



Dumb and Dumber

Investors should watch with great interest the trials of Ebbers, Kozlowski and Swartz, Lay and Scruchy, to name the most vilified, as prosecutors attempt to punish corporate America for its crimes against shareholders. Unfortunately, justice for shareholders may not be forthcoming for a very simple reason. The alleged perpetrators of corporate malfeasance were too dumb to understand their own accounting systems. [Should you doubt that, note that](#) the preferred defense of these alleged corporate villains is that they didn't know any better. Who says this is not a 'kinder America?' How can we punish 'dumb and dumber?' [Should stupidity a crime? Maybe the test should be whether the CEO at the time of his action knew "right from wrong?"](#)

Since 1843, when Daniel McNaughton was acquitted for the crime of murdering the secretary of the British Prime Minister on the grounds that he could not at the time distinguish between right and wrong, many accused have escaped criminal punishment by 'reason of insanity.' Attorneys for the accused corporate malfeasants appear to be heading down an analogous, time-tested path. They will defend their clients by claiming that the clients were victims of their own accounting and managerial underlings who had been cooking the books. Apparently, much like their own shareholders, these accused corporate executives were deceived. [As in the McNaughton rule, attorneys for the accused will attempt to show that at the time, the corporate executives were unable to distinguish the frauds concocted by their accountants. Accounting today is too arcane of a science. It's about time that a kinder society not only provides for the insane, but also for the dumb.](#)

Should we be upset at such an outcome? Probably not, since many outrages to conventional justice are permitted through some version of a "victim" theory! Never mind that the same mind that ostensibly lay behind a very rapid rise in their share prices, virtually unlimited access to capital markets for [unwise](#) corporate expansion and astounding, if not utterly defensible, compensation for "performance," could still be judged too dumb to understand the complexity of the corporate books. Reasonable juries will probably sympathize with the complexities these corporate executives had to face in understanding modern-day accounting. Jurymen, who often cannot understand their own tax returns, must surely be sympathetic to 'good men' who admit all too willingly that they too were victims of accounting complexity. To put it bluntly, much as McNaughton's defense argued that at the time of his crime, McNaughton did not possess sufficient mental competence to know right from wrong, these executives can appeal to the public's aversion to complexity and claim they too were victimized by underlings who cooked very complex books. Who has not been a victim of a complex financial statement, a complex loan contract or a complex warranty statement? If you doubt this, [consider the lack of objection by](#) the Board Members of these same companies?

Sarbanes-Oxley (SOX, in the current vernacular) attempted to address the issue of cooking the books, responding, no doubt to the public's call that it had been victimized by unscrupulous corporate executives. Who better than the Congress revels in waving the bloody flag of corporate crime and the benefits of re-election by assuaging gored shareholders. [Unwitting shareholder must feel somewhat relieved when the do-good Congress forgives their erroneous stockpicking as mere victims of executive inspired corporate fraud?](#) "Doing Good," is the modern day equivalent of Patriotism. [Should you doubt the efficacy of Congressional watchdogs, perhaps it is well to](#) recall Samuel Johnson's oft quoted remark that "patriotism is the last refuge of a scoundrel." Read "Doing Good" as modern day patriotism and the good Doctor is "right on!"

The quite intelligent sponsors of corporate accounting reform are known for their sharp wit and perspicacity. [Who better to wave the flag of 'doing good' than the esteemed Senator \(and lawyer\) from Maryland, who](#)



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hones his barbs on none other than Greenspan? If you judge intelligence by the manner in which he spars with the Chairman, you have to be impressed. Why shouldn't the public trust such a purveyor of the public good? A careful consideration of the defense tactics of these on-trial defendants suggests that Senator Sarbanes may actually be hoisted on his own petard. He missed the most obvious defense they would offer. What he should have required is a very simple statement by the CEO and the CFO--namely, "I, _____, hereby certify that I understand our corporate financial records!" Signed at the time of the alleged offense, Stupidity could not be allowed as a defense!

If you agree that we should require nothing less from the leaders of public companies, perhaps a similar oath from the Congress with regard to the Budget might be in order. But that is an essay all of its own.

Of course, one could argue that miscreants swore they understood accounting complexity when they didn't. Should they be punished if they just made a mistake? The counter to this defense is much like that of a driver who runs through a stop sign he claimed not to see. It doesn't matter! However, a self-assertion that the corporate executive does understand complex accounting raises the question of why we should not require "intelligence" as a pre-requisite of all important posts of leadership. The reader is right to next inquire if such a criterion should be applied to the makers of law in this country, namely the Congress. Just how much a difference this could make can be inferred from the remark that Richard Nixon once made. Replace "I am not a crook," with "I am not a stupid man" and history would have changed, correct?

Seems to me that a movement to end stupidity in public life should have broad support. Let the trials begin!



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