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# DEATH OF AN ACCOUNTANT: THE JURY CONVICTS ARTHUR ANDERSEN OF OBSTRUCTION OF JUSTICE

STEPHAN LANDSMAN\*

## INTRODUCTION

One of the functions of the American jury has been to serve as an agent of legal and social change. Precisely when and how the jury becomes involved in transformative decision making has only occasionally been scrutinized. What seems clear is that a great deal turns on the details of a given case and the historical context in which that case is tried. In an effort to explore the work of the jury as change agent, this Article will examine the recent trial of the Arthur Andersen accounting firm on a charge of obstruction of justice.

The Article is divided into seven sections. The first considers the commonly shared, though erroneous, belief that the *Andersen* case would result in a swift and resounding victory for the government because of the precipitous decline of the stock market, the widely publicized misconduct of an array of large business entities, the collapse of the Enron Corporation, and Andersen's exceedingly suspicious conduct in reaction to Enron's failure. The second section details the slow and laborious deliberations of the *Andersen* jury, which took ten days to agree on Andersen's guilt. The third section explores why the jury found the case so difficult, focusing special attention on questions of witness credibility, the appeal of arguments portraying Andersen as an underdog, and juror reluctance to embrace what was, in essence, a death sentence for the accounting firm. The next section goes on to analyze why the jury may have overcome its doubts and convicted. Section five argues that the *Andersen* verdict may be a watershed in American legal thinking about the misconduct of large corporations and their advisors. The sixth section then focuses attention on the disturbing conduct of federal prosecutors as they fought to convict in the politically charged *Andersen* case. The

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Article concludes with some thoughts about the social significance of the trial and jury decision.

## I. A SLAM-DUNK

Pundits across America suggested in the days before Arthur Andersen's jury trial on a charge of obstruction of justice that the government's victory would be emphatic and swift—as basketball argot has it, a “slam-dunk.”<sup>1</sup> “Specialists” quoted by the *Wall Street Journal* described the matter as “open-and-shut.”<sup>2</sup> *USA Today* declared that a Department of Justice victory was “widely expected.”<sup>3</sup> And Lynn Turner, a former chief accountant for the Securities and Exchange Commission (“SEC”), in the wake of a guilty plea by a key Andersen partner, David Duncan, and using a somewhat different (and perhaps fractured) sporting metaphor, described the plea deal as “a grand-slam hit.”<sup>4</sup>

It is not hard to understand why expert commentators and ordinary citizens alike might have expected the government to have had little trouble convicting Arthur Andersen. To begin, the news was dominated by reports likely to jaundice Americans' views about business defendants. The trial, which began on May 6, 2002, came at the end of a catastrophic stock market tumble and amidst an astounding flurry of business scandals. The explosive decline in the Nasdaq Composite Index looked “surprisingly like the U.S. stock market around the 1929 crash”<sup>5</sup> with the Index losing more than 72% of its value.<sup>6</sup> At the heart of the decline was the bursting of the speculative dot-com “bubble” in which investors displayed “irrational exuber-

1. The *New York Daily News* used this term at the end of the trial to describe “some observers,” beliefs about the ultimate outcome of the case. Judith Schoolman, *Andersen Fights for its Life, Obstruction Trial Begins in Houston*, DAILY NEWS (N.Y.), May 7, 2002, at 61. The *Houston Chronicle* used the same term to describe prosecutors' pretrial predictions about the case. David Ivanovich & Steve Brewer, *The Andersen Verdict, Verdict May Aid Government's Case Against Enron*, HOUS. CHRON., June 16, 2002, at A1.

2. Richard B. Schmitt & Jonathan Weil, *Government Takes Strong Case into Andersen Trial*, WALL ST. J., May 3, 2002, at C1.

3. Greg Farrell, *Neither Side Blinked, So Justice Day Has Arrived*, USA TODAY, May 6, 2002, at B1.

4. John R. Wilke et al., *Duncan Guilty Plea Roils Andersen*, WALL ST. J., Apr. 10, 2002, at A3.

5. E.S. Browning, *Abreast of the Market, Stock Recovery May Take Time*, WALL ST. J., Apr. 15, 2002, at C1.

6. *Id.*

ance”<sup>7</sup> for any stock related to the internet.<sup>8</sup> Serious corporate chicanery appeared to reach unprecedented proportions at about the same time. Such major corporations as Tyco, Adelphia, Global Crossing, Williams Companies, WorldCom, Dynegy, J.P. Morgan Chase, Citigroup, AOL Time Warner, and Lucent Technologies were all accused by shareholders of serious misconduct.<sup>9</sup> Additionally, a considerable number of major companies had, since 1995, entered into agreements to settle comparable claims by paying more than \$100 million in each case. These included Cendant, Waste Management, Bank of America, 3Com, Rite Aid, Micro Strategy, Informix, Sunbeam, Conseco, and Ikon.<sup>10</sup>

In many ways the *Andersen* case seemed to epitomize this turbulent era. It began with the collapse of the energy trading behemoth, Enron Corporation, which at one time was the seventh largest corporation in America.<sup>11</sup> Enron started to unravel in the summer of 2001 after the *Wall Street Journal* questioned a number of its business and accounting practices.<sup>12</sup> By mid-October the financial media were in full cry, and Enron stock was in dramatic retreat.<sup>13</sup> In the two weeks leading up to October 24, 2001, the date that Andrew Fastow, Enron’s chief financial officer, was furloughed (later to be indicted for fraud),<sup>14</sup> the company’s stock lost more than half its value.<sup>15</sup> The plunge never abated, and on December 2, 2001, Enron filed for bankruptcy protection.

When Enron collapsed, it buried not only itself but Arthur Andersen, its long-time auditor. Andersen was one of the so-called “big five” accounting giants in the United States. It was, in 2001, a ninety-year-old organization with a history of rectitude built on its early

7. Joseph Rebellio, *Do Markets Really Take Any Stock in Greenspan*, WALL ST. J., June 24, 2003, at C13 (noting this phrase was originally used by Alan Greenspan).

8. Stephen E. Frank & E.S. Browning, *A Year After the Peak: Bursting of the Tech Bubble Has a Familiar “Pop” to It*, WALL ST. J., Mar. 2, 2001, at C1.

9. See Jonathan D. Glater, *From Investor Fury, A Legal Bandwagon*, N.Y. TIMES, Sept. 15, 2002, § 3 (Money and Business/Financial Desk), at 1.

10. *Id.*

11. Jonathan Weil et al., *Guilty Plea by Enron’s Kopper Increases Scrutiny of Ex-CFO*, WALL ST. J., Aug. 22, 2002, at A1.

12. Anne Brady, *Andersen Was Lax in Auditing of Baptist Group, Witness Says*, WALL ST. J., May 2, 2002, at C3.

13. See, e.g., John Emshwiller & Rebecca Smith, *Enron Jolt: Investments, Assets Generate Big Loss*, WALL ST. J., Oct. 17, 2001, at C1.

14. Kurt Eichenwald, *Ex-Enron Finance Chief Is Indicted on 78 Counts*, N.Y. TIMES, Nov. 1, 2002, at C2.

15. Jathon Sapsford & Suzanne McGee, *Credit Markets*, WALL ST. J., Oct. 26, 2001, at C14.

leaders' refusal to curry favor with large clients by soft-pedaling negative accounting and auditing judgments.<sup>16</sup> Andersen had grown into a multinational partnership with more than 28,000 employees.<sup>17</sup>

Despite its history, in the three or four years preceding Enron's fall, Andersen had faced a series of difficulties. It had been closely associated with several major scandals including those at Waste Management, Inc. and Sunbeam Corporation. In *Waste Management*, "aggressive" accounting practices led to a \$1.43 billion overstatement of pretax earnings and a \$178 million understatement of tax expenses between 1992 and 1996.<sup>18</sup> When these facts were disclosed, the SEC vigorously investigated not only Waste Management but also Arthur Andersen. Eventually, the SEC proceeded against Andersen, charging it with failing to maintain its independence and issuing materially false and misleading audit reports.<sup>19</sup> Rather than fight those charges, Andersen entered into a consent decree in which it neither admitted nor denied the accusations against it. The SEC censured Andersen and the Federal District Court for the District of Columbia levied a \$7 million fine against the firm and entered an injunction prohibiting it from violating "Section 10(b), which [is] the anti-fraud provision [of the Securities Exchange Act of 1934,] . . . in the future."<sup>20</sup> The *Sunbeam* case was similar. Arthur Andersen's engagement partner on the account, Phillip Harlow, signed off on financial reports that were materially false and misleading because they overstated earnings (by some \$60 million or 30% of profits).<sup>21</sup> When this was disclosed, it led to the bankruptcy of Sunbeam Corporation and a fraud accusation against Harlow.<sup>22</sup> Arthur Andersen's troubles did not end with those two cases. At the time Enron began to come apart, Andersen

16. See Ken Brown & Ianthe Jeanne Dugan, *Sad Account: Andersen's Fall From Grace Is a Tale of Greed and Miscues*, WALL ST. J., June 7, 2002, at A1.

17. This number is drawn from lead defense counsel Rusty Hardin's remarks at a pretrial hearing. United States District Court Transcript, 2002 Extra LEXIS 447, at \*20, *United States v. Arthur Andersen*, 2002 Extra LEXIS 437 (S.D. Tex. June 15, 2002) (No. H-02-121) [hereinafter *Andersen Transcript*].

18. Portions of the SEC complaint in the *Waste Management* case were introduced into evidence during the *Andersen* trial, including passages making reference to the cited figures. *Andersen Transcript*, *supra* note 17, 2002 Extra LEXIS 459, at \*29-\*32 (testimony of Barbara Jeanne Sullivan, FBI Special Agent).

19. See *supra* note 16.

20. *Andersen Transcript*, *supra* note 17, 2002 Extra LEXIS 454, at \*183 (testimony of Thomas Newkirk, Associate Director of the Division of Enforcement of the SEC).

21. *Id.* 2002 Extra LEXIS 454, at \*160.

22. The charges against Harlow are pending. For a description of the status of the *Sunbeam* case as of September 2002, see Floyd Norris, *Former Sunbeam Chief Agrees to Ban and a Fine of \$500,000*, N.Y. TIMES, Sept. 5, 2002, at C1.

faced hundreds of millions of dollars in liability for a botched audit of the Baptist Foundation of Arizona,<sup>23</sup> as well as investigations of auditing improprieties in Connecticut and a number of other states.<sup>24</sup>

Enron's collapse was a noisy and public affair in which many prominent politicians were implicated. Enron officials had an exceptionally close relationship with the President of the United States. In fact, Enron "had long been a major financial backer of Mr. Bush."<sup>25</sup> Enron's largess extended beyond the White House to many other Republicans as well. Enron's support apparently bought it special access to sensitive governmental bodies such as Vice President Richard Cheney's energy committee, although the government has stubbornly resisted judicial orders to provide documents identifying exactly who had access to that body.<sup>26</sup> Enron used its vast resources aggressively to lobby for favorable government treatment, expending \$100 million on the task between 1999 and 2001.<sup>27</sup> Its reach even extended to prominent Democrats like Johnny Hayes, an influential advisor to Al Gore, who was paid at least \$100,000 in consulting fees by Enron.<sup>28</sup> All of this was grist for the media mill and made Enron's failure perhaps the biggest news story of the Bush presidency apart from the tragic events of September 11, 2001.

News about past indiscretions and political machinations was augmented by sensational charges that both Enron and Arthur Andersen employees were seeking to cover up their misconduct by shredding sensitive documents and deleting critical e-mails and other computer-based records. Such reports led not only to further press coverage, but also to a Department of Justice inquiry. The media frenzy was heightened by the SEC's opening of its formal investigation (in October 2001), Enron's declaration of bankruptcy (in December 2001), and Congress's pursuit of public hearings (in January 2002). Shortly before the congressional hearings, Andersen fired its Enron engagement partner, David Duncan, and sought to blame all

23. See Anne Brady, *Andersen Was Lax in Auditing of Baptist Group, Witness Says*, WALL ST. J., May 2, 2002, at C3.

24. See Richard B. Schmitt et al., *Glitches Imperil Possible Deal for Andersen*, WALL ST. J., Apr. 17, 2002, at C1.

25. Richard A. Oppel, Jr., *Senator Releases Documents On Gore Aide's Enron Ties*, N.Y. TIMES, Nov. 13, 2002, at C7.

26. Katharine Q. Seelye, *Judge Again Bars Effort To Keep Cheney Files Secret*, N.Y. TIMES, Nov. 28, 2002, at A30.

27. Richard A. Oppel, Jr., *Senate Panel Says Watchdog Missed Many Enron Clues*, N.Y. TIMES, Nov. 12, 2002, at C2.

28. Oppel, *supra* note 25, at C7.

problems arising out of the case on him. Prominent Andersen officials C.E. Andrews and Dorsey Baskin, Jr., in a statement to Congress, declared:

We should address the question why Andersen took the forceful action it did regarding Mr. Duncan. In our view, Mr. Duncan's actions reflected a failure of judgment that is simply unacceptable in a person who has major responsibilities at our firm. He was the lead engagement partner for a significant client exercising very substantial responsibility within the firm. Yet our investigation indicated that he directed the purposeful destruction of a very substantial volume of documents and in doing so he gave every appearance of destroying these materials in anticipation of a government request for documents. This is the kind of conduct that Andersen cannot tolerate. The case of Mr. Duncan was clear enough to allow us to draw conclusions about his responsibility at an early stage of the inquiry.<sup>29</sup>

In March 2002, the government indicted the Andersen firm on one count of obstruction of justice because of its alleged destruction of documentary and electronic data. Andersen chose an aggressive response, demanding the earliest possible trial date—a decision that may have been motivated by the dire straits in which the firm found itself as clients abandoned it and the possibility of a total shutdown loomed.<sup>30</sup> The case was assigned to Federal Judge Linda Harmon of Houston, who granted Andersen's speedy trial request and set a May 6, 2002 trial date (a mere forty-seven days from the date of the hearing on Andersen's motion).<sup>31</sup> On April 6, as the trial loomed, David Duncan entered his plea agreement with the government. On April 26, as the pool of potential jurors was being assembled for examination after having answered an elaborate written questionnaire, Andersen's lead attorney, Rusty Hardin, sought a postponement of the trial, claiming that the venire had been tainted by the nature and tenor of news coverage. Hardin explained:

The Court is aware that at the beginning of this week both sides with the Court reviewed juror questionnaires that showed, at least in my 27 years as a lawyer, the highest percentage of people who had already formed an opinion of a defendant's guilt in my practice.

As the Court knows, of the approximately 150 returns you received approximately a third of those addressed an opinion to open-ended

29. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 459, at \*15–\*16 (testimony of Barbara Jeanne Sullivan).

30. Kurt Eichenwald, *Enron's Many Strands: The Accountants*, N.Y. TIMES, Mar. 21, 2002, at C1.

31. *Id.*

questions that didn't give them any facts that they believe Arthur Andersen was guilty. Many of them, as you know, actually filled in the views of the case, much of which matched the Government's theory of this case as they announced in the indictment, which clearly shows that an unusually high percentage of a potential jury panel has not only been exposed to the media coverage of this case but has accepted the Government's theory, which in many ways has gone unanswered of [*sic*] Arthur Andersen other than to continue to insist that we were not guilty.<sup>32</sup>

Despite Hardin's plea, the judge ruled, as the government requested, that the trial commence on schedule. It began May 6, 2002.

The government's case was powerfully strengthened by the suspicious nature of Arthur Andersen's conduct, a fact that even Rusty Hardin admitted when, in his closing, he said: "Did it look suspicious? You bet."<sup>33</sup> Well before the tumultuous events of 2001, the Enron-Andersen relationship was one that might raise concerns in the mind of a dispassionate observer. An auditing firm is supposed to maintain genuine independence from its clients so that its assessments of financial activity are untainted by friendship, pressure, or profit. Much in Arthur Andersen's relationship with Enron worked to undermine independence. Enron hired away no fewer than 125 Andersen accountants. Enron's chief accountant, Richard Causey, had come from Andersen.<sup>34</sup> The practice had become so worrisome that Duncan asked Causey to stop raiding Andersen personnel.<sup>35</sup> The interweaving of present and former Andersen accountants created the potential for troubling alliances.

The steady stream of hirings also appeared to hold out the promise of lucrative future employment to those Andersen accountants who could ingratiate themselves to Enron officials. Accountants from Andersen were lavishly entertained by Enron's corporate officers. At the highest levels, auditors were whisked off to events like the Masters' Golf Tournament. This sort of junket was described by one Andersen partner as "out of the realm of normal relationship-building," and "potentially inappropriate."<sup>36</sup> The Enron engagement netted Arthur Andersen more than \$50 million in billing revenue

32. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 456, at \*2-\*3 (pretrial conference statements by Rusty Hardin, lead defense counsel).

33. *Id.* 2002 Extra LEXIS 458, at \*316 (closing argument by Rusty Hardin).

34. *Id.* 2002 Extra LEXIS 450, at \*191 (testimony of James Hecker, Andersen Houston Partner).

35. *Id.* 2002 Extra LEXIS 462, at \*200-\*01 (testimony of David Duncan, Andersen Enron Engagement Partner).

36. *Id.* 2002 Extra LEXIS 450, at \*194 (testimony of James Hecker).



during 2000. Enron was Andersen's second largest client, and, on both sides, the expectation was that fees would eventually grow to more than \$100 million a year.<sup>37</sup> The flow of Enron cash made Duncan an Andersen star at a very young age.<sup>38</sup>

Enron used its economic and personal leverage with Arthur Andersen to pursue what all involved agreed was a remarkably "aggressive" approach to its accounting.<sup>39</sup> The Andersen engagement team, headed by Duncan, appeared to do what it could to accommodate Enron's aggressiveness.<sup>40</sup> When an Andersen accountant did not react sympathetically to Enron's efforts to maximize profits or manipulate accounting rules, there was a significant likelihood that the accountant would be removed from his or her prestigious Enron posting. As early as 1998, Enron began to complain about rulings from Andersen's key accounting policy fixing body, the Professional Standards Group ("PSG"). Eventually, Enron targeted a member of the PSG, Carl Bass, for removal. Despite the unprecedented nature of the removal request, the protests of the most respected members of the PSG, and the circumvention of the normal Andersen chain of command, Bass was barred from Enron work in February 2001. That removal was affirmed at the highest levels of Andersen's management.<sup>41</sup> Other Andersen accountants faced similar treatment including Jennifer Stevenson and Pattie Grutzmacher, both of whom were removed from certain Enron work after they took positions adverse to their client's desires.<sup>42</sup>

At least sometimes, when the aggressive strategy of pressing for favorable accounting treatment did not work with the PSG, Enron and its Andersen engagement team advocates appeared simply to ignore PSG advice. Over time, Enron became increasingly fond of establishing hypothetically independent partnerships to remove various risky ventures from its own books. There are myriad rules regulating the ownership and use of such "special purpose entities." One of these rules requires that each such entity, set up to stand on its

37. *Id.* 2002 Extra LEXIS 458, at \*41 (government closing argument).

38. Anita Raghavan, *Accountable: How a Bright Star At Andersen Fell Along With Enron*, WALL ST. J., May 15, 2002, at A1.

39. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 448, at \*18 (testimony of Benjamin Neuhausen, Andersen Professional Standards Group Partner).

40. *Id.* 2002 Extra LEXIS 448, at \*18-\*19.

41. *Id.* 2002 Extra LEXIS 461, at \*159-\*72 (testimony of Richard Corgel, Andersen Practice Director for North America).

42. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 464, at \*52 (testimony of Jennifer Stevenson, Andersen Enron Engagement Experienced Manager).

own, must be evaluated independently with respect to the reporting of profit and loss.<sup>43</sup> Enron set up a number of special purpose entities jointly referred to as the “Raptor” partnerships. Several of these businesses experienced reversals that resulted in substantial losses. To hide these losses and, perhaps, the whole Raptor apparatus from public scrutiny, Enron sought to meld together the profits and losses from *all* the separate Raptor entities (the net result of this aggregation was a profit).

The PSG was asked to determine whether such a consolidation was permissible. It decided that aggregation would violate the special purpose entity rules unless steps were taken to bind the separate entities into a single unit.<sup>44</sup> Duncan, the senior members of the Andersen engagement team, and their Enron counterparts more or less ignored that determination and aggregated the various Raptors’ profits and losses. This aggregation occurred despite virtually unanimous agreement within Arthur Andersen that PSG advice should never be ignored and, generally, should be determinative.<sup>45</sup>

The Raptor problem, along with difficulties affecting other special purpose entities (among them Jedi, Chewco, and a number of others) continued to grow. By August 2001, Sheron Watkins, an Arthur Andersen alumna who had joined Enron, concluded that problems with these entities were so serious that they threatened the well-being of the company. She contacted Andersen’s James Hecker, with whom she had previously worked, and told him of her concerns.<sup>46</sup> Watkins’s disclosures confronted Andersen with a serious problem. Andersen’s position as independent auditor made it incumbent upon the firm to see that Enron took appropriate steps to address Watkins’s claims. If Enron did not act, Andersen was required to notify Enron’s board of directors and perhaps even the SEC. Andersen was then facing deep trouble in an Arizona case because it had failed to follow up on similar “whistle-blower” charges.<sup>47</sup> Watkins, at least in part, solved Andersen’s dilemma by taking her charges directly to

43. *Id.* 2002 Extra LEXIS 448, at \*22–\*28 (testimony of Benjamin Neuhausen).

44. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 448, at \*204–\*10 (testimony of Carl Bass, Anderson Professional Standards Group Partner).

45. *E.g., id.* 2002 Extra LEXIS 448, at \*7–\*10 (testimony of Benjamin Neuhausen); *id.* 2002 Extra LEXIS 457, at \*215–\*17 (testimony of John Riley, Andersen Practice Director/SEC Specialist Partner).

46. *Id.* Extra LEXIS 450, at \*196–\*98 (testimony of James Hecker).

47. Brady, *supra* note 12, at C3.

Enron's CEO, Kenneth Lay. Enron then asked one of its principal law firms, Vinson & Elkins, to investigate the matter.

Watkins's communication was not the only information Andersen received suggesting that all was not well at Enron. In late August 2001, Andersen's auditors discovered an equity accounting error of more than \$1 billion.<sup>48</sup> This error did not directly affect profits, but it did shrink the shareholders' stake in the company. Press interest in Enron's accounting began to intensify at about the same time. On August 27, the *Wall Street Journal* published the first of its pieces regarding the company's questionable bookkeeping practices. This prompted the Fort Worth branch of the SEC to open an informal investigation of Enron.

Within the upper reaches of Andersen's management, concern was beginning to grow about the Enron engagement. In the latter part of September, highly placed Andersen partners held a telephone conference to consider the Raptor problem.<sup>49</sup> Shortly thereafter, members of the PSG learned for the first time that the Enron engagement team had ignored their advice on Raptor aggregation. At the same time, memoranda written by the engagement team came to light in which PSG members were erroneously said to have reviewed and endorsed positions that were now under serious scrutiny.<sup>50</sup> All of this suggested a rapidly growing crisis, not only for Enron, but also for Andersen. On September 28, Nancy Temple, a Harvard-trained litigator and relatively new Andersen partner, was assigned to provide legal assistance on the growing list of problems. Amy Ripepi, then the head of the PSG, would later testify that the assignment of a fairly junior lawyer-partner to participate in such high-level discussions was unusual.<sup>51</sup> On October 8, Temple engaged outside counsel to help her. The firm she selected was Davis Polk, an elite New York law firm with a reputation for expertise in representing those accused of white-collar crime and in handling accounting firm problems. One day later, Temple remarked in her notes that it was "[h]ighly probable some SEC investigation [would be forthcoming]."<sup>52</sup> At the same time, she noted the possibility that Enron might be compelled to issue

48. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 467, at \*101 (testimony of David Duncan).

49. *Id.* 2002 Extra LEXIS 448, at \*39 (testimony of Benjamin Neuhausen).

50. *Id.* 2002 Extra LEXIS 466, at \*7-9 (testimony of Carl Bass).

51. *Id.* at \*155 (testimony of Amy Ripepi, Andersen Professional Standards Group Head and Partner).

52. *Id.* 2002 Extra LEXIS 459, at \*70-71 (testimony of FBI Agent Sullivan).

a restatement of recent financial disclosures—a move also likely to pique SEC interest. Finally, in her October 9 notes, she voiced concern that the engagement team's rejection of PSG advice might expose Andersen to accusations that it had violated the "cease and desist order in Waste Management"<sup>53</sup> regarding Section 10(b) of the Securities Exchange Act of 1934.

From this point on, suspicious conduct seemed to grow with each step Arthur Andersen took. On October 12, Temple sent Michael Odom, a key member of the Enron engagement team, the following e-mail: "Mike, it might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy. Let me know if you have any questions. Nancy."<sup>54</sup> The objective of the policy was to require the destruction of all but core accounting work papers.<sup>55</sup> Temple would continue for the next four weeks to remind various Andersen accountants about the policy and the need to comply. Those she told included members of the PSG as well as accountants who had worked on the Enron account. Her admonition was repeated by the leaders of the Enron engagement team including Duncan, who at two meetings on October 23 reminded people of the protocols previously highlighted by Temple. The message was eventually spread from Houston (where Enron was headquartered) and Chicago (where the PSG was situated) to London, England, and Portland, Oregon, where others who had worked on Enron matters were located.<sup>56</sup>

This document destruction effort in the midst of a growing accounting crisis was unprecedented. An SEC official testified at trial that he had never heard of a "big five" accounting firm doing such a thing.<sup>57</sup> At least three members of the PSG testified that they had never before received such instructions.<sup>58</sup> Duncan stated during his testimony that he had never before received or given such a direc-

53. *Id.*

54. *Id.* at \*81–\*82.

55. *Id.* 2002 Extra LEXIS 448, at \*52–\*54 (testimony of Benjamin Neuhausen); *id.* 2002 Extra LEXIS 467, at \*144–\*45 (testimony of David Duncan).

56. *Id.* 2002 Extra LEXIS 464, at \*184–\*90 (testimony of Shane Philpott, experienced Portland manager).

57. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 450, at \*45 (testimony of Thomas Newkirk).

58. *Id.* 2002 Extra LEXIS 448, at \*57 (testimony of Benjamin Neuhausen); *id.* 2002 Extra LEXIS 466, at \*14 (testimony of Carl Bass); *id.* 2002 Extra LEXIS 469, at \*86 (testimony of Amy Ripepi).

tive.<sup>59</sup> In Portland, Andersen accountants were so surprised by the “reminder” that the leaders of the office (to their great credit) held internal discussions during which they decided *not* to destroy any Enron-related material. They then instructed the young accountants under their supervision to preserve everything in their files.<sup>60</sup>

As the document destruction “reminder” circulated, events were taking place that signaled the impending rupture of the Enron/Andersen relationship. October 16, 2001 was the day on which Enron was scheduled to announce publicly its quarterly earnings. Shortly before that date, Enron officials provided Andersen with the proposed text of the announcement. Andersen’s accountants noted that Enron was reporting large losses related to the operations of its special purpose entities but describing them as “non-recurring.” This accounting classification was viewed by the Andersen team as misleading because the losses were precisely the sort any business might suffer during normal operations.<sup>61</sup> Duncan was dispatched to warn Enron that it risked an SEC challenge if it persisted in using the term “non-recurring.”<sup>62</sup> Despite Duncan’s warning, Enron issued its quarterly earnings statement with the objectionable language. Furthermore, Enron’s statement made no reference to the \$1 billion equity problem Andersen auditors had uncovered in August. By ignoring Andersen’s input, Enron seemed to be moving away from a cooperative relationship with its auditor. Duncan’s failure to persuade Enron to change course was viewed within Andersen as a sign that his effectiveness had been undermined and that others would be needed to deal with the growing Enron crisis.<sup>63</sup>

Duncan drafted a memorandum to memorialize his dealings with Enron regarding the October 16 earnings statement. In his draft he indicated that Andersen had determined that the use of the term “non-recurring” was “misleading” and that he had so informed Enron’s Richard Causey.<sup>64</sup> This draft was routed to Temple and a number of others for review. She advised Duncan to cut the word “misleading,” apparently fearing that such a designation would impose a responsibility on Andersen to report Enron’s conduct to the

59. *Id.* 2002 Extra LEXIS 467, at \*146 (testimony of David Duncan).

60. *Id.* 2002 Extra LEXIS 464, at \*184–\*90 (testimony of Shane Philpott).

61. *Id.* 2002 Extra LEXIS 448, at \*43–\*47 (testimony of Benjamin Neuhausen).

62. *Id.* 2002 Extra LEXIS 467, at \*71–\*73 (testimony of David Duncan).

63. *Id.* 2002 Extra LEXIS 457, at \*228–\*30 (testimony of John Riley).

64. *Id.* 2002 Extra LEXIS 467, at \*71–\*73 (testimony of David Duncan).

SEC.<sup>65</sup> She also requested that Duncan remove from the memorandum any indication that it had been routed to her or other members of Andersen's legal department.

By October 17, the day after the issuance of the quarterly earnings statement, all hell was breaking loose at Enron. Its acknowledgment of large losses in esoteric special purpose entities set off alarm bells in the stock market, and the *Wall Street Journal* wrote its second article decrying the apparent financial irregularities at the company.<sup>66</sup> On that same day, Vinson & Elkins's report on Sheron Watkins's accusations was released. At trial, David Stulb, a highly skilled and exceptionally candid Andersen forensic accountant, would describe their report as a "white-wash."<sup>67</sup> It is a fair guess that he was not alone in recognizing the problems with the report. Enron's stock began a free fall in which it lost 55% of its value within ten days.

Andersen turned from trying to work with its client to trying to save itself. On October 19, Andersen held the first of a series of conference calls to consider what course of action to pursue. The next day, Andersen's leadership participated in a highly unusual weekend conference call focused on the developing problem.<sup>68</sup> On October 23, the Andersen engagement team anxiously tuned into a webcast by Kenneth Lay, Enron's CEO, in which he sought to answer stock market analysts' questions about Enron. In Duncan's estimate, that interview was a disaster.<sup>69</sup> Lay acknowledged problems with "lawsuits, potential lawsuits, as well as the SEC inquiry."<sup>70</sup> On the heels of the webcast, Duncan immediately convened a meeting of his engagement team staff. At that meeting he directed his team to make effectuation of the document destruction policy a high priority. In his testimony at trial, Duncan said he was motivated to give what amounted to an order to shred documents because of "[t]he losses recorded in the quarter, the escalating news reports, the lawsuits and the potential for further lawsuits[,] and the SEC inquiry."<sup>71</sup> In essence, he admitted that he was encouraging the destruction of evidence that might be used against Arthur Andersen. This suggests a cool, clear-eyed decision to destroy potentially damaging evidence.

65. *Id.* 2002 Extra LEXIS 459, at \*92-\*93 (government document presentation).

66. *Id.* at \*102-\*04.

67. *Id.* 2002 Extra LEXIS 455, at \*213 (testimony of David Stulb).

68. *Id.* 2002 Extra LEXIS 467, at \*119-\*27 (testimony of David Duncan).

69. *Id.* at \*139-\*41.

70. *Id.* at \*142.

71. *Id.* at \*144.

In reality, it appeared that Duncan had panicked when his high-flying Enron-based world began to disintegrate. David Stulb would testify at trial that when he met Duncan a few days after these events, what he saw was a man so overcome by his anxieties that he was “like a deer caught in the headlights.”<sup>72</sup>

Shredding began in earnest at Andersen on October 24. Most of those who were given the document policy “reminder” took it as a directive to destroy Enron-related (and only Enron-related) materials.<sup>73</sup> This was true of PSG members in Chicago, as well as engagement team members in Houston and former team members in London. Only in Portland did highly placed Andersen accountants consider the negative implications of document destruction and direct the preservation of records. Elsewhere, the shredders and delete buttons worked overtime. Previously, there had never been a day in Houston when Arthur Andersen shredded more than 900 pounds of documents. However, on October 24, 925 pounds of documents were shredded. The next day (October 25) the total was an astounding 2,380 pounds. The day after that another 520 pounds were destroyed.<sup>74</sup> For the first time in anyone’s memory, the independent shredding-service used by Andersen was called twice in the same week.<sup>75</sup> During this period deletions of e-mails occurred at three times the normal rate.<sup>76</sup>

John Riley, a key Andersen troubleshooter with an SEC background and experience in both the *Waste Management* and *Sunbeam* cases, was sent to Houston on October 25. After he thought he heard shredders in action, he warned Duncan about the foolishness of document destruction.<sup>77</sup> Duncan stonewalled Riley, denying that any shredding was taking place and keeping him away from critical meetings with Enron officials.<sup>78</sup> Riley reported his difficulties with Duncan to Andersen leaders, and by October 29 most of the top brass of Andersen had gathered in Houston, apparently to take charge. However, shredding and deletion continued. On October 30, the

72. *Id.* 2002 Extra LEXIS 463, at \*96–\*97 (testimony of David Stulb).

73. *E.g., id.* 2002 Extra LEXIS 448, at \*63 (testimony of Benjamin Neuhausen); *id.* 2002 Extra LEXIS 469, at \*152–\*54 (testimony of James Green, Andersen Professional Standards Group Partner).

74. *Id.* 2002 Extra LEXIS 460, at \*109–\*11 (testimony of FBI Agent Paula Schanzle).

75. *Id.* 2002 Extra LEXIS 463, at \*207–\*08 (testimony of Sharon Thibaut, Andersen Records Department Supervisor).

76. *Id.* 2002 Extra LEXIS 460, at \*113 (testimony of FBI Agent Schanzle).

77. *Id.* 2002 Extra LEXIS 457, at \*134 (testimony of John Riley).

78. *Id.* 2002 Extra LEXIS 465, at \*124–\*27 (testimony of John Riley).

SEC informed Enron of its opening of a formal investigation. At about the same time, Andersen auditors concluded that Enron would have to restate publicly its equity accounting because of the \$1 billion error that had been discovered in August.<sup>79</sup> The consequence of this restatement was redoubled SEC and media scrutiny of both Enron and Andersen. No steps were taken to preserve Andersen documents until November 9, the day after Enron issued its restatement. On that date, a blunt e-mail was posted that commanded: "No more shredding."<sup>80</sup>

The story of October and early November seemed incredibly damning to Arthur Andersen. Duncan would eventually admit that he used Andersen's document destruction policy in an effort to obstruct justice, not only on his own, but on his firm's behalf. Other Andersen players including Temple and Tom Bauer (another engagement partner on the Enron account) would not make such open admissions but would invoke their Fifth Amendment privilege to remain silent rather than to testify at Andersen's trial. An air of the deepest suspicion hung over the case.

## II. THE JURY SCRUTINIZES THE CASE

The jury impaneled in the *Andersen* case was comprised of nine men and three women. It included a university professor, an airline executive, a pastry chef, a Baptist minister, a banker, an artist, a jeweler, a security guard, an accountant, and several manufacturing or warehouse workers.<sup>81</sup> Its composition did not seem remarkable except, perhaps, for the fact that a majority of its members were drawn from minority groups (either Latino or African-American). According to the *Houston Chronicle*, when the jurors took their first vote they were, despite the torrent of suspicious facts, evenly divided six-to-six. After more than fifty hours of deliberations spread out over seven days, the jury had shifted to nine in favor of conviction and three opposed.<sup>82</sup> There the jury stalled. At the end of the seventh day of deliberations (after more than fifty-six hours), the jury

79. *Id.* 2002 Extra LEXIS 467, at \*184-86 (testimony of David Duncan).

80. *Id.* 2002 Extra LEXIS 459, at \*218-19.

81. Mary Flood, *The Andersen Verdict, Decision By Jurors Hinged on Memo*, HOUS. CHRON., June 16, 2002, at A1.

82. *Id.*



sent Judge Harmon a note stating: "We are not able to reach a unanimous verdict."<sup>83</sup>

In response to the jury's note, the judge decided to instruct them with the so-called "dynamite charge," first used in *Allen v. United States*<sup>84</sup> This charge urges jurors to put aside their disagreements and come to a verdict. The charge got its nickname because of its frequent success in exploding the resistance of holdout jurors. After the judge's instruction, the jury went back to work. Over three tortuous days the jury slowly moved forward, finally reaching an eleven-to-one vote.<sup>85</sup> The lone holdout was the jury's foreman, university professor Oscar Criner. He said he was skeptical about much of the government's case (especially regarding Duncan) and wanted to believe that people at Andersen had stood up to Enron. Eventually, however, Criner and his fellow jurors came to concentrate on the actions and words of Nancy Temple. All twelve finally agreed that by editing Duncan's October 16 memorandum, so that it made no reference to the misrepresentations contained in Enron's earnings statement, Temple had destroyed critical material in an effort to obstruct justice on Arthur Andersen's behalf. After seventy-two hours of debate over ten days, the jury found a basis on which its twelve members could agree to convict. It was not, however, the one primarily pressed by the government. All this suggests that the *Andersen* case was anything but a slam-dunk.

### III. WHY THE *ARTHUR ANDERSEN* CASE WAS SO DIFFICULT—THE DYNAMICS OF JURY TRIAL IN AMERICA

Those who suggested that the *Andersen* prosecution would result in a swift and easy victory for the government failed to consider a number of factors that can dramatically affect jury evaluation of high-profile criminal trials including witness credibility, sympathy with an "underdog" defendant, reluctance to vote for an ultimate penalty (one that results in an execution or the disbanding of an organization), and sensitivity to powerful advocacy on behalf of the accused party. In the *Andersen* trial, all four of these factors were at work and made conviction far more difficult.

83. Tom Fowler et al., *Judge Puts Fire Under Jury, Urges End to Andersen Deadlock*, HOUS. CHRON., June 13, 2002, at A1.

84. 164 U.S. 492 (1896).

85. My description of the forging of the verdict is drawn from Flood, *supra* note 81, at A1.

Traditionally, one of the primary functions of the jury has been to assess witness credibility. Juries are instructed that this is their exclusive province, and criminal defense lawyers often construct their cases around an assault on prosecution witnesses' credibility. In the *Andersen* case, credibility was an important issue. David Duncan, the man who served as the government's star witness, presented a number of credibility questions for the jury. Duncan did not appear to be the sort of man who would intentionally destroy evidence or conspire to thwart a government investigation. He was highly regarded both at work and in his community.<sup>86</sup> His on-the-stand claim to have orchestrated a scheme to obstruct justice did not ring entirely true. As the *Houston Chronicle* put it: "[H]e 'mouthed the words' the government wanted at the same time his demeanor said the opposite."<sup>87</sup>

Duncan had strong incentive to say whatever the government desired. He had entered the standard sort of plea agreement pursuant to which, in exchange for his guilty plea to an obstruction of justice charge and his testimonial cooperation, he was promised protection from other Enron-related charges as well as the possibility of leniency in sentencing.<sup>88</sup> What this meant, as defense counsel Rusty Hardin was quick to point out, was that Duncan received protection from charges like fraud that might have carried a far longer sentence.<sup>89</sup> It also meant that if the government were satisfied, it could choose to submit a letter to the sentencing judge that might have the effect of securing Duncan probation rather than incarceration.<sup>90</sup>

Duncan had other reasons to seek to curry favor by testifying on behalf of the government. First, he had young children and a clearly expressed desire to avoid jail in order to help care for them.<sup>91</sup> Second, the target of his testimony, Arthur Andersen, had given him grounds to be resentful. The firm which had lionized him as a budding superstar a few short months earlier had decided on January 15, 2002 to blame him for everything and terminate his employment. During his cross-examination, Duncan admitted that he felt "unfairly treated" by

86. See Raghavan, *supra* note 38, at A8.

87. Mary Flood, *U.S. Case Against Andersen Strong, But Legal Game is Tight*, HOUS. CHRON., May 27, 2002, at A1.

88. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 462, at \*136-\*40 (testimony of David Duncan).

89. *Id.* at \*138.

90. *Id.* at \*148-\*49.

91. *Id.* at \*140.

Andersen.<sup>92</sup> Hardin insinuated that both Duncan's personal lawyers and the government used these considerations improperly to manipulate the witness into accepting both his and Arthur Andersen's guilt—something he had vigorously denied until his plea deal. There were ample grounds for sympathetic jurors to accept Judge Harmon's instruction to scrutinize Duncan's testimony "with great care" and discount it because of the witness's "interest."<sup>93</sup> In the end, if one believes what certain jurors told the *Houston Chronicle*, Duncan's testimony was disregarded as the basis for conviction.<sup>94</sup>

The Government confronted a different sort of credibility problem with respect to other Andersen witnesses, a group that formed the core of the prosecution's case (eight of its fifteen witnesses) and the totality of the defendant's presentation (all twelve of its witnesses). Arthur Andersen was an elite accounting firm—one of the "big five" that dominated the industry. Accountants associated with Andersen generally felt proud of their work and of the firm. Not only did Andersen accountants enjoy high status and self-esteem, but they made very handsome livings as employees of one of the most successful professional services firms in America. There was little likelihood that many of them would be predisposed to attack the firm.

Two of the prosecution's early witnesses illustrated the government's dilemma. James Hecker, the man contacted by Sheron Watkins, was a partner in the Houston office. He was something of a maverick and a wit. Five years before Enron's collapse, he had penned a satirical song about the company using the tune from the Eagles' hit song "Hotel California." In his ditty he described Enron as an aggressive client that manipulated accountants to maximize business advantage. Despite Watkins's charges and the events of 2001, Hecker resisted any suggestion that his Enron satire was grounded in or reflected reality. Hecker insisted that Andersen's accountants had worked hard and, generally, successfully "to keep [Enron] . . . within the line."<sup>95</sup> This was hardly the stuff to convince a jury that Enron had destroyed Andersen's independence or produced auditors willing to commit felonies.

92. *Id.* at \*102

93. *Id.* 2002 Extra LEXIS 458, at \*18–\*21 (Judge Harmon's charge to the jury).

94. Flood, *supra* note 81, at A1.

95. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 450, at \*214 (testimony of James Hecker).

The government also hoped to demonstrate Enron's corrupting influence on Andersen when it called PSG head, Amy Ripepi, to the stand. She, however, resisted. She even declined to criticize Enron, refusing to agree that the company's October 2001 quarterly earnings statement was misleading. Nor would she concede that in October 2001, accountants at Andersen expected an SEC investigation. (This point was critical to the prosecution. If Andersen employees had recognized a likelihood of investigation, any destruction of documents in mid-October or later could be far more readily categorized as obstruction of justice.)<sup>96</sup> Her direct examination was manifestly unsatisfactory to the government. The prosecution's problem was compounded when Ripepi responded sympathetically to Rusty Hardin's cross-examination on behalf of Andersen. The government was so incensed with her performance that it took the highly unusual step of attempting on redirect examination to attack her credibility. In justifying that move prosecutor Samuel Buell said: "Mr. Hardin spent a couple of hours with this witness on Friday. I can only characterize it as she was skipping down the garden path with him. And I'm entitled to bring out bias. I'm entitled to impeach this witness now."<sup>97</sup> The government impeached Ripepi by pointing out that Andersen paid her approximately \$750,000 a year (giving her a significant stake in its survival). It also confronted her with a number of her inconsistent prior statements. To all this, the government added a not too subtle attack on Andersen itself by reminding Ripepi of the *Waste Management* and *Sunbeam* scandals—black marks on her firm's record.

The government suffered the Hecker and Ripepi problems on the third and fourth days of its case-in-chief. Such problems signaled just how difficult it would be for the prosecutors to convict Arthur Andersen out of the mouths of Andersen employees. In apparent reaction to these experiences, the government steered clear of a number of important Andersen employee witnesses later in the trial, including the most prominent and esteemed member of the PSG (John Stewart) and the upright Portland accountants who had prohibited document destruction in their office (Shane Philpot, Timothy McCann, and Richard McCune). In the end, Andersen employees' allegiance to their firm seriously weakened the prosecution's case. The government had started out as if Andersen was a typical criminal

96. John C. Coffee, Jr., *The Andersen Fiasco*, NAT'L L.J., Feb. 11, 2002, at A19.

97. *Id.* 2002 Extra LEXIS 469, at \*50 (testimony of Amy Ripepi).

organization like a Mafia “family” or a drug gang. Prosecutors appeared to expect witnesses to be ready to attack Andersen or, at least, distance themselves from it. Instead, they found deep and abiding loyalty to what had been, for decades, a pillar of the accounting industry. Andersen witnesses’ attitudes forced the government to look for alternative ways to convince the jury of the firm’s guilt—a difficult problem in a case where the actions of insiders on behalf of the firm were the central issue.

As the trial progressed, jurors seemed, more and more, to see Andersen as the “underdog” and accord it sympathy on that basis. At first blush, it might seem ridiculous to suggest that one of the “big five” accounting firms could come to be regarded as an underdog, but events both outside and inside the courtroom seemed to move things in that direction. From almost everyone’s perspective, it was not Andersen but Enron that was the real villain. Enron was the proponent of aggressive accounting practices and the preparer of misleading financial statements. Enron lied not only to the market and the public but also to Arthur Andersen as well. In particular, the evidence suggested that Enron’s officials had lied to or withheld information from its auditors about a number of the special purpose entities that had done so much to undermine the energy trader. The true ownership of these entities was kept hidden as was the fact that they were, in a number of cases, little more than instruments for self-dealing by highly placed Enron officers like CFO Andrew Fastow.<sup>98</sup> Placing the blame on Andersen for Enron’s collapse might easily be seen as scapegoating, especially in light of all of Enron’s chicanery. (It should be noted, however, that Enron’s misconduct did little to justify Andersen’s own very real and serious negligence.)

The scapegoat theme and other considerations appeared to garner Andersen a good deal of public support. As the *Houston Chronicle* said of the proceedings, Andersen “had more than a small measure of public sympathy.”<sup>99</sup> Juror receptivity to Andersen’s plight was perhaps enhanced by the fact that a majority of the jurors were minority group members likely to be particularly sensitive to the interests of underdogs and naturally suspicious of schemes to shift blame away from wealthy and powerful wrongdoers. This sympathy

98. *Id.* 2002 Extra LEXIS 466, at \*1–\*4 (testimony of Carl Bass); *id.* 2002 Extra LEXIS 462, at \*41–\*42 (testimony of David Duncan); *id.* 2002 Extra LEXIS 469, at \*105 (testimony of Amy Ripepi).

99. Ivanovich & Brewer, *supra* note 1, at A1.

was, in all likelihood, heightened by the constant media focus on Andersen. At some point, negative publicity can boomerang and generate concern for a targeted individual, as appeared to be the case with respect to President Clinton during the Lewinsky affair. Moreover, as Arthur Andersen's options dwindled and clients fled the accounting firm in droves, a feeling of sympathy for the thousands of innocent Andersen employees was likely to have been kindled.

Courtroom events also seemed to foster a shift in sympathies to Andersen. The government, under incredible pressure to win the case or suffer a substantial legal and political setback in its Enron investigation, proceeded with the grimmest sort of resolve. It turned James Hecker's light-hearted parody into a jeremiad. Rusty Hardin was quick to point out the government's heavy-handedness and to argue, in popular parlance, that the government's lawyers "need[ed] to get a life."<sup>100</sup> Even more provocative was the government's repeated references to Andersen's prior wrongdoing in the *Waste Management* and *Sunbeam* cases. This matter will be explored in some detail below, but here it should be noted that the government's repeated references to prior wrongdoing gave the appearance of an effort at character assassination—a ploy that can, at least sometimes, backfire.

Judge Harmon and Rusty Hardin clashed repeatedly during the trial. While such disputes can turn jurors against what may be perceived as an obstreperous or disrespectful lawyer, in the *Andersen* case they seemed to underscore the embattled circumstances in which Arthur Andersen found itself. On the second day of the trial, Hardin complained (with some justification): "Judge, you haven't sustained a single objection of mine yet."<sup>101</sup> A few days later he suggested that the judge's rulings were "about 185 to 3."<sup>102</sup> Hardin confronted the judge repeatedly claiming that she applied a different, more lenient standard of evaluation to the government's arguments. Despite a number of dubious sallies, there was something to Hardin's charge, and jurors could easily find this an additional reason to be sympathetic to Arthur Andersen as an underdog.

The *Andersen* prosecution was also made more difficult by the fact that conviction would be the functional equivalent of a death

100. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 458, at \*245 (defense closing argument).

101. *Id.* 2002 Extra LEXIS 454, at \*253 (testimony of Thomas Newkirk).

102. *Id.* 2002 Extra LEXIS 469, at \*167 (testimony of James Green).

sentence for the accounting firm. This was so because the SEC has a rule requiring the debarment of any accounting firm convicted of a felony from serving as the auditor of a publicly traded corporation.<sup>103</sup> Since that was the core of Andersen's business, its conviction would mean the demise of the firm, a fact acknowledged by the prosecution in its closing argument.<sup>104</sup> It has long been recognized that significant segments of the population are profoundly uneasy about the imposition of a death sentence. Concern about this has led many states to adopt procedures designed to exclude potential jurors who are unalterably opposed to the ultimate penalty.<sup>105</sup> While the identity of those who would object to the execution of a defendant might be very different from those who would protest the dismantling of a business entity, the same sorts of concerns—about the draconian nature of the punishment, the inevitable risk of mistake, and the likelihood of disparities in treatment—would seem to be present. It is reasonable to assume that jurors confronted with the destruction of a huge firm and the consequent loss of jobs by thousands of innocent employees would be reluctant to convict.

Even before the trial began, Rusty Hardin was hard at work trying to frame the proceedings as a life and death matter. At a hearing on March 20 in which the defense sought the earliest possible trial date, Hardin repeatedly emphasized the extremity of the danger to Andersen. He told the court that Arthur Andersen was "a company whose very existence is in jeopardy,"<sup>106</sup> and supported his accelerated scheduling request by arguing "if you're going to put 28,000 people out of work, there ought to be some fundamental fairness attached to it."<sup>107</sup> He reminded the court that his client was "totally at risk"<sup>108</sup> and succeeded in convincing the judge to set a dramatically expedited trial schedule. Recognizing the power of the death penalty argument, the government made a motion in limine to prevent the defense from making such an appeal to the jury. What the government specifically sought to bar was the eliciting of "information about the effect of this

103. 17 C.F.R. § 201.102(e)(2) (2002) (SEC Rule of Practice mandating suspension of right to appear or practice before the SEC upon conviction of a felony or misdemeanor involving moral turpitude).

104. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 458, at \*154 (government closing argument).

105. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

106. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 447, at \*17 (pretrial hearing).

107. *Id.* at \*20.

108. *Id.* at \*30.

indictment and this case on Andersen and its personnel.”<sup>109</sup> The court granted the government’s motion.

Throughout the trial, Hardin, in subtle and not so subtle ways, sought to remind the jury of the stakes involved. In his opening, he described Arthur Andersen as “a proud firm of 28,000 employees” that was “90 years of age.”<sup>110</sup> He reiterated the same numbers in his cross-examination of the government’s first witness, SEC Division of Enforcement Associate Director Thomas Newkirk. He went even further with Newkirk by questioning him about the history of SEC debarment of accounting firms, which Hardin described as “the ultimate penalty.”<sup>111</sup> He eventually pursued this theme so vigorously with Newkirk and later witnesses that the government sought sanctions against him for breaching the limitations fixed by the motion in limine.<sup>112</sup>

As part of his strategy, Hardin relied on arguments often used in death penalty cases, that (in Eighth Amendment terms) the punishment proposed was cruel and unusual.<sup>113</sup> As Hardin described it, the cruelty was to the thousands of innocent Andersen employees who would lose their jobs if the firm were convicted, an argument made more poignant since the acts in question in the case had been carried out by a mere handful of Andersen partners. The unusualness Hardin focused on was twofold. First, he pointed out that on three other occasions “big five” firms had faced disciplinary proceedings before the SEC for “improper professional practice” and that in none of these cases had there been a debarment.<sup>114</sup> Second, he elicited testimony that although there were dozens of financial restatements each year, virtually none ever led to charges against an auditing firm, let alone the termination of its practice.<sup>115</sup>

As in death penalty cases, Hardin strove to “humanize” his client. He made a special effort to place young, attractive Andersen employees on the stand. One was Emily Madison, a young accountant who had a child a brief ten weeks before the trial. Others in-

109. *Id.* 2002 Extra LEXIS 463, at \*142 (government motion to enforce motion in limine).

110. *Id.* 2002 Extra LEXIS 454, at \*64 (defense opening statement).

111. *Id.* 2002 Extra LEXIS 450, at \*11 (testimony of Thomas Newkirk).

112. *Id.* 2002 Extra LEXIS 463, at \*142–\*45 (government motion to enforce motion in limine).

113. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

114. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 454, at \*237–\*38 (testimony of Thomas Newkirk).

115. *Id.* 2002 Extra LEXIS 450, at \*20 (testimony of Thomas Newkirk).



cluded Shane Philpott and Timothy McCann, who had led the Portland opposition to shredding. Hardin also called Jennifer Stevenson who, with her colleague, Pattie Grutzmacher, had resisted Enron demands and had been removed from some of its work. All these witnesses served an analogous role to those called by a defendant in the penalty phase of a death case. They displayed the defendant's good characteristics as well as contributions to family and community.

Hardin closed his case as he had opened it, with a reminder to the jury that Arthur Andersen was a ninety-year-old firm with 28,000 employees.<sup>116</sup> He emphasized the "incredible impact [of conviction] on such a company whose integrity is everything."<sup>117</sup> He warned the jurors not to "rush to judgment" because a conviction would mean the ruin of a 28,000-person firm.<sup>118</sup>

Hardin did not rely exclusively on the emotional appeal of the "underdog" and death penalty arguments. He challenged much of the testimony that raised suspicions about Andersen's conduct between mid-September and early November 2001. One of his tactics was to attempt to shift the focus of suspicion from Arthur Andersen to others who might be held responsible. His most promising target was, of course, Enron. He sketched Enron's lies and misconduct with a number of witnesses. He particularly underscored the improvidence of Enron's board of directors—a body that had approved Andrew Fastow's pocket-lining schemes.<sup>119</sup> He also attempted to assign blame for Enron's collapse to the SEC. With the second of the two SEC witnesses offered by the prosecution, defense counsel sought to suggest that the government's oversight of Enron was inadequate and that the SEC had fiddled "while Rome burned."<sup>120</sup>

Duncan, too, came in for his share of blame. Hardin, however, was gentler with Duncan, suggesting that Duncan's key mistake had been breaching Andersen's cardinal rule that decisions be collegial and made after full consultations. The consultation theme was one he sounded with at least three Andersen witnesses,<sup>121</sup> and it was cun-

116. *Id.* 2002 Extra LEXIS 458, at \*171 (Defendant's closing argument).

117. *Id.* at \*200.

118. *Id.* at \*335.

119. *Id.* 2002 Extra LEXIS 448, at \*128 (testimony of Benjamin Neuhausen).

120. *Id.* 2002 Extra LEXIS 450, at \*183 (testimony of Spenser Barasch, SEC Associate District Administrator for Ft. Worth Office).

121. *Id.* 2002 Extra LEXIS 455, at \*21, \*113–\*14 (government document presentation); *id.* 2002 Extra LEXIS 461, at \*112–13 (testimony of Richard Corgel); *id.* 2002 Extra LEXIS 452, at \*13 (testimony of Emily Madison, Andersen Houston Partner).

ningly designed to suggest that while Duncan had erred, Andersen had not. As a follow up, Hardin appeared to suggest that having failed to get the input of his partners, Duncan panicked and made bad choices that landed him in serious trouble.

Another of Hardin's strategies with respect to suspicious events was to ask the jury to reassess them in light of clarifying or qualifying information. Three of the most suspicious incidents in the government's proof were: (1) Arthur Andersen's removal of Carl Bass from Enron PSG work; (2) the Houston engagement team's rejection of PSG advice about Raptor aggregation; and (3) the massive shredding that began in earnest on October 24 and did not stop until November 9. As to the first of these, Hardin proffered a number of points. He questioned Duncan about Bass. The engagement team leader described the PSG member as temperamental, negative, and stubborn.<sup>122</sup> Moreover, Duncan testified that Bass had caused Enron substantial embarrassment and expense with respect to a transaction (the so-called Blockbuster deal) on which he had worked.<sup>123</sup> Beyond pursuing Bass's idiosyncrasies, Hardin sought to emphasize that Bass's removal from Enron matters had no significant effect on Andersen policy because those who remained on the PSG, most particularly the distinguished John Stewart, held similar views and insisted on adherence to sound accounting principles. Hardin stressed the continuing integrity of the PSG and its apparently unabated commitment to getting the accounting right.

Accreditation of the PSG, however, presented Hardin with a dilemma because the engagement team led by Duncan had, at a critical juncture, ignored the PSG's advice and aggregated the accounts of the various Raptor entities. Moreover, engagement team members had prepared memoranda that erroneously suggested that the PSG had endorsed the engagement team's approach. These problems were hard ones to resolve. What Hardin decided to do was to try to get Carl Bass to agree that Duncan and his team had not acted with improper intent. Bass more or less obliged, testifying (perhaps in another example of an Andersen employee not wishing to disparage the firm) that the Enron engagement team had done nothing fraudulent in its Raptor work but had simply disagreed with the PSG on a question of accounting.<sup>124</sup> As to the misleading ascriptions in the

122. *Id.* 2002 Extra LEXIS 462, at \*198-\*99 (testimony of David Duncan).

123. *Id.* at \*218.

124. *Id.* 2002 Extra LEXIS 466, at \*38 (testimony of Carl Bass).

memos, Bass viewed these as simply “an honest mistake” that had been corrected when discovered.<sup>125</sup> In his examination of Duncan, Hardin reinforced these points, getting Duncan to state that he felt there was no absolute obligation to conform to the PSG’s view and that he had done what he thought was proper at the time.<sup>126</sup> Hardin went further, getting Duncan to testify that there were occasions when the SEC had taken a more liberal approach to an accounting problem than had the PSG.<sup>127</sup>

The shredding question was by far the most difficult for Andersen to handle. The facts regarding the massive shredding carried out from October 24 to November 9 at the apparent suggestion of several Andersen partners were extremely troubling. Hardin tried a number of different approaches in response. He suggested that the shredding was not nearly so massive as the government contended. He argued that a great deal of what was destroyed had nothing to do with Enron. Hardin pointed out that multiple copies of most documents existed and that there had been no thoroughgoing effort to get rid of all of them. Many of those who had deleted materials, including Carl Bass and Benjamin Neuhausen of the PSG, testified that they had no intention of hiding anything from anyone when they destroyed documents or deleted e-mails.<sup>128</sup> Key Andersen leaders including Amy Ripepi, who headed the PSG, and Richard Corgel, who was Practice Director for all of North America, denied that Andersen believed any SEC document request was imminent.<sup>129</sup> If they were to be believed then no documents were destroyed with the intention of depriving the SEC of access to them. Finally, and perhaps most significantly, Hardin led a number of witnesses to testify that accountants were not supposed to make determinations about document retention in cases of investigation or litigation. That was a job for lawyers. Neuhausen so stated<sup>130</sup> and Bass agreed, testifying that he would not know about litigation, “[s]omeone would have to tell me. Someone with competent legal experience.”<sup>131</sup> Emily Madison

125. *Id.* at \*57.

126. *Id.* 2002 Extra LEXIS 462, at \*63-\*64 (testimony of David Duncan).

127. *Id.* at \*214.

128. *Id.* 2002 Extra LEXIS 448, at \*115-\*16 (testimony of Benjamin Neuhausen); *id.* 2002 Extra LEXIS 466, at \*102-\*03 (testimony of Carl Bass).

129. *Id.* 2002 Extra LEXIS 466, at \*233 (testimony of Amy Ripepi); *id.* 2002 Extra LEXIS 461, at \*159-\*60 (testimony of Richard Corgel).

130. *Id.* 2002 Extra LEXIS 448, at \*110 (testimony of Benjamin Neuhausen).

131. *Id.* 2002 Extra LEXIS 466, at \*103 (testimony of Carl Bass).

said the same thing,<sup>132</sup> and John Riley, one of Andersen's SEC experts, stated that it was up to "the attorneys who were working with us on these types of matters [to] let us know."<sup>133</sup>

The argument asserting lawyers' responsibility for deciding when litigation or investigation is likely and what documents should, therefore, be preserved, had genuine appeal. It was logical and had the effect of substantially diminishing Andersen's accountants' responsibility for document destruction or retention decisions. It did, however, have one serious negative consequence for the defense. It focused special attention on Arthur Andersen's lawyers and what they had been telling their client throughout the Enron crisis. Hardin's strategy made it extremely likely that the jury would have to review Temple's actions and statements with the greatest of care. If she should have advised her client that shredding was improper, then Andersen was in deep trouble. If not, then Andersen might be exonerated.

#### IV. THE BALANCE TIPS TO CONVICTION

Despite Hardin's aggressive effort to take the sting out of shredding, it raised serious questions about Andersen's integrity as a firm. No one on either side disagreed that, as a general matter, it was unwise to undertake massive document destruction in the midst of a deepening accounting and auditing crisis. The SEC's Thomas Newkirk said he had never before seen it done by a "big five" accounting firm.<sup>134</sup> Andersen's straight-talking forensic accountant, and key government witness, David Stulb, said it was a bad idea and that he had told Duncan so on October 30.<sup>135</sup> Arthur Andersen's SEC expert and key defense witness, John Riley, had concluded exactly the same thing and had warned Duncan about document destruction on October 26.<sup>136</sup>

Yet shredding on a massive scale had occurred. It had happened because not one, but several Andersen partners sent out signals that document destruction was desirable. Although Duncan was the primary conduit for destruction orders, the critical decision regarding the matter appeared to have been made before he acted by the

132. *Id.* 2002 Extra LEXIS 452, at \*55 (testimony of Emily Madison).

133. *Id.* 2002 Extra LEXIS 465, at \*133 (testimony of John Riley).

134. *Id.* 2002 Extra LEXIS 450, at \*45 (testimony of Thomas Newkirk).

135. *Id.* 2002 Extra LEXIS 463, at \*83-\*84 (testimony of David Stulb).

136. *Id.* 2002 Extra LEXIS 457, at \*134 (testimony of John Riley).

woman who in both the government's case and the defendant's response had become the central figure in the affair, Andersen's in-house counsel, Nancy Temple. She was introduced into the Enron crisis to render legal advice on September 28. In her notes of October 1, Temple was already asking the key question: "What documents should we keep?" Her own preliminary answer was telling: "Historically, keep everything."<sup>137</sup> By October 9, Temple had already concluded: "Highly probable some SEC investigation."<sup>138</sup> Despite all this, on October 12, 2001, Temple sent her fateful memorandum to Michael Odom of the Enron engagement team suggesting that he "[remind] the engagement team of our documentation and retention policy." She also told him: "[I]t will be helpful to make sure that we have complied with the policy."<sup>139</sup>

Odom's reaction to this suggestion was to push the idea of document destruction, something he had already begun to do on his own in a continuing education program (captured on video tape and played at trial) on October 10.<sup>140</sup> With counsel's apparent endorsement, the destruction of Andersen's Enron documents began. When Stewart, Ripepi, Neuhausen, and Green (all members of the PSG) received Temple's reminder, they began deleting e-mails and electronic files.<sup>141</sup> When Duncan saw Enron starting to disintegrate on October 23, it was to Temple's suggestion that he turned. Temple provided the apparent legal "blessing" that led accountants throughout Arthur Andersen to destroy materials that they otherwise would have been reluctant to shred. Temple's interactions involved even more than shredding. It was she who redacted Duncan's memoranda regarding critical meetings with Enron officials and struck Duncan's warning to Enron that its third-quarter earnings statement was misleading.

Hardin had, perhaps inadvertently, drawn a line that led directly to Temple, and her conduct presented Andersen's defenders with a serious problem. She had, on behalf of the firm, invited document destruction. One of the few remaining lines of defense was to suggest that neither Temple nor other Andersen employees had any idea that

137. *Id.* 2002 Extra LEXIS 459, at \*63 (government document presentation).

138. *Id.* at \*71.

139. *Id.* at \*81-82.

140. *Id.* at \*75-78.

141. *Id.* 2002 Extra LEXIS 448, at \*57, \*62-63 (testimony of Benjamin Neuhausen); *id.* 2002 Extra LEXIS 469, at \*90-91 (testimony of Amy Ripepi); *id.* 2002 Extra LEXIS 469, at \*153-55 (testimony of James Green).

there might soon be an SEC investigation. If no investigation was anticipated then there could be no intent to obstruct justice by shredding or deleting documents. The problem with this argument was that it was hard to believe that sophisticated and experienced auditors had no idea that the SEC might want to look at their papers. The seventh largest corporation in America was collapsing. Its demise was tied to a series of dubious accounting practices. Accounting problems would force it to issue a gigantic restatement. All the witnesses agreed that as soon as a restatement like the one required of Enron was released, a thorough SEC investigation was a near certainty.<sup>142</sup> They also agreed that extensive media reporting and the significant decline in stock price were likely to trigger an SEC investigation. Despite the media assault on Enron's accounting from October 17 onwards, the dramatic drop in its stock price at the same time, the dubious accounting surrounding the Raptor and other special purpose entities, and the growing awareness of the need for an enormous restatement, Arthur Andersen's witnesses continued to insist they had no expectation that an SEC investigation involving Andersen was likely.

Such a claim was simply not credible. Temple had undermined such a claim as early as October 9, when she said: "Highly probable some SEC investigation."<sup>143</sup> As soon as David Stulb took his first look at the situation on either October 28 or 29, he concluded that both a restatement and an SEC investigation were inevitable.<sup>144</sup> He was blunt in his criticism of his colleagues' failure to own up to the obvious:

[W]e had at least a potential accounting restatement with a billion dollar plus accounting error; you had potential misrepresentations being made by the former CFO—or the CFO that was on administrative leave; you had a credible whistle blower that had brought forward a number of these facts. And I understand that she had raised these back in August. I was concerned why it took, you know, 60-plus days for people to be focusing on it.<sup>145</sup>

Arthur Andersen's witnesses' dogged denial of any awareness of an impending SEC investigation made them sound either incompetent or untruthful. Amy Ripepi, the chief of the PSG, monitored the

142. *E.g., id.* 2002 Extra LEXIS 466, at \*113–\*14 (testimony of Carl Bass); *id.* 2002 Extra LEXIS 455, at \*186 (testimony of David Stulb).

143. *Id.* 2002 Extra LEXIS 459, at \*71 (government document presentation).

144. *Id.* 2002 Extra LEXIS 455, at \*192–\*96 (testimony of David Stulb).

145. *Id.* 2002 Extra LEXIS 463, at \*78 (testimony of David Stulb).

SEC's website on a daily basis. She was an expert in SEC matters. In her testimony she denied any concern about the SEC until at least October 20.<sup>146</sup> The government demonstrated that no later than October 13 she was discussing "the question of an SEC enforcement action."<sup>147</sup> This inconsistency raised substantial doubts about her candor.

Richard Corgel, the most highly placed Andersen official to testify at trial and the defense's first witness, had a similar problem. He testified that the Andersen crisis team was unaware of any threat of SEC investigation throughout most of October.<sup>148</sup> Yet, SEC investigation was an item on the core group's October 23 agenda—a fact concerning which he had only the lamest explanation.<sup>149</sup> Corgel's credibility problem was compounded because, no later than October 24, he and his group had chosen to send Andersen's top SEC troubleshooter, John Riley, to Houston.<sup>150</sup> Why bring in an SEC troubleshooter unless you expect SEC trouble? Corgel had no persuasive answer.

John Riley was Andersen's last witness, the anchor of its case. He, too, stumbled with respect to the SEC question and thereby detracted from his credibility. He denied expecting that the SEC would want Andersen documents when he went to Houston on October 24.<sup>151</sup> He said he was present at Enron headquarters only to help with accounting issues raised "in the press."<sup>152</sup> He stated: "I gave no conscious thought to the SEC up until [November 5]."<sup>153</sup> Yet, this SEC troubleshooting expert, in a deposition in the *Sunbeam* case, had testified under oath that a single article in the financial press (in Enron there had been dozens) would trigger close SEC scrutiny.<sup>154</sup> Moreover, Riley's own notes indicated that by October 25 he recognized the likelihood of an Enron restatement and, as a consequence, an SEC investigation.<sup>155</sup> It is difficult to conclude that the jury could

146. *Id.* 2002 Extra LEXIS 469, at \*60–\*62 (testimony of Amy Ripepi).

147. *Id.* at \*62–\*63.

148. *Id.* 2002 Extra LEXIS 461, at \*159–\*72 (testimony of Richard Corgel).

149. *Id.* at \*169–\*72.

150. *Id.* at \*215–\*16, \*246.

151. *Id.* 2002 Extra LEXIS 457, at \*123–\*24 (testimony of John Riley).

152. *Id.* at \*131.

153. *Id.* 2002 Extra LEXIS 465, at \*28–\*29 (testimony of John Riley).

154. *Id.* at \*71–\*72.

155. *Id.* at \*98.

have been favorably impressed by the tergiversations of Ripepi, Corgel, and Riley.

Other considerations besides the defendant's suspicious behavior and Andersen employees' lack of candor seemed to urge a conviction. Over the course of the trial, it became apparent that the SEC, on its own, simply did not have the resources to police the behavior of America's thousands of publicly held corporations. As in so many other situations in the American scheme of regulation, parties other than the government are expected to take the lead in uncovering misconduct.<sup>156</sup> Spenser Barasch, the government's second witness and the Associate District Administrator of the SEC's Fort Worth office, was quite candid about this situation. He testified that it was the *Wall Street Journal's* investigative reporting that led his office to begin its own Enron inquiry. Rusty Hardin was then moved to ask, "Do we really need the SEC if we have the Wall Street Journal?"<sup>157</sup> Barasch's earnest reply stressed the fact that the Fort Worth office of the SEC was "swamped" and was no match for the "batteries of lawyers" employed by a corporation like Enron.<sup>158</sup> Barasch noted that auditors have far easier access to key corporate documents and can get a much clearer picture of corporate financial behavior.<sup>159</sup> The defendant's concluding witness, Riley, had served in the SEC for eleven years. In a bit of a turnabout on the theme of employee loyalty, he confirmed that the SEC "can't look at all public companies. They just don't have the resources."<sup>160</sup>

If the SEC was institutionally incapable of ongoing supervision of corporate America, who was left to do the job? Certainly neither the press nor the plaintiffs' lawyers could fill the role since they were unlikely to get involved without clear, public signs of trouble. The proof in the case made it apparent that there was no other option than to rely on America's auditing industry, especially its largest accounting firms. Everyone involved in the trial agreed that auditors

156. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 99–104 (2001); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669 (1986); Carl F. Goodman, *The Somewhat Less Reluctant Litigant: Japan's Changing View Towards Civil Litigation*, 32 LAW & POL'Y INT'L BUS. 769, 777–79 (2001).

157. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 450, at \*84 (testimony of Spenser Barasch).

158. *Id.* at \*182–\*84.

159. *Id.* at \*184.

160. *Id.* 2002 Extra LEXIS 465, at \*143 (testimony of John Riley).



were charged with the responsibility of protecting the integrity of corporate fiscal operations and financial reporting on those operations. The 1934 legislation, adopted to address the abuses that helped trigger the 1929 stock market crash, mandated annual financial disclosure statements by publicly owned corporations.<sup>161</sup> Such statements are to be based on corporate financial records kept in accordance with generally accepted accounting principles (“GAAP” in the parlance of the accounting world) and to be audited in conformity with generally accepted auditing standards (“GAAS”).<sup>162</sup> The depression-era legislation prohibits companies from making materially false and misleading financial statements to the public.<sup>163</sup> Publicly-traded companies are required to retain auditors to review company books. In turn, the auditors are obligated to raise questions about financial statement inaccuracies. If “material” inaccuracies are found in a public financial statement, the company involved is obliged to issue a restatement.<sup>164</sup> Auditors are charged by law to be on the lookout for illegal acts and to police related-party transactions. If misconduct is discovered, the auditors are required to inform management and the SEC if the audited company does not correct the problem.<sup>165</sup> The SEC is empowered to police not only corporate compliance with these rules but auditor compliance as well.<sup>166</sup>

The jury empanelled in the *Andersen* case had, along with all other Americans, just lived through one of the worst periods of corporate scandal ever experienced. Tyco, WorldCom, Qwest, Adelphia, Sunbeam, and Waste Management, to name but a few, had all been tarnished. These companies’ troubles paled in comparison to those of Enron. American business was in a crisis—a crisis that extended beyond businessmen to the “watchdog” accounting firms that were supposed to safeguard the system. Accountants had been swept up in the pursuit of large profits, had lost their independence, and had become perfunctory in the performance of their duties. Instead of serving as careful and candid public surrogates, members of the accounting industry in general, and Arthur Andersen in particular, had become advocates for their corporate clients. As advocates they engaged in sharp practices to help corporations

161. *Id.* 2002 Extra LEXIS 454, at \*114–\*15 (testimony of Thomas Newkirk).

162. *Id.* at \*121–\*22.

163. *Id.* at \*123.

164. *Id.* at \*124.

165. *Id.* at \*126–\*27.

166. *Id.* at \*129.

befuddle regulators and the public. The Raptor partnerships and other Enron special purpose entities had the look and feel of a clever ruse. So did Temple's effort to hide what Andersen knew about the misleading nature of Enron's October quarterly earnings report. Temple told her outside counsel, Daniel Kolb of the Davis Polk law firm, that she wanted to edit Duncan's memo because otherwise it might be said that Andersen "had a responsibility to follow up when we knew the client had issued a press release that was potentially misleading."<sup>167</sup> This is nothing less than a headlong flight from public responsibility. The integrity of business and health of markets cannot be maintained if "watchdog" auditors adopt such an approach.

Faced with all this, the jury may have concluded that it had to send a message to the accounting industry that greater attention to the public interest was expected. As the government argued in its closing, watchdogs could not be permitted to shred documents with impunity or treat the enforcement of the law as a "game." "The auditor is not supposed to be thinking about whether they [*sic*] can out maneuver the SEC."<sup>168</sup> Nor could auditing firms and their clients be allowed to silence the few vigilant accountants among them—those like Bass, Stevenson, Gutzmacher, and Watkins, willing to raise the tough questions. In the end, the jury may have concluded that the only way to clean up the systemic mess was to convict Andersen.

## V. THE SIGNIFICANCE OF THE JURY'S DECISION

Since colonial times, juries have reviewed and legitimated government action in America.<sup>169</sup> In the three-branch system of the United States, officials of the executive are not free to impose their view of criminality by fiat. They must convince a court and twelve ordinary citizens that the law has been violated by accused defendants and that it is fair to punish those charged. Once the government has persuaded a jury, the jury's verdict stands as a powerful declaration of the *community's* condemnation of the defendant's conduct. In the Enron debacle, the jury's conviction of Arthur Andersen was a powerful signal that the misconduct with which Andersen was associated was, in society's eyes, serious and sanctionable. That determination opens the way for the government to proceed against the more

167. *Id.* 2002 Extra LEXIS 459, at \*92 (government document presentation).

168. *Id.* 2002 Extra LEXIS 458, at \*138 (government closing argument).

169. See Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 592–605 (1993).

significant criminal targets in the affair, the officers of the Enron Corporation.

The *Andersen* conviction legitimated the prosecution of these defendants and displayed the community's willingness to see the law vigorously applied in their cases. An acquittal might have undermined the government's pursuit of Enron. The conviction had the opposite effect, intimating that the government is likely to succeed in its efforts to convict Fastow and the rest of the Enron gang. At the same time, the jury's long struggle to reach its verdict should serve to remind the government that it has to make a good case and that whatever it presents will be closely scrutinized.

A number of Arthur Andersen's witnesses tried to defend (or at least explain) the firm's decision to destroy documents as a justified response to a hostile civil litigation climate in which accounting firms are constantly being hounded by greedy, unethical, and aggressive plaintiff's securities litigation firms like the nationally famous (or, in some circles, infamous) Millberg Weiss.<sup>170</sup> Richard Corgel, the highest-ranking Arthur Andersen official to appear at trial, testified that document destruction was essential to Andersen because "extraneous material" could seriously harm the firm.<sup>171</sup> Its danger, as Corgel put it, was that "often times the plaintiff's bar will take information out of context and use that as a point of criticism against the client, against our firm, whatever."<sup>172</sup> Corgel went on to argue that plaintiff's lawyers do not give accounting firms a "fair hearing" but twist "small points taken out of context" and use them as a "20/20 hindsight opportunity."<sup>173</sup> This situation, in Corgel's view, justified aggressive shredding policies.

The fear of plaintiff's lawyers and their lawsuits ran deep at Arthur Andersen. At no fewer than four places in his testimony, Duncan indicated that his concern with document destruction was tied not only to the SEC but to plaintiff's law firms.<sup>174</sup> Revealingly, on *every one* of those occasions Duncan mentioned "plaintiffs' attorneys" or the litigation they file *before* mentioning concern over an SEC investigation. Duncan testified that Temple had warned him

170. See Jeffrey Toobin, *The Man Chasing Enron*, NEW YORKER, Sept. 9, 2002, at 86.

171. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 468, at \*55 (testimony of Richard Corgel).

172. *Id.* at \*55-\*56.

173. *Id.* at \*58-\*59.

174. *Id.* 2002 Extra LEXIS 467, at \*66, \*144, \*151, \*164 (testimony of David Duncan).

about “extraneous documents” because she said: “[T]hey are often used against us in litigation. A plaintiff lawyers [*sic*] can take the most innocent thing and make it seem to be a very, very significant thing.”<sup>175</sup> Duncan appeared to have been powerfully influenced by this warning. If he seemed “like a deer caught in the headlights,”<sup>176</sup> as David Stulb suggested, the onrushing vehicle he thought he saw was probably plaintiff’s lawsuits rather than the SEC.

The same might be said of the Andersen engagement team’s Michael Odom, who stressed private litigation problems when he counseled wide-ranging document destruction during his videotaped October 10 training session. It seems no coincidence that Millberg Weiss filed a suit against Enron (a fact widely reported within Andersen)<sup>177</sup> on October 23, just as Duncan was reaching his decision to encourage shredding. The jury appeared to reject the blame-it-on-the-plaintiff’s-bar argument propounded by Andersen’s employees. That rejection might be said to be a vindication of the civil enforcement process presently in operation across America. Accounting firms will not be permitted to shred documents, dissemble, or justify misconduct because they fear the likes of Millberg Weiss.

The jury’s decision came at a time when the rules regulating accountants were in flux. In response to the Enron fiasco, Congress passed the Sarbanes-Oxley Act, designed, among other things, to tighten the regulation of accounting firms.<sup>178</sup> To that end, a board was created to rewrite rules of accounting practice. This will be a difficult undertaking and the accounting industry has already impeded the effort by torpedoing the first proposed chair of the new accounting board because of his reputation as a serious reformer (a move that, indirectly, led to the resignation of SEC head, Harvey Pitt).<sup>179</sup> The jury’s reaction to the Arthur Andersen story is at least one signal that real reform is desired by the American people. Accounting is esoteric and much of it goes on in contexts screened from public view. It would, however, be a mistake on the part of the industry to believe that it can avoid addressing the serious problems disclosed by the Enron/Andersen mess. The jury’s verdict and the many successes of

175. *Id.* at \*161.

176. *Id.* 2002 Extra LEXIS 463, at \*96–\*97 (testimony of David Stulb).

177. *Id.* 2002 Extra LEXIS 459, at \*154–\*55 (government document presentation).

178. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 103, 116 Stat. 745 (2002).

179. See Stephen Labaton, *Bitter Divide as Securities Panel Picks an Accounting Watchdog*, N.Y. TIMES, Oct. 26, 2002, at A1; Stephen Labaton, *In Stormy Time, S.E.C. Is Facing Deeper Trouble*, N.Y. TIMES, Dec. 1, 2002, at A1.

plaintiff's firms in securities cases demonstrate continuing community dissatisfaction with an accounting industry that has sacrificed independence in the pursuit of ever-fatter fees. Accountants like Andersen's Duncan and his counsel Temple are not bad people, but the jury verdict suggests that they have lost sight of their public obligations and basic moral tenets like those regarding truthfulness.

On a more prosaic level, the lesson of the jury's decision is that the updated obstruction of justice statute,<sup>180</sup> enacted in 1982 to widen restrictions on document destruction,<sup>181</sup> means what it says: destruction is barred as soon as a party has reasonable grounds to believe that an official inquiry is foreseeable.<sup>182</sup> The notion that a holder of documents is free to do anything he or she wishes with them until presented with a subpoena has been exploded. John Coffee, Jr., the distinguished securities law scholar, has argued that Andersen's critical mistake in the wake of Enron's meltdown was its failure to understand that the obstruction of justice laws had changed.<sup>183</sup> Temple and others at Andersen behaved as if destruction were proper until a court or agency told them to stop. In the wake of the 1982 legislation, that approach was based on clearly erroneous legal analysis. Moreover, such an approach could yield not only an obstruction of justice conviction, but also a presumption of fraud under the 1995 Private Securities Litigation Reform Act.<sup>184</sup> Ignorance of the law, as the old refrain goes, is no excuse, and a jury of twelve Houstonians so reminded Arthur Andersen.

The *Andersen* conviction also demonstrated that American juries will accept the treatment of wayward corporations and accounting firms as criminal enterprises. The genteel approach that featured slaps on the wrist and stern warnings about future consequences<sup>185</sup> has given way to unrelenting prosecution. The Houston jury, albeit reluctantly, accepted that shift. The government removed its kid gloves in the *Andersen* case. It treated Andersen like a common criminal and played "hardball" in its effort to win a conviction. The

180. 18 U.S.C. § 1512 (2002).

181. For a brief history of this section, see Coffee, *supra* note 96, at A19.

182. *Id.*

183. *Id.*

184. 15 U.S.C. § 78u (2002).

185. See Lynn Cowan & Cheryl Winokur Mynk, *Andersen: Called to Account: Criminal Charges Threaten Auditor's Survival*, WALL ST. J., Mar. 18, 2002, at C15; Gary Young, *When a Business Stands in the Dock Conviction Isn't the End of the World*, NAT'L L.J., Sept. 16, 2002, at A1.

government stressed Andersen's "prior bad acts" as if Andersen were a three-strikes bank robber. The government tenaciously pressed its case. It was willing to point an accusing finger at Harvard-trained lawyers and high-ranking accountants as "corrupt persuaders." All of this signals that the climate in business failure and accounting misconduct cases has changed substantially—a change that the government could not accomplish without the endorsement of the jury.

The *Andersen* prosecution may prove to be a seminal event. In a number of important ways it is the mirror image of an earlier watershed case, the trial of Peter Zenger.<sup>186</sup> In that 1734 prosecution, the government took a vague law (one prohibiting the publication of seditious libel) and sought to use it to control the colonial press. A jury was told that it was required to convict if the defendant, Zenger, had published the offending article—a document the judge ruled was libelous on its face. The jury refused to accept the case as a slam-dunk (Zenger had published the piece) and acquitted the defendant. Its determination squelched a politically motivated campaign to muzzle the press. In *Andersen*, the government took an exceedingly vague obstruction of justice statute and sought to apply it in the politically charged prosecution of a major accounting firm. The jury, after hearing about the problems in the accounting industry (at least those touching Andersen) and the dubious behavior of the defendant, decided that the government could use its ill-defined statute to punish the accounting firm. Interestingly, however, as in *Zenger*, no piece of proof would be treated as automatically dispositive (in *Andersen*, Duncan's confession was claimed to have the same sort of dispositive power as ascribed to Zenger's technically libelous article). In both cases it was the jury's decision that was key to establishing the reach of the law and an appropriate social agenda. The Houston jury opened the door to much broader regulation of accountants and business. Time will tell if this was a watershed step. If so, it was one that only a jury could legitimate.

## VI. CONCERNS ABOUT GOVERNMENT MISCONDUCT ARISING FROM THE *ANDERSEN* CONVICTION

The *Andersen* case did more than send a powerful message about corporate governance and auditor integrity: it raised a series of

186. See Paul Finkelman, *The Zenger Case: Prototype of a Political Trial*, in *AMERICAN POLITICAL TRIALS* 21–42 (Michael R. Belknap ed., 1981).

questions about the proper limits of governmental zeal in hard-fought cases with vast political ramifications. Unfortunately, a number of the steps that the government took threaten to erode the fairness of American jury trials. As already noted, the prosecutors were extremely aggressive in introducing "other crimes evidence." From the outset of the case through the closing arguments, United States attorneys repeatedly made reference to the *Waste Management* and *Sunbeam* cases. Federal Rule of Evidence 404(b) dictates when a litigant may use other crimes evidence against an opponent as part of its case on the merits (in other words, for some purpose other than impeachment). The rule states:

Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.<sup>187</sup>

The rule prohibits the use of other crimes evidence to show an accused's general propensity to engage in criminal activity.<sup>188</sup> The idea is that jurors should not be encouraged to engage in did-it-before-at-it-again (or recidivist) thinking. The reason for the ban is that such proof is extremely powerful and likely to prejudice a fact finder against a defendant. Empirical studies have found that both jurors and judges are likely to be powerfully and negatively influenced by other crimes and prior conviction evidence, to the point where they will become unfairly dismissive of a targeted defendant's witnesses and arguments.<sup>189</sup>

The evidentiary dilemma is that, sometimes, other crimes evidence can be highly revealing, as when it supplies "proof of motive." In the *Andersen* litigation, the government succeeded in introducing powerfully incriminating evidence regarding the *Waste Management* and *Sunbeam* matters on the theory that these cases provided a

187. FED. R. EVID. 404(b).

188. See generally Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981).

189. See HARRY KALVEN JR. & HAN ZEISEL, *THE AMERICAN JURY* 124 (1966); Roselle Wissler & Michael Saks, *On the Inefficiency of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide Guilt*, 9 LAW. & HUM. BEHAV. 37 (1985).

motive for Andersen to act as it did in regard to Enron.<sup>190</sup> The government argued that the SEC put Andersen on a sort of “probation” because of its misdeeds in the two earlier cases and that Andersen was so fearful of being held to have violated the terms of its probation that it undertook document destruction to hide the fact of its breach.<sup>191</sup>

The theory that *Waste Management* and *Sunbeam* provided Andersen with a motive for shredding is legitimate. Yet, it imposed limits on what sort of use the government might make of the facts underlying the earlier misconduct. The government was clearly entitled to use the prior cases to show that particular Andersen employees were worried about the firm’s probationary status when Enron started to spin out of control. The government might go further and show what the consequences were likely to be if the firm were held to have violated its probation. What the government was prohibited from doing under the terms of Rule 404(b) and its motive theory was dwell on the underlying facts of *Waste Management* and *Sunbeam* or suggest that Andersen was up to its old tricks with Enron.

Unfortunately, in its grim determination to secure victory, the government misused the *Waste Management* and *Sunbeam* evidence for propensity purposes. Whenever the government wanted to blacken Andersen’s reputation, it hauled out the prior cases. When Amy Ripepi resisted agreeing with the government about problems at Andersen (apparently because of her loyalty to the firm), the government threw *Waste Management* and *Sunbeam* in her face.<sup>192</sup> It was as if these cases were trotted out to show that Andersen was a bad firm. This is precisely what Rule 404(b) does not allow. In addition, in its case-in-chief, the government had one of the investigating FBI agents, Barbara Jeanne Sullivan, present documents setting forth, in full detail, the *Waste Management* charges lodged by the SEC against Andersen.<sup>193</sup> The government made a number of points about the *Waste Management* case. Andersen had given its corporate client, Waste Management, a clean bill of health for a number of years. Andersen and Waste Management were extremely close (having

190. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 459, at \*33–\*40 (evidentiary hearing).

191. *Id.* 2002 Extra LEXIS 458, at \*55 (government closing argument).

192. *Id.* 2002 Extra LEXIS 469, at \*56–\*57 (testimony of Amy Ripepi).

193. *Id.* 2002 Extra LEXIS 459, at \*29–\*32, \*43–\*45.



worked together for more than twenty years). What brought down Waste Management was “aggressive” accounting that eventually led to an accounting restatement that drastically reduced pretax profits (by \$1.43 billion); Andersen partners were directly implicated in the entire mess.<sup>194</sup> These facts had nothing to do with motive in the Enron case; instead, they demonstrated how *similar* the two cases were. The government appeared to be encouraging the jurors to make the forbidden assumption—did-it-before-and-were-at-it-again. The United States Supreme Court in a somewhat different legal context recently condemned such invitations in *Old Chief v. United States*.<sup>195</sup>

The government was not satisfied simply to set its dubious evidence before the jury. In its closing, the prosecution made extensive arguments about *Waste Management* and *Sunbeam*. It claimed that the cases served as “road maps” to Enron with Andersen partners signing-off on dubious audits for years, only to have their clients eventually face the need to make gigantic financial restatements resulting in fiscal crisis, SEC investigation, and ruin.<sup>196</sup> This argument is improper. It is a propensity claim in its baldest form. The problem was not cured by the fact that the government went on to make reference to its “probation” motive theory. The defense complained bitterly at every opportunity about the government’s inflammatory evidence ploy. It “beseached” the judge not to give the jury any 404(b) instruction because it feared that such an instruction would only remind the jury of the prejudicial material.<sup>197</sup> The court ignored the defendant’s plea.

The question is: why did the government take this tack and make improper use of the *Waste Management* and *Sunbeam* evidence? It is hard to escape the conclusion that the government had decided to “dirty up” Andersen, to make it appear to be a rogue accounting firm. The government team clearly felt enormous pressure to win a conviction and seemed willing to take dubious steps to succeed. Moreover, the government had little concern that there might be an appellate reversal because a conviction would drive Andersen out of business

194. *Id.*

195. 519 U.S. 172 (1997) (deciding not to allow elements of prior similar crime to be made known to the jury).

196. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 458, at \*50–\*51 (government closing argument).

197. *Id.* 2002 Extra LEXIS 465, at \*208–\*09 (second precharge conference).

long before any court of appeals could rule on the case.<sup>198</sup> If this analysis is correct, it suggests a prosecutorial win-at-all-costs attitude that is antithetical to American notions of fairness and presents a real threat of causing a miscarriage of justice.

Two lesser but still serious issues were raised by the government's approach to other evidentiary problems. The first of these involved application of the hearsay rule and the second involved the invocation of the Fifth Amendment right to remain silent. As to the first, the prosecution took the position that any word uttered at any time by any Arthur Andersen employee was an admission by the defendant that could be offered into evidence by the government.<sup>199</sup> The government insisted, however, that the defendant was prohibited by the hearsay rule from offering precisely the same sort of materials because it was hearsay.

While there is solid support in the rules of evidence for such an approach as a general matter, in the *Andersen* case the government, with the approval of Judge Harmon, pressed the principle to a troubling extreme. Addressing the admissibility of documentary materials, Department of Justice Attorney Andrew Weissman declared: "[I]f I have any witness who says they're Arthur Andersen [statements] that's an admission by the partnership."<sup>200</sup> Rusty Hardin's response was: "This is shameful."<sup>201</sup> Why it might be "shameless" became clear when the government started introducing statements like the civil trial deposition of Andersen partner Tom Bauer. This deposition was taken after Bauer had been placed on administrative leave by Andersen and the community of interest between employer and employee had been broken.<sup>202</sup> These facts notwithstanding, the court admitted Bauer's deposition.

The use of Bauer's words against Andersen was disturbing. They were spoken after the two had, more or less, parted ways. Bauer had every reason to seek to protect himself at Andersen's expense. Since Bauer had invoked his Fifth Amendment privilege not to testify at the Houston trial, there was absolutely no opportunity for Andersen

198. The only real risk for the government was that the trial judge might declare a mistrial. Judge Harmon's apparent sympathy for the government substantially reduced this constraint on government action. It should be noted, however, that what little remains of Andersen has appealed the conviction. See *United States v. Arthur Andersen*, No. 02-21200 (5th Cir.).

199. See FED. R. EVID. 801(d)(2)(D).

200. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 463, at \*125.

201. *Id.*

202. *Id.* 2002 Extra LEXIS 460, at \*2-\*3 (evidentiary hearing).

to cross-examine him. The defendant was thus deprived of any real right to confront the witness. When Andersen sought to show what absent witnesses, like Bauer, had said by offering their e-mails or other out of court statements, the government invoked the hearsay rule to bar their admission. The result was a one-sided presentation tilted to the government's advantage.

This was the case when Hardin sought to introduce a particular Temple e-mail. The government argued that the e-mail was hearsay, and the court excluded it on that ground. Hardin declared himself "dumbfounded" by the ruling.<sup>203</sup> His reaction seems justified. Not only was the government regularly using analogous materials (it would that same day introduce a series of Temple e-mails),<sup>204</sup> but Hardin needed this evidence to explain the motives of key but unavailable actors like Temple. The one-way hearsay bar unfairly deprived the defense of critical evidence. In *Chambers v. Mississippi*,<sup>205</sup> the Supreme Court ruled that such one-way application of the hearsay rule can pose the most serious sort of due process questions. Those questions were not carefully weighed at Andersen's trial.

It is widely accepted that jurors should not be informed that witnesses have chosen to invoke their Fifth Amendment privilege to refuse to testify.<sup>206</sup> This has been the practice because there is felt to be a danger that jurors informed of a witness's refusal to testify will embrace an adverse inference about the guilt of the witness and those with whom he or she is associated. In the *Andersen* case, the government sought to have the jury informed that Temple, Bauer, and a woman named Kate Agnew (a manager on the Enron account) had invoked the Fifth Amendment.<sup>207</sup> The government's justification for this request was that jurors might otherwise make adverse assumptions about its failure to produce these witnesses.<sup>208</sup> While the government's argument was not frivolous, it fell well short of justifying

203. *Id.* 2002 Extra LEXIS 469, at \*17-\*18 (testimony of Amy Ripepi).

204. *Id.* at \*90.

205. 410 U.S. 284 (1973) (stating that requirements of due process may overcome traditional hearsay barriers).

206. See Richard B. Schmitt & Jonathan Weil, *Prosecutors Seek Unusual Directive: Andersen Judge Is Asked to Permit as Evidence Workers' Refusal to Testify*, WALL ST. J., May 24, 2002, at C13; see also CAL. EVID. CODE § 913 (2002); Griffin v. California, 380 U.S. 609 (1965); Charles R. Nesson & Michael J. Leotta, *The Fifth Amendment Privilege Against Cross-Examination*, 85 GEO. L.J. 1627 (1997).

207. *Andersen* Transcript, *supra* note 17, 2002 Extra LEXIS 463, at \*139 (evidentiary hearing).

208. *Id.*

the risk that jurors might view Andersen employees as criminals seeking to hide behind the Fifth Amendment. The court's solution to the problem was to instruct jurors that the named witnesses were absent for reasons of no relevance to the case.<sup>209</sup> This was fairer but still posed the risk of adverse juror reaction. The government's call for disclosure came worryingly close to inviting jurors to condemn the use of the right to silence. Insensitivity to or impatience with this right signals, once again, the government's apparent disregard for the risk of an improper conviction. In the *Andersen* case it suggests a prosecution team too willing to win at any cost.

The government pursued at least one more alarming evidentiary strategy. It focused a significant part of its case on the fact that Arthur Andersen, and later, its employees, expended a great deal of effort on securing legal advice. In questioning both Bass and Ripepi, the government repeatedly underscored the point that by October 8, 2001, Andersen had "retained a large New York law firm to assist with this Enron situation."<sup>210</sup> The firm involved was Davis Polk, known for its skill in representing those accused of white-collar crime and accounting infractions. When Hardin began his Ripepi cross-examination, he highlighted this point by asking: "How many times do you think he used the words 'big New York law firm'?"<sup>211</sup> The government's preoccupation with Andersen's use of counsel also was evident when prosecutors reviewed Temple's notes<sup>212</sup> and when an FBI agent was asked to testify about an interview conducted with Davis Polk partner Dan Kolb.<sup>213</sup>

When it came time for the government to cross-examine, it once again made repeated use of Andersen's and its witnesses' felt need for legal advice. Richard Corgel was asked by the government attorney cross-examining him whether his personal lawyers were present in the courtroom.<sup>214</sup> He admitted that they were. The government then questioned Corgel about Andersen's hiring of the Davis Polk firm and about the fact that Temple had been a partner specializing in litigation at a prestigious Chicago law firm (Sidley &

209. *Id.*

210. *Id.* 2002 Extra LEXIS 466, at \*167 (testimony of Amy Ripepi); *id.* at \*108 (testimony of Carl Bass); *id.* 2002 Extra LEXIS 469, at \*34 (testimony of Amy Ripepi).

211. *Id.* 2002 Extra LEXIS 469, at \*132 (testimony of Amy Ripepi).

212. *Id.* 2002 Extra LEXIS 459, at \*220-21.

213. *Id.* 2002 Extra LEXIS 460, at \*33-\*34, \*119 (testimony of Paula Schanzle).

214. *Id.* 2002 Extra LEXIS 468, at \*5 (testimony of Richard Corgel).

Austin) before joining Andersen.<sup>215</sup> The government also pursued the Davis Polk issue with the last defense witness, John Riley. Although Riley claimed he had paid little attention to the fact, the government again underscored the point that Andersen had brought in high-powered lawyers at an early date.<sup>216</sup>

In its closing, the government argued that Andersen should have known better than to destroy documents because it had “armies of lawyers working for them, a whole department of lawyers.”<sup>217</sup> The government then went further and attacked the lawyers suggesting that “Andersen’s legal department was the driving force behind this.”<sup>218</sup> The government claimed that lawyers had engineered the document destruction as part of a scheme to help Andersen avoid liability for Enron’s collapse. That, suggested government counsel, was why Temple was assigned to the matter on September 28.<sup>219</sup> That was why Davis Polk was brought in on October 8 and why the mid-October memos were edited.<sup>220</sup> Hardin felt himself obliged to defend the lawyers and the “system set up to protect the communication between attorney and client.”<sup>221</sup> The government had pressed its lawyer-bashing theme so vigorously that defense counsel had to defend not just his client but the system itself.

The trouble with the government’s attack on Andersen’s use of lawyers is that it suggested that seeking legal advice is an inherently suspicious act which a jury is entitled to use as incriminating evidence and that due process, as often insisted upon by lawyers, is an impediment to “real” justice. The government’s case had far too much lawyer bashing for it to have been accidental. The government’s impatience with the defendant’s mounting of a legal defense might be construed as its invitation to the jury to punish Andersen for putting up a fight.

This sort of invitation is demagogic and improper. It seeks the condemnation of any who choose vigorously to defend themselves. It seems to be consistent with the government’s aversion to the use of legal process in terrorist-related cases<sup>222</sup> and its more general antipa-

215. *Id.* at \*129.

216. *Id.* 2002 Extra LEXIS 457, at \*211–\*12 (testimony of John Riley).

217. *Id.* 2002 Extra LEXIS 458, at \*37.

218. *Id.* at \*38.

219. *Id.* at \*88–\*89.

220. *Id.* at \*91.

221. *Id.*

222. See Anthony Lewis, *Bush and Iraq*, N.Y. REV. BOOKS, Nov. 7, 2002, at 4.

thy towards lawyers and litigation.<sup>223</sup> The same impatience with legal process and disrespect for adversarial methods appears to have undergirded recent SEC proposals that were designed to limit confidentiality between lawyers and clients in the corporate setting.<sup>224</sup> What Temple did may have actually constituted obstruction of justice, but that does not mean that whoever the government accuses is guilty or should be intimidated from seeking counsel and offering a defense. The jury may not have been swept away by the government's lawyer bashing, but the prosecutors stooped very low indeed in their desperate effort to win a conviction.

## VII. A JUDGMENT ON JURY TRIALS—THE *ANDERSEN* CASE

A single case can never provide a definitive benchmark concerning the value of the jury trial system. Anecdotes are subject to far too many caveats to be considered conclusive.<sup>225</sup> Yet anecdotes can provide some useful insights, especially when they reinforce historical and empirical data. The *Andersen* trial supports a number of the arguments made in favor of the jury. Twelve ordinary Texans were asked to decide a complex and hard-fought case that followed on the heels of months of press coverage. They did not appear to be overwhelmed by either the difficulty or the celebrity of the case. They deliberated with care and patience for more than ten days. They appeared to display sensitivity to subtle questions of credibility and to cast aside a number of dubious government arguments. They did not appear to be overawed by press assertions of wrongdoing or to be swayed by the piling up of other crimes evidence. The jury displayed an awareness of the enormous consequences for Andersen and put the government to the proof.

No government attorney reviewing the *Andersen* case should be overly sanguine about the prospects of convicting politically targeted defendants. The jury insisted on hard proof and plenty of it. This is exactly what the framers of the Constitution hoped for when they guaranteed the right to jury trial in criminal cases. The jury in the *Andersen* case stood as a check to prosecutorial enthusiasm. Yet, the government won. It won, I would suggest, because Andersen and the

223. *Id.* at 5.

224. Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. Part 205, available at <http://www.sec.gov/rules/proposed/33-8150htm>.

225. See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System— and Why Not?*, 140 U. PA. L. REV. 1147, 1159–62 (1992).

whole accounting industry had failed to do its job—a job that no one else in America can do. The *Andersen* jury served as a kind of spokesperson for a polity tired of the evasion of rules designed to insure the honest operation of business in America. Sharp practices by sophisticated accountants on behalf of wealthy corporations are not acceptable.

It is too soon to tell if the *Andersen* decision is the bellwether it seems to be. Many more cases remain to be decided, and the way they are sorted out will powerfully affect our future approach to business and financial crime. Yet, *Andersen* seems to suggest that the current era of boardroom chicanery is drawing to a close.

The report is not, however, altogether rosy. The government yielded to political and social pressure and adopted tactics that are open to serious criticism. It offered an array of potentially inflammatory other crimes evidence, abused the strictures of the hearsay rule to create a one-sided impression of Andersen employee conduct, and attempted to draw inappropriate attention to the fact that the defendant and its employees had sought the advice of counsel. The efforts targeting lawyers are especially troubling. They seem to be tied to a more general governmental animosity towards the rule of law. They also seem to be connected to both regulatory and political efforts to vilify lawyers and the protections they provide. Only time will tell whether the benefits of Andersen's conviction outweigh these very real costs. The jury did its part. The question remains whether the government can perform with equal integrity and good sense.