal law, then, despite appearances, *Andersen* may prove to be a highly significant decision indeed.

<sup>115</sup>See Memorandum from Deputy Attorney General Larry Thompson, U.S. Dep't of Justice, to Heads of Department Components, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

<sup>116</sup>125 S. Ct. 2129, 2135 (2005).

<sup>117</sup>*Id.* at 2136.

#### IV. Conclusion

Having presented my strongest case for *Andersen's* greater jurisprudential significance, I must concede that it rests on some rather weak reeds. Indeed, if the Court was truly resolved to rein in the discretion it had previously given to federal prosecutors, it could have done so much more effectively by reading a materiality requirement into § 1512(b), just as it read such a requirement into the federal fraud statutes in *Neder*.<sup>118</sup> Requiring obstructive conduct to be material to the government's ability to establish an underlying offense permits the government to prosecute genuine efforts to impede its law enforcement efforts, but restrains prosecutors' discretion to charge obstruction of justice when their ability to pursue the substantive offense could not have been affected and when the choice of charge is therefore "a mere shortcut to acquire a quick criminal conviction."<sup>119</sup> Overturning *Andersen's* conviction on the ground that the government failed to establish that the alleged obstructive conduct was material would have had significance beyond the instant case because it would have applied to §§ 1503, 1505, 1510, 1512(c), and 1519 as well as the now dormant § 1512(b).

But perhaps it is too much to expect the Court to have decided *Andersen* on a ground that was not argued to it. Under such circumstances, a decision that applies only to the instant case (and perhaps Frank Quattrone's), but that also indicates that consciousness of wrongdoing is the "level of 'culpability . . . we usually require in order to impose criminal liability,'"<sup>120</sup> may be the best that could be hoped for. In truth, given its limited range of application, there is not much in *Andersen* for one concerned about excessive prosecutorial power to love. Yet, it is pleasant to think of it as a precursor of similar decisions with wider application.

So perhaps *Andersen* really is a lot like sex without love. And just as sex without love is an empty experience, so *Andersen*, as a case

<sup>118</sup>See *supra* notes 100–04 and accompanying text.

<sup>119</sup>Ellen S. Podgor, *Arthur Andersen, LLP and Martha Stewart: Should Materiality Be an Element of Obstruction of Justice?* 44 Wash. L.J. 583, 584 (2005). The author is grateful to Professor Podgor for pointing out this possibility to him.

<sup>120</sup>125 S. Ct. at 2136.

without prospective application, is a meaningless decision. But, to paraphrase Woody Allen, as meaningless decisions go, it's one of the best.