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Michael J. Gerardi

THE "PERSON" AT FEDERAL LAW: A FRAMEWORK AND A RICO TEST SUITE

*Michael J. Gerardi**

INTRODUCTION

Who does this statute address? Usually, the answer at federal law is that the statute addresses things known as "persons." Lawyers typically only go this far when doing statutory analysis. They fail to ask a second, more penetrating, question: *What, exactly, is a "person"?* The word "person" describes the entities to which the law assigns rights and duties. Theories of culpability connect these entities to legally prescribed behavior, and serve as a restraint on the size of the class of persons that are potentially liable for a violation of law.

The forces that shape the meaning of the term "person" place considerable strain upon it. Attempts by the courts and Congress to wrestle with the problems of statutory construction presented by personhood created a body of interpretive rules surrounding the term "person" that fail to provide the necessary certainty and consistency expected from basic legal definitions. This Note aims to describe federal law's use of the term "person" to define those with legal duties and rights, show how the current framework fails to adequately achieve these goals through its application to a typical "personhood" problem, and outline some simple proposals that will give the framework a far greater degree of coherence.

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* Candidate for Juris Doctor, Notre Dame Law School, 2010; B.S., Electrical Engineering, University of Notre Dame, 2007. I thank G. Robert Blakey for his mentoring and insight. This Note has its origins in my work as Professor Blakey's research assistant in the summer of 2008; a lengthy footnote from one of his articles served as inspiration. *See* G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 290 n.151 (1982). I thank Alexis Zouhary and all my friends on the *Notre Dame Law Review* for their invaluable assistance in the preparation of this Note for publication. *Cf.* Michael Coenen, *Rhapsody in Blue: An Ode to* The Bluebook, 12 GREEN BAG 2D 115 (2008) (praising, in verse, the cite-checker's most potent weapon). Finally, I thank my father, Joseph, and my mother, Sharon, without whom none of this was possible.

Part I describes a theoretical framework for answering personhood questions at federal law. It begins with a general discussion of the concept of the legal person, and of the theories of criminal and civil liability entrenched in federal law that connect legal "persons" to rights and obligations Congress creates by statute. It then describes Congress' attempts to elaborate on these concepts through the Dictionary Act's[1] definition of the term "person" and individual definitions of the term in various statutory provisions. Part II employs a "test suite"[2]—the problem of whether municipalities are subject to civil liability under the Racketeering Influenced and Corrupt Organizations Act (RICO)[3]—to illustrate the inadequacies of the current framework. Part III uses the descriptive analysis of Part I and the applied analysis of Part II as a springboard for proposing improvements to the current framework for resolving personhood questions at federal law.

I. THE TERM "PERSON" AT FEDERAL LAW

The person is a fundamental unit of legal analysis. Despite its centrality, personhood is difficult to describe succinctly because it cuts across legal concepts that appear unrelated at first glance. This is especially true in federal law because Congress' approach to defining the term "person" has never been systematic. This Part of the Note will first lay out the framework for understanding legal personhood questions as a general matter, and then discuss the basic protocol courts should follow when dealing with a question of whether or not a particular individual or entity is a person under a federal statute.

A. The Concept of Legal Personhood

1. Entities to Which Rights and Duties Are Assigned

Few words enshrine as many important values and ideas as the word "person." In common usage, it can be used to refer to one's sense of self; one's role in life; or one's spiritual, psychological, and emotional identity.[4] Personhood is also a seminal idea of the law;

1 Act of June 25, 1948, ch. 645, § 6, 62 Stat. 683, 859 (codified as amended at 1 U.S.C. § 1 (2006)).

2 "Test suite" is a term of art borrowed from computer science. It refers to a program written in order to test the functionality of another piece of software. *See* EUGENE VOLOKH, ACADEMIC LEGAL WRITING 22 (3d ed. 2007) (describing test suites).

3 18 U.S.C. §§ 1961–1968 (2006).

4 11 THE OXFORD ENGLISH DICTIONARY 596–98 (2d ed. 1989).

"persons" are the "units" to which the law attaches rights and duties.[5] Scholarly opinion on the nature of legal personhood is wide-ranging.[6] Categorizing something as a "person" is not meaningful solely in the abstract. The classification has real significance in terms of how the legal system will interact with a particular entity or group of entities.[7]

Popular and legal concepts of personhood intersect insofar as all natural persons are usually legal persons. One convenient way of discerning whether something is a legal person is to ask whether or not it is "treated more or less as a human being" by the law.[8] Occasionally, theorists attempt to merge the popular and legal concepts of per-

5 4 ROSCOE POUND, JURISPRUDENCE 191 (1959) ("One mode of securing interests is to recognize or establish . . . certain entities to which rights in the wider sense are attributed; or on which legal rights, powers, and privileges are conferred; in which liberties are recognized, and upon which duties and liabilities are imposed. These entities have been known in the science of law, if not from antiquity certainly in the modern world, by the name of persons . . . .").

6 *See id.* at 222 (identifying seven influential theories of legal personhood).

7 The history of American corporations is an excellent example of why this categorization matters. Early American corporate law conceived of corporations as artificial beings granted limited privileges by the state for the public good. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960, at 72 (1992) ("Under the grant theory, the business corporation was regarded as an artificial being created by the state, with powers strictly limited by its charter of incorporation."). Thinking on this matter began to change after the Supreme Court's surprising holding in *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886), that a corporation was a "person" within the Fourteenth Amendment to the Constitution. *Id.* at 396. The case sparked a "virtual obsession" among legal scholars in the late nineteenth and early twentieth centuries about the nature of "corporate personality." HORWITZ, *supra*, at 101. Ultimately, the view that the corporation was a "natural entity," not unlike a human being for most legal purposes, took a foothold among scholars, leading toward a more permissive regime of corporate law that facilitated the rise of modern business. *See id.* at 68 ("[T]he rise of a natural entity theory of the corporation was a major factor in legitimating big business . . . none of the other theoretical alternatives [for explaining the corporation's legal status] could provide as much sustenance to newly organized, concentrated enterprise"). Cases from the early twentieth century testify to the triumph of the "natural entity" theory, although this triumph was not unqualified. *See, e.g.*, Herndon v. Chi., Rock Island, & Pac. Ry. Co., 218 U.S. 135, 158 (1910) (rejecting a restriction on foreign corporations as unconstitutional because the corporation "had become a person within the State within the meaning of the Constitution, and entitled to its protection"); Hale v. Henkel, 201 U.S. 43, 76 (1906) (arguing that Fourth Amendment protections from unreasonable searches and seizures attach to corporations). *But see id.* at 69–70 (denying Fifth Amendment protections to corporations and declining to decide "whether a corporation is a 'person' within the meaning of [the] Amendment").

8 BLACK'S LAW DICTIONARY 1178 (8th ed. 2004).

sonhood by applying "[p]hilosophical and psychological theories of personality" to the problem of legal personhood.[9] Such accounts do not describe legal personhood in practice.[10] The law considers abstract entities like corporations and governments to be persons in many contexts, and even *inanimate* objects can obtain the status of persons.[11] In practice, legal personhood is best thought of as reflecting a legal system's policy choices behind the enforcement of statutory rights and responsibilities, making an accurate description of the "lineup" of legal persons a statute addresses vital to proper interpretation of the law.

The term "person" lumps together two arguably distinct groups: those liable under a statute, and those capable of asserting claims under it.[12] This merger is immaterial in most instances; those who can violate a law typically have the ability to assert their rights under it. Nevertheless, there are situations where policy considerations or overriding legal rules, such as sovereign immunity, dictate that the class of persons with the capacity to bring claims may be broader than the class of potentially liable persons. In spite of their usual counsels

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9 *See* 4 POUND, *supra* note 5, at 198.

10 *See id.* ("[A]ttribut[ion] . . . of legal personality to an unborn child [and] associations, business devices, masses of property, foundations . . . and in India to idols . . . ha[s] tried the saving dogmatic fiction to the limit so that the nature of a juristic person became one of the most vexed questions of the science of law." (footnotes omitted)).

11 Examples of this type of thinking abound. Recently, Ecuador ratified a new constitution which confers human rights on the environment; thus, "nature" is a "person" under Ecuadorian law. *See* CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR ti. 2, art. 10 (2008 rev.) ("Persons . . . have the fundamental rights guaranteed in this Constitution and in the international human rights instruments. Nature is subject to those rights given by this Constitution and Law."), *translated in* Thomas A. Szyszkiewicz, *Nature as a Privileged Minority*, AM. SPECTATOR, Oct. 1, 2008, http://spectator.org/archives/2008/10/01/nature-as-a-privileged-minorit. Federal forfeiture proceedings, which nominally run against the seized objects themselves, are a more mainstream example of such thinking. *See, e.g.*, United States v. 92 Buena Vista Ave., 507 U.S. 111, 114 (1993) (affirming forfeiture of a piece of real estate purchased with proceeds from drug sales); United States v. $8,850, 461 U.S. 555, 556 (1983) (affirming seizure of cash by Customs officials despite delay by the government in filing civil forfeiture proceeding); United States v. One Ford Coupe Auto., 272 U.S. 321, 323–24 (1926) (reversing dismissal of an order to seize a car used in defrauding the United States of liquor taxes).

12 *See* United States v. Bonanno Organized Crime Family of La Cosa Nostra, 879 F.2d 20, 23 (1989) ("Whether the government has standing to sue and whether it [can be sued] may, in the abstract, be different questions, but [when the statute uses the word "person" to describe both groups] the answer to one is apparently the answer to both.").

against constructions giving statutory terms inconsistent meanings,[13] courts will interpret the word "person" flexibly to comport with the policy considerations behind the statute.[14]

2. Can "Person" Mean More than the Principal?

Statutes typically describe the behavior required to be guilty as a principal; nevertheless, one should not assume that a statute is limited to principals. The term "person" also describes the set of parties that are responsible alongside the principal for violations of legal rights.[15] The two most important forms of such liability for purposes of this Note are secondary liability (including conspiracy and aiding and abetting) and vicarious liability. The potentially wide-ranging consequences of the existence of non-primary liability in a given statute make a proper grasp of its dimensions on both the civil and criminal sides of the law crucial to deciphering personhood questions.

a. Civil Law

i. Vicarious Liability

At common law, those who stood as "masters" over their "servants" were responsible civilly for the servant's torts, independent of fault.[16] That rule, known today as vicarious liability, was frequently

13 *See, e.g.*, United States v. Cooper Corp., 312 U.S. 600, 606 (1941) (finding that, since it was "hardly credible" that Congress meant the term "person" to have different meanings within the same sentence of the Clayton Act's treble damages action, Congress could not have intended to include the federal government in the term "person"); *cf.* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 238–39 (1986) ("Without strong evidence to the contrary, we doubt that Congress intended the same phrase to have significantly different meanings in two adjoining paragraphs of the same subsection.").

14 *See* Pfizer Inc. v. Gov't of India, 434 U.S. 308, 313 (1978) (rejecting, in the Clayton Act context, "a technical or semantic approach in determining who is a 'person' entitled to sue for treble damages"); Georgia v. Evans, 316 U.S. 159, 162–63 (1942) (holding that a state is a "person" for purposes of bringing Sherman Act claims and rejecting the argument that, since states were immune from such suits under sovereign immunity doctrine, *Cooper Corp.* dictated a contrary result).

15 Federal criminal law's complicit party statute makes this relationship explicit. The default rule in federal law is that those who are secondarily liable for an offense are "punishable as a principal." 18 U.S.C. § 2 (2006). Thus, the word "person" as used in a criminal statute includes not only those who commit the principal offense, but anyone who "aids, abets, counsels, commands, induces, or procures" the principal offense. *Id.*

16 *See* Phile v. The Ship Anna, 1 U.S. (1 Dall.) 197, 207 (Pa. Ct. Comm. Pl. 1787) ("The law never punishes any man criminally but for his own act, yet it frequently punishes him in his pocket, for the act of another. Thus, if a wife commits an offence,

the subject of pointed scholarly criticism during the late nineteenth and early twentieth centuries.[17] Today, the most widely accepted rationale for the rule is that it places liability on those best suited to absorb the costs of accidents, an economically optimal outcome.[18]

When Congress creates a civil cause of action, it often does not mention the presence, or absence, of vicarious liability. One could interpret this silence as an indication that such principles are inapplicable to federal rights sounding in tort, but, as a general matter, courts do not interpret the law so narrowly. The Supreme Court frequently views statutory silence on vicarious liability principles as an indication that Congress intended the courts to apply "traditional" or "ordinary" principles of tort law in their interpretation.[19] In securities law, some courts supplement the explicit statutory provisions providing for a form of vicarious liability with the traditional theory, even as an explicit alternative provision strengthens the case for exclusion of the traditional theory.[20]

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the husband is not liable to the penalties; but if she obtains the property of another by any means not felonious, he must make the payment and amends."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499 (5th ed. 1984) ("[Vicarious liability] means that, by reason of some relation existing between A and B, the negligence of A is to be charged against B, although B has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it.").

17 *See* T. BATY, VICARIOUS LIABILITY 148 (1916) (listing nine asserted rationales for vicarious liability, and surmising that it "may . . . rest[] on no very firm basis of policy"); Oliver Wendell Holmes, Jr., *Agency*, 5 HARV. L. REV. 1, 22 (1891) (lampooning the concept of vicarious liability).

18 *See* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 543–45 (1961) (arguing that vicarious liability is economically efficient because superiors are in the best position to insure against accidents).

19 *See* Meyer v. Holley, 537 U.S. 280, 285 (2003) ("It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment."); *id.* at 286 ("Congress' silence, while permitting an inference that Congress intended to apply *ordinary* background tort principles [like vicarious liability], cannot show that it intended to apply an unusual modification of those rules."); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760–61 (1998) (applying vicarious liability rules specific to intentional torts in a Title VII sexual harassment suit).

20 The securities laws provide for the liability of "controlling persons." *See* 15 U.S.C. § 77o (2006) ("Every person who . . . controls any person liable . . . shall also be liable jointly and severally with and to the same extent as such controlled person . . . ."). Nevertheless, courts continue to apply vicarious liability to securities cases. *See* Makor Issues & Rights, Ltd. v. Tellabs Inc., 513 F.3d 702, 708 (7th Cir. 2008) ("[T]he doctrines of respondeat superior and apparent authority remain applicable to suits for securities fraud." (citing AT&T Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1429–33 (3d Cir. 1994))); Hoffend v. Villa (*In re* Villa), 261 F.3d 1148, 1152 n.5

ii. Secondary Liability

The civil law theories of secondary responsibility most relevant to a discussion of personhood at federal law also emerge from tort law. There are two varieties of secondary liability in tort: conspiracy and aiding and abetting. Conspiracy is an agreement between two or more persons to act unlawfully, resulting in an injury caused by an overt act made pursuant to, and in furtherance of, the unlawful scheme.[21] Aiding and abetting is knowing and substantial assistance of a party that commits an unlawful, injury-causing act, with awareness of the principal's unlawful scheme.[22] These theories seek to reconcile tort law's competing goals by increasing a tort victim's chances of compensation, while restraining the scope of tort liability to only those parties with the necessary quantum of responsibility.[23]

As is the case with vicarious liability principles, Congress is not consistent about writing aiding and abetting or conspiracy provisions into statutes explicitly. As the Supreme Court's treatment of vicarious liability suggests, this does not necessarily mean that theories of secondary liability are inapplicable to civil causes of action arising under federal law. As was the case with vicarious liability, there is a substantial line of precedent establishing the principle that courts should interpret statutes as incorporating generally accepted principles of tort law whenever such incorporation serves the overall goals of the statutory scheme.[24] This is in keeping with an older strain of thought

(11th Cir. 2001) (collecting case law supporting the use of common law agency principles as an additional form of vicarious liability in securities actions). *But see* Rochez Bros. v. Rhoades, 527 F.2d 880, 884 (3d Cir. 1975) (deeming application of respondeat superior to securities law "inappropriate" in light of the explicit provision for controlling person liability).

21 Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983) (giving a four-element formulation of civil conspiracy).

22 *Id.* (giving a three-element formulation of civil aiding and abetting).

23 *Compare* KEETON ET AL., *supra* note 16, § 1, at 5–6 ("[Tort law is that] body of law [which] is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally, rather than one interest only, where the law considers that compensation is required."), *with id.* § 2, at 9–15 (recognizing that certain features of the law of torts exist to "punish[] the defendant").

24 *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709–10 (1999) (holding, in the context of a civil rights claim under § 1983, that the Court will interpret statutes against the "'background of tort liability'" if it is apparent that Congress has created rights sounding in tort (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961))); Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 570 (1982) (applying the doctrine of apparent agency to the Sherman Act claim because it is "consistent with the intent behind the antitrust laws"); Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 646 (1980) (refusing to deviate from application

in federal law that courts could go so far as to read causes of action, much less tort principles, into federal statutes, to effectuate statutory intent under certain conditions.[25] The question of whether particular principles are "traditional" or "ordinary"—colloquial ways of saying the principles are so entrenched in the legal landscape that it would be reasonable to believe Congress presumed their inclusion—can be a difficult one; often, reasonable answers on both sides are possible.[26] Despite this uncertainty, application of secondary liability principles in the absence of explicit statutory authorization under federal law is not an unreasonable proposition.[27]

The Supreme Court brought this line of reasoning into question with its decision in *Central Bank of Denver v. First Interstate Bank of Denver*.[28] It held that aiding and abetting liability did not apply to civil actions under section 10(b) of the Securities Act of 1934[29] because

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of traditional joint and several liability principles under the Sherman Act); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) (regarding the failure of Congress to "delineate the full meaning of the statute" in the context of the Sherman Act's "broad mandate" as an invitation for courts to "draw[ ] on common-law tradition" in order to interpret its requirements); *see also supra* notes 19–20 and accompanying text (discussing the predisposition of federal courts to read vicarious liability rules into statutes). This rule is particularly relevant to "remedial" statutes like the antitrust laws, securities laws, and RICO, which traditionally receive more liberal construction. *See, e.g.*, Piedmont & N. Ry. Co. v. Interstate Commerce Comm'n, 286 U.S. 299, 311 (1932) (reasoning that the Transportation Act, described as "remedial" by the Court, "requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress").

25 *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) ("[T]he Court has long recognized that under certain limited circumstances the failure of Congress to [create a cause of action] is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation."). Courts are no longer so generous about reading causes of action into statutes. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.3.3, at 397–401 (5th ed. 2007) (discussing the more limited modern approach taken by the Supreme Court in regard to implied causes of action).

26 *Compare* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 180–85 (1994) (rejecting argument that civil aiding and abetting is such a generally accepted notion of tort law that Congress presumes it will apply when drafting legislation), *with id.* at 193 n.2 (Stevens, J., dissenting) (arguing that at the time the securities laws were enacted, civil aiding and abetting was "widely, albeit not universally recognized in the law of torts").

27 *See* Petro-Tech, Inc. v. W. Co. of N. Am., 824 F.2d 1349, 1356–57 (3d Cir. 1987) (looking to *Hydrolevel* and other cases to conclude that common law aiding and abetting can be applied to a statute if it "advance[s] the goals of the particular federal statute which plaintiffs allege has been violated").

28 511 U.S. 164 (1994).

29 15 U.S.C. § 78j(b) (2006) ("It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . . [t]o use or employ, in

Congress failed to indicate explicitly that complicit parties were "persons" liable under the statute.[30] When Congress fails to mention aiding and abetting explicitly, the Court argued, it makes a conscious decision not to include such liability. Had Congress wished to impose secondary liability, it would "presum[ably] . . . use[] the words 'aid' and 'abet' in the statutory text," rather than rely on the courts to construe the statute in light of background legal principles.[31] The Court failed to find persuasive the applicability of aiding and abetting liability to *criminal* violators of the securities laws.[32] This finding went against decisions in every federal appeals court, in addition to the holdings of "hundreds" of district court cases and administrative actions by the SEC, that aider and abettor liability was an implied consequence of the tort-like nature of the section 10(b) action.[33]

The rule of *Central Bank* is not, in and of itself, a bad one. It is unambiguous, and it places Congress on notice as to what they must do to broaden the scope of liability. Nevertheless, these benefits do not come without costs. *Central Bank* circumscribed a general understanding that secondary liability concepts inhered in the securities laws. A cooperative relationship between the courts and Congress, in which courts use background tort concepts to bridge statutory gaps and effect congressional intent, is not the vision of *Central Bank*. The choice a court makes between these competing visions of statutory interpretation places crucial policy decisions in the hands of the courts rather than Congress, and reflects a breakdown in the consis-

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connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe . . . .").

30 *Cent. Bank*, 511 U.S. at 177 ("[T]he text of the 1934 Act does not itself reach those who aid and abet a § 10(b) violation. . . . [W]e think that conclusion resolves the case.").

31 *Id.* at 176–77 (citing examples of civil remedy statutes with explicit complicit party provisions). The Court's treatment of the issue is analogous to its treatment of implied causes of action. *Id.* at 190 (classifying their task as "infer[ing] a private right of action"). As the case law on other tort law theories has shown, this categorization is questionable, at best. *See supra* notes 19–20, 24 and accompanying text.

32 *See Cent. Bank*, 511 U.S. at 190–91. The result is thus a curious one: a private individual harmed by a person guilty of a *criminal* securities violation cannot hold that individual liable *civilly*.

33 *Id.* at 192–93 (Stevens, J., dissenting). The Court recently reaffirmed the vitality of its holding in *Central Bank*. *See* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 768–69 (2008) (holding that secondary actors are liable only if they "satisfy each of the elements or preconditions for liability" and noting Congress' failure to respond to the decision by enacting an aiding and abetting provision).

tency and predictability of the concept of legal personhood at federal law.

b. Criminal Law

i. Vicarious Liability

Vicarious liability is primarily relevant to the criminal law in the context of attaching liability to entities like corporations.[34] The common law glibly asserted that corporations had "neither a body to beat nor a soul to damn."[35] The quip reflected a resistance to prosecutions of corporations because they lacked a distinct state of mind[36] and could not stand for traditional punishment.[37] Despite these theoretical issues, prosecution of corporations and municipalities for certain strict liability offenses committed by their agents took place in many American jurisdictions during the nineteenth century.[38]

Commentators became more open to corporate liability for crimes requiring intent near the turn of the century.[39] The watershed

34 For crimes with a scienter requirement, natural person "superiors" are typically liable on either a conspiracy or an aiding and abetting theory. A form of vicarious criminal liability may attach to a natural person for certain strict liability offenses depending on their relationship to the principal offenders. *See, e.g.*, United States v. Park, 421 U.S. 658, 672–74 (1975) (upholding the conviction of a corporate official under the Federal Food, Drug, and Cosmetic Act, based on his "responsible relationship" to violations of the law by his employees).

35 Lord Thurlow receives credit for the original quote: "Why, you never expected justice from a company, did you? [T]hey have neither a soul to lose, nor a body to kick." 1 LADY HOLLAND, A MEMOIR OF THE REV. SYDNEY SMITH 331 (Sarah Austin ed., New York, Harper & Bros. 1855) (internal quotation marks omitted).

36 WAYNE R. LAFAVE, CRIMINAL LAW, § 13.5, at 701–02 (4th ed. 2003) ("[A] corporation . . . had no mind, and thus was incapable of the criminal intent then required for all crimes . . . .").

37 1 WILLIAM BLACKSTONE, COMMENTARIES *477 ("Neither can [a corporation] be committed to prison; for its existence being ideal, no man can apprehend or arrest it." (footnote omitted)).

38 *See* Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 404–10 (1982) (summarizing the development of American corporate crime doctrine for strict liability crimes); Stuart P. Green, *The Criminal Prosecution of Local Governments*, 72 N.C. L. REV. 1197, 1203 (1994) ("The basic nineteenth-century rule was that municipalities and business corporations were immune from prosecution for crimes requiring mens rea, but subject to prosecution for non-mens rea acts that harmed the public at large." (footnote omitted)).

39 *See* 1 JOEL PRENTISS BISHOP, BISHOP ON CRIMINAL LAW § 420, at 305 (John M. Zane & Carl Zollmann eds., 9th ed. 1923) ("If . . . the invisible, intangible essence which we term a corporation, can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them,—it can intend to do it, and can act therein as well viciously as virtuously.").

moment for corporate crime arrived with the Supreme Court's decision in *New York Central & Hudson River Railroad Co. v. United States*,[40] which recognized that Congress could impose punishment on the corporate person for the acts of its agents.[41] Today, the theory is sufficiently well entrenched that a statute need not invoke corporate liability explicitly in order for liability to attach to a corporation.[42]

ii. Secondary Liability

Federal criminal law's secondary liability framework is fairly straightforward. Title 18 of the United States Code defines complicity[43] and conspiracy[44] through statutes which apply generally to federal criminal law. These statutes apply without Congress' explicit invocation unless Congress specifies another standard of liability.[45] Courts are consistent about applying these rules to criminal provisions outside of Title 18, like those found in the antitrust and securities

40 212 U.S. 481 (1909).

41 *Id.* at 494–95 (holding that for a class of crimes that "consist[ ] in purposely doing the things prohibited by statute," there was "no good reason why corporations may not be held responsible for and charged with the knowledge and purpose of their agents, acting within the authority conferred upon them"). The decision reflects the movement towards a "natural entity" theory of corporations that was in progress in the early twentieth century. *See supra* note 7.

42 Kendel Drew & Kyle A. Clark, *Corporate Criminal Liability*, 42 AM. CRIM. L. REV. 277, 279–86 (2005) (discussing current formulations of the *New York Central* standard in use today). Today, corporate "persons" are expressly included in the Dictionary Act, and courts will presume corporate liability exists in the absence of a suggestion to the contrary by the statute. *See, e.g.*, United States v. A & P Trucking Co., 358 U.S. 121, 123 (1958) (interpreting criminal provisions for violation of Interstate Commerce Commission rules without explicit inclusion of corporate persons to include a partnership, relying on Dictionary Act). Congress enacted the modern version of the Dictionary Act's definition of "person" contemporaneously with the federal criminal code, and the Court in *A & P Trucking* found this persuasive evidence that Congress intended to apply the code to corporations. *Id.* at 123 n.2 ("[T]he very same statute which creates the crime admonish[es] that 'whoever' is to be liberally interpreted.").

43 18 U.S.C. § 2(a) (2006) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

44 *Id.* § 371 ("If two or more persons conspire either to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned . . . .").

45 *See* United States v. Pino-Perez, 870 F.2d 1230, 1233 (7th Cir. 1989) (en banc) ("Congress doesn't have to think about aider and abettor liability when it passes a new criminal statute, because section 2(a) attaches automatically. The question is not whether 2(a) is applicable—it always is.").

laws.[46] The primary differences between the criminal and civil secondary liability rules are the lack of any result requirement and the need for a finding that the defendant, in Learned Hand's words, had a "stake in the venture" formed by the agreement.[47] Both differences reflect criminal law's overriding concerns of punishing the morally culpable and deterring socially disruptive acts, in contrast to tort law's focus on remunerating victims.[48]

B. Interpreting the Word "Person" Under Federal Law

Congress has made some efforts to bring consistency to the definition of the term "person" across the United States Code. The primary source of guidance on this matter is the Dictionary Act's definition of the term "person,"[49] which is generally applicable to every title of the U.S. Code. Within specific statutory schemes, Congress may attempt to define with greater specificity the class of persons bound or liable. These two features, taken together, provide a rudimentary guide for resolving personhood questions raised by federal statutes.

Congress first defined the term "person" in the initial version of the Dictionary Act, passed in 1871.[50] The Act stipulated that "the word 'person' may extend and be applied to bodies politic and corporate" throughout federal law, "unless the context shows that such words were intended to be used in a more limited sense."[51] An 1874 recodification of the Act stipulated that "the word 'person' may

46 *See, e.g.*, Cent. Bank of Denver, v. First Interstate Bank of Denver, 511 U.S. 164, 190 (1994) (noting that those who aid and abet a criminal violation of the securities laws violate 18 U.S.C. § 2); United States v. MMR Corp., 907 F.2d 489, 492 (5th Cir. 1990) (upholding a conviction under 18 U.S.C. § 2 for aiding and abetting a Sherman Act violation).

47 United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940) (Hand, J.) ("[I]n prosecutions for conspiracy or abetting, [the defendant's] attitude towards the forbidden undertaking must be more positive. . . . [H]e must in some sense promote their venture himself, make it his own, have a stake in its outcome.").

48 *See* LAFAVE, *supra* note 36, § 1.2(e)–(f), at 13–14 (discussing the basic animating principles of criminal law).

49 1 U.S.C. § 1 (2006).

50 Dictionary Act, ch. 71, 16 Stat. 431 (1871) (current version at 1 U.S.C. § 1).

51 *Id.* The language represented an understanding on the part of at least some members of Congress that legal personhood extended well beyond natural persons. *See* CONG. GLOBE, 42d Cong., 1st Sess. 752 (1871) ("[C]ounties, cities, and corporations of all sorts, after years of judicial conflict, have become thoroughly established to be an individual or person or entity of the personal existence, of which, as a citizen, individual, or inhabitant, the United States Constitution does take note and endow with faculty to sue and be sued in the courts of the United States." (citing Louisville, Cincinnati, & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844))). This

extend and be applied to partnerships and corporations . . . unless the context shows that such words were intended to be used in a more limited sense . . . ."[52] Congress restyled the language again in 1948 into the modern definition: "[U]nless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . . ."[53]

A careful reading of the Dictionary Act shows how its definition should impact statutory interpretation. The phrase "unless the context indicates otherwise" allows other statutes, either implicitly or explicitly, to modify the breadth of the term "person." "Context" refers to the surrounding statutory language and similar statutes, rather than other tools of statutory interpretation with looser connections to the text.[54] This "context" need only "indicat[e]" such a

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seems to reflect the trend of this particular historical period toward a greater level of openness about the personhood of fictional entities.

52 REV. STAT. § 1 (1874) (current version at 1 U.S.C. § 1). The legislative history suggests that the change arose out of a concern that sovereigns would be included as "persons" by default. 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE, at tit. 1, ch. III, sec. 22 (1872) (suggesting that the commissioners changed the definition of the term "person" to head off a presumption that the term "body politic" included the sovereign, a rule that would require drafters to explicitly exclude the states, the federal government, and foreign nations from liability whenever such an outcome was inappropriate). Today, the rule of statutory construction that "sovereigns are not persons" is pervasive. *See, e.g.*, Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 780 (2000) ("We must apply to this text our longstanding interpretive presumption that 'person' does not include the sovereign.").

While the concerns of the drafters of the Revised Statutes are certainly valid, the "sovereigns are not persons" presumption leads to redundancy by taking sovereigns out of the class of "persons liable" regardless of whether the immunity protections are valid. For example, the Supreme Court held in a civil rights suit against a state police department that even when sovereign immunity is not formally at issue, a state remains immune from suit because of the "sovereigns are not persons" rule. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (ruling that a state agency which consented to suit in state court is not a "person" under the civil rights laws). The Court reasoned that the immunity protections which were supposedly inapplicable because of the choice of a state forum nonetheless should channel the interpretation of the word "person" and limit the scope of its applicability. *See id.* at 66–67 ("[I]n deciphering congressional intent as to the scope of [the civil rights laws], the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of [them] that disregards it.").

53 Act of June 25, 1948, ch. 645, § 6, 62 Stat. 683, 859 (codified as amended at 1 U.S.C. § 1).

54 Rowland v. Cal. Men's Colony, 506 U.S. 194, 199 (1993) ("'Context' here means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts . . . .").

change by "rais[ing] a specter short of inanity . . . with something less than syllogistic force."[55] Second, the definition is open-ended. It "include[s]" the categories listed, but does not necessarily exclude potential legal persons that are not on the list.[56]

Some major statutory schemes have gone well beyond "indicating" another meaning of the word "person" by defining it separately.[57] These definitions range from the compact and open-ended[58] to the exhaustive and exclusive.[59] No matter how Congress chooses to elaborate on what it means by the term "person," the rules of interpretation remain the same. The content of the Dictionary Act is subject to expansion or restriction if the "context" of the particular statute, including its definition of the term "person," "indicates" that this is appropriate. The open-ended and malleable nature of the term "person" in federal law means that close personhood questions rarely have one overwhelmingly persuasive answer. As this Note's "test suite" attempts to demonstrate, the current scheme leads to ambiguity and uncertainty in statutory interpretation and frustrates the Dictionary Act's ambitions.

II. MUNICIPAL LIABILITY UNDER RICO: A TEST SUITE

Having the proper theoretical understanding of how to interpret the term "person" is important, but it is insufficient if one wishes to develop a full understanding of how personhood analysis works. Heuristically, one must deploy the framework on an actual problem in

55 *Id.* at 201; *see also* Pfizer Inc. v. Gov't of India, 434 U.S. 308, 315 (1978) ("The word 'person' . . . is not a term of art with a fixed meaning wherever it is used.").

56 *See* Sims v. United States, 359 U.S. 108, 112 (1959) (observing that when a definition uses the word "includes," the question of whether or not a state is a person "cannot be abstractly declared," but must be discerned from the "legislative environment"); Helvering v. Morgan's, Inc., 293 U.S. 121, 125 n.1 (1934) ("[T]he verb 'includes' imports a general class, some of whose particular instances are those specified in the definition."). Congress' liberal approach to the class of statutory "persons" stands in stark contrast to *Central Bank*'s basically negative stance on the implication of tort theories, another internally contradictory feature in this area of statutory interpretation.

57 For some typical examples, see 15 U.S.C. § 7 (2006) (antitrust), *id.* § 77b(a)(2) (Exchange Act of 1934), and 18 U.S.C. § 1961(3) (2006) (RICO).

58 *See* 18 U.S.C. § 1961(3) ("[The term] 'person' [under RICO] *includes* any individual or entity capable of holding a legal or beneficial interest in property . . . ." (emphasis added)).

59 *See* 42 U.S.C. § 9601(21) (2006) ("The term 'person' [under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA of 1980)] *means* an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." (emphasis added)).

order to reveal its inadequacies and to show how courts resolve problems when they encounter ambiguities (if they choose to deal with them at all). As a way of running the "personhood" framework through a real-life problem, this Part of the Note will analyze the status of municipalities as "persons" within the scope of the RICO statute.[60]

There are good reasons for choosing this particular problem as a test suite. RICO is part of a loose family of "remedial" statutory schemes. While popularly classed as a "criminal" statute, RICO is actually a hybrid of criminal and civil law. Analysis of a RICO problem should thus be readily applicable to other statutory regimes, including antitrust law, securities law, civil rights law, and environmental law, that take a similar approach to addressing other difficult policy problems. Proper interpretation of RICO thus requires recourse to both civil and criminal law concepts. Examining municipal "persons" is advantageous because they constitute a "borderline" case under current law that will make some of the inadequacies of the present framework more apparent.

A. The Problem

New York Central and the Dictionary Act make corporations potential criminal defendants under federal law. This has not been the case with regard to municipalities and other local governmental units which do not enjoy any form of sovereign immunity. Federal cases involving prosecution of municipalities are extraordinarily rare.[61]

60 RICO sets out its scheme of liability in three steps. First, it defines five central concepts: "racketeering activity," "person," "enterprise," "pattern," and "unlawful debt." 18 U.S.C. § 1961(1), (3)–(6) (2006). Second, it describes three unlawful relationships between "persons" engaged either in "patterns" of "racketeering activity" or in the collection of "unlawful debt," and the "enterprises" through which such "persons" work—investing in the "enterprise," acquiring an interest or control in the "enterprise," and conducting "enterprise" affairs. *Id.* § 1962(a)–(c). It also prohibits conspiracy to engage in this behavior. *Id.* § 1962(d). Finally, it sets out a comprehensive set of criminal and civil penalties for such behavior. *Id.* §§ 1963–1964.

61 *See* Green, *supra* note 38, at 1212–14 (explaining why state criminal prosecution of municipalities declined after the nineteenth century). At the time his article was published, Professor Green could only identify two attempted federal prosecutions of municipalities in the case reporters. *See* United States v. City of Rancho Palos Verdes, 841 F.2d 329, 331 (9th Cir. 1988) (holding that the defendant municipality was not liable under the Endangered Species Act, but that such liability might be possible if Congress provided more explicit authorization); United States v. Little Rock Sewer Comm., 460 F. Supp. 6, 8–10 (E.D. Ark. 1978) (holding a municipal sewer agency liable for filing a fraudulent pollution-discharge report with the Environmental Protection Agency); *see also* Green, *supra* note 38, at 1222 (citing these cases). This

Nevertheless, curious minds continue to ask, "Why not municipal liability?"[62] RICO has been a frequent avenue for these questions because it opens the possibility of civil remedies for those harmed by systematic governmental corruption that would be plainly criminal if pursued by private groups.[63] A number of academic articles propose the use of RICO to target police corruption,[64] and civil plaintiffs have made numerous attempts to plead RICO against government agencies.[65] Yet, for the most part, little systematic analysis usually goes into determining (a) whether municipalities are "persons" under the statute, and (b) whether a theory of liability exists to tie them to the unlawful behavior RICO describes.

B. Are Municipalities RICO "Persons"?

Proper analysis begins with the statutory terms. The Dictionary Act does not list municipalities as "persons," but does not exclude them, either.[66] RICO's definition of a "person,"[67] which is tied to the ability to hold property, is certainly broad enough to include a municipality on its face, even though it does not mention them explicitly. Some statutory schemes that mix criminal and civil remedies, including the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980[68] and the securities laws,[69] make a point of mentioning municipalities explicitly. One could plausibly argue from this sparse evidence that RICO does not intend to make municipalities "persons." Even though RICO's definition is open-

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author knows of no new prosecutions of municipalities since the publication of Green's article.

62 *See* Green, *supra* note 38, at 1214–15 (inquiring whether the current contents of the federal criminal code can be reasonably construed to include municipalities).

63 The presence of civil penalties circumvents the "no body to beat" problem that generally precludes criminal liability for legal persons like municipalities and corporations. *See supra* note 37.

64 *See, e.g.*, Steven P. Ragland, Comment, *Using the Master's Tools: Fighting Persistent Police Misconduct with Civil RICO*, 51 AM. U. L. REV. 139, 146 (2001) (arguing that civil RICO is an "appropriate and justified" measure to combat municipal corruption); Michael Rowan, Comment, *Leaving No Stone Unturned: Using RICO as a Remedy for Police Misconduct*, 31 FLA. ST. U. L. REV. 231, 238 (2003) (arguing for the use of RICO in combating police corruption).

65 *See infra* notes 89, 100 (listing cases).

66 *See supra* notes 53, 56 and accompanying text.

67 18 U.S.C. § 1961(3) (2006).

68 42 U.S.C. §§ 9601–9675 (2006); *see supra* note 59.

69 *See* 15 U.S.C. § 78c(a)(9) (2006) ("The term 'person' means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.").

ended, it is by no means obvious that it covers municipalities, especially considering the low ebb at which municipal crime rests at present.[70] If Congress intended such a novel use, it certainly had the authority to mention municipalities explicitly in the statutory definition.[71]

While this is certainly a plausible conclusion, it is not necessarily the best construction of the statute. The Supreme Court concluded that the term "person" includes municipalities in two analogous statutory schemes imposing civil liability for conduct also punishable by criminal sanctions. In *Monell v. Department of Social Services*,[72] the Supreme Court found that municipalities were "persons" within the scope of 42 U.S.C. § 1983.[73] Section 1983, the primary statute for bringing civil rights claims under federal law, does not define the term "person" separately. After a close analysis of older versions of the Dictionary Act, which came into force at roughly the same time § 1983 did, the Court concluded that the language "bodies politic and corporate" in the original version of the Act[74] was broad enough to include a municipal agency.[75] An even more compelling analogy emerges from antitrust.[76] RICO and antitrust are closely analogous in terms of their goals and remedial structure. Like RICO, antitrust's definition

70 *See supra* note 61 and accompanying text.

71 While this is an argument about the scope of the term "person," rather than the applicability of tort theories, the echoes of *Central Bank* are certainly audible in this argument. *See supra* note 31 and accompanying text.

72 436 U.S. 658 (1978).

73 *Id.* at 701. *Monell* overruled *Monroe v. Pape*, 365 U.S. 167 (1961), which held that municipalities enjoyed blanket immunity from § 1983 claims. *Monell*, 436 U.S. at 663 ("[W]e now overrule *Monroe* . . . insofar as it holds that local governments are wholly immune from suit under § 1983."); *see also* 42 U.S.C. § 1983 (2006) ("Every *person* . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." (emphasis added)).

74 *See supra* note 51 and accompanying text.

75 Today's language does not suggest a "municipality" as strongly as it did in the past. *See supra* note 52 and accompanying text (describing the change in language). Congress' decision to change the language seems motivated by a desire to avoid an impasse with sovereign immunity doctrine. *See supra* note 52. This is not really an issue for municipalities, which have never enjoyed sovereign immunity of their own right. *See Monell*, 436 U.S. at 690 n.54 (sketching briefly the inapplicability of constitutionally based sovereign immunity to municipalities).

76 RICO and antitrust are very close analogues. *See* G. Robert Blakey & Kevin P. Roddy, *Reflections on* Reves v. Ernst & Young*: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1349 n.4 (1996) ("As the antitrust laws seek to maintain economic freedom in the market place, so, too, RICO seeks to promote integrity in the marketplace, physical or fiscal.").

of person is open-ended and inclusive.[77] On numerous occasions, the Supreme Court has held that the term "person" in the antitrust context is broad enough to encompass a municipality.[78] *Monell* and the antitrust cases are both persuasive authority for believing that a municipality can serve as a RICO "person."

In RICO cases where municipal liability has been at issue, courts have not paid much attention to the question of whether municipalities are "persons" in the abstract. Those cases that have raised the issue typically note that the language of the statue is broad enough on its face to include a municipality, but do not attempt to probe any deeper than this.[79] Rather, they challenge the personhood of municipalities on the grounds of liability theories, as the next subpart discusses.

C. Does a Theory of Liability Exist to Attach Municipalities?

It is not sufficient to argue that municipalities fit within the statutory definition of the term "person." Unless a theory of liability exists to attach the person to the offense charged, RICO effectively does not apply to municipalities. If RICO were purely a civil cause of action, this would be unproblematic. When interpreting other statutory schemes employing a mixture of criminal and civil sanctions to achieve remedial ends, including civil rights,[80] antitrust,[81] and securi-

77 15 U.S.C. § 12(a) (2006) ("The word 'person' or 'persons' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.").

78 *See, e.g.*, Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 56 (1982) (affirming that the antitrust laws "apply to municipalities as well as to other corporate entities"); City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 395 (1978) ("Since the Court has held that the definition of 'person' or 'persons' embraces both cities and States, it is understandable that the cities do not argue that they are not 'persons' within the meaning of the antitrust laws."); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396–97 (1906) (acknowledging that municipalities are persons who can bring antitrust claims).

79 *See, e.g.*, Brubaker v. City of Richmond, 943 F.2d 1363, 1378 (4th Cir. 1991) ("[T]he RICO statute . . . contains language broad enough to include municipal corporations."); County of Oakland v. City of Detroit, 784 F. Supp. 1275, 1283 (E.D. Mich. 1992) ("Because a municipal corporation is capable of holding legal or beneficial property in Michigan, [it] qualifies as a 'person' for the purposes of RICO."). *But see* Smallwood v. Jefferson County Gov't, 743 F. Supp. 502, 504 (W.D. Ky. 1990) (arguing that since municipalities are incapable of forming mens rea, they cannot be classified as "persons" under RICO).

80 Monell v. Dep't of Soc. Servs., 436 U.S. 658, 688–89 (1978) (concluding that municipalities are subject to certain forms of liability under 42 U.S.C. § 1983, and

ties,[82] the courts have allowed municipal liability, or, at the very least, not rejected it categorically. RICO, by contrast, requires the application of criminal standards of liability. Saying that a municipality can be liable under RICO is essentially equivalent to charging municipalities with crimes. Is this permissible?

Vicarious liability theory provides a potentially viable path for assigning crimes to municipalities. Criminal law treated municipalities more or less like corporations during the late nineteenth and early twentieth centuries.[83] Despite the historical similarities between these two artificial entities, *New York Central* did not result in the rise of widespread municipal crime; on the contrary, there was retrenchment.[84] Nevertheless, *New York Central*'s holding that criminal intent can attach to a corporation seems easily applicable to a municipality.[85] Municipal liability under RICO is arguably more equitable to the defendant than it is under similar schemes because *New York Central* requires the imputation of criminal intent to the municipality in order for RICO civil liability to attach. Under federal law, this typically

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classifying them as "'bodies corporate and politic'" under the original language of the Dictionary Act (quoting Dictionary Act, ch. 71, 16 Stat. 431 (1871))).

81 *Cmty. Commc'ns Co.*, 455 U.S. at 56–57 (affirming the district court's grant of preliminary injunctive relief against a municipality for an ordinance it passed that allegedly restrained trade). At the time, opponents of the decision in *Community Communications* feared it would open the door to treble damages liability for municipalities. *See id.* at 65 n.2 (Rehnquist, J., dissenting) ("It will take a considerable feat of judicial gymnastics to conclude that municipalities are not subject to treble damages . . . ."). *But see id.* at 58–60 (Stevens, J., concurring) (disagreeing with the apocalyptic views of the dissenters on the case's significance). Congress' response was to amend the antitrust laws to prevent treble damage suits against municipalities, but not to give them total immunity for measures taken in violation of the antitrust laws. *See* Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (codified at 15 U.S.C. §§ 34–36 (2006)). No similar provision exists for RICO.

82 Sonnenfeld v. City & County of Denver, 100 F.3d 744, 746–47 (10th Cir. 1996) (enforcing a section 10(b) action against municipal defendants on the basis of their inclusion in the statutory definition of "person" in the securities laws); *see also* 15 U.S.C. § 78c(a)(9) (2006) (defining "person" for the purposes of section 10(b) actions).

83 *See* Green, *supra* note 38, at 1203 ("Cases involving the criminal liability of business corporations were regularly cited as support in decisions and scholarly treatises involving the criminal liability of local governments and vice versa." (footnote omitted)).

84 *See id.* at 1213–14 (speculating on why municipal prosecutions declined in the twentieth century).

85 *Id.* at 1225 ("Outside the criminal law, intentions, motives, and other mental states are regularly attributed to governmental entities.").

means a finding of knowing violations of the law.[86] The Supreme Court applied a similar approach to municipalities charged with civil rights violations.[87] By contrast, regimes like securities law impose civil sanctions with a lower degree of scienter, closer to recklessness or negligence.[88] Thus, municipal liability under RICO seems not only plausible, but more equitable than comparable methods of imposing liability on municipalities already recognized by the courts.

Despite the plausibility of these arguments, most courts that have dealt with RICO claims have failed to even acknowledge them, much less engage them. The most common response of courts presented with RICO claims is to fall back on the pre-*New York Central* fiction that a municipality is incapable of forming the criminal intent necessary to violate RICO.[89] None of these cases make an effort to discuss *New York Central* or other potentially relevant statutory schemes. There is no relevant precedent that "compels the conclusion that municipalities are per se immune from prosecution" for crimes with a

86 *See* United States v. Bailey, 444 U.S. 394, 408 (1980) ("[T]he cases have generally held that, except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction.").

87 Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978) ("Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.").

88 Richard H. Walker & David M. Levine, *"You've Got Jail": Current Trends in Civil and Criminal Enforcement of Internet Securities Fraud*, 38 AM. CRIM. L. REV. 405, 416 (2001) (differentiating between civil securities proceedings, which require a showing of "recklessness," and criminal securities proceedings, which require a showing of "willful" activity).

89 *See, e.g.*, Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir. 1996) (rejecting municipal liability claims out of hand on criminal intent grounds (citing Lancaster Cmty. Hosp. v. Antelope Val. Hosp. Dist., 940 F.2d 397, 404 (9th Cir. 1991))); Brubaker v. City of Richmond, 943 F.2d 1363, 1378 (4th Cir. 1991) (affirming dismissal of a RICO claim against the city, but denying a Rule 11 motion to impose sanctions on the attorneys who brought the claim); *Lancaster Cmty. Hosp.*, 940 F.2d at 404 ("The RICO claims against [municipal hospital operators] fail because government entities are incapable of forming a malicious intent."); Interstate Flagging, Inc. v. Town of Darien, 283 F. Supp. 2d 641, 646 (D. Conn. 2003) ("[T]he Municipal Defendants cannot be held liable under Section 1962(b) because the Municipal Defendants cannot have the requisite criminal intent."); County of Oakland by Kuhn v. City of Detroit, 784 F. Supp. 1275, 1283 (E.D. Mich. 1992) ("[I]t is doubtful that a municipal corporation can form the requisite [specific] intent."); D.H. Blair & Co. v. City of N.Y. (*In re* CitiSource, Inc. Sec. Litig.), 694 F. Supp. 1069, 1079 (S.D.N.Y. 1988) ("The issue of intent is the Achilles' heel of the plaintiff seeking to impose RICO liability upon a municipal corporation . . . . Unlike an ordinary corporation, a municipal corporation is incapable of the criminal intent necessary to support the alleged predicate offenses." (citation omitted)); *see also* Green, *supra* note 38, at 1223 n.163 (listing cases).

state of mind requirement under federal law,[90] and cases do not attempt to cite such precedent. These arguments effectively undermine the broad definition of "person" in the text of the statute by imposing a restrictive and unimaginative legal fiction upon an entire class of legal entities. Moreover, the result is inconsistent with other "remedial" statutory schemes used to impose liability on municipalities, such as antitrust and securities.

The result of this interpretation is also thorny from a textual perspective. RICO does not distinguish between "persons" who can bring RICO claims, and "persons" who can violate RICO.[91] Since municipalities cannot violate RICO, even though they fit under the statutory definition of the term "person," one must argue that the meaning of the term "person" shifts depending on its use in the statute, a distinction that appears neither in the Dictionary Act nor in RICO itself. Of course, those cases construing the term "person" establish that one is not inexorably bound to read the term consistently between uses, even when this tortures the text of the statute.[92] This is the approach the courts adopt in the majority of cases.

In *United States v. Bonanno Organized Crime Family of La Cosa Nostra*,[93] the Second Circuit Court of Appeals demonstrated the degree of confusion a unified definition of the term "person" can create when judges are unwilling to suspend textualist disbelief in statutory construction. The defendant, an organized crime family, challenged the ability of the United States to bring a treble damages claim against them.[94] The court held that since the United States was immune from suit for a violation of RICO,[95] it was also therefore not a "person" capable of suing for treble damages unless it met the high threshold of waiver of sovereign immunity.[96] This result appeared to contradict

90 Green, *supra* note 38, at 1223.

91 *See supra* note 12.

92 *See supra* notes 13–14 and accompanying text.

93 879 F.2d 20 (2d Cir. 1989).

94 *Id.* at 21.

95 *Id.* at 22–23. Since the United States is immune from suit unless it gives an explicit waiver, and RICO contains no such waiver, the United States could not be a RICO "person," because "[t]he disadvantage of being a 'person' within the meaning of RICO is that it subjects qualifying entities to the powerful and expansive criminal and civil liability provisions of the Act." *Id.*

96 *See id.* at 27 (reasoning, in part from RICO's failure to explicitly waive sovereign immunity, that the United States could not be a person for purposes of violating RICO). The court took into consideration two other factors, as well. First, it found strongly persuasive *United States v. Cooper Corp.*, 312 U.S. 600 (1941), which came to a similar holding in the context of the Clayton Act. *See Bonanno*, 879 F.2d at 23 (reciting and agreeing with the Court's reasoning in *Cooper Corp.*). Second, it relied heavily

RICO's plain authorization of "actions" under its civil remedies section brought by "the Attorney General,"[97] and the apparent efforts of Congress to draft around malignant antitrust precedent which denied the federal government the power to sue for treble damages.[98] Nevertheless, the court placed maintenance of a consistent definition of the term "person" as a virtue in statutory interpretation above rendering that section of the statute effective.[99] Thus, if *Bonanno*'s reasoning governs in a circuit adhering to the "municipalities cannot form criminal intent" logic, a municipality would theoretically be incapable of bringing RICO treble damages claims as a price of their immunity from suit.[100]

It is not necessary for courts to lean on these old legal fictions. *Genty v. Resolution Trust Corp.*,[101] a case out of the Third Circuit, posits a more nuanced view of municipal liability. The court, while refraining from ruling on the issue definitively, declined to dismiss a

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on structural features of RICO which it claimed militated against providing the federal government with treble damages. *See id.* at 24–25.

97 18 U.S.C. § 1964(b) (2006) ("The Attorney General may institute proceedings under [the civil remedies] section."); *see also id.* § 1961(10) (giving broad definition of "Attorney General").

98 *See Cooper Corp.*, 312 U.S. at 614 (rejecting the federal government's attempt to bring treble damages action for an antitrust violation and asserting that "the text of the [Sherman] Act, taken in its natural and ordinary sense, makes against the extension of the term 'person' to include the United States . . . ."), *superseded by statute*, 15 U.S.C. § 15(a) (2006) (granting the federal government the right to sue for treble damages, but not altering the statutory definition of "person").

99 *Bonanno*, 879 F.2d at 23–24. The court further bolstered its interpretation by pointing to the general hesitancy on the part of the courts to construe statutes in a manner that confers additional remedies on the government. *Id.* at 22. Finally, the court examined RICO's legislative history as further evidence of Congress' intent to deny the treble damages remedy to the federal government. *Id.* at 26–27.

100 Courts have not given *Bonanno* uncritical acceptance. *See, e.g.*, European Cmty. v. RJR Nabisco, Inc., 150 F. Supp. 2d 456, 489–92 (E.D.N.Y. 2001) (declining to hold, in line with *Bonanno*, that sovereigns must be able to stand as RICO defendants since prior cases held they were "persons" capable of asserting a RICO claim). A similar pattern has emerged in considering state agencies. *Compare* Ill. Dep't of Revenue v. Phillips, 771 F.2d 312, 314–17 (7th Cir. 1985) (allowing suit by a state agency under treble damages provisions of RICO), *with* Fiore v. Kelly Run Sanitation, Inc., 609 F. Supp. 909, 912 n.1 (W.D. Pa. 1985) (reasoning that, in the absence of specific inclusion of states in the definition of the term "person," a state or state agency could not stand as a RICO defendant). There is no dispute that foreign sovereigns are RICO "persons," despite their general immunity from suit. *See, e.g.*, Republic of the Philippines v. Marcos, 862 F.2d 1355, 1358 (9th Cir. 1988) ("[T]he Republic as a governmental body is a person . . . . The foreign nature of the Republic does not deprive it of statutory personhood." (citation omitted)).

101 937 F.2d 899 (3d Cir. 1991).

plaintiff's RICO treble damages claim against Gloucester Township, New Jersey, on the basis of the municipality's inability to form criminal intent.[102] It criticized other courts for their failure to grapple with the basic doctrinal problems underlying municipal liability,[103] and engaged in a favorable discussion of the rationales behind classifying municipalities as "persons" capable of criminal acts, including the strongly persuasive precedent of *New York Central*.[104] Ultimately, the court upheld the lower court's dismissal on the grounds that RICO's treble damages provisions were "punitive" and thus inapplicable to a municipality, a more palatable grounds for decision.[105]

Genty is valuable not because of its underwhelming result, but because of its more thoughtful approach to the personhood question, as compared to the majority of other courts that have considered the issue. Absent more pointed direction in a criminal statute that it is inapplicable to municipal persons (like a crime that is only punishable by a prison sentence), there will be many situations where the federal law framework for determining the content of the term "person" strongly suggests inclusion of municipalities. Nonetheless, as the perfunctory dismissal of RICO claims claiming that municipalities engaged in criminal behavior suggest, there is little willingness to

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102 *Id.* at 910.

103 *Id.* at 909.

104 *Id.* at 909–10.

105 *Id.* at 914. The Supreme Court has held in the context of private civil rights lawsuits that municipalities are not subject to "punitive" damages because such liability would run against innocent taxpayers. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981) ("Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the governmental entity itself."). At least one scholar contends that RICO's treble damages provisions are not punitive. *See* G. Robert Blakey, *Of Characterization and Other Matters: Thoughts About Multiple Damages*, LAW & CONTEMP. PROBS., Summer 1997, at 97, 118–19 (arguing that treble damages, given the practical realities of settlement and litigation expenses, tend to produce an average damages award that is roughly compensatory); *cf.* Lawrence Vold, *Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory?*, 28 KY. L.J. 117, 157–58 (1940) ("[C]losely analyzed, the threefold damage provision [in antitrust] is . . . compensatory in its nature . . . . It is a penalty upon the defendant only in the loose sense of penalty as signifying a burden encountered by the defendant as a consequence of his wrongdoing."). A successful argument along these lines, combined with *Genty*'s reasoning on a municipality's ability to demonstrate criminal intent, would make municipal liability under RICO theoretically possible. Regardless of the correct classification of treble damages, municipalities would still be subject to RICO's wide-ranging equitable remedies under *Genty*'s analysis, but not under the presumption that municipalities cannot have criminal intent imputed to them. *See* 18 U.S.C. § 1964(a) (2006) (listing the arsenal of civil RICO remedies in addition to the treble damages remedy).

reach beyond the outmoded doctrines which long prevented imputation of criminal scienter to corporations.

In addition to direct vicarious liability, one could also argue that a municipality is vicariously liable for secondary participation in a RICO violation, either as a conspirator, or as an aider and abettor of another's substantive RICO violation. RICO has its own conspiracy provision,[106] but no parallel definition for aiding and abetting exists. The argument in favor of imposing such liability is that an additional provision is not necessary, because 18 U.S.C. § 2 defines the relevant standard of complicity for criminal violations, and this standard should govern any violation under Title 18 of the U.S. Code, regardless of whether the action takes place on the criminal or civil side of the bench.

The leading appellate court case on this issue, *Rolo v. City Investing Co. Liquidating Trust*,[107] rejects this approach.[108] First, the court rejected the applicability of criminal aiding and abetting standards to the case and chose to frame RICO aiding and abetting claims filed by civil plaintiffs as governed by civil principles of secondary liability, rather than criminal ones.[109] Second, it concluded that the interpretive rule of *Central Bank* with regard to secondary liability rendered aiding and abetting a dead letter under RICO.[110] While RICO does

106 18 U.S.C. § 1962(d) (2006). RICO's definition of conspiracy removes the "overt act" requirement of 18 U.S.C. § 371, the standard federal criminal conspiracy statute.

107 155 F.3d 644 (3d Cir. 1998).

108 *Id.* at 656.

109 *See id.* at 657 ("Criminal liability for aiding and abetting a violation of § 1962 is imposed by reference to the general aiding and abetting statute . . . . This provision has no application to private causes of action."). In most statutes, the choice between criminal and civil standards of secondary liability is straightforward. RICO adds another level of complexity because it is not obvious whether one should apply civil or criminal standards of secondary liability to *civil* actions. Congress enacted Title 18 as a unified whole, meaning the concepts of § 2 apply to civil actions to the extent they are capable of doing so, in the absence of an indication to the contrary. *See* Act of June 25, 1948, ch. 645, pmbl., 62 Stat. 683, 683 ("Title 18 of the United States Code . . . is hereby *revised, codified, and enacted into positive law*, and may be cited as 'Title 18, U.S.C., § —' . . . ." (emphasis added)). In the context of conspirator liability under RICO, the Supreme Court embraced this conclusion. *See* Beck v. Prupis, 529 U.S. 494, 500–01 & n.6 (2000) (concluding that civil conspiracy rules apply in determination of whether individual has a legally cognizable injury, and criminal conspiracy rules apply in determination of whether the defendant violated RICO).

110 *Rolo*, 155 F.3d at 657 ("We conclude that the same analysis [the Supreme Court employed in *Central Bank*] controls our construction of the civil RICO provision . . . ."); *see also* De Falco v. Bernas, 244 F.3d 286, 330 (2d Cir. 2001) (following *Central Bank* and invalidating civil RICO action premised on an aiding and abetting theory). *Rolo* overruled two cases decided prior to *Central Bank* that upheld aiding

not have the extensive history of aiding and abetting liability that existed under the securities laws,[111] *Rolo*'s reasoning shares in the shortcomings of *Central Bank*'s unduly narrow approach to statutory interpretation. Behavior that subjects defendants to criminal RICO penalties is exempt from civil remedies of any sort under RICO on the negative reasoning that whenever Congress fails to mention something, it must be excluded. Like other remedial statutes, RICO merits a liberal reading[112] and ignoring the federal courts' past practice of filling in the blanks when Congress creates a cause of action arguably undermines those aims.

D. What Does Congress Want?

At every juncture of this analysis, difficult questions have arisen regarding the status of municipalities as legal "persons." Are municipalities within the scope of the statutory definitions? If Congress made them persons capable of violating the law, what theory of liability exists to attach them? Did Congress intend the term "person" to have meanings that shift during statutory interpretation? Do theories of secondary liability exist that bring municipalities within the scope of liability? Plausible answers to all of these questions exist on both sides of the ledger. The conclusion to draw from this analysis is that the term "person" is inadequate to describe the number of concepts forced upon it in an unambiguous and systematic manner. It is a waste of resources for courts to spend so much time litigating questions that Congress could resolve in a straightforward manner before the fact, if only it paid closer attention to what it was doing.

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and abetting liability under RICO. *See* Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 270 (3d Cir. 1995) ("Civil RICO liability for aiding and abetting advances RICO's goal of permitting recovery from anyone who has committed the predicate offenses, 'regardless of how he committed them.'" (quoting Petro-Tech, Inc. v. W. Co. of N. Am., 824 F.2d 1349, 1357 (3d Cir. 1987))); United States v. Local 30, United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n, 871 F.2d 401, 406 (3d Cir. 1989) (holding, in a civil RICO litigation brought by the federal government to restructure a labor union, that the executive board of the union was liable for aiding and abetting the RICO offenses of an organized crime group).

111 *See supra* note 33 and accompanying text.

112 Moreover, RICO explicitly calls for liberal interpretation of its provisions to effect the statute's overriding goals. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. 9, § 904(a), 84 Stat. 922, 947 ("The provisions of this title shall be liberally construed to effectuate its remedial purposes.").

III. CAN WE DO BETTER? SUGGESTIONS FOR IMPROVEMENT

Personhood is a vital legal category; nevertheless, like most legal categories, it quickly loses traction if it begins to carry more content than it can bear. Can Congress make the definition more coherent from statute to statute, or even within a statute? Proposals for "federal rules of statutory interpretation" are not novel.[113] Indeed, the Dictionary Act itself reflects an effort on the part of Congress to provide courts with some consistent basis for analyzing key provisions in a statute. This Part of the Note will propose two changes to the definition of the term person that would provide courts with better guidance in determining "the lineup" of entities and individuals described by the word "person."

A. "Close Up" and Separate the Definition of "Person"

The current language of the Dictionary Act has two central flaws. First, its open-endedness and ambiguity are poor qualities for a statute written with the intent of bringing precision and clarity to statutory drafting and interpretation. Second, the policy differences between making a particular person a plaintiff or a defendant are sufficiently great that it is difficult to justify a unitary definition for both concepts. A potentially useful restyling of the Dictionary Act could, as an alternative, provide separate, closed-ended definitions (like that seen in CERCLA)[114] of who is a "person liable," and who is a "person with the right to assert claims." Further division into groups subject to criminal and civil liability would increase the definition's utility. These default sets could then be enlarged, restricted, or ignored by particular statutes as Congress saw fit for each statutory scheme.

Consider how a better scheme for defining the term "person" would impact the test suite discussed above. A definition of the term "person" that was both explicit about the classes of persons it addressed, and that separated the concepts of which persons can be held liable under it and which are merely permitted to bring claims, would solve many of the problems in the test suite without recourse to complex arguments about statutory construction. The borderline question about whether a municipality is a "person" would no longer be present. Separating out the class of entities liable from those with the capacity to sue would substantially ease the conflict of interpreta-

113 *See generally* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (encouraging Congress to be more proactive in giving guidance to the courts on matters of statutory interpretation).

114 42 U.S.C. § 9601(21) (2006).

tional methodologies that currently troubles the courts when the dual policy aims of the term "person," as used today, are in conflict. Explicit definitions of who can and cannot be liable would serve as a powerful antidote to the tendency of the courts to fall back on legal fictions like the inability of entities to form mens rea. Conversely, if Congress' intent is to the contrary, it would save the court system the hassle of hearing and dismissing the futile efforts of plaintiffs attempting to sue untouchable entities. Precise rules are not always appropriate in the law, but when it comes to a fairly limited problem like personhood, there is no excuse for failing to develop a solution that is simple to apply and leads to certain answers.

B. End the Guessing Game About Vicarious and Secondary Liability

The Supreme Court's decision in *Central Bank* symbolized an important shift in the way federal courts treat claims of civil liability outside of the principal offenders. Unless a statute makes explicit provisions for the civil liability of parties that are complicit in or conspire to violate the law, the Court will not read such liability into a statute, even in the sweeping, remedial context of securities law.[115] Lower courts do not view *Central Bank* as limited to the securities aiding and abetting context, but as a particular application of a broader principle of statutory construction. They have extended its reasoning to strike down claims of civil conspiracy under section 10(b).[116] *Central Bank* also appears to have implications for the tradition of inferring vicarious liability for 10(b) actions alongside the provisions for "controlling person" liability.[117] The decision's impact has expanded into other statutory schemes, as well. The test suite shows how *Central Bank* has affected the approach of the courts toward RICO.[118] Recently, the Second Circuit strongly suggested that the principles of *Central Bank* preclude civil rights aiding and abetting claims, even though such

115 *See supra* Part I.A.2.a.ii.

116 Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin, 135 F.3d 837, 841 (2d Cir. 1998) ("[E]very court to have addressed the viability of a conspiracy cause of action under [section] 10(b) and Rule 10b-5 in the wake of *Central Bank* has agreed that *Central Bank* precludes such a cause of action."). *But see* Wenneman v. Brown, 49 F. Supp. 2d 1283, 1289 n.3 (D. Utah 1999) (contending that conspiracy and aiding and abetting are sufficiently distinct and that conspiracy liability under section 10(b) should continue after *Central Bank*).

117 *See supra* note 20.

118 *See supra* Part II.C.

activity would constitute a criminal violation of the civil rights laws.[119] The decision's impact on antitrust law remains an open issue, but it is difficult to fathom that the theory of aiding and abetting liability under antitrust[120] would survive in the wake of *Central Bank*. The Supreme Court does not appear to recognize the tension between its application of certain tort principles without explicit statutory language[121] and its holding in *Central Bank*. While the case may seem innocuous on the surface, the principles of statutory construction articulated in *Central Bank* suggest a far-reaching impact on federal law. For instance, the Seventh Circuit recently extended *Central Bank*'s rule to cover the terrorism cause of action under title 18. [122]

To stem the tide of *Central Bank*—or, in the alternative, to eliminate any ambiguity as to whether or not the case reflects congressional intent—Congress should exercise its power to channel statutory interpretation by providing in the Dictionary Act for a general rule on the applicability of background tort theories. Statutes similar to the general complicity and conspiracy statutes in Title 18[123] which govern all criminal provisions would generally apply to civil causes of action under federal law. Then, for each cause of action, Congress could choose whether to adopt, ignore, or modify the standard provisions,

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119 *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 317 (2d Cir. 2007) (citing *Central Bank* as authority for the proposition that aiding and abetting cannot be used in a § 1983 action under the federal civil rights laws).

120 *See* Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 809–10 (1945) ("It would be a surprising thing if Congress . . . had bestowed upon such unions complete and unreviewable authority to aid business groups to frustrate its primary objective."); *In re* Brand Name Prescription Drugs Antitrust Litig., 288 F.3d 1028, 1034–35 (7th Cir. 2002) (recognizing, in dicta, that aiding and abetting an antitrust violation still carries the potential for both criminal and civil repercussions, but failing to discuss the possible significance of the Supreme Court's *Central Bank* decision). Like RICO, antitrust already has an explicit conspiracy provision. 15 U.S.C. § 1 (2006) ("Every . . . conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

121 *See supra* notes 19, 24.

122 See 18 U.S.C. § 2333(a) (2006) (providing a cause of action for "any national of the United States" harmed "by reason of an act of international terrorism"). The court, through Judge Posner, relied heavily on the rules of construction set out in *Central Bank* in concluding that the statute did not permit the extension of liability to aiders and abettors. Boim v. Holy Land Found. for Relief and Dev., 549 F.3d 685, 689 (7th Cir. 2008) (en banc) ("[S]tatutory silence on the subject of secondary liability means there is none . . . section 2333(a) authorizes awards of damages to private parties but does not mention aiders and abettors or other secondary actors."). The decision overruled a three-judge panel's determination that the terrorism statute encompassed claims of secondary liability. Boim v. Holy Land Found. for Relief and Dev., 511 F.3d 707 (7th Cir. 2007).

123 *See supra* notes 43–44.

as is already the case within Title 18. These civil liability statutes would recognize, as the courts seem to have done indirectly, that certain basic concepts of liability inhere in the term "person" and that courts should construe statutes according to these principles in order to fully implement Congressional intent.

CONCLUSION

Personhood is an important idea in the law, and this Note attempts to demonstrate that the manner in which a statutory scheme defines "person" substantially impacts the interpretation and application of that scheme. Congress has not ignored this fact, and has made some initial efforts towards giving the term a consistent meaning. Nevertheless, it has fallen short of this goal in a number of ways. The definition of "person" in the Dictionary Act "includes" an indefinite class of entities. Many statutes use the term "person" to define both the class of people with standing to bring claims and the class that can violate the law, a tension that neither the Dictionary Act nor the individual statutory definitions seem to countenance. Individual definitions within particular statutes often fail to address either concern. Moreover, Congress defines the concepts of secondary and vicarious liability that undergird the term "person" in a haphazard fashion. Sometimes, it writes them down explicitly; at other times, it trusts that the courts will pick up on congressional intent without prompting and read the appropriate theory into the statutory text.

Congress' failure to provide sound guidance on these issues forces judges into difficult choices when construing statutes. These choices may be undermining congressional intent in a number of statutes, whether by excluding certain important classes of legal persons from lawsuit, or by raising the threshold of participation in unlawful activity so as to exclude parties one might presume would be responsible. Some of this confusion may be inevitable, as Congress' approach to drafting statutes and the preferred methodological approach of the courts towards these problems is constantly in flux and rarely synchronized. Nevertheless, simple legislative enactments clarifying the definition of the term "person" and the background concepts it enshrines would greatly mitigate these problems. Lawyers and legislators may not be in the habit of asking what the term "person" means; this Note has hopefully shown that the question is essential to a complete understanding of the limits of a statutory regime.