Milberg Weiss: Of Studied Indifference and Dying of Shame

Theresa A. Gabaldon

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THERESA A. GABALDON*

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I. INTRODUCTION

THE CRIMINAL INDICTMENT OF THE LAW FIRM OF MILBERG WEISS BERSHAD & SCHULMAN ("Milberg Weiss") has generated a great deal of commentary, the net effect of which can be characterized by its heat, if not its light. The limited wattage of public discussion doubtless is the result of conversations passing in the night; many of those expressing opinions simply are addressing different issues—stoking, as it were, different parts of the elephant. Not surprisingly, countering even a very cogent comment about the size of the elephant’s ears with a comment about the length of its tail has little to commend it as a method of illumination.

At a minimum, we have seen in print Milberg Weiss–related comments about (i) whether securities class action litigation is good or bad, (ii) whether entity liability is good or bad, (iii) whether manipulating threats of entity liability to achieve individual convictions is good or bad, (iv) whether solicitation of plaintiffs in situations in which there are problems of the commons is good or bad, (vi) whether partners in law firms realistically can be expected to monitor the conduct of other lawyers in the firm, (vii) whether federal intrusion on the states’ regulation of attorney conduct is desirable, and (viii) the possibility for abuse presented by politically motivated prosecution. Although referring in passing to many of the other issues presented, this article is dedicated largely to the constellation of questions (the part of the elephant) surrounding the legitimacy and utility of the federal imposition of criminal entity liability either as a surrogate for punishing individu-

1. For information about Milberg Weiss, see http://www.milbergweiss.com/firm/firm.aspx (last visited June 29, 2007).
2. See infra notes 5–10.
4. Throughout this article, the term entity liability is used interchangeably with "organizational liability" or "corporate liability."
5. See, e.g., Kate Coscarelli, 2006 Sees Sharp Drop in Class Action Suits, STAR-LEDGER (Newark, N.J.), July 26, 2006, at S1 (commenting on externalities of organization’s indictment).
8. Editorial, Very Rough Justice, WALL ST. J., May 22, 2006, at A12 (commenting on the Department of Justice’s tactics in obtaining indictments); see also Gilles & Friedman, supra note 7, at 128 n.105 (commenting on federal intrusion into state regulation of lawyers).
als against whom criminal cases cannot be made or as a remedy for defects in organizational structure or operation.

The succeeding discussion is organized as follows. Part II provides a brief overview of the factual background underlying the Milberg Weiss indictment and its resulting public controversy. Part II also discusses the various counts of the Milberg Weiss indictment, characterizing them as either “central” or “peripheral.” It then separately identifies the possible wrongdoers in the Milberg Weiss scenario and posits that criminal entity liability in some circumstances is used as a surrogate form of punishment for individuals against whom criminal cases cannot be made, but who have more-or-less clearly engaged in non-criminal wrongdoing. Part III describes the current posture of federal criminal entity liability, and examines the linked issues of whether that liability should be determined by borrowing the law of individual states, whether federal law should be structured according to the “model” approach taken by many states, or whether a different uniform federal law should be imposed. After taking the position that the federal government should have a well thought-out uniform law, the Article turns toward considering the shape of that law. Part IV addresses the general promises and perils of criminal entity liability, particularly as compared to civil liability. The Article suggests that criminal entity liability has a sometimes overlooked warning function that should be more central to analysis. Part V seeks to overtly integrate imposition of criminal entity liability with the accomplishment of the goals of criminal law. Ultimately, the Article suggests that the most important step toward this integration is rethinking the punishments for criminal entity liability.

II. THE MILBERG WEISS STORY

A. Factual Background

The indictment of Milberg Weiss in 2006 was the first high-profile filing of federal criminal charges against an entity since 2002. In that earlier year, the criminal conviction of Arthur Andersen LLP ("Arthur Andersen") led to substantial loss of its prospective business and ultimately its dissolution, with the concomitant loss of 28,000 American jobs. In the interim, and in indicting Milberg Weiss, the United States Department of Justice ("DOJ") was guided largely by the so-called "Thompson Memorandum," which set out guidelines for charging corporations, including

-See Elizabeth K. Ainslie, Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution, 43 AM. CRIM. L. REV. 107, 107 (2006). Within a year, only 3,000 out of 85,000 Arthur Andersen employees remained worldwide. Id. at 109; see also Lawrence A. Cunningham, Too Big to Fail: Moral Hazard in Auditing and the Need to Restructure the Industry Before It Unravels, 106 COLUM. L. REV. 1698, 1701 (2006) (discussing causes and consequences of Arthur Andersen’s dissolution).
the role and knowledge of management during the alleged wrongdoing, and its cooperation during investigation.12

At the time of its indictment, Milberg Weiss had for some twenty-five years been positioned as one of the leading, and perhaps the leading, plaintiffs' firm in the field of federal securities class-action litigation.13 At an indistinct point during those years, it attracted the attention of the DOJ, which launched a long-term investigation into the firm's conduct.14 The first cooperating witness was coaxed into the fold in 1999.15 Three years later, the law firm received its first subpoena.16 Everyone appears to agree that, in the course of its investigation, the DOJ asked Milberg Weiss to waive its attorney-client privilege so that the DOJ could gather incriminating information about the conduct of individual partners.17 No such waiver was forthcoming.18 In May 2006, the investigation culminated in the criminal indictment of the entire firm and two of its managing partners, David J. Bershad and Steven G. Schulman.19 The precise allegations of the indictment are discussed in Part II.B.20

Close on the heels of the indictment followed a great public hue and cry, during which each of the issues raised in the Introduction of this article became the subject of some discussion.21 Debate echoed as far as the halls of Congress—Congressman Charles B. Rangel and others very quickly issued a statement describing the “attempt by the Bush Administration to accomplish by bullying and intimidation what it has not been able to do by law—to end class action lawsuits, one of the few tools remaining to safeguard the American consumer.”22 Congressman Barney Frank, a long time proponent of class actions, nonetheless rose to the defense of the

15. Id.
16. Id.
17. Id.
18. Id.
20. See infra text accompanying notes 30–35.
21. See supra notes 6–8.
Milberg Weiss prosecutors, noting that although he was "skeptical" about whether the indictment was a good idea, he saw no evidence indicating that the DOJ had "followed an excessively political course." The controversy focused attention on the guidelines used by the DOJ in charging Milberg Weiss, leading to congressional hearings and proposals in the fall and winter of 2006. As discussed below, the guidelines subsequently were revised. There has, however, been no move by the DOJ to quash the Milberg Weiss indictment.

B. Initial Observations

1. The Alleged Crimes

Although nothing like a world record, the list of crimes alleged against Milberg Weiss and its individual partners is impressively long. Further analysis is assisted by roughly categorizing the numerous crimes charged as either "peripheral" or "central." The "peripheral" category contains such alleged courses of conduct as conspiring to commit a "central" count, aiding and abetting a "central" count, laundering the proceeds of a "central" count, destroying documents to impede the investigation of a "central" count, etc. The "central" category contains those acts that independently had a point. Both categories are described in more detail below.

The "peripheral" counts in the Milberg Weiss indictment actually comprise two types of conduct. One type, referred to in this Article as "facilitation," really has no legal, much less moral, significance apart from the "central" wrongdoing it advances, notwithstanding the sometimes pejorative terminology employed to describe it. Thus, a "conspiracy" to take flowers to the elderly in an assisted living facility would not be a bad thing, nor would "abetting" such an act by growing the flowers, nor would delivering the flowers through the United States mail or wires. Obviously, facilitation charges sometimes are used to prosecute those who somehow are involved in specific wrongdoing but who do not satisfy the tests that have been legislatively devised. In other words, they are catch-alls for situations in which legislative imagination has failed. Catch-alls may not be a bad thing, but they should be recognized for what they are: authorization of a prosecutorial version of manifest destiny. As will be clarified below, the facilitation category thus seems to have a great deal of spiritual overlap with the possibility of criminal entity liability, at least as described by its detractors.

25. See infra text accompanying notes 81–83.
26. See infra Part III.A.
The second type of peripheral wrongdoing indeed is wrongful, though pointless, apart from a more "central" wrongdoing to which it relates. Lying to a judge or prosecution official and falsification of tax returns are examples of this type of conduct. Past, real-life illustrations are provided by Martha Stewart’s conviction for lying and obstruction of justice, notwithstanding the fact that it never was shown that she engaged in insider trading, as well as by notorious crime-lord Al Capone’s conviction for tax fraud, although not for his more colorful alleged deeds. This category largely is composed of activities involving misrepresentation, reminding us (as would our mothers) that there is nothing so bad that is not made worse by lying about it.

Somewhat meatier, but probably harder to prove, are the “central” counts—the basic bad acts that allegedly were the subject of conspiracy, cover-up, and so forth. Interestingly, because Milberg Weiss was an organization of licensed professionals, in many circumstances these acts also might be characterized as professionally unethical. In fact, one easily can imagine an incentive to engage in an illegal cover-up of activities that were “merely” unethical, though not in themselves illegal. As far as the Milberg Weiss indictment was concerned, however, these bad acts indeed were characterized as violating federal law.

The central illegalities of which Milberg Weiss is accused include commercial bribery, breaching the firm’s fiduciary duty to the plaintiff classes the firm represented in various securities actions, making excess payments to the lead plaintiffs in those actions, and paying witnesses for their testimony. If the allegations are true, individual Milberg Weiss lawyers also congruently engaged in professional misconduct by soliciting legal employment, sharing legal fees with non-lawyers, paying witnesses, accepting representations in which there were undisclosed conflicts among clients, and failing to disclose conflicts between clients’ interests and those of the firm.

29. See Indictment, supra note 19.
30. Id.
31. See MODEL RULES OF PROF’L CONDUCT R. 7.3 (2002). This solicitation would have been both general in nature and to have taken the form of soliciting plaintiffs to purchase specific securities for the purpose of satisfying standing requirements.
32. Id. R. 5.4(a).
33. Id. R. 3.4(b).
34. Id. R. 1.7(a)(1).
35. Id. R. 1.7(a)(2).
2. The Arguable Wrongdoers

Assuming the factual truth of the allegations in the indictment, it is easy to conclude that at least Messrs. Bershad and Schulman, the individual Milberg Weiss lawyers charged, did something "wrong," both by personally engaging in "central" bad acts and by personally engaging in the types of misrepresentation contemplated by the second class of "peripheral" acts. As management committee members or otherwise, they each may also have personally facilitated the wrongdoing of the other or of some unknown third person(s). The issue of whether the Milberg Weiss entity and/or the unindicted partners therein were wrongdoers presents a more interesting question. This question is different than whether that entity and those partners could, under the present state of the law, be criminally charged.

Without violence to analysis we can assume that the prosecutors preparing the indictment of Milberg Weiss did not act frivolously, and believed in good faith that the elements of the alleged crimes could be established (particularly those involving facilitation). After all, and as detailed below, federal criminal law currently employs principles of respondeat superior borrowed from the common law, and does so more generously than is the custom of the states. Does this mean that the law firm actually did something wrong? Of course not; law firms—be they professional corporations, limited liability partnerships, limited liability companies or otherwise—are fictional entities. They cannot do anything, much less something with moral content. At best, speaking in terms either of organizational wrongdoing or "corporate morality" is a shorthand way of conveying that something is amiss about the way the organization was structured (by human beings) or operated (again, by human beings). At worst, it is meaningless, and confusingly so.

The Milberg Weiss indictment is a poster-child for the confusion just described. Presumably, if individual lawyers other than Messrs. Bershad and Schulman personally participated in the crimes alleged in the indictment, including personal facilitation of other wrongdoing, they would have been charged accordingly. In other words, the prosecuting lawyers must have believed that probable cause did not exist with respect to the partners that were not individually named. Does this mean that the unnamed partners really did nothing wrong? Of course not; it simply means that they either did nothing provable or did nothing criminally chargeable.

36. Id. R. 3.8(a) (prohibiting prosecutors from filing criminal charges without a reasonable belief in the existence of probable cause).
37. See infra Part III.A.
38. See Ainslie, supra note 11, at 119–20.
40. It is worth noting, however, that the Indictment, supra note 19, at 3–4, did allude to wrongdoing by "Partner A," "Partner B," and Partner E," in addition to the alleged wrongdoing of Messrs. Bershad and Schulman.
We may well feel, of course, that the unindicted Milberg Weiss partners were negligent in selecting or monitoring Messrs. Bershad and Schulman, and particularly in allowing the individually named partners to assume significant management roles. If so, we might also suspect that indicting and convicting the entity is a justifiable, albeit indirect, method of punishing them. We nonetheless still might have concerns about other reasons the entity may have been pursued, and would not know which of our suspicions were correct. Moreover, to the extent that federal prosecution simply imposes discipline for transgressions of professional responsibility or for other matters of organizational structure and operation that traditionally are the province of the states (by reason of both the traditional regulation of the conduct of lawyers by the state\textsuperscript{41} and the "internal affairs" doctrine\textsuperscript{42}), the Federalists in the audience might find cause for genuine alarm.\textsuperscript{43} To the extent that the method is indirect and creates no clear guidelines for future conduct, fans of clear thinking might also complain.

Before considering the subject of the perils and promise of entity liability either generally or in the specific context of the Milberg Weiss prosecution, it is useful to spend a bit more time contemplating the possible non-criminal failings of the unindicted Milberg Weiss partners. We might start by inquiring into whether the conduct of these partners would have given rise to individual civil liability to private plaintiffs. Most problematic, of course, is the evident absence of private parties who feel sufficiently aggrieved to bring any claim. Were such parties present, however, general principles of partnership law historically would have done the trick with respect to imposing liability on all partners for the wrongdoing of fewer than all.\textsuperscript{44} Fairly recent widespread conferral of the benefits of limited liability, however, clearly signals that, so far as state legislatures are concerned, individual liability to private parties must be based on individual bad acts, for which individual breaches of duty must be established.\textsuperscript{45} These breaches are not evident from the facts alleged in the Milberg Weiss indictment.

The typical rules adopted by the various state supreme courts for governance of state-licensed lawyers contemplate that a partner’s simple failure to assure that a law firm has in place reasonable safeguards against professional misconduct by others is itself a form of misconduct.\textsuperscript{46} The wrongfulness of the actual conduct of

\textsuperscript{41} See Mortimer D. Schwartz et al., Problems in Legal Ethics 30–31 (7th ed. 2005).
\textsuperscript{44} See Unif. P’ship Act §§ 14–15 (1916).
\textsuperscript{46} See Model Rules of Prof’l Conduct R. 5.1(a) (2002). This section provides as follows:
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the unnamed Milberg Weiss partners is neither established nor foreclosed merely by reciting this standard, but it is worth noting that this articulation of public policy exists. It is, however, limited to the context of law firms, and would not automatically apply in other organizational contexts. In Part IV, it will be argued that public recognition of this type of wrongfulness should be expanded. Were this to transpire, it presumably would be good to give express notice of what is expected, and, if criminal consequences attach for non-compliance, to memorialize the notice in criminal law.

At any rate, limited to the law firm context, the existence of certain structural defects might be said to establish that, as a matter of public policy, there are no innocent partners. It might even be said that the laxity of inactive partners facilitates wrongdoing. In the abstract defense of the inactive partners of active criminal wrongdoers, it might be argued that where law firms have exceeded a certain size, it simply becomes unrealistic and presumably uneconomic to expect each partner to monitor the conduct of the others. This doubtless is true, but misses the point that the obligation imposed on law partners relates to firm structure rather than personal supervision. If the argument then slips sideways into concern about individual partners and their inability to bring about change, we basically are saying that it is unrealistic to expect lawyers to turn down or resign lucrative partnerships in large law firms over mere structural issues. If so, the proper response may be that a little criminal liability could be just the thing to reverse the flow of realism.

III. THE FEDERAL QUESTION

To understand what actually has, and perhaps what should have, happened to Milberg Weiss, it is useful to consider the general state of federal law with respect to

A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

R. 5.3(a) provides to similar effect with respect to a partner's obligations vis a vis nonlawyers.

47. See infra Part IV.

48. In this Article, references to law firm "partners" include references to those with comparable managerial authority in professional corporations, limited liability companies, etc.

49. The general occasion of argument on the issue of a law firm partner's duty to prevent misconduct by others affords an opportunity to reflect on whether there is obvious social utility to increasingly large firms (a question closely related to whether the existence of gigantic non-professional corporations is socially optimal). Although Milberg Weiss was not a mega-firm, at the time of the indictment it had approximately 120-some lawyers. Although some, if not all, of the unindicted Milberg Weiss partners may have lacked specific incriminating or otherwise liability-creating knowledge, this feat surely would have been more difficult in a firm of more modest size. To the extent that any profession lays claim to the right to self-regulate, requiring the quid pro quo of practice in a setting in which the scrutiny of one's organizational colleagues is practically feasible seems a modest enough demand.

50. In fact, although the ethics rule in question has been on the books for quite some time, there seem to have been few, if any, enforcement actions brought involving large law firms. Were such actions forthcoming, realistic expectations with respect to the future conduct of individual lawyers also might change.
the criminal charging of entities. This is the subject of Part III.A. Part III.B compares the federal approach with standards adopted by a number of the states and confirms that the federal approach is more broadly permissive, presumably allowing for more prosecutorial discretion. Part III.C explores whether the existence of a different federal standard does or could intrude on the internal affairs of the entities potentially subjected to this standard, a subject that could be of particular concern for members of a profession that is generally regulated at the state level.

A. The Actual State of Federal Law

1. General Liability of Entities for the Commission of Federal Crimes

It is clear as a matter of constitutional law that Congress can pass criminal statutes (hereafter "design" statutes) specifically regulating organizations engaging in particular activities (such as interstate common carriers) and providing that the acts of their agents are to be considered the acts of the regulated organizations. Design statutes may either require the performance of specific duties or prohibit certain conduct. In approving congressional action of this sort, the Supreme Court has received, but been unimpressed by, arguments that imposing criminal liability on corporations deprives innocent shareholders of their property without an opportunity to be heard, and that imposing liability as a matter of respondeat superior deprives the entity itself of the presumption of innocence.

Congress also can and does pass statutes of a criminal nature, simply holding liable "any person who" or "whoever" violates the relevant provisions. Some of these statutes (hereafter "reference" statutes) provide definitions of "person" and "whoever" that specifically refer to corporations and other types of organizations.

More often, the only definition that might apply is found in Title 1, Chapter 1, Section 1 of the United States Code (hereafter "1:1:1"), which states that, for all purposes under the Code, "unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."

In parsing the catch-all language of 1:1:1, commentators have argued that the context of criminal prosecution generally should negate inclusion of organizations,
especially since at least some criminal statutes do specifically refer to them as being subject to liability. As illustrated by the prosecution of Arthur Andersen, discussed immediately below, this is not a construction that has been embraced by federal prosecutors or the federal judiciary.

2. The Arthur Andersen Prosecution as an Earlier Example of an Assertion of Entity Liability for the Commission of Federal Crimes

On June 15, 2002, the accounting firm of Arthur Andersen was convicted of violating a federal obstruction of justice statute. The statute did not specify that organizations were capable of violating it. The trial court, employing general standards of respondeat superior, instructed the jury that Arthur Andersen could be found guilty if any one of Arthur Andersen’s United States employees acted knowingly and with intent to violate the relevant statute, provided that the employee was acting within the scope of employment. The court further instructed that an act could be within the scope of employment even if contrary to instructions or firm policy. Upon inquiry from the jury, the court responded that the jurors need not agree on which employee possessed the requisite criminal intent. The conviction was affirmed by the Fifth Circuit Court of Appeals in 2004, but in 2005 the matter was reversed by the Supreme Court and remanded on the basis of flawed jury instructions. The flaws identified had nothing to do with the respondeat superior aspects of the case. With continued prosecution of an effectively defunct entity seeming to be overkill, the United States government did not choose to pursue the matter further.

3. Prosecutorial Discretion and the Thompson Memorandum

It is easy to understand why federal prosecutors might generally prefer to pursue defendants who can breathe rather than those that cannot. As has been well explained elsewhere, criminal sanctions against organizations are, in effect, exclusively economic, and there often are willing private plaintiffs attracted by deep corporate pockets, as well as a variety of government agencies that may be available

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59. See, e.g., Ainslie, supra note 11, at 117 n.41.
60. See infra text accompanying notes 62–70.
64. Id. at 6.
68. Instead, they had to do with the failure of the instructions in describing the elements of a corrupt persuasion. Id. at 706–08.
to seek civil economic penalties for the identical conduct. Moreover, since the economic penalties of criminal entity prosecutions are borne by individuals (and in the case of the prosecution of a large corporation, large numbers of individuals who vote), bringing such prosecutions seems potentially politically costly, as well as unnecessary. These points were rather vividly illustrated, of course, by what happened in the wake of the Arthur Andersen prosecution.

Perhaps reluctant to admit what the public regarded as a mistake, and in any event anxious to signal that organizational prosecutions were not dead, in 2003 the federal government sought to outline the circumstances in which organizational prosecutions were justified. This outline was contained in the Thompson Memorandum, named for its attributed author, Deputy Attorney General Larry D. Thompson. The Thompson Memorandum contained a general discussion of the pros and cons of criminal corporate prosecutions. The “many hands make light work,” but “too many cooks spoil the broth” nature of this general discussion was neither controversial nor particularly enlightening. More eye-catching was a catalogue of factors to be taken into account when making a charging decision, including whether the entity was willing to waive its attorney-client privilege and whether it was paying legal fees for possibly guilty corporate agents. These factors seemed, to many, to signal that the threat of criminal prosecution would be instrumentally employed to reach individual corporate agents (not that the practice of trying to get co-defendants to “roll over” on each other was exactly new).

The Thompson Memorandum guidelines were controversial well before the indictment of Milberg Weiss. After the indictment they became more so. Congressional hearings on the guidelines were held in the fall of 2006, and following Senator Arlen Specter’s introduction of corrective legislation, they were revised and renamed. The Thompson Memorandum thus has been replaced by the “McNulty Memorandum”.

74. Id.
75. Id.
76. This latter aspect was deemed unconstitutional by the court in United States v. Stein, 435 F. Supp. 2d 330, 366, 369 (S.D.N.Y. 2006).
79. See Johnson, supra note 24.
Memorandum” (so called after its attributed author, Deputy Attorney General Paul J. McNulty). The McNulty Memorandum prescribes, among other things, a process requiring multiple approvals before a corporate waiver of the attorney-client privilege can be sought.

4. The Corporate Sentencing Guidelines

Not particularly well integrated with the standards for federally imposed criminal entity liability are the federal guidelines for the sanctions to be imposed once liability is found. These guidelines provide that upper-level management’s lack of involvement in any organizational wrongdoing can mitigate a monetary penalty. They also provide that a corporate “compliance” program—that is, one designed to avoid constituent wrongdoing—can mitigate.

5. Summary

The general state of federal law with respect to criminal entity liability thus may be summarized as broadly permissive. Entities may be charged under design statutes or reference statutes, as well as under statutes that are silent (hereafter “silence” statutes) on whether they are eligible defendants. This does not mean that federal indictment of entities is frequent, particularly under silence statutes. Logically, this state of affairs owes largely to the exercise of prosecutorial discretion. This discretion may be influenced by a perception of good organizational hygiene; good hygiene also can be considered by way of mitigation at the penalty phase.

B. Comparison with State Law

Federal laws obviously coexist with the mandates of the various states (as well as the strictures of local jurisdictions and assorted foreign sovereigns). With respect to some issues, because of case law development, more rigorous statutory drafting, or otherwise, questions that are not well-answered by federal law have more clearly thought-out answers in at least some states. The question of when organizations should be subject to criminal liability is said to be one of them.
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1. The Model Penal Code Approach: Something to Work With?

The provisions of section 2.07 of the American Law Institute's Model Penal Code ("MPC") have served as the basis for many state statutes dealing with criminal entity

86. MODEL PENAL CODE § 2.07 (1985)

(1) A corporation may be convicted of the commission of an offense if:

(a) the offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

(2) When absolute liability is imposed for the commission of an offense, a legislative purpose to impose liability on a corporation shall be assumed, unless the contrary plainly appears.

(3) An unincorporated association may be convicted of the commission of an offense if:

(a) the offense is defined by a statute other than the Code that expressly provides for the liability of such an association and the conduct is performed by an agent of the association acting in behalf of the association within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the association is accountable or the circumstances under which it is accountable, such provisions shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on associations by law.

(4) As used in this Section:

(a) "corporation" does not include an entity organized as or by a governmental agency for the execution of a governmental program;

(b) "agent" means any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association and, in the case of an unincorporated association, a member of such association;

(c) "high managerial agent" means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.

(5) In any prosecution of a corporation or an unincorporated association for the commission of an offense included within the terms of Subsection (1)(a) or Subsection (3)(a) of this Section, other than an offense for which absolute liability has been imposed, it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission. This paragraph shall not apply if it is plainly inconsistent with the legislative purpose in defining the particular offense.

(6) (a) A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf.

(b) Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or association having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon himself.

(c) When a person is convicted of an offense by reason of his legal accountability for the conduct of a corporation or an unincorporated association, he is subject to the sentence authorized by law when a natural person is convicted of an offense of the grade and the degree involved.
liability.\textsuperscript{87} In fact, these provisions have been praised as representing a superior approach to the loosey-goosey, respondeat superior-based approach employed at the federal level.\textsuperscript{88} It has been urged either that Congress follow the MPC example or that the federal judiciary adopt a uniform jury instruction to attain more-or-less the same effect.\textsuperscript{89}

The MPC can be characterized as generally restricting criminal entity liability, a state of affairs justified on the grounds that such liability is largely unnecessary and imposes costs on innocent shareholders and others.\textsuperscript{90} Its provisions can be summarized as (a) permitting entity liability where it is clearly the subject of legislative intent, and (b) otherwise limiting such liability (at least in the case of corporations)\textsuperscript{91} to situations in which "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by an upper-level managerial agent acting in behalf of the corporation within the scope of his office or employment."\textsuperscript{92} Interestingly, the due diligence of supervisory agents is made a matter of affirmative defense against assertions of entity liability based on some instances of legislative intent.\textsuperscript{93} The occasions when the defense actually would be operational are somewhat less than clear. The relevant subsection provides that the defense will not apply where the offense is one involving absolute liability (presumably having no mens rea requirement whatsoever) or where it is plainly inconsistent with legislative purpose.\textsuperscript{94}

The functioning of the provisions of the Model Penal Code with respect to legislatively-intended entity liability (category (a)) is worth contemplating. After all, if legislative intent with respect to entity liability for a particular crime is manifest (as it obviously is in the case of a design statute and evidently is in the case of a reference statute), the first type of liability clearly is operational. Thus, statements like the one in the MPC are superfluous, although nice as a matter of consistency.\textsuperscript{95} Identifying a category defined by legislative intent did, however, give the drafters of

\begin{itemize}
  \item \textsuperscript{87} See Ainslie, supra note 11, at 120, 124.
  \item \textsuperscript{88} See, e.g., id. at 120–23.
  \item \textsuperscript{89} Id. at 122–23.
  \item \textsuperscript{90} See Jeffrey S. Parker, Doctrine for Destruction: The Case of Corporate Criminal Liability, 17 Managerial & Decision Econ. 381, 387–88 (1996) (arguing that the availability of punitive sanctions in civil actions makes criminal entity liability unnecessary); see also United States v. Sec. Nat'l Bank, 546 F.2d 492, 494 (2d Cir. 1976) (holding that in cases of corporate criminal liability, "it is [the] shareholders, who in the end must bear the financial burden consequent upon criminal liability"); Robert W. Hamilton, Corporate Criminal Liability in Texas, 47 Tex. L. Rev. 60, 70 (1968) (describing how consumers also may bear the burden of corporate criminal liability).
  \item \textsuperscript{91} Section 2.07 actually provides for different standards for unincorporated associations that generally would result in more frequent liability; the majority of the states basing their statues on section 2.07 have opted to eschew the differentiation. Ainslie, supra note 11, at 122 n.63.
  \item \textsuperscript{92} Model Penal Code § 2.07(1)(c) (1962).
  \item \textsuperscript{93} Id. § 2.07(5).
  \item \textsuperscript{94} Id.
  \item \textsuperscript{95} Moreover, the working of the due diligence defense would be downright mysterious if the matter was not specifically addressed in the definition of the crime.
\end{itemize}
the MPC an occasion to distinguish it from category (b) and to attach the defense of managerial due diligence. This defense to entity liability does not exist under federal criminal law, although it certainly is a matter that federal prosecutors may consider in deciding whether to bring a charge and that judges may consider in sentencing. Addition of such a federal defense presumably would reduce the circumstances in which criminal entity liability even arguably could result, and therefore would be expected to influence the exercise of prosecutorial discretion.

Compared to federal law, the MPC's treatment afforded where legislative intent is not deemed clear with respect to entity coverage (category (b)) also reduces the circumstances under which entity liability could be imposed. It is important to note, however, that this is not a matter of entirely avoiding entity liability in the absence of manifest legislative intent. Rather, it is superimposing through criminal law a notion of appropriate organizational structure and function that is relatively uncontroversial. Who, after all, would argue that the board of directors or high managerial agents should be ordering or recklessly tolerating criminal acts? At first blush, it is so uncontroversial that if it were federally employed, such a standard would be unlikely to be perceived as trespassing on any state's vision of how its entities should be functioning. Nonetheless, it is interesting to observe both that entity liability for Milberg Weiss might exist in this category due to the participation of both Messrs. Bershad and Schulman on the firm's management committee, and that entity liability for Milberg Weiss has been anything but uncontroversial.

2. Wide of the Mark?

The MPC approach effectively renders organizations immune from liability where their managers have been no worse than negligent, unless a legislature has manifested an intent to the contrary. A primary benefit claimed for the approach is that it will generally reduce impacts on innocent shareholders, employees, etc., absent good, hard legislative thought. Presumably, at the state level, at least some of that good hard thought is supposed to have been cheerfully contributed by the drafters of the MPC as part of the model's package.

96. See supra notes 52–59 and text accompanying note 83.
98. See generally Coffee, Jr., supra note 83.
99. See, e.g., Ainslie, supra note 11, at 121.
100. It is interesting, however, to note that in some states, the board of directors can be immunized from monetary liability to private parties for reckless breaches of the duty of care. See, e.g., DEL. CODE ANN. tit. 8, § 102(b)(7) (1974); MODEL BUS. CORP. ACT § 2.02(b)(4) (2005); HAMILTON & MACKEY, supra note 42, at 699 (stating that forty-three states have adopted similar statutes).
101. The "manifestation" is to consist of an imposition of absolute liability or other clear indication of purpose. MODEL PENAL CODE §§ 2.07(2), (5) (1962).
In the instance of the federal government, however, criminal liability is strewn hither and yon throughout a multitude of acts and statutes, many of which are neither design nor reference statutes.\(^{102}\) Even in the case of reference statutes, it is possible that hard thought on the issue of entity liability simply has never occurred. If so, it may be inauspicious to demand hard thought as a matter of retrofit. In other words, the MPC approach might be a rather blunt tool to federally employ on any kind of quick-fix basis. This is true because it evidently conflates the treatment of design and reference statutes (thus tending to possible over-exclusion of liability), might prematurely eliminate at least some types of desirable entity liability by demanding initial prosecutorial showings as to matters within the knowledge of management, and would largely eliminate entity liability in the event of "mere" managerial negligence. Nonetheless, it might take decades for Congress to reconsider each of the existing laws under which criminal liability currently might be imposed on entities and to decide whether such imposition indeed is warranted. Such an endeavor is unlikely to be undertaken.\(^{103}\) From this standpoint, a blunt retrofit may be all that is possible.

Perhaps more important, encouraging a theoretical separation of the general question of entity liability from particularized types of wrongdoing, and thus from the question of what social consequences are to be discouraged or coerced in particular contexts, may be a shortsighted surrender of a powerful weapon. The idea that entity liability could or should ever be dealt with in the abstract might be extremely puzzling, were it not for the grand tradition of characterizing corporations (and now various forms of unincorporated associations) as fictional human beings.\(^{104}\) The MPC approach seems to generally conceptualize organizations as "good" fictional people if their management has been no worse than negligent, and as "bad," punishment-worthy fictional people if their management has been reckless or worse. As noted above, this may be theoretically uncontroversial, but is oddly discomfiting when the rubber hits the road of application in, say, the Milberg Weiss case—ironically, a situation where it widely is suspected that prosecutors were trying to employ entity liability to accomplish their particularized vision of social goals.\(^{105}\)

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102. See Stephanie Martz, Address Before Civil Justice Reform Group: Why Criminal Law Should Matter to Business (May 23, 2006), in \textit{CHAMPION} 42, July 2006, at 43–45 (stating that there are at least 4,000 crimes defined by federal statute and at least 6,000 crimes defined by agency regulation).

103. This probably would be even more true were adoption of the MPC approach to take place, insofar as it might prompt time-crunched legislators and others to believe that the question of criminal entity liability has been definitively addressed.


C. Congressional Power, Policy and Prudence

At present, the federal respondeat superior approach clearly diverges from the MPC approach. It is interesting to think about whether the mere fact of divergence represents any sort of federal interference in organizational structuring. Such an interference certainly is theoretically possible. After all, state laws requiring less would be effectively trumped if Congress adopted a rule holding entities liable for all federal crimes committed by any agent absent a showing that the entity had a five member board of directors that met for two hours every Wednesday. On the other hand, where federal law formally deems management conduct irrelevant to the basic question of criminal liability, as it does now, state organizational law arguably maintains full sway. In other words, no matter how careful management might be, there is no effect on federal criminal liability (except for some possible mitigation of penalty), so managerial care will be dictated by other concerns. These concerns presumably will include the practical desirability of monitoring agent conduct to avoid civil and criminal violations of all types, but the steps taken would be those devised by management and/or dictated by state law. From this standpoint, any move away from the respondeat superior approach and toward a law in which management conduct assumes formal significance risks theoretical intrusion on a province traditionally reserved to the states.

1. Just Say "No" to Federal Encroachment

The question of—actually, the ruckus over—whether federal involvement in the structuring of corporations' internal affairs is a good idea has been with us for a long, long time. There has been so much said, in fact, that many readers already will be equipped with a fully formed opinion on the subject. Those who firmly believe that federal patty cakes should be kept in federal pockets might logically prefer a continuation of the respondeat superior approach. If, however, fears of prosecutorial abuse or the like prompted a desire for change, the logical candidates for such change presumably would be (a) deference to the states by borrowing individual state law, (b) invoking an impressionistic version of the law of most states by analogy, or (c) abolishing federal criminal entity liability entirely.

107. See Part III.C.1, however, for a discussion of the prospective abolition of federal criminal entity liability.
109. In this article, the MPC approach stands as a surrogate for the typical state's laws.
a. Borrowing

The notion of borrowing the laws of the individual states to fill gaps in federal law is one that has been repeatedly addressed, sometimes awkwardly, by the federal judiciary. There indeed are circumstances in which federal gaps have been filled by overt borrowing from the laws of specific states. For instance, when deciding whether shareholder demand on the board of directors is required before initiation of a derivative suit claiming rights under federal statutes, the Supreme Court has turned to the laws of the states. Borrowing is, however, generally undertaken in the civil context, and even then deemed to be inappropriate when the question is one of determining liability rather than establishing the availability of a remedy.

The reason it is eschewed in the determination-of-liability context is, presumably, the undesirability of diversity in the definition of federal misconduct. This self-evidently is even more true in the case of criminal liability.

There is no reason to expect a different result if one is considering a call for congressional, rather than judicial, action. The possibility of borrowing state law on entity liability is an obvious one, owing to the traditionally announced interest of the states in the functioning of the fictional creatures for which they are responsible. Borrowing of this sort probably is not a good idea, even if Congress has the power to state that the laws of the state in which the entity was formed should be dispositive. As intimated above, the prospect of defining criminal liability in a non-uniform manner is a traditional, and understandable, bugaboo. Moreover, one would expect that it would give gigantic and unseemly impetus toward incorporation in whichever state managed to pass the standard demanding the highest prosecutorial showing.

When test-driving the possibility of a strict borrowing principle in the context of Milberg Weiss, an additional issue crops up. Questions of how a state generally factors such matters as organization structures, functioning of management, etc., in imposing entity liability probably should be joined by the question of how that

111. See Kamen v. Kemper Fin. Servs., 500 U.S. 90, 98, 101 (1991) (referring to laws of individual states to determine demand requirements for derivative actions brought under the Investment Company Act); see also Burks v. Lasker, 441 U.S. 471, 477–79 (1979) (using state law to determine ability of an investment company's disinterested directors to elect termination of a derivative lawsuit brought under the Investment Company Act).
112. See Gabaldon, *supra* note 110, at 182, 187 (discussing factors considered in borrowing state law and importance of the remedy versus liability distinction).
113. *Id.* at 183–84.
114. It is worth noting that the arguments are those generally recited by the federal judiciary, and ignoring the insights of feminism, which generally call for attention to contextually meaningful specifics. See generally Theresa A. Gabaldon, *Feminism, Fairness, and Fiduciary Duty in Corporate and Securities Law*, 5 TEX. J. WOMEN & L. 1, 4–5, 19–20 (1995) (discussing feminist approaches and applying them in context of corporate and securities law).
115. See *supra* notes 111–14.
116. This obviously is related to the traditional "race-to-the-bottom" concern. See *infra* note 130 and accompanying text.
state wants its professional entities to function. Although this is something that the states have ignored, insofar as criminal law is concerned,\textsuperscript{117} if Congress really wished to avoid trespass on state choices, it should be thorough in doing so. Mandating an inquiry into both state criminal entity liability and state professional responsibility standards might result in some amount of intrastate contradiction; one would assume, after all, that states would tend to require better than normal organizational practices from their professionals.\textsuperscript{118} Although any such contradiction could be resolved by allowing the specific concerns of professional regulation to take precedence, it is easy to see how the difficulties of analysis might proliferate. It also is easy to appreciate the contextual reminder that a one-step inquiry into the organizational standards of a particular state easily could omit aspects that might be very important.

b. Analogy

Although borrowing individual state law to determine federal questions of entity law seems both unlikely and ill-advised, relying on prevailing state law for relevant analogies is more practically promising.\textsuperscript{119} In other words, corporate federalists might feel that if federal law mirrored that of most state law with respect to the importance of management's conduct in determining entity liability, state choices about that conduct generally would be unaffected.\textsuperscript{120} This analysis evidently would prompt federal adoption of an approach based on the MPC. A brief reprise serves to remind us of the argued drawbacks and virtues of such an approach.\textsuperscript{121} The MPC permits legislatures to manifest intent, but begs the question of what that intent should be. Its default rules generally restrict criminal entity liability; its adherents contend that this is appropriate because civil liability generally is adequate and because criminal liability may affect innocent individuals.\textsuperscript{122} In generally restricting entity liability, however, the MPC conceptually severs it from the question of how to achieve particular public goals.\textsuperscript{123} Moreover and most certainly, if a decision were made to pattern federal law after the MPC, inquiry into any special standards applicable to members of a regulated profession would have no obvious or

\textsuperscript{117} Brett H. McDonnell, Getting Stuck Between Bottom and Top: State Competition for Corporate Charters in the Presence of Network Effects, 31 Hofstra L. Rev. 681, 683–84 (2003) (describing the argument that states focus on attracting businesses for incorporation when shaping their corporate law; and, therefore, cater to the interests of management rather than the interests of shareholders or other social concerns).

\textsuperscript{118} See, e.g., S. High Dev., Ltd. v. Weiner, Lipe & Cromley Co., 445 N.E.2d 1106 (Ohio 1983) (holding that shareholders of professional corporations do not enjoy the protection of limited liability); cf. We're Assoc. Co. v. Cohen, Stracher & Bloom, P.C., 480 N.E.2d 357 (N.Y. 1985) (holding that shareholders of professional corporations enjoy the same limited liability as shareholders of ordinary business corporations).

\textsuperscript{119} See Gabaldon, supra note 110, at 193–95 (discussing the analogy approach).


\textsuperscript{121} See supra notes 101–14.

\textsuperscript{122} See supra notes 91, 101.

\textsuperscript{123} Model Penal Code § 2.07(2) (1962).
easy fit. Just as certainly, other important details might be missed. Nonetheless, if one were wedded firmly to the minimization of federal intrusion on state choices about entity management, the MPC approach would be something to seriously consider.

c. Abolition of Federal Criminal Entity Liability

Corporate federalists presumably are federalists more generally, however, and actually might prefer the whole hog of entirely abolishing federal criminal entity liability. This obviously would have the effect of at least a mild decrease of the federal presence in American life. Those inclined to be federal abolitionists might still be willing to contemplate calls for changes in criminal entity liability by individual states. It would, for instance, be possible for any state to adopt a statute saying that some irregularity in the structuring of one of its domestic corporations merits entity criminal liability in and of itself. Admittedly, the adoption of such a statute by any particular state seems unlikely due to fears of losing the “race to the bottom.” Moreover, it initially would appear to fly in the face of the MPC, and concurrently the approach of a number of states. Indeed, since such a statute and the MPC independently would move the instances of entity liability in opposite directions, their goals would be directly opposed. Nonetheless, given sufficient indication of legislative intent, the approaches would be formally consistent and could co-exist in any jurisdiction.

2. Bigfoot’s Not So Bad

Those who do not believe that American commerce will collapse if additional federalization of corporate law occurs may also think that it generally is appropriate for the federal government to address regulatory lacunae in organizational contexts. This seems particularly true when the issue is organizational criminal liability for federally-defined bad acts. This is simply another gap in federal law that very clearly has not yet been thoughtfully filled. A congressional response probably would be nice, and the bulk of this Article is devoted to suggesting its shape.

124. Section 2.07 of the Model Penal Code, governing entity liability, contains no provisions imposing special standards for professional corporations or unincorporated associations. See id. § 2.07.
125. Renee M. Jones, Rethinking Corporate Federalism in the Era of Corporate Reform, 29 J. Corp. L. 625, 633 (2004). These federalists may not prefer abolishing criminal entity liability with respect to specific, well thought out and congressionally-defined crimes having truly national implications.
126. Id.
127. See, e.g., Roberta Romano, Competition for Corporate Charters and the Lesson of Takeover Statutes, 61 Fordham L. Rev. 843 (1993) (addressing the possibility of a “race to the bottom” in the context of takeover statutes); see also supra text accompanying note 116 (addressing “race to the bottom” in the context of the need for federalization).
128. See supra note 90.
130. As intimated just above, corporate federalists may regard the arguments presented as relating to a call to action by individual states (race-to-the-bottom concerns notwithstanding).
IV. THE PROMISE AND PERILS OF CRIMINAL ENTITY LIABILITY

The first step in redesigning the federal approach to criminal entity liability is to consider just how such liability really differs from civil entity liability. Part IV.A deals with the justifications of civil entity liability. Part IV.B examines how, if at all, considerations differ in the criminal context.

A. Civil Entity Liability

The arguments for an entity’s private liability under respondeat superior for the actions of its agents are well-rehearsed and relatively convincing. The legal ability of the organization’s management to direct the agents’ actions equates to responsibility for the results. Although civil liability translates to a reduction in value for the organization’s owners, we see the reduction as generally appropriate. After all, whatever the benefits of the liability-creating activity were, the benefits have been received and should be charged with their actual costs. This reckoning strikes us as fair and encourages the belief that management’s future economic decision-making will be more accurate. This reasoning works relatively nicely as long as causal requisites are observed and whatever damages are awarded are actual rather than punitive.

When civil liability is a matter not of private rights of action, but instead of civil enforcement by some government agency, the calculation logically changes. Although some penalties are reckoned by reference to losses caused (such as environmental clean-up costs), others clearly are not. We nonetheless seem willing to assume that the legislative scheme pursuant to which the penalty is imposed was generally well-designed, and that the penalties themselves were well-thought-out surrogates for actual societal losses. This perception is buttressed wherever monetary civil penalties are to be disbursed to a class of injured private individuals. In any event, the general concept of civil entity liability, by way of government enforcement or otherwise, is not any kind of lightning rod.

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132. It also is conceivable that the structure of analysis would remain the same if foreseeability requirements were substituted for causation requirements. Cf. Theresa A. Gabaldon, Causation, Courts, and Congress: A Study of Contradiction in the Federal Securities Laws, 31 B.C. L. Rev. 1027 (1990) (discussing role of cause and possible substitutes).
B. Criminal Entity Liability

1. General

The prospect of imposing criminal penalties on entities resonates quite differently. For one thing, we are not so accustomed to accepting economic analysis in this sphere. For another, and as noted above, there are those who contend that civil entity liability is usually adequate to control organizational conduct. In addition, it has been said that the only differences between civil and criminal liability are the prospects for incarceration and/or shaming inherent in criminal liability. Because entities cannot be incarcerated and cannot feel shame, it is also claimed that imposing criminal liability rather than (or in addition to) civil liability largely is pointless. An exception (vividly illustrated by the experience of Arthur Andersen and feared by some in the Milberg Weiss context) is acknowledged for those convictions resulting in the more-or-less automatic loss of eligibility for government-related business.

Without a doubt, part of the differing resonance also has to do with the perceived likelihood of sub rosa manipulations in the case of criminal entity liability. In the civil context, if it is private rights of action we are talking about, we simply expect the prospective plaintiffs to be motivated primarily by their own economic calculations. If it is a matter of civil enforcement by a government agency such as the Securities and Exchange Commission ("SEC"), we expect application of rules that are relatively specific and often particularly designed to shape organizational conduct. On the other hand, since we have reasoned above that criminal liability rarely need be invoked (because of its overlap with civil liability), when prosecutors even threaten to do so they must be attempting to chill activities other than those

135. The same partially is true for civil penalties not designed to achieve compensatory goals. See John C. Coffee, Jr., Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It, 101 Yale L.J. 1875 (1992) [hereinafter Coffee, Jr., Blurring] (responding to the contentions of Mann, supra note 133).

136. But see Kenneth G. Dau-Schmidt, An Economic Analysis of the Criminal Law as a Preference-Shaping Policy, 1990 Duke L.J. 1, 2 (recognizing historical law and economic approaches to analyzing criminal punishment, and employing an economic analysis of criminal law as a preference-shaping policy).

137. See supra text accompanying notes 125–26.

138. See Ainslie, supra note 11, at 110.


140. See, e.g., Ainslie, supra note 11, at 113–14; Lynch, supra note 70.

141. Arthur Andersen's conviction, of course, resulted in its loss of the ability to audit clients filing with the Securities and Exchange Commission. Appearance and practice before the Commission, 17 CFR § 201.102(e)(2) (2006), provides "any person who has been convicted of a felony . . . shall be forthwith suspended from appearing or practicing before the Commission." See infra notes 157–58 for the argument that such losses should be more finely tuned and contextualized.
that are the subject of the criminal statutes (such as the bringing of securities class actions in the Milberg Weiss scenario) or to accomplish other goals (such as waiver of the organization's attorney-client privilege in order to obtain evidence against individual wrongdoers). Oddly, an attempt is made to give these arguments added weight by intimating that these threats are highly effective (as well as dreadful) because of the dire effect of criminal entity liability on innocent shareholders and others. If taken to its logical conclusion, this generally contradicts the "criminal prosecution is pointless" argument referred to above. But what the heck.

Arguments about the manipulation of criminal entity liability seem to depend, at least in part, on the perception that such liability is dreadful and unusual, and also to assume that criminal liability otherwise has a non-instrumental point that is somehow subverted when used for a different purpose. It is necessary, then, to consider what the point of criminal entity liability is (or should be) and to examine just why it is considered to be so draconian.

2. The Traditional Justifications of Criminal Liability

The traditionally advanced justifications of criminal liability include, of course, retribution, incapacitation, rehabilitation, and deterrence, with an occasional nod to restitution. Of these, restitution clearly is the least problematic in an entity context. It dovetails nicely with the justifications of civil entity liability; our primary concern, then, should have to do with its possible overlap and putative lack of necessity. Certainly, a proper criminal restitutionary remedy would make allowance for a civil remedy, and vice versa. In addition, a criminal restitutionary penalty could be a nice supplement to civil liability where problems of the commons or the like might prevent the private assertion of remedies.

Retribution poses different, and more numerous, concerns. Because, as noted above, entities cannot actually do anything, much less do something wrong, it would seem at first that exacting retribution against an organization is not a logical goal. Retribution is not, however, about logic; it is about public sentiment. It arguably makes as much sense to salve public wounds in an organizational context as

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142. See supra notes 133–36.
143. See, e.g., Brent Fisse, Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions, 56 S. CAL. L. REV. 1141, 1146, 1159, 1167 (1983). It is important to note that shaming and incarceration merely are methods of achieving these goals, but are not regarded as goals in and of themselves.
145. See id. at 326 (noting that restitution as a criminal penalty, "is not appropriate when the organization has independently compensated its victim"); see also Mary Kreiner Ramirez, The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty, 47 ARIZ. L. REV. 933, 952 (2005) (stating that some states have adopted "[corporate] deferred prosecution agreement[s]" that allow a corporation to civilly resolve criminal investigations by agreeing to certain sanctions, including restitution, that otherwise would have been imposed in a criminal prosecution).
146. Fisse, supra note 143, at 1167.
in an individual one.\textsuperscript{147} This suggests that retribution is a cognizable goal primarily in high-profile contexts, which is somewhat perplexing.\textsuperscript{148}

Just as troubling, to the extent that the criminal penalty imposed on an entity is most likely a monetary one, or one with monetary consequences,\textsuperscript{149} and unrelated to actual benefits extracted at someone else’s expense, retribution actually is extracted from the organization’s owners, who themselves may be entirely innocent. If the monetary consequences are severe, innocent employees, creditors, and consumers may also be affected. It seems to be this prospect of innocents suffering retribution that is most off-putting in the context of organizational criminal liability.\textsuperscript{150} Presumably, this suffering can be distinguished from the anguish and monetary devastation that may be experienced by the family and friends of individual criminal defendants on the basis that, in the individual context, the suffering of any innocents is collateral to that of the criminal human defendant.\textsuperscript{151} In the entity context, the suffering of innocents seems to be the only human suffering that occurs. Although this conceptualization disregards the possible human suffering of sometimes culpable managers, it makes its point.

In any event, innocent suffering by owners, etc., also is a threatened byproduct of the other (arguably loftier) goals of criminal liability, insofar as the spur to their accomplishment is some form of monetary penalty. Take first the goal of incapacitation as a method of avoiding further social harm.\textsuperscript{152} Since, as earlier noted, a fictional entity cannot be incarcerated or otherwise physically be restrained from engaging in bad acts,\textsuperscript{153} incapacitation would at first seem to require administration of capital punishment. This presumably would take the form either of mandatory dissolution or of monetary penalization so extreme as to drive the entity out of business.\textsuperscript{154}

On second examination, however, there may be other possibilities. If the bad act occurred in the context of utilization of a government benefit, disallowance of the benefit effectively incapacitates the organization from future violations.\textsuperscript{155} Thus, in


\textsuperscript{148} This may be illustrated by some of the public reaction to suspicion that publicity played a role in the securities fraud and obstruction prosecution of Martha Stewart. See Heminway, supra note 27 (addressing perceived reasons for prosecution); see also Moom, supra note 27 (same).

\textsuperscript{149} Disqualification from various government-sourced benefits are separately considered infra notes 209–11.


\textsuperscript{152} Steven S. Nemerson, \textit{Alcoholism, Intoxication, and the Criminal Law}, 10 CARDozo L. REV. 393, 462 (1988).

\textsuperscript{153} See supra note 139 and accompanying text.


\textsuperscript{155} See Ainslie, supra note 11, at 115.
the case of Arthur Andersen, automatic deprivation of the ability to practice before the SEC\[156\] would prevent the firm from inadequately auditing clients in that context,\[157\] as well as from obstructing the investigation of any such inadequate audits (the charge on which it actually was found guilty).\[158\] If Arthur Andersen somehow managed to survive, one still might have feared the injury of clients without business before the SEC, unless rehabilitation was achieved by the entity’s near-death experience.

Rehabilitation contemplates that someone who has wandered from the path of righteousness can, after public identification as a criminal, be encouraged to return to that path.\[159\] This would seem to work better in the case of individuals, as to whom incarceration in a “correctional” facility and rehabilitative training are options, but still is not entirely illogical in the organizational context.\[160\] Even though organizations cannot walk righteous or non-righteous paths, one certainly can imagine management setting a new organizational course involving better controls over individuals after the entity’s criminal conviction.\[161\] Indeed, one assumes that these rehabilitative consequences are one of the primary theoretic justifications for imposing entity liability in addition to individual liability.

The goal of rehabilitation (which sounds of spiritual renewal) can converge with that of deterring (presumably on cost-benefit or similar grounds) the particular convict in question from committing further crimes.\[162\] Deterrence, however, has a broader social goal of example-setting, effectively influencing others in addition to the convict.\[163\] It is quite rational to think that an entity’s criminal conviction may have an effect on decision-making by the managers of other organizations. Here, selection of targets on the basis of their public profile seems logical, if still somewhat distasteful. The bad flavor may even be enhanced in the entity context; after all (and once again), the price of the deterrent effect is borne primarily by those we characterize as innocents, and it may be a price in addition to the one extracted by a well-working civil liability scheme. Where this is the case, of course, it also is arguable that economic over-deterrence may occur.

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156. *See supra* note 141.
157. Ironically, this was not the charge of which Arthur Andersen was convicted.
158. Of course, it also helped drive the entity out of business, harming innocent partners, employees, and clients. *See, e.g., Cunningham, supra* note 11, at 1701 (describing reasons for Arthur Andersen’s exit from the industry).
159. *See Black’s Law Dictionary* 891 (6th ed. 1991) (defining rehabilitation as “[i]nvesting or clothing again with some right, authority, or dignity” or “[r]estoring person or thing to a former capacity”).
160. In fact, it has been suggested that rehabilitative effects can be more pronounced with respect to corporations. *See Fisse, supra* note 143, at 1159–60 (individuals react to stigma by becoming outlaws; corporations react by reforming themselves).
161. One can also imagine that this would be facilitated if one of the penalties for an organizational crime were replacement of management, which the market, if not the criminal law, might require.
3. A Revisionist View

After all is said and done, if we indulge the modest assumption that government regulators properly disavow any interest in the state of individual (much less corporate) souls, it is obvious that incarceration, rehabilitation, and deterrence are themselves instrumental goals designed to achieve improvements in social welfare. The foregoing examination suggests that, in the entity context, such improvements primarily are achieved by way of impact on management structures and practices. In the case of retribution, social improvement looking toward a desired state of public consciousness (i.e. a feeling of public security in the securities markets or in the functioning of the court system) depends on how the public feels. This may turn on a perception that entities will be managed differently in the future, but arguably is effected simply by the satisfaction of vengeful urges.

Discussion thus far has not clearly identified nor dealt with the possible warning function of criminal liability. Certainly, those agitating for the passage of “Megan’s laws” believe that criminal convictions can brand wrongdoers, permitting the public to take appropriate precautions and thus preventing future wrongdoing. Perhaps criminal entity liability usefully could be conceived of as, at least in part, an attempt to warn those who would deal with, invest in, or work for the entity that all is not as it should be. Whether the immediate consequence is a simple fleeing for the hills (that is, disinvolve with the convicted entity), or ostentatious reform in management structure or practices in order to maintain current and prospective relationships, the ultimate result should be avoidance of future wrongdoing and thus a presumed improvement in public welfare. Thus characterized, the dislocations experienced by current investors, etc., arguably are necessary costs that may prevent larger future harms to themselves as well as others.

4. The Role of Prosecutorial Discretion

Given that it will never be possible for all crimes, in entity context or otherwise, to be prosecuted, the exercise of prosecutorial discretion with respect to charging is inevitable. However exercised, it is for instrumental goals, and it will impose costs on innocents. The issue this presents is that imposition of costs on innocents may take place for reasons that have not been legislatively or otherwise publicly mandated. Although not mandated, the possibility of additional instrumental uses of prosecutorial charging authority presumably cannot be unforeseen by any legislative body that includes (or has tolerated inclusion of) entities within the group capable of committing a specific crime. This does not mean, of course, that the matter should not be revisited. At a minimum, this revisitation probably should

165. Id. at 398 (citing Smith v. Doe, 538 U.S. 84, 101 (2003)).
recognize that the most justifiable (or, at any rate, least controversial) uses of entity liability will take place where the effect on innocents can be limited or truthfully characterized as matters of voluntary choice. As discussed above, the Milberg Weiss indictment might properly be viewed as a situation in which no partner was entirely innocent. Although there may have been pronounced spillover effects on the employees and clients of the firm, it would be interesting to know to what extent they could be characterized as voluntary reactions to the public warning given by the indictment.

5. Composite Crime

Unexamined thus far is the idea that entity liability may consciously be used (and even theoretically endorsed) as a method to address a situation in which individual liability is not possible. This would be the case, for instance, where it was not possible to show that a single individual possessed the requisite knowledge and engaged in the requisite acts to satisfy all elements of a specified crime. Imposing liability on the basis of the composite knowledge and acts of all the organization’s agents then would seem to be a good way of discouraging organizations from structuring themselves so as to deliberately compartmentalize knowledge, decision-making authority, and execution. Whether this is a useful analysis is one of the subjects discussed below. In any event, it is directly related to the notions that the unindicted individual owners of Milberg Weiss nonetheless properly might be characterized as wrongdoers and that those who deal with irresponsibly structured entities deserve warning of the true state of affairs.

V. OVERTLY INTEGRATING ENTITY LIABILITY AND SOCIAL GOALS

Part IV indicated that the abstract, generally cognizable goals of entity liability involve salving the public’s sense of injury, attracting the attention of entity managers (both those of the entity accused and those of other organizations) to conditions permitting individuals to engage in criminal behavior, and warning the public of existing irregularities. The obvious undesirable cost is the suffering that may be imposed on innocent owners who lose some portion of the value of their investment, with possible spillovers to employees, creditors, etc. This cost seems particularly intolerable when entity liability is invoked to achieve some less-straightforward goal, such as chilling the bringing of securities class action lawsuits, which may be within the peculiar tastes of the charging official. This Part takes the

171. *See infra* Part V.B.
position that it would be beneficial to clearly and publicly acknowledge these goals and then engage in some tweaking, both to facilitate their achievement and to minimize their costs, voluntary or otherwise.

A. Exposing Charging Considerations

The smallest tweak that one could imagine would involve superimposing some sort of ritual public exposure and balancing of the considerations engaged in before a prosecutorial assertion of entity liability takes place. For instance, the charging authority could be required to list and disclose all the foreseeable consequences of a contemplated assertion and then reveal the balancing analysis that it engaged in to assure that the assertion truly is in the public interest. In the Milberg Weiss situation, one would hope that Debra Wong Yang or her superiors would have noted that securities class actions might be deterred if the leading securities class action law firm were indicted, as well as that threatening such an indictment might result in the ability to gather additional evidence against individual wrongdoers. One would also hope to see some frank acknowledgment that firm lawyers might be expected to run down the ropes in an attempt to escape the leaky ship, that clients might choose or be forced to take their business elsewhere, and so forth. However, it must be noted that a proposal based on hope, rather than expectation, is less than satisfying. Indeed, some might say that our experience in forcing federal agencies to ruminate on the costs and benefits of new regulations generally has been less than fulfilling. It might also be argued that requiring exposure of prosecutorial reasoning would have the undesirable effect of signaling to some elements that certain types of conduct are at less risk of prosecution.

Still, if the hoped-for listing really were forthcoming and the charging authorities proceeded to meaningfully assess the balance, the Milberg Weiss indictment might or might not have continued. The deterrence of securities class actions beyond the deterrence achieved by federal litigation in the 1990s seems a perversion of legislative intent. The threat of entity liability to achieve waiver of the attorney-client privilege may have seemed like a dandy idea at the time, but if re-evaluated in the light of subsequent public scrutiny, it probably has lost some of its attraction. Since neither sinking law firms nor substantially impairing their ability to float seems like an independently justifiable goal, what, then, would have justified entity liability? There was, at the time, no palpable sense of public injury akin to that following Arthur Andersen’s alleged connivance in the Enron debacle, so retribution seems dubious. Moreover, layering on some sort of overt “public outcry” test for criminal prosecution seems both unfair and ultimately detrimental to the public’s sense of confidence.

172. See Choi & Thompson, supra note 13 (discussing the purposes and general effect of the Private Securities Litigation Reform Act of 1996); see also Choi et al., supra note 13 (same).
173. See supra Part III.A.3.
There are, nonetheless, two more respectable consequences to be considered, both in line with the abstract, generally cognizable goals described above. One, of course, is the encouragement of Milberg Weiss management, in particular, and the management of class action-handling law firms, in general, to scrutinize the opportunities of their members to engage in wrongdoing. This consideration, which even provides a nice opportunity for a tip of the hat to professional responsibility considerations, prompts one to think that defining Milberg Weiss's crimes in terms of its structural shortcomings (and assuring that the punishment fits those crimes) makes more sense than asserting that the fictional entity engaged in the various bad acts (even those sounding in facilitation) referred to in the indictment. A general redefinition of this sort might also reduce the opportunity for prosecutorial eccentricity, as is further described below.

The second respectable goal of the Milberg Weiss indictment appears to be warning those who dealt or will deal with the firm of its possible rogue tendencies (less colorfully, its structural deficiencies). Insofar as some of the alleged wrongdoing was premised on breach of fiduciary duty, giving warning that the firm had no effective method of preventing such breaches definitely seems to be a legitimate goal. Although none of the allegations seem to have gone toward the menace of employee interests, perhaps it was useful to warn employees that lax structures might result in civil liability that could injure the firm's viability. This analysis also prompts one to suspect, however, that the interests of third parties should be as much at the heart of the issue as the interests of putatively innocent owners. This, yet again, is a matter to be addressed below.

B. Rethinking Corporate Crimes

1. The Theoretical Heartland of Criminal Entity Liability

Interestingly enough, even those generally decrying the need for and/or desirability of criminal entity liability tend, evidently as some sort of safety valve, to acknowledge that it may not be quite so bad in at least one situation, which is symbolized, albeit incompletely, by the MPC's default rule of imposing liability where a specific criminal act is ordered or recklessly tolerated by the board or other high managerial agent. In this deviant corporate culture scenario, endorsement of punishment might, in the public eye, slip by on the basis of not much more than anthropomorphism. Naughty managers (who often can be identified and individually punished) simply serve as the tainted corporate soul of the naughty, punishment-worthy entity. This view theoretically would condone indictment of the Milberg Weiss entity

174. See supra note 166 and accompanying text.
175. See infra text accompanying note 209.
177. A variant sometimes is known as the "tone at the top" problem.
based on the fact of the high organizational placement of Messrs. Bershad and Schulman (at least if no one is worried about selective prosecution).

Another instance in which corporate criminal liability seems to carry particular appeal is the situation in which a criminal allegation can be mustered only on the basis of the composite knowledge and actions of an entity’s agents. This is the case where it simply cannot be proven that any single human being both possessed the requisite knowledge and took the requisite action to satisfy the elements of the crime. In the case of composite crimes, anthropomorphism takes on an added twist. Here, we may suspect that management actually and cannily structured the enterprise so as to avoid concentrating knowledge and decision-making authority in a single place; if not that, we fear that such a structure “just grewed.” In the latter instance, we presumably are worried about managerial neglect. Because we do not know which scenario is correct, all that we can be sure of is that, at a minimum, the entity’s managers (and perhaps its owners) have not been sufficiently vigilant. Then, reluctant to criminalize individual conduct amounting to nothing more than mere white-collar lack of oversight, but still desperately worried because something “bad” happened, we content ourselves with pretending that the fictional human being has perpetrated the perceived wrong. In effect, we appear to conclude from the opposing scenarios the sanctionable state of the corporate soul.

In either the corporate culture or composite crime situation, “punishing” the entity, either by taking some of its worth or by detracting from its reputation, presumably beneficially results in the indirect punishment of the actual wrongdoers—managers—by operation of market forces. This punishment is, to be sure, imprecise and unpredictable. Where it occurs, it may be the result of the prosecutorial whimsy and/or manipulation discussed above, and therefore may fail to assure that like situations are treated in like fashion, offending our sense of fairness and becoming a matter of arguable under-deterrence (unless the civil liability scheme is functioning perfectly).

Nonetheless, as thus described, corporate culture and composite crimes rather clearly distill to crimes that occur where overseers have done wrong, either through negligence or by design. Unless analysts really have been hopelessly confused by the seductive traditional imagery of the entity as fictional human being (which is unlikely), the belief that entity liability can be appropriate in this theoretical heartland must signal that the believers regard managerial misconduct (including lack of diligence) itself as a criminal matter (albeit one for which we do not choose to punish managers directly). From this perspective, wrongdoing really did occur, whether or not the elements of some other crime can be established. Presumably, telling the

179. *See supra* text accompanying note 45.
182. *See id.* (discussing various ways corporate criminal liability can effect corporate management).
the public that the wrongdoing has occurred also serves as an indicator that it may be a
continuing condition, permitting protective measures to be observed.183

The straightforward thing to do, then, would be to somewhat more rigorously
identify situations of managerial shortcoming and set about redressing them. In
doing so, we should be realistic about the pressures that have thus far served to
confuse the area. Likely to be foremost among them is our reluctance to see manag-
ers (who happen to look a lot like some of us) marched off to jail for actions that
we probably can imagine ourselves being caught up in. Leaving their punishment
to indignant market forces reacting to entity penalization seems, well, just about
right, but for its unpredictability.

From this standpoint, imposing legal liability on entities rather than managers
probably is the only thing for which we can muster the will—though we presumably
would like to see it happen more often, and not as the result of prosecutorial
discretion exercised for unarticulated goals. This seems to suggest the formulation
of entity crimes that can be more-or-less easily proven by reference to organiza-
tional charts and procedures, without any need to make complicated showings ei-
ther of composite mens rea or of precisely who did what. These specially
formulated crimes should be coupled with penalties that are appropriately designed
to attract market attention without unduly harming innocent owners, employees,
etc.

Thus imagined, a question obviously occurs as to why a newly clarified type of
misconduct should result in criminal, rather than civil sanctions. In contemplating
this question, it is helpful to think again about what have been called the only “real”
differences between criminal and civil liability: the prospects of incarceration and
shaming as methods of achieving improved social conditions.184 Because in the case
of entity liability no one is going to jail, criminalizing managerial conduct logically
must have something to do with shaming the entity in the eyes of the market, or
actually shaming those human beings associated with the convicted entity.185 The
correlation of this presumably would be manifest public enthusiasm about convey-
ing a very distinct message concerning the shameful nature of organizational struc-
tures and practices that either facilitate or fail to discourage wrongdoing.186

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183. Wilson Meeks, Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation
184. See supra note 139. Claiming that there are only two distinctions overlooks the fact that criminal
conviction frequently carries the prospect of ineligibility for government contracts and/or government benefits.
See supra note 141, infra notes 209–11 and accompanying text.
185. See generally Skeel, Jr., Shaming in Corporate Law, supra note 139.
186. See, e.g., Tom R. Tyler, Why People Obey the Law (1990) (explaining that people obey law because
of its perceived moral legitimacy, not because of its deterrent threat); John C. Coffee, Jr., Does "Unlawful" Mean
(1991) (describing criminal law as a kind of moral education); see also Coffee, Jr., Blurring, supra note 135, at
1876 (discussing the difference between pricing conduct as a matter of civil law and prohibiting it as a matter
of corporate law).
What we seem to be contemplating, then, is “branding” organizations (and, to some extent, their human associates) when human management has behaved culpably. The brand may warn away some who otherwise would deal with the entity, or may even trigger some sort of mandatory loss of prospective business, particularly in the case of a gatekeeper or other entity which traffics in government benefits for which the entity becomes disqualified. This raises the possibility that an entity might actually die of shame, as Arthur Andersen arguably did, but the avoidance (if so desired) of this ultimate sanction is an issue better reserved for the discussion of how best to fine tune entity penalties.

2. The Precise Elements of, and Defenses Against, Entity Crime

The most obvious elements of entity criminal liability would be as follow: (1) that a foreseeable triggering event (including criminal activity by an entity agent or the composite satisfaction of the elements of any crime) has occurred, and (2) that the triggering event either has been intended to confer or has had the effect of conferring a benefit on the entity. This is, in effect, not eye-poppingly different than the respondeat superior approach to criminal liability invoked by the federal government in both the Arthur Andersen and Milberg Weiss situations, although it would have the advantage of being more clearly stated and thus more overtly threatening. Novelty vis a vis federal law would inhere, however, in the specific articulation of a defense, permitting a showing that management had taken reasonable action to prevent the triggering event.\(^{187}\)

This type of defense would be similar to that allowed by the MPC approach in the case of crimes as to which the legislature has manifested an intention of imposing criminal entity liability (either by design or by reference).\(^{188}\) As proposed, however, it also would operate in the sphere as to which legislative intent with respect to criminal entity liability is not clear; in that category, under the MPC approach, a showing that managerial shortcomings are more extreme than negligence is made part of the state’s affirmative case.\(^{189}\)

When compared to the existing state of federal law, formal availability of a defense based on management’s care presumably would go some distance toward assuaging concern that entity liability is draconian and erratic, perhaps prompting its regular invocation. At the same time, prosecutors presumably would not bring claims where it seemed likely that the defense could be shown, again assuaging at least some of our concern with prosecutorial discretion. Where claims of entity liability actually were made and sustained, they effectively would constitute a penalty for management’s (even negligent) shortcomings, without automatically ren-

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187. A more novel defense might be based on a demonstration of some proportion of innocent owners—sort of a Sodom and Gomorrah kind of thing.
188. See supra notes 91–109 and accompanying text.
dering the managers themselves criminals. Perhaps most important, the statement of the defense would give notice of what is expected of managers and provide an incentive for compliance. This incentive actually should be superior to the one provided by a respondeat superior standard, in that conviction pursuant to respondeat superior casts no necessary aspersions on management conduct. It should also be superior to any incentive provided by the current federal sentencing guidelines, insofar as it would be a complete defense and not left in any way to judicial discretion.

It was suggested above that federal adoption of the MPC approach might be too blunt a tool, in that it combines design and reference statutes, which arguably reflect different levels of true legislative intent. An approach combining design, reference and silence statutes surely is that much blunter. It does not, however, risk under-inclusion to the same extent, in that burdens with respect to matters within managerial knowledge are more properly placed. After all, so long as a triggering event has occurred, it seems entirely appropriate to regard management as having functioned incorrectly, unless there is a showing to the contrary. Requiring such a showing is in no sense unduly harsh, given both the existing federal standard and the concession of the drafters of the MPC that it is acceptable to make management’s diligence a matter of defense.

Another criticism advanced with respect to the approach of the MPC was that it was undesirable to deal with the issue of entity liability in the abstract. Without a doubt, this is a criticism equally applying to the above-made defense proposal. It is important to note, however, that the defense proposal is intended to be adopted in tandem with a penalty proposal described below, and it is by reason of this penalty proposal that contextualization may be improved.

In an attempt to apply the defense proposal in at least some contexts, however, let us once again consider the Milberg Weiss situation. There, a showing that Messrs. Bershad and/or Schulman had engaged in the alleged criminal conduct would suffice to establish the first element. To the extent that the entity benefited from lucrative attorney’s fees received from the solicited class actions, a showing of the second element also would seem to be readily forthcoming. It would then become the obligation of Milberg Weiss to show that it had reasonable procedures in effect to prevent wrongdoing. These presumably would include attorney training programs, audits of accounts, and reporting systems, among other possibilities. Not remarkably, these would be precisely the types of things that appear to be affirmatively required by the typical rules of professional responsibility governing lawyers,

190. Managers would be expected to lack negligence in all circumstances involving foreseeable federal crime.
191. See supra notes 86–87.
192. See supra Part III.B.2.
193. The existing federal standard permits no showing on the matter until the penalty phase.
of which all partners in Milberg Weiss certainly had reason to know. Critically, however, if prosecutors believed that the requisite safeguards were in place, they would have been unlikely to bring the indictment, no matter what their other political motivations might have been.

In the Arthur Andersen scenario, a single conviction of, or guilty plea by, any employee (and there was one, count it, one such plea) would satisfy the first element. To the extent that the plea related only to the destruction of evidence and other acts obstructing justice after Enron’s wheels had begun to come off, we would need to face the question of whether Arthur Andersen did, or was intended to, benefit. After all, the truth came out, and the obstructing employee may just have been trying to save himself from individual prosecution. This sort of test-driving suggests that we could avoid at least some questions by more careful definition in the first place. If we were to specify that benefit to the entity is conclusively presumed if the bad-acting agent is not attempting to extract a benefit from the entity, the bases might be well covered. When the (sports-metaphor-mixing) baton is passed to the entity to establish its defense, it would need to show that it had the well-designed and functioning training, reporting, and internal auditing programs that we might expect from a then “big five” accounting firm. Whether Arthur Andersen did or did not might be something that the actual prosecutors took into account in their charging decision; in any event, we do not know whether the defense could have been established. If not, we would move to the penalty phase. Before doing so, however, it is useful to posit a hypothetical involving a non-professional entity (that is, neither an association of lawyers or public accountants).

Rather than tackling anything on the order of an imploding Enron, let us simply consider a hypothetical corporation engaged in government contracting. We will assume that one of its employees has engaged in unlawful bribery of government officials for the purpose of obtaining contracts for the corporation. We then have assumed ourselves a slam-dunk satisfaction of the above suggested elements. What would the corporation have to show to establish a defense? Tests based on “reasonableness”—be they of precautions or otherwise—tend to be rather more easily stated than applied. Because the possibility of bribery is hardly esoteric, however, it would seem that any such entity would be expected to have some system for checking on cash or electronic disbursements to a list of government officials at agencies with which the entity does business, as well as internal standards prohibiting the use of corporate assets and employees for the private benefit of such officials. If such a system and such standards in fact were in place, but a canny employee managed to subvert them, so be it—the corporation nonetheless would go free. If it did not have such a system and standards, it would be deemed criminally sanctionable. This hypothetical thus moves us beyond any comfort zone associated with

195. See Ainslie, supra note 11, at 123.
regulated professionals (although certainly entities bidding on government contracts have a daunting array of specialized regulations with which to comply), and it really does not feel so bad. Whether we really could muster the public will to announce in general terms that organizational failure has formal consequences in criminal law might depend, then, only on how skillfully we can address concerns about penalties.

3. The Possibility of “Untriggered” Entity Crime

Before turning to the question of sanctions, it must be acknowledged that the foregoing discussion comes perilously close to constituting a call for a crime—let’s call it “entity indifference”—that does not include the trigger of some other criminal wrongdoing, but simply comprises an assessment that an entity does not have in place a system of controls deemed abstractly adequate. Stepping over the brink to discuss such a call, it would seem, at a minimum, to have the advantage of leveling playing fields (perhaps the ones where batons are passed?) between those entities that lack adequate controls, but coincidentally lack employees with criminal inclinations, and those entities without adequate controls, but with bad luck in hiring. It has the disadvantage of abstraction, and obviously would impose significant costs on entities, and perhaps ridiculously high costs on regulators, were enforcement to be taken seriously.

At this point, it becomes quite relevant to contemplate the reporting and internal-control assessment requirements imposed by the Sarbanes-Oxley Act of 2002. These requirements appear to be an excellent example of abstract indifference controls in the specific context of financial reporting. Section 404 of Sarbanes-Oxley requires that annual reports under Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (“34 Act”) contain “internal control reports,” and section 906 requires an entity’s chief executive officer and chief financial officer to certify that the entity’s reports under those two sections comply with all requirements. Both knowingly and willfully inaccurate certifications are criminalized, with the latter suffering higher penalties than the former. More generally, willful violations of the ’34 Act are criminal. The controversy over the alleged costs and the alleged difficulty of implementing the internal controls requirements is educational, and certainly signals caution with respect to broader non-indifference mandates. Nonetheless, it is important to note that the certification crimes just described are

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199. Id.
individual in nature. From this standpoint, Congress may have gotten it just right or just wrong as far as attracting management attention is concerned; had the crime been a matter of entity liability for lacking controls, the issues might have played out differently.

Signaling caution, moreover, is not the same thing as putting on the brakes entirely. Suppose, for instance, that all entities of a certain size (say all that are required to be registered under the '34 Act) or of a certain type (say all law firms seeking to appear before the SEC) were required to establish committees responsible for considering and implementing procedures relating to a specified list of issues as to which we fear insufficient attention. At a minimum, this list would include constituent and composite crime, and might eventually extend to such matters as exploitation of children, contribution to global warming, etc. Failure to have such a committee would be a crime itself; proof by the entity that it had such a committee and that it was functioning reasonably well (whatever that might mean) could be made a defense to assertions of entity liability in the context of “triggered” crimes.

In justification of the idea of an “untriggered” crime of entity indifference, it is relevant to rebut the notion that the prospect of civil liability adequately takes care of all, or even most, instances of managerial malfeasance. Certainly, individual managers have little to fear from the civil side; there has been a virtual landslide of state legislation permitting the elimination of private monetary civil liability for managers themselves. Although entities themselves may be liable on a respondeat superior basis for harming third parties, a remedy only follows if such harms actually materialize. This means that there may be many instances in which managerial indifference (or worse) with respect to the risk of such harms may go unnoticed, even where harm is completely foreseeable.

As far as civil enforcement by a government agency is concerned, there also will be noticeable gaps. First, any such agency will usually and understandably be more attentive to instances of actual harm. Second, the areas in which such agencies may be involved tend to be quite specific (i.e., securities regulation, banking regulation, etc.), meaning that there is a significant realm in which management may be negligent with respect to the possibility of injuries to third parties without any civil reckoning whatsoever.

How likely is it that an untriggered crime of entity indifference might be imposed? A lesson is suggested by the hue and cry about the Sarbanes-Oxley internal reporting requirements just described, although those did (as noted) pose the spec-

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203. In addition, such matters as foreseeable loss of employee life may be completely, and regrettably, monetarized. This appears to be an intractable problem with any liability scheme based primarily on monetary penalties.
ter of individual liability. More educational, perhaps, are the somewhat lily-livered provisions of Sarbanes-Oxley that force an entity's disclosure of the existence or absence of corporate ethics codes, without requiring such codes, as well as disclosure of whether the corporation does or does not have financial experts on the audit committee, without requiring such experts. One suspects, especially in light of the subsequent heated commentary about the extension of the federal nose under the state tent of internal affairs, that the drafters of Sarbanes-Oxley regarded actually requiring ethics committees and financial experts to be too controversial an involvement in matters of corporate governance. More generally criminalizing lack of corporate controls presumably would be regarded as even worse—unless, perhaps, the penalty were appropriately moderated.

4. Fitting the Crime

As previously mentioned, whenever criminal entity liability is discussed, there is a predictable response of head-shaking over whether the penalty is necessary, given civil liability (the "necessity" concern). This head-shaking can be quite violent if the duplication is also seen as a matter of economic over-deterrence. The shaking is accompanied by the second predictable response, which is chanting about the suffering of the innocent (the "poor innocents" concern). Both of these concerns can be addressed by appropriate tailoring of the penalty for entity crime, whether it is of the triggered or untriggered variety.

a. The Necessity Concern

The necessity concern logically depends, of course, on whether the criminal law penalty merely duplicates civil penalties. To the extent that civil penalties are primarily monetary, and given that the usual (and feasible) criminal penalties against entities are monetary, overlap necessarily exists. This does not mean, however, that the overlap need be complete.

i. Limitation of Monetary Penalties

To the extent that monetary criminal penalties are regarded as duplicative, and thus not only unnecessary, but perhaps posing a risk of economic over-deterrence, the obvious thing to do is to limit their size. Suppose, then, that the criminal penalty to be assessed against an entity was to be limited to disgorgement of all profits in excess of some industry average. Ideally, the calculation would be made after the

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205. Id. § 407. Contrast these with the bold (this is sarcasm) move taken by Congress in that self-same Act in criminalizing securities fraud! Id. § 807. (This is a real and rare Dave Barry moment as far as law review articles are concerned). See generally Douglas M. Branson, Too Many Bells? Too Many Whistles? Corporate Governance in the Post-Enron, Post-WorldCom Era, 58 S.C. L. Rev. 65 (2006) (generally discussing and criticizing the various provisions of Sarbanes-Oxley).
settlement of civil liability. If civil liability only later materialized, a refund could be allowed. Such a limitation presumably would avoid any truly hideous over-deterrence effects, as well as have the favorable effect of discouraging management from turning a blind eye toward constituent wrongdoing, which it might do if permitted to reason that whatever civil liability were to result, it would be outweighed by enhanced firm profitability. It is true that this incentive would be diminished in the case of an entity that otherwise does not expect to exceed industry standards of profitability, as well as in the situation of an entity that participates in a universally mismanaged industry—but nothing is perfect.

Interestingly and enticingly, one can imagine distinct market benefits generally attending the adoption of a system criminalizing entity indifference and penalizing the entity with disgorgement of all profits in excess of the industry average. In these circumstances, unless an organization generally was able to signal that it had a substantially effective program for avoiding entity indifference, it would not be rational for the market ever to place a value on the entities’ ownership interests based on anything other than a projection of earnings at or below the industry average. This would tend to prevent irrational speculation in those interests, as well as give a significant incentive for implementing programs for avoiding indifference.

It is, once again, useful to test the proposal in at least one fact-based context. As it turns out, in implementing a profit-limited penalty against our friends at Milberg Weiss, we would encounter complications attendant to owner participation in the enterprise. How does one measure profitability in such a circumstance? Presumably, some fair quantum meruit-based compensation would need to be permitted before considering the firm’s ultimate profitability. Nonetheless, the exercise points out once again the necessity of testing proposals in a variety of contexts for purposes of fine-tuning before implementation.

ii. The Strength of Names: “Bad Corporation, No . . . What?”

Another possible response to the necessity concern would be to eliminate entirely all monetary criminal penalties against entities. Thus, the only penalty associated with criminal entity liability would be the conviction itself. If branding of this sort were to become more commonplace, we still might take pride in what we had achieved. Public willingness to take a stand on the desire to have consistently non-moribund management presumably could carry an important message with a powerful ability to shape corporate and other market culture.

There is, however, a counter-consideration that also is powerful. One might fear either that prosecutors would not bother to charge or that the strength of public

censure alone might fade when compared to the costs of mounting a defense. If this were the case, entities might automatically plead guilty to a charge of entity indifference. In either event (that is, if charging became even rarer or being a convict became truly commonplace), the threat of liability presumably would lose a great deal of its exhortational value.

It is to be hoped that neither phenomenon would occur. To the extent that a conviction (or, for that matter, an indictment) would call market attention to an entity’s organizational hygiene (and the prospect of civil liability), at least some market sanction might be expected. Similarly, at least some response by prospective trading partners warned of organizational proclivities should be foreseen. In the interest of avoiding an adverse market or business reaction, then, an entity’s managers might be expected both to avoid indifference and to contest its charge. Similarly, a rational prosecutor might easily find the bringing of charges worthwhile.

It admittedly is difficult to predict exactly how market or other business reaction to the shame of criminalization might affect overall firm value. Examining the recent experiences of Martha Stewart Living Omnimedia, Inc. (“Martha Stewart, Inc.”) and Arthur Andersen provides inconclusive and possibly contradictory results.

There was, of course, no charge of entity liability involved in Martha Stewart’s criminal prosecution. Still, one is inclined to take the market’s reaction to her conviction as some sort of surrogate for reaction to the criminal conviction of her eponymous corporation. We know that after a brief period of decline, the shares of the organization rebounded when it became clear that Ms. Stewart and her genteel sensibilities would be rejoining the company (perhaps providing an analogy to an entity conviction that does not lead to replacement of theretofore successful management). Although the popularity of the enterprise’s products seems to have declined, it is impossible to say how much of the decline simply is attributable to normal cycling of fashion tastes. In any event, it is clear that Martha Stewart, Inc. did not die of shame.

Arthur Andersen, obviously, suffered a different outcome. The defection of its partners may be viewed as a rational market reaction to anticipated civil liability and loss of prospective business. This loss of business was, in part, the result of the warning given to Arthur Andersen’s clients. More important, perhaps, the firm’s criminal difficulties led more-or-less automatically to loss of its ability to represent clients before the SEC.

As a minimum attempt to limit outright deaths from shame, the dangers associated with disqualification of the sort suffered by Andersen should be dealt with. It

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208. See supra note 141 and accompanying text.
would be relatively simple for any statute generally addressing entity crime (including one creating a crime of entity indifference) to specify that conviction is to have no automatic disqualifying effect with respect to any government-administered regime. Stating that government disqualification practices are to be modeled after those generally employed for government contracting purposes (where disqualification is left to the discretion of designated officials) might fit the bill nicely. 209

b. The Poor Innocents Concern

i. Rethinking the Claim to Innocence

As repeatedly alluded to above, penalties assessed against entities have the effect of diminishing their value, and thus the wealth of their owners. 210 Spillover effects on employees, consumers, creditors and others also are quite predictable. Although regarded as objectionable by some on the grounds that many of those affected will not bear any responsibility for the wrongdoing and may not even have been associated with the entity at the time the wrongdoing occurred, 211 penalizing entities—particularly those that are publicly held—does give the market some incentive to pay attention to whether wrongdoing has been, or is likely to be, committed by a particular entity. One thus would not be surprised to see the market value of ownership interests declining well in excess of the amount of any penalty imposed. Contrariwise, if an entity could offer credible assurances to the market that wrongdoing is less likely to occur there than at similarly situated entities, its ownership interests rationally would command a relatively higher price vis a vis those other entities. In a way, this tells us (albeit formally) that people who buy interests in non-assuring entities have gotten what they paid for. This parleys nicely (but only formally) into an assertion that, just as there are no innocent partners in law firms that lack adequate controls, there might be no innocent shareholders if a new regime were implemented and prospective shareholders were adequately warned.

The formalism of the argument is disturbing and, in the light of day, not particularly convincing. Reminiscent of one of the stepsisters in a non-Disney version of Cinderella, it lops off all the realistic toes that cannot be crammed into the glass slipper. Carried to its logical extremes, even employees, clients, and customers could lose their claim of innocence. As to all of these, limits (as described above)


211. Id.
with respect to penalties and disqualifications seem to be a necessary minimum protection.

\[ \text{ii. Limiting Penalties and Deaths from Shame} \]

Thus, the response to the poor innocents concern is virtually congruent with the response to the necessity concern. If the monetary criminal penalty assessed against an entity simply were to be disgorgement of all profits in excess of some industry average, bag-holding shareholders would not be drastically penalized by the penalty itself. This would be even truer were monetary penalties eliminated entirely. Moreover, adverse effects on employees and customers should be distinctly moderated, although not obliterated. To the extent that automatic disqualification issues also could be addressed, much more comfort should be achieved for all concerned. Although it was posited above that market and business reactions would transpire in response to the warning given by criminal branding, it is difficult to criticize their rationality. Their effect on innocents is lamentable, but no more lamentable than civil liability or mere bad luck. This is particularly true to the extent that they represent an attempt to limit subsequent, more severe harms.

\[ \text{VI. CONCLUSION: MORE CRIME, LESS PUNISHMENT} \]

Dealing with the question of entity liability in abstraction is fraught with risk (to say nothing of boredom). The starting-point invocation of the experience of Milberg Weiss was intended to provide a context that is timely and interesting. Conclusions that seem reasonable in that context may themselves be contextually limited. Thus, an attempt was made to recognize that arguments about the unindicted partners' lack of innocence no more than formally translate into arguments about the unclean hands of other types of owners of other types of entities. This recognition probably constitutes an acknowledgment that criminal entity liability in the Milberg Weiss context could be one of its better uses. Given the lack of clarity in existing federal law, however, it is difficult to know.

The foregoing parts of this article thus made the claim that the law of federal criminal entity liability requires reworking. Part IV suggested that the goal of influencing management structure and practice, and the goal of public warning, should be specifically identified and made the centerpiece of the federal criminal entity regime. In furtherance of these goals, Part V advanced a proposal with respect to clarifying the elements and defenses of entity liability triggered by constituent wrongdoing, partly in the belief that this clarification might lead to more frequent invocation. Part V also proposed an untriggered crime of entity indifference. As far as sanctions are concerned, Part V called for limiting monetary penalties assessed against entities by reference to supernormal profits, or, in the alternative, for eliminating monetary penalties entirely. It also addressed automatic disqualification sanctions, and suggested that they be eliminated.
The article's overall bottom line accordingly might be summarized as "more crime and less punishment." The greatest problem with this philosophy might well be a perception that if the stakes of entity liability were not relatively high, prosecutors would not bother to indict, and/or entities would not bother to resist. To the extent that punishment is reconceived as a thing meted out by the public, whom prosecutors have a duty to warn, this problem does not seem to be extreme. At the close of the day, then, it is worth recognizing that it is contextualized public reaction that may constitute an entity's most appropriate punishment, whether known as "shame" or otherwise. Whether the punishment ultimately is fatal is thus for no single human to decide.

212. It thus is in direct opposition to the call of Professor Mann, supra note 133, and is not well aligned with the views of Professor Coffee expressed in Blurring, supra note 135.