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Innocence by Association: Entities and the Person-Enterprise Rule under RICO

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Section 1962 of the Racketeer Influenced and Corrupt Organizations Act (RICO),\(^1\) prohibits a “person” from investing in, acquiring, or operating an “enterprise” through a “pattern of racketeering activity.”\(^2\) Widely acknowledged as one of the broadest federal statutes,\(^3\) many courts have attempted to limit its scope. Notably, those restrictive judicial interpretations that have reached the Supreme Court have been struck down.\(^4\) Nevertheless, a majority of lower courts continues to develop and apply a doctrine that either partially or completely precludes entity liability\(^5\) under RICO.

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(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

\(^3\) See, e.g., Strasser, Prosecutors, Private Bar Find New Uses for RICO, Nat'l L.J., Sept. 28, 1987, at 18, col. 1 (RICO “a bit like the atomic bomb”).


\(^5\) In this note, “entity” liability refers to the liability of corporations, partnerships, or other associations of individuals recognized as distinct juristic persons. See infra note 26. Entity liability is thus distinguishable from the “personal” liability of partners, shareholders, officers, associates or...
Referred to by this note as "the person-enterprise rule," the doctrine prohibits the same entity from being both the "person" and the "enterprise" in the same count of a complaint or indictment. Courts normally apply the rule only to claims under section 1962(c). For example, under the rule a corporation may not be a "person" that can conduct itself unlawfully as an "enterprise." Thus, in the majority of circuits, the rule may immunize corporations in many situations from liability for violations of section 1962(c). Courts applying the person-enterprise rule to any or all of the other three subsections of section 1962 have reached inconsistent results.

The thesis of this note is that the person-enterprise rule should be abandoned, and that courts should instead apply established criminal law principles to determine an entity's liability under RICO. After an overview of RICO in Part I, Part II reviews general liability principles of the civil and criminal law. Part III examines RICO in light of these general principles, and suggests that courts should apply criminal standards of entity liability to RICO cases. Part IV summarizes the case law regarding the liability of artificial entities under RICO. Part V critiques the foundation and consequences of the majority approach. Finally, Part VI concludes that traditional criminal law principles of entity liability are fully consistent with the policies behind both RICO and the person-enterprise rule.

I. Congressionally Enacted Organized Crime Laws

Finding that "organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption," Congress enacted RICO as part of the Organized Crime Control Act of 1970. The Act's stated pur-
pose is to “seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies.”

Purposefully broad in order to combat the realities of organized crime, RICO provides enhanced criminal penalties and civil sanctions for those “persons” that acquire or operate an “enterprise” through a “pattern” of “racketeering activity” —

![Procedural Control in Determining Who May Sue or Be Sued: Lessons in Statutory Interpretation from Civil RICO and Sedima](image)

Section 1962 establishes a threefold prohibition aimed at stopping the infiltration of racketeers into legitimate organizations.

Subsection (a) makes it unlawful to invest funds derived from a pattern of racketeering activity, as defined in section 1961(1) and (5), or collection of an unlawful debt as defined in section 1961(6), in any enterprise engaged in interstate or foreign commerce. The funds must have been derived by the investing party from activity in which he participated as a principal. An exception has been provided for the purchase on the open market of less than 1 percent of a company's securities where there is no degree of control in law or in fact to the investor.

Subsection (b) prohibits acquisition or maintenance of an enterprise through the prescribed pattern of racketeering activity or collection of unlawful debt. There is no 1 percent limitation here as in subsection (a) because (a) focuses on legitimate acquisition with illegitimate funds. Subsection (b) focuses on illegitimate acquisition with illegitimate funds. Subsection (b) focuses on illegitimate acquisition through the prescribed pattern of activity or collection of debt. Consequently, any acquisition meeting the test of subsection (b) is prohibited without exception.

Subsection (c) prohibits the conduct of the enterprise through the pattern of racketeering activity through the prohibited pattern of racketeering activity or collection of debt. Again, the prohibition is without exception.

Subsection (d) makes conspiracy to violate (a), (b), or (c) equally subject to the sanctions of sections 1963 and 1964.


RICO's criminal penalties include a fine of up to $25,000, imprisonment of up to 20 years, or both, and of forfeiture of any interest acquired or maintained in violating the statute.

RICO's civil remedies include divestment from any interest in any enterprise, restrictions on activities or investments, dissolution or reorganization of any enterprise, and treble damages.

“Person” includes any individual or entity capable of holding a legal or beneficial interest in property.

“Enterprise” includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.
in short, for those who engage in "organized crime" in its generic, rather than stereotypical sense.20

II. Generally Accepted Accountability Principles

Any individual or entity capable of holding a legal or beneficial interest in property may sue or be sued for a RICO violation.21 In violating any statute, an individual may act alone, in concert with others, or through employees and agents. An artificial entity, by contrast, is incapable of acting at all except through employees and agents.22 The civil and criminal law provide similar but distinct rationales for attributing the

"pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.


"racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), section 891-894 (relating to credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia, section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2514 and 2515 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c)(relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States

20 See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) ("[A]ny person, not just mobsters.") Id. at 494. ("ILegitimate . . . enterprises . . . enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences.") Id. at 499. See also United States v. Turkette, 452 U.S. 576, 590-91 (1981) ("major purpose of . . . [RICO was] to address the infiltration of legitimate business by organized crime . . . [but] unpersuaded that Congress . . . confined . . . RICO [to] only infiltration of legitimate business.") (emphasis in original); Twenty seven states have enacted "little RICO" statutes of their own, twenty-one of which include multiple-damage private claims for relief. Blakey & Cessar, supra note 18, at 596 (statutes collected). These state RICO laws, too, are not limited to organized crime. Plains Resources, Inc. v. Gable, 782 F.2d 883, 887 (10th Cir. 1986) (Federal and Colorado RICO not limited to organized crime); Banderas v. Banco Cent. del Ecuador, 464 So. 2d 265, 268-69 (Fla. App. 1985) (Florida RICO not limited to organized crime).

21 See infra notes 88-89 and accompanying text.

conduct of individuals to themselves, to other individuals, or to artificial entities.

This section seeks to provide a brief review of general principles of civil and criminal liability. Commentators critical of the majority’s approach to entity liability under RICO have suggested that judges have failed to adequately consider the potential interplay between some of the law’s common liability distinctions and RICO’s specific liability requirements. The difference between civil and criminal liability is among the allegedly ignored distinctions. Others include the difference between individual and entity liability, and the difference between direct and vicarious liability. This section will highlight these distinctions. In its examination of RICO, Part III will attempt to evaluate the merits of the distinctions, and to suggest an application of the doctrines to RICO cases.

A. General Rules of Civil Liability

Grounded in the law of torts, the civil law seeks to resolve conflicts between persons arising out of “all the things that constitute modern living.” Tort law defines the duties and responsibilities of persons with respect to each other in civil society, and adjusts between the parties to a civil suit for the losses incurred and injuries suffered as a result of the breach of such duties. These responsibilities, absolute rather than contractual in nature, have been extended to commercial as well as everyday activities.


24 See Dwyer & Kiely, Vicarious Civil Liability Under the Racketeer Influenced and Corrupt Organizations Act, 21 CAL. W. L. REV. 324, 330 (1985) (recognizing “a corporation can act only through natural persons”); Judicial Efforts, supra note 23, at 600 (recognizing “A corporation is an artificial entity which acts through its board of directors, its officers, and its employees.”); Blakey, supra note 13, at 294 (recognizing “The legal rules for determining the criminal responsibility of entities parallel those applicable to individuals.”)

25 See Judicial Efforts, supra note 23, at 606 (noting distinction between direct and vicarious corporate liability); Dwyer & Kiely, supra note 24, at 325-327 (distinguishing direct and vicarious claims); 2 Civil RICO Rep. (BNA) 1, at 1, 2 and 5 n.8 (May 5, 1987) (categorizing claims as direct and vicarious).

26 No less than seven theories of juristic personality exist. IV R. POUND, JURISPRUDENCE 222 n.1, 260-261 (1959). Although legal personality was once confined to individual human beings, see id. at 192, the law today recognizes various artificial entities as “persons.” Compare United States v. A-P Trucking Co., 358 U.S. 121 (1958) (partnership is a “person” for purposes of criminal liability) with United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965) (unincorporated association not person for purpose of diversity jurisdiction).

27 W. PROSSER AND W. KEETON, TORTS § 1 at 6 (5th ed. 1984) (quoting Wright, Introduction to the Law of Torts, 8 CAMBRIDGE L.J. 238 (1944))

28 W. PROSSER & W. KEETON, supra note 27, § 1.

29 Id.

30 See, e.g., 15 U.S.C. § 1 et seq. (trust); 15 U.S.C. §§ 77b et seq., 77j, 77k, 77m, 77o, 77s, 78a et seq. (securities).
1. Individuals

Individuals may incur civil liability solely by themselves, jointly with others, or vicariously through agents. In assessing whether to hold individuals liable for their own actions, the focus of tort law is on the intent or negligence of the wrongdoer. Nevertheless, certain activities may result in strict liability.

In order to be found jointly liable, multiple tortfeasors must all act with the requisite intent or negligence. An express agreement among joint tortfeasors is not necessary; a "tacit understanding" suffices. However, an agreement to commit a wrongful act, by itself, is never a tort.

As employers or principals, individuals can incur vicarious civil liability for the torts of their employees or agents. As an employer, an individual is liable for the torts employees commit within "the scope of their employment." Known generally as respondeat superior, such derivative liability is currently characterized as "a rule of policy, a deliberate allocation of risk." As a principal, an individual may be liable under agency theories that the individual actually authorized, apparently authorized, or subsequently ratified the agent's conduct. Similarly, as a member of a "joint enterprise," an individual may be held vicariously liable for the torts fellow members commit within the scope of the enterprise. Vicarious liability may attach for both intentional and negligent conduct.

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31 See generally, W. Prosser & W. Keeton, supra note 27.
32 Id. § 6 at 30.
33 Id. § 75 at 536. ("There is a strong and growing tendency, where there is blame on neither side, to ask, in view of the exigencies of social justice, who can best bear the loss and hence to shift the loss by creating liability where there has been no fault.") See also Pound, The End of Law as Developed in Legal Rules and Doctrines, 27 Harv. L. Rev. 195, 233 (1914).
34 W. Prosser & W. Keeton, supra note 27, at 324.
35 Id. at 323.
36 Id. at 324. Such an agreement may constitute conspiracy in the criminal context. Id. See also infra note 62. While the "gist" of criminal responsibility is "conspiracy," Ianelli v. United States, 420 U.S. 770, 777 (1975), it is an overt act performed in furtherance of the conspiracy from which damages flow that forms the basis of civil responsibility for conspiracy. Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 389 (1971); Nalle v. Oyster, 230 U.S. 165, 182 (1913); Kamm, Inc. v. Flink, 113 N.J. 502, 588-89, 175 A. 62, 68-69 (1994).
37 See generally Restatement (Second) of Agency §§ 228-237 (1958) (Scope of employment).
38 W. Prosser & W. Keeton, supra note 27, at 500.
39 Id. at 500.
40 Id. at 499. See also Restatement (Second) of Agency § 215 (1958) (Conduct authorized but unintended by principal).
41 W. Prosser & W. Keeton, supra note 27, at 499. See also Restatement (Second) of Agency § 216 (1958) (Unauthorized tortious conduct).
42 W. Prosser & W. Keeton, supra note 27, at 499. See also Restatement (Second) of Agency § 218 (1958) (Effect of Ratification).
43 W. Prosser & W. Keeton, supra note 27, § 72.
44 Id. § 70 at 505. See also Restatement (Second) of Agency § 245 (1958) (Use of Force).
45 W. Prosser & W. Keeton, supra note 26, § 70.
2. Entities

Unlike a human individual, an artificial entity can act only through its employees and agents. Accordingly, the rules governing the derivative liability of individuals determine the liability of entities. Thus, a corporation may incur liability under theories of respondeat superior, authority, or ratification. With apparent authority, the corporate principal may be civilly liable even though the agent did not act in order to benefit the corporation. Partnerships are treated analogously to joint enterprises.

Voluntary associations, as distinguished from corporations and partnerships, typically organize for religious, charitable, or other public causes. Such groups are incapable of holding any legal or beneficial interest in property unless a statute provides otherwise. Where statutes apply, the laws are often unclear as to the potential civil liabilities of associations and their members.

B. General Rules of Criminal Liability

Crimes, unlike torts, are offenses against society as a whole rather than specific persons. Of course, the same act may be both a tort and a crime. Unlike the civil law, however, the criminal law exists not to adjust losses or compensate injuries, but rather to punish, deter, incapacitate, or reform the wrongdoer.
1. Individuals

As in the civil context, an individual may incur direct or vicarious criminal liability. Unlike tort liability however, criminal guilt requires a forbidden act (actus reus) coupled with a culpable state of mind (mens rea). An individual may be criminally liable for the acts of another as an aider-and-abettor or co-conspirator. The criminal forms of vicarious liability have their own actus reus and mens rea requirements. In addition to complicity and conspiracy, courts have held persons without criminal fault of their own liable for the unlawful conduct of others. However,

56 Id., § 1.2 at 7, § 3.1; Morissette v. United States, 342 U.S. 246, 251 (1952) ("an evil—meaning mind with an evil-doing hand"). The act may be one of omission or commission. W. LAFAVE & A. SCOTT, supra note 5, §§ 3.2-3.3. Like the prohibited conduct, the required state of mind is generally determined by statute. Id., § 3.4 at 213. Courts infer a state of mind requirement for common law crimes. See Morissette, 342 U.S. at 255-265. Where no state of mind requirement appears in the statute, courts may impose strict liability for "regulatory" or "public welfare" offenses. See, e.g., United States v. Balint, 258 U.S. 250, 251-254 (1922) (interpreting Narcotic Act § 2, 38 Stat. 785, 786 (1914)) ("Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to damage from the drug, and concluded that the latter was the result preferably to be avoided.").

57 Complicity is the facilitation of criminal conduct. See generally W. LAFAVE & A. SCOTT, supra note 5, §§ 6.6-6.8. Only knowledge of the activity itself, not of its criminal character, is required. Id. at 581 ("Such is not the case, for here as well the general principle that ignorance of the law is no excuse prevails."). Conspiracy is the agreement to commit crime. See generally id., §§ 6.4, 6.5. An overt act may be required in addition to the agreement itself. The general federal conspiracy statute, quoted below, requires an overt act. Most states also require an overt act in furtherance of the conspiracy. Id. at 548.

The general federal complicity statute provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.


The general federal conspiracy statute provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provide for such misdemeanor.


Courts are divided as to the appropriate state of mind under the general complicity and conspiracy statutes. Compare United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (requiring an interest for complicity) and United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940) (requiring an interest in conspiracy), aff'd on other grounds, 311 U.S. 205 (1940) with Backun v. United States, 112 F.2d 635, 637 (4th Cir. 1940) (requiring only knowledge for complicity) and Scales v. United States, 227 F.2d 581, 587 (4th Cir. 1955) (requiring only knowledge of conspiracy), rev'd on other grounds, 367 U.S. 203 (1961). See generally W. LAFAVE & A. SCOTT, supra note 5, § 6.7 at 579-587 (noting "considerable confusion" regarding required mental state for complicity); id., § 6.4 at 535-542 (noting "considerable confusion" regarding required mental state for conspiracy)


Conspiracy and complicity related doctrines also allow for criminal liability that is both strict and vicarious. A person will be liable for foreseeable acts committed in furtherance of the conspiracy by a co-conspirator. Pinkerton v. United States, 328 U.S. 640, 645 (1946). See also W. CLARK & W. MARSHALL, TREATISE ON THE LAW OF CRIMES 552 (7th ed. 1967) ("The combinatorial characteris-
the law excepts victims of criminal activity from criminal liability even though they may have in fact engaged in conduct that otherwise aided and abetted the commission of the crime.59

2. Entities

Incapable of thought or action without their employees and agents, artificial entities engaging in criminal conduct do not conform easily to the actus reus/mens rea model of individual criminal accountability.60 Early common law held corporations incapable of mens rea, and therefore incapable of criminal activity.61 Today, however, rules governing corporate criminal liability resemble those governing individual criminal liability.

Generally, a corporation may be liable for the illegal activities of its employees or agents if they acted (1) within the scope of their employment or agency and (2) with the intent to benefit the corporation.62 Liable of conspiracy places liability on a dragnet plane, for a co-conspirator's liability flows from his membership in the conspiracy, rather than physical participation."

59 Gelbard v. United States, 387 U.S. 112 (1933) (following Queen v. Tyrell, 1 Q.B. 710 (1894)); United States v. Spiteri, 800 F.2d 1267, 1275-1279 (4th Cir. 1986); W. LaFave & A. Scott, supra note 5, at 595.


61 1 W. Blackstone, Commentaries *476.


The intent to benefit rule serves to prevent successful prosecution of a corporation that is the victim rather than a mere vehicle for criminal conduct, by requiring that the wrongdoing agent act with some purpose of forwarding corporate business. But the corporation need not receive actual benefit from the wrongdoing or even be the intended beneficiary of the misconduct itself before the entity will be held accountable. The agent's conduct may, indeed, be detrimental to the interests of the corporation. As long as the corporation is not the object of the crime— as opposed to a convenient vehicle for its perpetration— the intent to benefit rule will not preclude conviction of the corporate entity.

bility may also result from a corporate duty owed to the public. Similar rules apply to partnerships and voluntary associations. Entity criminal liability neither precludes nor depends upon a finding of individual responsibility.

III. RICO Adapted Accountability Principles

Because of its broad scope, RICO can easily become a quagmire for the distinctions among conventional theories of liability. Although RICO is codified as part of the criminal code, the statute authorizes both civil remedies and criminal sanctions for the criminal conduct it pros-

agent's acts are not "in behalf of the corporation" if undertaken solely to advance the agent's own interests or interests of parties other than the corporate employer.

W. LaFave & A. Scott, supra note 5, at 262 (footnotes omitted). See United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); United States v. Harry L. Young & Sons, 464 F.2d 1295 (10th Cir. 1972). See also United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir.) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation even if . . . such acts were against corporate policy or express instructions.")., cert. denied, 464 U.S. 956 (1983); United States v. Automated Medical Laboratories, Inc., 770 F.2d 399, 406 n.5 (4th Cir. 1985) ("We believe that Basic Construction states a generally applicable rule on corporate criminal liability despite the fact that it addresses violations of the antitrust laws."); United States v. Gold, 743 F.2d 800, 823 (11th Cir. 1984) ("To be acting within his employment, the agent must first have intended that his act would have produced some benefit to the corporation or some benefit to himself and the corporation second.")., cert. denied, 469 U.S. 1217 (1985); United States v. Richmond, 700 F.2d 1183, 1195 (8th Cir. 1983) ("Generally, a corporation is responsible for the criminal acts of its officers, agents, and employees committed within the scope of their employment and for the benefit of the corporation."); United States v. Cincotta, 689 F.2d 238, 241-242 (1st Cir.) (agent must be "performing acts of the kind which he is authorized to perform, and those acts must be motivated—at least in part—by an intent to benefit the corporation"), cert. denied, 459 U.S. 991 (1982). See also R. Pound, Law and Morals 76-77 (1926). Perhaps anticipating RICO, Pound wrote:

[R]espondeat superior is not a universal moral rule [footnote omitted]. The shifting of the burden to the employer, no matter how careful he has been and how free from fault, proceeds on the social interest in the general security, which is maintained best by holding those who conduct enterprises in which others are employed to an absolute liability for what their servants do in the course of the enterprise.

Id. (emphasis in original).

A different rule of corporate liability is the so-called "superior agent rule." W. LaFave & A. Scott, supra note 5, at 259-262. Under this rule, a corporation may be liable only if a high managerial agent committed or ratified the unlawful conduct. This concept of corporate criminal liability is reflected in the Model Penal Code, Model Penal Code § 2.08(1)(c) (1962), and it has been adopted by statute in some jurisdictions. See, e.g., Colo. Rev. Stat. § 18-1-606 (1986) ("high managerial agent"); Ga. Code Ann. § 26-803 (1988) ("managerial official"). The superior agent rule is not, however, the federal standard. Nor does it appear to be the general rule in any sense. K. Brickey, supra, §§ 3:03, 3:04; W. LaFave & A. Scott, supra note 5, at 262.

See, e.g., United States v. Illinois Cent. R.R., 303 U.S. 259, 244 (1938) ("The duty [not to confine cattle in freight cars for more than 28 hours without unloading for rest, water and feeding] . . . did not arise out of the relation of employer and employee but was one that, in virtue of the statute, was owed by respondent to the shippers and the public."); see also K. Brickey, supra note 62, § 2:07 ("The law of nuisance provided the earliest weapon in the arsenal of theories that would support a criminal prosecution.").


See Gordon, 347 U.S. at 910.

In addition to RICO's perplexing dual character, courts must also deal with the statute's broad language and interrelated provisions.

A. The Statutory Distinction Between a "Person" and an "Enterprise"

RICO prohibits "persons," not "enterprises" from engaging in the conduct it proscribes. The "enterprise" is properly regarded as an element of a RICO offense, not a party to the litigation. Corporations satisfy both the RICO definition of "person" and "enterprise." Thus, a corporation may be both a defendant and an element of a RICO offense. To violate RICO as a "person" (defendant), a corporation must necessarily act through its employees or agents. To qualify as an element of a "person's" RICO violation (enterprise), the corporation need only exist as a legally recognized artificial entity.

1. Relevance of the Distinction Between Individual and Entity Liability

Understanding the difference between individual and entity liability further clarifies the distinction between the RICO definitions of "person" and "enterprise." Significantly, the definition of "enterprise" expressly includes associations in fact, but the definition of "person" does not. As part of its scheme to eliminate organized crime, RICO targets the proceeds of such activity. Because an association in fact is incapable of holding a legal or beneficial interest in property, it is incapable of retaining the tangible benefits of racketeering in its own right. Such property must necessarily be held by the members of the association, who are capable of maintaining a legal or beneficial interest in property. Each member of an association in fact thus qualifies as a "person," and may be liable under RICO—just like any other member of a joint enterprise, partner, co-conspirator, or accomplice. Therefore, the entire asset pool of an association in fact "enterprise" is within RICO's purview even though such associations themselves do not qualify as "persons."
A corporation or other legal "person," by contrast, is capable of holding property in its own right. Of course, employees of corporations, like members of an association in fact, may be liable as RICO "persons." However, the assets of a corporate enterprise — which may have been increased or decreased as a result of racketeering — remain distinct from the personal assets of the employees. Because corporations can act only through their employees, corporate assets would remain outside RICO's purview unless the corporation itself could also be named as the "person," or unless the corporation could be otherwise held vicariously liable for the actions of its employees.

A RICO violation by a corporate employee thus sets the stage for the potential interplay between RICO's statutory requirements and common law liability principles. This interplay may occur in two pleading situations. Initially, a plaintiff (or prosecutor) may plead that the corporation was the "person" that violated RICO through its employee. Under this first pleading option, the liability sought is said to be "direct" from the corporation. Alternately, the plaintiff may plead that the employee was the "person" who violated RICO, and that the corporation is liable for its employee's violation. Under this second pleading option, the liability sought is said to be "vicarious." In both counts, the plaintiff names the corporation as the "enterprise" that was illegally invested in, acquired, or operated.

2. Irrelevance of the Distinction Between Direct and Vicarious Liability

The "direct"/"vicarious" terminology accurately categorizes potential forms of individual liability. However, this terminology does not accurately describe corporate liability, given the difference between the actions of individuals and those of artificial entities. Individuals may take action by themselves or through agents. Unlike individuals, however, corporations can act only through their agents. Thus, all corporate liability is vicarious liability. Both of the above pleading options present the question whether the actions of the employee are fairly attributable to the corporate principal.

Ca. 1979), aff'd, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982). The significance of this apparent split in authority is considered in Part V. See infra note 184.


77 See Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 29-32 (1st Cir. 1986).

78 See id.

79 The common law contained a similar vocabulary. A principal in the first degree was the individual who actually engaged in the criminal conduct. W. Lafave & A. Scott, supra note 5, at § 66. A principal in the second degree (a.k.a " aider and abetter," see id., § 33 at 571) was one actually or constructively "present" at the scene of the crime and who helped the principal in the first degree commit the crime. Id. at 497-98.

80 See supra notes 31-45, 56-59.

81 Because corporations can act only through their employees and agents, corporate liability is perhaps best thought of as "a form of vicarious liability." T. Gardner & V. Manian, Criminal Law 110 (1980) (emphasis added).

82 Whether the liability sought is "direct" or "vicarious," "there still arise significant questions concerning those acts which may be attributed to the corporation." Dwyer & Kiely, supra note 24, at 327.
B. The RICO Distinction Between Civil and Criminal Liability

Established civil and criminal agency principles each offer possible answers to this question of accountability. Absent a clear indication to the contrary, normal rules of agency apply to a federal statute.\(^83\) However, because RICO is both civil and criminal, it is not obvious whether normal criminal or normal civil rules should apply.

1. Relevance of the Distinction Between Civil and Criminal Liability

Understanding the difference between civil and criminal liability facilitates the choice between the two. RICO's purpose is to eradicate crime, not merely to compensate victims.\(^84\) Accordingly, the criminal standards of entity liability are preferable to those of the civil law. Notably RICO is codified\(^85\) as part of the criminal code, which contains express provisions for aiding and abetting\(^86\) and conspiracy.\(^87\)

2. Appropriateness of Criminal Rules for Civil RICO: Section 1964

RICO section 1961(3) indicates that "person" includes any individual or entity capable of holding a legal or beneficial interest in property.\(^88\) "Person" not only describes the potential RICO civil defendant, but the plaintiff as well. Section 1964(c) states that "any person injured in his business or property by reason of a violation of section 1962 . . . may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."\(^89\)

The statutory treble damages RICO provides serve both civil (compensatory) and criminal (deterrent) purposes, as does RICO itself.\(^90\) Inasmuch as treble damages provide compensation for any "accumulative

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\(^84\) See supra note 12 and accompanying text.
\(^85\) Codification is meant to accomplish three objectives: "(1) collate the original law with all subsequently passed amendments by taking into consideration the deletion or addition of language changed by the amendments; (2) bring all laws on the same subject or topic together; and (3) eliminate all repealed, superseded, or expired laws." J. Jacobstein & R. Mersky, Fundamentals of Legal Research 143 (1987). Certain titles of the United States Code have been codified by the Office of Law Revision Counsel and enacted by Congress into positive law. Id. at 145. These titles represent "a complete compilation, restatement, and revision of the general and permanent laws of the United States . . . ." 1 U.S.C. § 204(a) (1982). Those titles which have not been enacted into positive law are prima facie evidence of the law. The wording found in the Statutes at Large takes priority over that found in a nonenacted Code title. Id. at 145-46. See also M. Cohen & R. Berring, How to Find the Law 191-94 (6th ed. 1983).

Title 18 (Crimes and Criminal Procedure), containing RICO, is an example of a title which has been codified and enacted by Congress into positive law. Title 15 (Commerce and Trade), containing the antitrust and securities laws, is an example of a title which has not been enacted into positive law. Because Title 18, unlike Title 15, contains express general provisions for aiding and abetting and conspiracy liability, arguments that these criminal forms of derivative liability do not lie under RICO appear out of place.

harm," they enhance the established remedial purposes of the civil law.91 Insofar as treble damages exceed such real damages, however, they also enhance available criminal sanctions which punish the wrongdoer and deter others.92

Because RICO's damage provisions contain a punitive or deterrent component, it seems appropriate to require a showing of entity culpability (intent to benefit) and to reject strict liability (no intent to benefit). The criminal law's traditional insistence upon an intent to benefit the entity tempers the loss adjusting purposes of vicarious civil liability with the fault-based principles of general criminal liability. An intent to benefit approach to entity liability under RICO appears well suited to the dual character of RICO in general and of statutory treble damages in particular. The approach makes RICO's enhanced recovery available based only upon an enhanced showing, i.e., a showing including an intent to benefit the entity that is in accord with established corporate liability principles. The criminal law's traditional protection of victims from liability is a related safeguard against a harsh result. Generally however, courts have been reluctant to hold traditionally legitimate corporations liable for RICO violations under any theory of liability.93


RICO itself does not define its potential criminal defendant, "whoever."94 The definition is found in the general rules of construction for all federal statutes.95 The primary distinction between RICO's civil and criminal defendants is that unlike the civil defendant, the class of criminal defendants does not include governmental entities that would be "capable of holding a legal interest."96 Where the defendant is an entity, fines and forfeiture are the applicable penalties.97

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91 Id. at 528 & 528 n.13 ("Accumulative harm is that harm falling outside the range of legal damages, too elusive and indeterminate for adequate measurement by traditional damage principles.")

92 Compensatory damages also deter. R. POSNER, ECONOMIC ANALYSIS OF LAW 154 (2d ed. 1977). Indeed, compensatory damages may sometimes produce the amount of deterrence necessary to inhibit wrongful conduct. Id. at 143. When they do not, multiple damages can be used to ensure that the expected benefits discounted by the likelihood of getting caught will not exceed the anticipated costs, including opportunity costs and potential liability costs. R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 226 (1976).

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94 Id. at 533 n.38.

95 Id. at 527-28.

96 See infra notes 102-30 and accompanying text.


98 "[U]nless the context indicates otherwise," the general rules of construction of the United States Code provide that "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals" 1 U.S.C. § 1 (1982). As noted earlier, RICO "indicates otherwise" for the definition of "person." See supra note 16. RICO does not, however, contain its own definition of "whoever." Notably, governments fit the RICO description of "person" as potential holders of legal or beneficial interests in property, but fall outside the 1 U.S.C. § 1 definition of "whoever." See United States v. UMW, 330 U.S. 258, 276 (1946); United States v. Cooper Corp., 312 U.S. 600, 604 (1941). The use of "whoever" to describe the criminal RICO defendant and "person" to describe the RICO civil RICO defendant thus indicates that, while civil RICO liability may extend to governments, criminal liability may not.

The courts have also been reluctant to impose criminal liability on traditionally legitimate corporations.98 Where criminal liability has been found, the courts have generally failed to articulate the standards of criminal entity liability under RICO. Usually, employees or agents have held important positions within the enterprise.99 In addition, most of the alleged predicate acts have included fraud or bribery to enhance the entity.100 As such, courts have been able to infer "scope of employment" and "intent to benefit."101

IV. Juridically Inferred Statutory Requirements

The Seventh Circuit's *Liquid Air Corp. v. Rogers*102 is among the most recent appellate cases dealing with corporate liability under RICO. *Liquid Air* reflects the majority's reluctance to impose liability in several respects.103 Like the Seventh Circuit, most circuits adhere to the person-enterprise rule for counts brought under section 1962(c).104 Thus, a corporation may not be liable for employees conducting its affairs through

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98 See, e.g., United States v. Computer Sciences, 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983); see also K. BRICKEY, supra note 62, at 244 (person-enterprise issue is "most apt to arise when the enterprise in question is a legitimate business enterprise").


100 See, e.g., United States v. Marubeni Am. Corp., 611 F.2d 763 (9th Cir. 1980) (international corporation indicted for fraud).


102 834 F.2d 1297 (7th Cir. 1987).

103 *Liquid Air* involved the termination of a compressed gas and compressed gas cylinder distributorship agreement between Liquid Air, a corporation, and D & R Welding Supply Co., a partnership. Id. at 1300. With the assistance of a Liquid Air employee, the D & R partners falsified shipping orders to show that several thousand cylinders had been returned in accordance with the agreement. Id. To reward the Liquid Air employee, the partners set him up with his own welding business, Bridges Welding Supply & Therapy, a corporation. Id. Although Bridges Welding did not exist during the scheme, the court concluded that the jury properly inferred its acquiescence in the wrongdoing. The complaint alleged RICO violations, conversion, and breach of fiduciary duty. Id. at 1301.

With respect to the RICO violations, Bridges Welding acted as both the "person" and the "enterprise." Because Bridges Welding benefited from the wrongdoing, the court held the corporation could be vicariously liable for the § 1962(a) and (b) violations of its president, the former Liquid Air employee. Id. at 1307. (The implications of this apparent "actual benefit" requirement for vicarious liability are discussed infra note 173.) Because of the "person"/"enterprise" identity, such liability was not possible for § 1962(c) violations. Id. at 1306. Because it would not affect the damage award, the court declined to reach the issue under § 1962(d). Id. at 1307.


racketeering in the majority of jurisdictions. Because corporations can act only through their employees and agents, the rule effectively immunizes corporations from all liability under this subsection in this factual setting. Like the Seventh Circuit, however, an increasing number of courts refuse to apply the person-enterprise rule under section 1962(a) and recognize derivative liability under that section. Also like Liquid Air, relatively few decisions have considered corporate accountability for employee conspiracies under section 1962(d). Finally, even where courts have recognized the availability of derivative liability claims under RICO, they have often failed to articulate the appropriate standards by which the RICO violations of racketeer employees or agents may be fairly attributed to their corporate employers or principals.

Courts have offered two basic reasons to support the person-enterprise rule: (1) the need to respect the “employed by or associated with” language of section 1962(c), and (2) the desire to protect from RICO liability corporations that are “innocent victims” or “passive instruments” of racketeering activity. Although most courts only apply the person-enterprise rule to section 1962(c), some courts have reasoned that the necessity of a person-enterprise distinction under subsection 1962(c) requires a similarly restrictive construction of subsections 1962(a), (b), and (d).

A. The General Rule (The Judicial Distinction Between a “Person” and an “Enterprise”)

As mentioned above, the person-enterprise rule prohibits naming the same corporation as both the person and the enterprise within the

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105 See infra text accompanying notes 110-35.
106 Petro-Tech, Inc. v. Western Co. of North Am., 824 F.2d 149 (3d Cir. 1987); Shreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393 (9th Cir. 1986); Schofield v. First Commodity Corp. of Boston, 793 F.2d 28 (1st Cir. 1986); Masi v. Ford City Bank & Trust Co., 779 F.2d 397 (7th Cir. 1985).
107 Schofield v. First Commodity Corp., 793 F.2d 28 (1st Cir. 1986). A number of district courts have considered the issue. See infra notes 121-22 and accompanying text.
108 See Dwyer & Kiely, supra note 24, at 324 (noting “vexing” question whether RICO “contemplates true vicarious liability”); Judicial Efforts, supra note 23, at 564. (noting “confusion regarding corporate liability under RICO”).
110 See, e.g., United Energy Owners Comm., Inc. v. United States Energy Management Systems, Inc., 837 F.2d 356 (9th Cir. 1988) ((c), not (a) or (d); but applies to (d) for conspiracies to violate (c)); Liquid Air Corp. v. Rogers, 834 F.2d 1297 (7th Cir. 1987) ((c), not (a) or (b)); Petro-Tech, Inc. v. Western Co., 824 F.2d 1349 (3d Cir. 1987)((c), (c), not (a)); In re Dow Co. Sarabond Prod. Litig., 666 F. Supp. 1466 (D. Colo. 1987) ((c), not (a) or (b)); Klapper v. Commonwealth Realty Trust, 657 F. Supp. 948 (D. Del. 1987) ((c), not (a) or (b)); McMurtry v. Brasfield, 654 F. Supp. 1222 (E.D. Va. 1987) (c)); United Air Lines, Inc. v. CEI Indus., Inc., 654 F. Supp. 1209 (N.D. Ill. 1987) ((c)).
111 Entre Computer Centers, Inc. v. FMG of Kansas City, Inc., 819 F.2d 1279 (4th Cir. 1987) (applying person-enterprise rule to § 1962 as a whole); United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982) (appearing to apply person-enterprise rule to § 1962 as a whole); H. J. Inc. v. Northwestern Bell Tel. Co., 653 F. Supp. 908 (D. Minn. 1987) (appearing to apply person-enterprise rule to § 1962 as a whole), aff'd on other grounds, 829 F.2d 648 (8th Cir. 1987), cert. granted, 56 U.S.L.W. 3638 (U.S. Mar 21, 1988) (No. 87-1252); see also Rush v. Oppenheimer, 628 F. Supp. 1188, 1195 (S.D.N.Y. 1985) (applying person-enterprise rule to both (c) and (a)).
112 Compare cases cited supra note 110 with cases cited supra note 111.
113 See infra notes 121-22 and accompanying text.
same count of a complaint or indictment. However, it apparently does not preclude alleging that a corporation associated as a "person" with an "enterprise" consisting of itself and other corporations or individuals. Nor does the rule bar allegations in the alternative where an corporation is named as the enterprise in one count and as the "person" in another.

B. The Forbidden "End-runs"

Because a corporation is presumed unable to associate with its employee or agent under the person-enterprise rule, it may not be named as a defendant under derivative liability theories for the section 1962(c) violations of its employees or agents. Thus, claims based on respondeat superior have been disallowed. Because allegations that a corporation aided and abetted its employee would also permit circumvention of the rule, courts have likewise held such theories inappropriate. Similarly, courts have foreclosed attempts to characterize the corporation as a "person" associating with an association in fact "enterprise" comprised of itself and its employees. Although some courts have permitted alle-


115 Connors v. Lexington Ins. Co., 666 F. Supp. 434 (E.D.N.Y. 1987) (individuals and firms can be culpable persons and members of an association in fact enterprise); In re Gas Reclamation, Inc. Sec. Litig., 659 F. Supp. 493 (S.D.N.Y. 1987) (individuals and firms can be culpable persons and members of an association in fact enterprise). Contra Entre Computer Centers, Inc. v. FMG of Kansas City, Inc., 819 F.2d 1279, 1287 (4th Cir. 1987) (corporation may not be defendant and part of association in fact); United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982) (corporation and unincorporated association not enterprise). The general result may be different when only the corporation and its employees are involved. See infra note 120 and accompanying text.

116 Roeder v. Alpha Indus., 814 F.2d 22 (1st Cir. 1987).

117 Petro-Tech, Inc. v. Western Co. of North Am., 824 F.2d 1349 (3d Cir. 1987) (no aiding and abetting or vicarious liability for corporation under § 1962(c) where same corporation is both enterprise and person).

118 Liquid Air Corp. v. Rogers, 834 F.2d 1297 (7th Cir. 1987) (no vicarious liability under § 1962(c) where same corporation is both "person" and "enterprise"); Petro-Tech, Inc. v. Western Co. of North Am., 824 F.2d 1349 (3d Cir. 1987) (no vicarious liability for corporation under § 1962(c) where same corporation is both "person" and "enterprise"); Schofield v. First Commodity Corp. of Boston, 793 F.2d 28 (1st Cir. 1986) (no respondeat superior under § 1962(c) for corporation where same corporation is both "person" and "enterprise").

119 Petro-Tech, Inc. v. Western Co. of North Am., 824 F.2d 1349 (3d Cir. 1987) (no aiding and abetting liability under § 1962(c) where same corporation is both "person" and "enterprise").

gations under section 1962(d) that a corporation conspired with its employees or agents,\textsuperscript{121} many have dismissed such contentions as attempts to "end-run" the person-enterprise rule.\textsuperscript{122} Courts have also borrowed reasoning found in antitrust\textsuperscript{123} and civil rights\textsuperscript{124} cases in support of a general anti-intracorporate conspiracy doctrine under RICO.\textsuperscript{125}

C. The Permitted Alternatives

While denying respondeat superior and aiding and abetting theories under section 1962(c), courts generally recognize the potential for such liability under section 1962(a).\textsuperscript{126} That section makes it unlawful for persons involved in racketeering activities as "principals" to receive income from such activities.\textsuperscript{127} In addition to section 1961(3)'s definition of "person," the federal criminal code defines "principal" as anyone who "aids, abets, counsels, commands, induces, or procures."\textsuperscript{128} Because section 1962(a) does not contain any "employed by or associated with" language, and because employer corporations can obviously be "principals" with respect to their racketeer employees, no textual support for any person-enterprise distinction under section 1962(a) exists.\textsuperscript{129} As for section 1962(b), the lower courts are divided.\textsuperscript{130}

\begin{itemize}
\item [\textsuperscript{123}] E.g., Copperweld v. Independence Tube Corp., 467 U.S. 752 (1984) (no intracorporate conspiracy under 15 U.S.C. § 1 (Sherman Antitrust Act)).
\item [\textsuperscript{124}] E.g., Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972) (no intracorporate conspiracy under 42 U.S.C. § 1985(3)).
\item [\textsuperscript{126}] See cases cited supra note 110.
\item [\textsuperscript{127}] See full statutory text quoted supra note 2.
\item [\textsuperscript{128}] See full text of 18 U.S.C. § 2 quoted supra note 57.
\item [\textsuperscript{129}] Petro-Tech, Inc. v. Western Co. of North Am., 824 F.2d 1349 (3d Cir. 1987); Haroco, Inc. v. American Nat'l Bank, 743 F.2d 383 (7th Cir. 1984).
\item [\textsuperscript{130}] Compare cases cited supra note 110 with cases cited supra note 111.
\end{itemize}
D. The Minority Rule

The only circuit to repudiate the person-enterprise rule did so in a criminal case. In *United States v. Hartley*, the United States Court of Appeals for the Eleventh Circuit concluded that "a corporation may be simultaneously both a defendant and the enterprise under RICO." The defendants in *Hartley* were convicted of conspiracy, mail fraud, violations of the National Stolen Property Act, and section 1962(c) of RICO. Upholding the RICO conviction, the court agreed with the government’s contention that “if an individual were named as the enterprise, and a group of persons engaged in a pattern of racketeering activity with that individual, it would defy reason to suggest that the central figure (the enterprise) could not also be prosecuted under RICO.” The court addressed the appellant’s contention that their conviction rendered the person-enterprise distinction a nullity, and held that proving the existence of the corporation itself was a “separate and distinct burden,” thereby satisfying the statute’s person-enterprise distinction.

V. Unwittingly Created RICO Immunities

Despite their superficial appeal, neither the textual or policy reasons offered by the courts that have posited the person-enterprise rule support the rule. First, it is not at all clear that Congress “contemplated” the kind of distinction required by the rule in adopting the language of section 1962(c). Second, although the rule clearly does protect “victim” enterprises, it does so because it shields all enterprises—including racketeer influenced and corrupt organizations—from liability under section 1962(c). The consequences of the rule are clearly contrary to the statute’s purposes.

A. Reason by Tautology

The indiscriminate application of the person-enterprise rule appears to follow logically from the rule’s crude beginnings. Indeed, the rule seems to have preceded its justification. Stemming from fears of a potential flood of RICO litigation, the rule was adopted quickly by many jurisdictions, often without analysis. In *Haroco, Inc. v. American National Bank*, the Court of Appeals for the Seventh Circuit undertook a textual

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131 678 F.2d 961 (11th Cir. 1982).
132 Id. at 988.
133 Id. at 965.
134 Id. at 989. The court also recognized that beneath a corporate exterior can lie “a group of individuals associated in fact whose common purpose is to engage in racketeering.” Id. The *Haroco* court found the comparison to an association in fact unpersuasive. Haroco, Inc. v. American Nat’l Bank, 747 F.2d 384, 401 (7th Cir. 1984). On the possible similarity or difference between a corporation and an association in fact, see *supra* text accompanying notes 72-78; *infra* text accompanying notes 184-190 and note 186.
135 678 F.2d at 988.
136 *See* Blakey & Cessar, *supra* note 18, at 583 n.235 (“[T]he rule... seemed to acquire a life of its own, and it swept through the courts of appeal largely without careful or independent analysis of its rationale or perverse consequences.”).
137 *See infra* notes 141-149 and accompanying text.
138 747 F.2d 384 (7th Cir. 1984).
and policy analysis, concluding—without reference to the legislative history—that the rule reflected Congressional intent. The Haroco opinion has since been adopted by the overwhelming majority of circuits, \(^{139}\) often with the same paucity of critical review accorded to its less articulate predecessors. \(^{140}\)

1. The Early Cases

In *Van Schaik v. Church of Scientology*, \(^{141}\) the District Court of Massachusetts became the first to declare that “[t]he defendant cannot, at once, be the associated person and the enterprise.” \(^{142}\) Briefly reciting section 1962(c)’s “employed by or associated with” language, the court concluded “[i]t is only a person, or one associated with an enterprise, not the enterprise itself who can violate the provisions of the section.” \(^{143}\) Later in the opinion, the court expressed concern that “slavish literalism” would “escort into the federal courts through RICO what traditionally have been civil actions pursued in state courts.” \(^{144}\) Similarly, in *United States v. Computer Sciences Corp.*, \(^{145}\) the Court of Appeals for the Fourth Circuit’s discussion of the issue consisted of a conclusory statement and a questionable analogy between a corporate agent and a

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139 See cases cited supra note 104.
140 See infra note 154.
142 Id. at 1136.
143 Id.
144 Id.
145 689 F.2d 1181 (4th Cir. 1982).
human arm. The Eighth and Ninth circuits adopted the Computer Sciences rule without any independent consideration.

2. The Leading Case

The first reasoned articulation of the person-enterprise rule came with the now landmark case of Haroco, Inc. v. American National Bank. Not the least of Judge Cudahy's contributions in Haroco was the observation that "discussion of this person-enterprise problem under RICO can easily slip into a metaphysical or ontological style of discourse—after all, when is the person truly an entity 'distinct' or 'separate' from the enterprise." Noting the policy concerns over the potential liability of "victim" corporations expressed in earlier cases, the court surmised that section 1962(c)'s language was part of a congressional plan in this regard. Judge Cudahy reasoned that to appreciate this plan, one had to read the language of section 1962(c) against the backdrop of section 1962(a). Section 1962(a), the court maintained, "makes the corporation-enterprise liable under RICO when the corporation is actually the direct

Commentators have also drawn an analogy between § 1962(c)'s requirement of employment or association and conspiracy law's requirement of agreement. Accordingly, because an individual may not conspire with himself, he may not be employed by or associated with himself. See, e.g., Tarlow, RICO: The New Darling of the Prosecutor's Nursery, 49 FORDHAM L. REV. 165, 202 n.194 (1980) (citing United States v. Chase, 372 F.2d 453, 459 (4th Cir.), cert. denied, 387 U.S. 907 (1967); Poller v. C.B.S., Inc., 284 F.2d 599, 603 (D.C. Cir. 1960), rev'd on other grounds, 368 U.S. 464 (1962)). Although this conclusion obtains for individuals under conspiracy rules, it may not obtain for corporations. Therefore, it is necessary to continue the analogy into the corporate context rather than simply apply the conclusion reached for individuals to corporations. Corporate conspiracy, like all other corporate action, is a function of the actions of agents and employees. Thus, corporate liability may not be predicated on a theory that a single employee conspired with himself, but may be found if an employee conspires with another individual, including another employee. In the latter instance, therefore, a corporation may be said to "conspire with itself" through an intracorporate conspiracy between two employees. See generally K. BRICKEY, supra note 62, § 6:21. Such conspiracies are recognized under the general federal conspiracy statute. Id.; see supra note 57 for full text of statute. Policy has dictated a different conclusion in antitrust law. K. BRICKEY, supra, § 6:20; See infra note 191.

Thus, the Computer Sciences reasoning well illustrates the need for appreciation of the distinction between individual and corporate action. What the court labelled "inexact" appears to be flatout incorrect both literally and figuratively. The conduct of a human arm is not difficult to attribute to its human owner. RICO, like most other statutes proscribing criminal activity, states the conditions for such attribution. See supra note 2. Whether such conduct may be attributed to the owner's corporate employer is a separate question. RICO, like most other statutes proscribing criminal activity, does not state the conditions for this kind of attribution. General principles of corporate liability, however, do answer this second question. See supra notes 60-67 and accompanying text. The Computer Sciences reasoning reflects neither application of these principles nor policy for their rejection.

146 "To be sure, the analogy between individuals and fictive persons such as corporations is not exact. Still we would not take seriously, in the absence of very explicit statutory language, an assertion that a defendant could conspire with his right arm, which held, aimed and fired the fatal weapon." Id. at 1190.


148 Rae v. Union Bank, 725 F.2d 478 (9th Cir. 1984).

149 The Ninth Circuit's consideration of the issue is particularly noteworthy for its lack of independent analysis: "If Union Bank is the enterprise, it cannot also be the RICO defendant. See United States v. Computer Sciences Corporation [citation numbers omitted]. Thus, Rae can state no RICO cause of action against Union Bank itself." Id. at 481.

150 747 F.2d 383 (7th Cir. 1984).

151 Id. at 401.

152 Id. at 400.
or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim, prize, or passive instrument of racketeering.\textsuperscript{153} The Haroco reasoning seems to imply that Congress intended to exclude the application of traditional criminal entity liability principles by incorporating them into the text of the statute. Even though the court cited no legislative history to support its interpretation, Haroco, like Computer Sciences, gained uncritical acclaim in the courts of appeal.\textsuperscript{154}

\section*{B. Difference from Similarity}

The notion that the statutory language precludes enterprise liability under section 1962(c) is questionable on its face. Although "self-associated" is not vernacular, "self-employed" is hardly archaic.\textsuperscript{155} Notably, courts have permitted sole proprietorships to fill both the "enterprise" and "person" roles.\textsuperscript{156} Moreover, what legislative history there is sug-

\textsuperscript{153} Id. at 402 (citing Blakey, supra note 13, with approval). See Blakey, id. at 308-323 for discussion of "perpetrator," "instrument," "victim," and "prize.

\textsuperscript{154} See, e.g., Bishop v. Corbitt Marine Ways, Inc., 802 F.2d 122, 123 (5th Cir. 1986) (per curiam) ("[W]e find ourselves in agreement with the reasoning of the Seventh Circuit. . . we adopt it and need not repeat it here.").

\textsuperscript{155} See Blakey & Cessar, supra note 18, at 581 n.235 (citing IX THE OXFORD ENGLISH DICTIONARY (Supp. 1985)).

\textsuperscript{156} McCullough v. Suter, 757 F.2d 142 (7th Cir. 1985) (sole proprietorship can be both "person" and "enterprise" under § 1962(c), so long as not "strictly a one man band"). Accord United States v. Benny, 786 F.2d 1410 (9th Cir. 1986).

How the reasoning of McCullough and Benny can coexist in the same circuits as Haroco and Rae is difficult to comprehend. Cf. United States v. Yonan, 622 F. Supp. 721, 722-23 (N.D. Ill. 1985) (Shadur, J.) ("Judge Posner's [McCullough] opinion does not (of course) acknowledge just how much it bends RICO out of shape . . . ."). Judge Posner related McCullough and Haroco in this way:

There would be a problem if the sole proprietorship were strictly a one-man show. If Suter had no employees or other associates and simply did business under the name of the National Investment Publishing Company, it could hardly be said that he was associating with an enterprise called the National Investment Publishing Company; you cannot associate with yourself, any more than you conspire with yourself, just by giving yourself a non de guerre. We therefore held in Haroco . . . [citation omitted], that an enterprise . . . could not associate with itself for purposes of section 1962(c). But Suter had several people working for him; this made his company an enterprise, and not just a one-man band; and all section 1962(c) requires, as we said in Haroco, is "some separate and distinct existence for the person [Suter] and the enterprise [National Investment Publishing Company]." (citation omitted).

757 F.2d at 144.

The impropriety of the analogy between individual and intracorporate conspiracy has already been noted. See supra note 146. As the court in Benny observed, "[c]oncededly, the [Haroco] distinction wears thin when one considers that a sole shareholder of a corporation would, under the language of the statute, be able to 'associate with that corporation.'" 786 F.2d at 1416. Appearing to further erode the Haroco distinction, Judge Posner continued:

It is true that if Suter were all by himself, and yet adopted the corporate form for his activity, he might well fall under section 1962(c), for the corporation would be an enterprise within the meaning of section 1961(4). And from this it could be argued that since subsection 4 defines enterprise so broadly, even a sole proprietorship is an enterprise and Suter is therefore caught by section 1962(c)— thus showing the absurdity of ever treating a sole proprietorship as an enterprise. But these cases are different. If the one-man band incorporates, it gets some legal protections from the corporate form, such as limited liability; and it is just this sort of legal shield for illegal activity that RICO tries to pierce. A one-man band that does not incorporate, that merely operates as a proprietorship, gains no legal protections from the form in which it has chosen to do business; the man and the proprietorship really are the same entity in law and in fact. But if the man has employees or associates, the enterprise is distinct from him, and it then makes no difference, so far as we can see, what legal form the enterprise takes. The only important thing is that it be either
gests that the “as a principal” in language in section 1962(a) was added simply to “clarify Congress’ intent to limit that subsection to active participants, excluding mere recipients of funds.”157 In its present form, every subsection of section 1962, including section 1962(c), requires affirmative conduct by the “person.”158 Without its “as a principal” language, subsection (a) might threaten to hold a completely “victim” entity liable.159 In short, contrary to the Haroco hypothesis, it appears section 1962(a) was changed to make it more like section 1962(c). Nevertheless, decisions continue to depend upon the allegedly “crystal clear”160 difference in statutory language. Constrained by its earlier decision in Haroco, the Court of Appeals for the Seventh Circuit in LiquidAir reasoned that whether vicarious liability lies under section 1962(b) turned on “whether the language of subsection (b) is more like (a) or (c).”161

C. Innocence by Association

Although the person-enterprise protects victims, it also protects perpetrators. As such the rule is both dangerous and superfluous. Criminal agency principles distinguish victims from perpetrators,162 but the person-enterprise rule precludes their application. Moreover, the general

formally (as when there is incorporation) or practically (as when there are other people besides the proprietor working in the organization) separable from the individual.

757 F.2d at 144.

The above reasoning appears virtually indistinguishable from that of the Hartley opinion. See supra notes 131-135 and accompanying text.


158 See full text of § 1962 quoted supra note 2.

159 See full text of § 1962(a) quoted supra note 2.

160 “If Congress had meant to permit the same entity to be the liable person and the enterprise under section 1962(c), it would have required only a simple change in language to make that intention crystal clear.” Haroco, 747 F.2d at 400.

161 Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1307 (7th Cir. 1987).

162 See supra notes 60-67 and accompanying text. The desire to protect victim enterprises “hardly seems a reason to fashion a general rule that applies even when the enterprise is not the victim, but is instead the perpetrator.” Ad Hoc CIVIL RICO TASK FORCE, A.B.A. SEC. OF CORPORATION, BANKING AND BUSINESS LAW 374 n.607 (1985) (emphasis in original).

[S]uppose the Board of Directors of a corporation commits multiple mail frauds in its operation of the company. Surely each participating member of the Board faces possible RICO liability. The only policy reason not to hold the company liable as well is to protect corporate assets owned by innocent shareholders. But this interest may well be outweighed by (1) the preference of allocating risk of loss to persons who have exercised some choice in corporate governance or who can otherwise potentially exercise some control over corporate affairs; (2) the desire to encourage private enforcement actions when a legitimate enterprise is being turned to corruption; (3) the need to encourage shareholders to insist upon internal audit procedures to protect against such corporate activities; (4) the aim of ensuring full compensation of losses suffered by victims; (5) the availability of actions on behalf of the corporation or shareholders against Board members; and (6) the appropriateness of holding the corporate entity liable as a separate person just as many of the advantages of “personhood” inure to its benefit. Accordingly, under circumstances like these, the policies underlying RICO would appear to argue in favor of an “enterprise” which is also a “person” pursuing its affairs through racketeering activities.

Id. at 374-376.
jurisprudence of the federal criminal law protects victims from criminal liability and would therefore protect victims from RICO liability regardless of the civil or criminal character of the remedy or penalty sought for the unlawful conduct. Apparently panicked by the prospect of guilt by (employment or) association, however, the courts have fashioned an equally disturbing rule of innocence by association.

1. Corporations qua Corporations

The immunity from section 1962(c) liability that the person-enterprise rule confers upon corporations was well illustrated in Schofield v. First Commodity Corp. of Boston ("FCCB"). In Schofield, the defendants allegedly fraudulently induced the plaintiffs to invest all of their liquid assets into commodity futures. The complaint asserted that the defendant corporation was liable either directly or vicariously. The plaintiffs

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163 W. LaFave & A. Scott, supra note 5, § 6.8 at 595 (victims are excepted from accomplice liability).
164 793 F.2d 28 (1st Cir. 1986).
165 Id. at 29. Part III of this note suggested the potential for confusion created by drawing distinctions between "direct" and "vicarious" forms of corporate liability akin to those drawn in individual liability contexts. See supra notes 78-81 and accompanying text. In Schofield, this potential was realized.

The Schofield court cited Judicial Efforts (supra note 23), in support of its ban on "vicarious" liability under § 1962(c). Schofield, 793 F.2d at 33 and 34 n.4. The word "vicarious" apparently did not mean the same thing to the court and to the commentator, however. Schofield apparently used the terms in their literal sense. Thus, as noted earlier, if the plaintiffs name the corporation as the "person," the liability sought is said to be "direct." If the plaintiffs name the employee as the "person," the liability sought is said to be "vicarious."

Unlike Schofield, Judicial Efforts apparently used the terms "direct" and "vicarious" to connote a substantive difference between "corporate statutory liability" for crimes and "common-law vicarious liability" for torts. See Judicial Efforts, supra note 23, at 564, 606 (appearing to use the terms "corporate statutory" and "common law vicarious" interchangeably with "direct" and "vicarious," respectively). Ironically, Judicial Efforts also advocated abandonment of the person-enterprise rule. Id. at 605 ("The distinct person and enterprise requirement should also be rejected.")

The use of the "direct" and "vicarious" terminology seems to cloud any underlying distinction sought to be drawn between civil and criminal doctrines. Both "corporate statutory" and "common-law vicarious" liability share common origins in the doctrine of respondent superior. K. Brickey, supra note 62, at 217. The terminology also distorts the idea that a corporation may be "directly" liable even though there is no individual guilt of the employee or agent to "vicariously" impute to it. See Judicial Efforts, supra note 23, at 601 ("A theory of vicarious liability imputes the employees' guilt or innocence to the corporation. Direct corporate liability does not depend upon the guilt or innocence of the employees.") (Emphasis added). While corporate liability does not depend upon the legal guilt or innocence of employees or agents, it nevertheless does depend upon the actions of employees or agents. Labeling such liability "direct," therefore, seems inappropriate.

A similar fate appeared to befall Professor Blakey's "person-instrument-prize-victim" terminology in Haroco. Where Schofield misconstrued an attempted substantive distinction in justifying its ban on vicarious liability, Haroco misused an attempted literal description in rationalizing its person-enterprise rule under § 1962(c). That an enterprise may be a "victim," "instrument," "perpetrator," "prize," "conduit," "tool," "front," is all very well. Like the word "vicarious," however, the words only describe possible roles; they do not define legal standards to determine who may properly play which roles. Accord Blakey & Cessar, supra note 18 at 581 n.235 ("The approach reflects little more than basic linguistic theory.") (citing G. Dillon, INTRODUCTION TO CONTEMPORARY LINGUISTIC SEMANTICS 68-82 (1977)); C. Feltcher, RETHINKING CRIMINAL LAW 147 (1978) ("That liability is 'vicarious' simply expresses the conclusion that the defendant will be held liable for the acts of another. It is not a rationale for holding the defendant liable.").

Fundamentally, the substantive law is concerned with only two types of enterprises: those which may be held liable, and those which may not be. Criminal respondeat superior and agency principles draw the line between the two. The person-enterprise rule does not. Nor do labels like perpetrator and victim or direct and vicarious.
alleged the FCCB’s account representatives were the “persons,” and that FCCB itself was the “enterprise.” The plaintiffs also argued that the corporation should be liable if the FCCB representatives’ actions reflected corporate policy. Rejecting “direct” liability under these allegations, the court stated “it is only by straining the language that we could read Section 1962(c) as imposing liability on even a culpable enterprise as well as the person.” The court viewed respondeat superior as a method “to accomplish indirectly what the statute directly denies,” and upheld the dismissal of the section 1962(c) claims. Recognizing the Haroco distinction between section 1962(c) and section 1962(a), however, the court stated “[b]ecause a narrow reading of section 1962(a) . . . would insulate much criminal activity, and because the language permits a broader reading, that section must be read to allow corporations to serve both as the RICO person and as the RICO enterprise.”

Yet, as noted earlier, the language of section 1962(c) also “permits a broader reading.” Moreover, a narrow reading of section 1962(c) also “insulates much criminal activity.” If the racketeering activity produces a nonmonetary or untraceable benefit— or no benefit at all— section 1962(a) does not apply. Such activity by an entity is covered by sec-

166 Schofield, 793 F.2d at 30.
167 Id.
168 Id.
169 Id. at 33.
170 Id. at 33-34.
171 Id. at 32.
172 See supra notes 154-160 and accompanying text.
173 See full text of § 1962(a) quoted supra note 2. Disturbingly, the Court of Appeals for the Seventh Circuit in Liquid Air appeared to advance a requirement that the entity actually benefit from the racketeering before it may be subject to vicarious RICO liability. 834 F.2d at 1307 (“Respondent superior is therefore entirely appropriate under both subsections (a) and (b), so long as Bridges Welding derived a benefit from the violations.”). Inasmuch as an actual benefit is inherent whenever an entity invests the proceeds of racketeering in itself, it is true that § 1962(a) “requires” an actual benefit to the violator. However, “racketeering activity” includes a host of non-income-producing methods by which to acquire or maintain an interest in an enterprise in violation of § 1962(b). See supra note 19 (“racketeering activity” includes murder, kidnapping, arson, etc.).

That a person must actually benefit from a violation of law in order to be held liable for the violation seems bizarre as a general proposition. See Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir.) (“[B]enefit, at best is an evidential, not an operative fact”), cert. denied, 326 U.S. 734 (1945). It is directly at odds with civil RICO, which focuses upon the injuries to business or property sustained by victims of racketeering, not the benefits derived by perpetrators. See supra notes 10-13, 89 and accompanying text. Entity criminal liability is premised upon violations committed by employees or agents acting within the scope of their employment or authority and with the intention of benefiting their employers or principals. See supra note 62. Accordingly, the proper approach to determine an entity’s liability under RICO is to focus on whether the employees or agents in question intended to benefit their corporate employer or principal, not whether they actually did so. Cf. Petro-Tech v. Western Co. of North America, 824 F.2d 1349, 1361 (3d Cir. 1987) (quoted infra note 185) (attempt to benefit determinative).

Furthermore, the ability to sue under § 1962(a) at all may be limited in some jurisdictions by a rule of narrow construction other than the person-enterprise rule. Some courts have held that the injury required in order to sue for a § 1962(a) violation must flow specifically from the “investment or use” of the proceeds of racketeering activity, rather than the racketeering activity itself. See Gilbert v. Prudential Bache Sec., Inc., 643 F. Supp. 107, 109 (E.D. Pa. 1986); Heritage Ins. Co. v. First Nat’l Bank of Chicago, 629 F. Supp. 1412, 1417 (N.D. Ill. 1986). But see Louisiana Power and Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 805-07 (E.D. La. 1986). When combined with the person-enterprise rule under § 1962(c), the effect of this “investment rule” under § 1962(a) may be to insulate entities from RICO liability altogether. See Blakey & Cessar, supra note 18, at 585 n.237.
tion 1962(c), yet the person-enterprise rule effectively confers immunity upon entities when they violate this section by conducting their own affairs through a pattern of racketeering.174 As a result, plaintiffs injured by "non-profit" criminality are left without RICO's remedies, and entities engaged in such racketeering175 are left outside RICO's purview. This result appears contrary to both the statute's liberal construction clause,176 and its express provision for the dissolution or reorganization of any enterprise.177

2. Corporations in Associations in Fact

In Petro-Tech v. Western Co. of North America,178 the Court of Appeals for the Third Circuit affirmed the dismissal of a count alleging the vicarious liability of the defendant corporation and naming the corporation as the "enterprise" under section 1962(c).179 Significantly, in light of its earlier decision in B. F. Hirsch v. Enright Refining Co.,180 the court allowed to stand a similar derivative liability count under section 1962(c) which named the corporation as part of an association in fact consisting of the defendant corporation and some of its employees.181 The ability to plead around the person-enterprise rule in this fashion has been cited as indicative of the weakness of the rule.182 Earlier cases in the Third Circuit appeared to leave open this possibility, but implied that the plaintiff might still have to establish that the association in fact had an organizational structure identifiably separate from that of the corporation itself.183 Without this or a similar requirement, it is difficult to see how Petro-Tech does not allow "corporate liability in fact" under section

174 See Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 32 n.3 (1st Cir. 1986).
175 The classic example of such an enterprise may be a corrupt union. See, e.g., United States v. Local 560 Int'l Bd. of Teamsters, 581 F. Supp. 279 (D.N.J. 1984), af'd, 780 F.2d 267 (3d Cir. 1985), cert. denied, 106 S. Ct. 2247 (1986).
176 See supra note 13.
178 824 F.2d 1349 (3d Cir. 1987).
179 Id. at 1359-60.
180 751 F.2d 628 (3d Cir. 1984).
181 824 F.2d at 1361-62.
183 In United States v. Riccobene, 709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849 (1983), the Third Circuit enumerated three prerequisites for an enterprise: (1) an ongoing organization (2) a functioning of the associates as a continuing unit and (3) an existence of the enterprise separate and apart from the pattern of racketeering activity in which it engages. 709 F.2d at 221-23 (citing Turkette, 452 U.S. at 583). Eighth circuit decisions originated these requirements. See United States v. Bledsoe, 674 F.2d 647, 694 (8th Cir. 1982) (enterprise must have "some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering."); cert. denied, 459 U.S. 1040 (1982); see also United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980) (association in fact must have "an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the pattern of racketeering activity.").

A corporation would appear to fulfill such requirements automatically via incorporation. Whether an association in fact comprised of a corporation and its employees would need to have an organizational structure separate and apart from that of the corporation (in addition to being separate and apart from the pattern of racketeering) remains uncertain after Petro-Tech. See Seville Indus. Mach. v. Southmost Mach. Corp., 567 F. Supp. 1146, 1153-54 (D.N.J. 1983) (noting distinct "person""enterprise" issue but declining to reach the question), modified, 742 F.2d 786, 790 (3d Cir. 1984) (also noting distinct "person""enterprise" issue but declining to reach the question), cert. denied, 469 U.S. 1211 (1985).
1962(c), contrary to the rule in *Enright*. As such, it is not clear whether *Petro-Tech* pays *Enright* homage or lip service.

That Congress intended a single corporation to be described as an association in fact comprised of itself and its employees seems doubtful in light of the fact that the statutory definition of "enterprise" already includes a corporation.\(^\text{184}\) The differences between an association in fact and a corporation were noted in Part III.\(^\text{185}\) Arguably, the reason RICO includes a corporation, but not an association in fact, in its definition of "person" is to avoid precisely the result of the person-enterprise rule: immunizing corporations from liability for conducting their own affairs through a pattern of racketeering activity.\(^\text{186}\) Strangely however, it appears that if a corporation may be a member "person" of an association in fact "enterprise" comprised of itself and its employees, the person-enterprise rule is circumvented— and the corporation may then be liable under the same respondeat superior principles that it would have been liable under had it originally been named as both the "person" and the "enterprise."\(^\text{187}\)

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\(^\text{184}\) See statutory definition of "enterprise" quoted supra note 17.

\(^\text{185}\) See supra notes 72-76 and accompanying text.

\(^\text{186}\) As noted earlier, the notion that an association may not legally hold property in a way distinct from the personal holdings of its members underpins the reasoning of the person enterprise rule. See supra note 75. Presumed incapable of holding a legal or beneficial interest in property, associations therefore do not qualify as "persons" under RICO. In this way, a distinction between member-persons and association-enterprises is inherent in situations where the enterprise is an association in fact. Thus, the person-enterprise rule does not apply in such situations. As noted earlier, however, there may be a problem when one of the members of an association in fact is a legally recognized artificial entity. See supra note 120 and accompanying text.

In fact, associations may be able to hold property in a way that is distinct from the personal holdings of its members. See United States v. Thevis, 474 F. Supp. 134, 142 (N.D. Ga. 1979) (discussing forfeiture under RICO): "[T]he ... natural interpretation is that an 'interest' [in the RICO enterprise] is akin to a continuing proprietary right in the nature of a partnership or stock ownership." If this is the case, then associations in fact are "persons," entities capable of holding a beneficial interest in property, as well as "enterprises." A consistent application of the person-enterprise rule would therefore appear to require that the rule be applied to situations where the alleged enterprise is an association in fact. Such an application of the rule would shield even the traditional organized crime family (an association in fact) from RICO liability.

In sum, with respect to associations in fact, the person-enterprise rule is unprincipled in both its reasoning and application. Even if its underlying assumptions about the nature of association property are correct, the rule is inconsistently applied. However, a consistent application of the rule would remove even stereotypical organized crime from RICO's purview. The rule should therefore be rejected as directly contrary to the statute.

\(^\text{187}\) Cf. Petro-Tech v. Western Co. of North America, 824 F.2d 1349, 1361 (3d Cir. 1987):

The enterprise in Count IV is alleged to be an association in fact consisting of Western [the corporation] and the individual defendants [Western employees]. Because Western is alleged to have attempted to benefit from its employees' racketeering activity, it is appropriate to allow the victims of that activity to recover from Western. Moreover, although Count IV is brought against Western under § 1962(c), theories of respondeat superior and aiding and abetting liability are not out of place here because under Count IV Western is not alleged to be an enterprise. Holding Western liable under those theories is therefore not inconsistent with the *Enright* rule that § 1962(c) enterprises may not be held liable.

While *Petro-Tech*'s recognition of such theories of liability under RICO is admirable, the reasoning by which the court arrived at this result is nevertheless subject to criticism. Although the court acknowledged that "[t]he doctrine of aiding and abetting is simply one way that an individual can violate the substantive criminal laws," 824 F.2d at 1357, the court seemed unaware that RICO, a substantive criminal law itself, is codified as part of the federal criminal code. As such, 18 U.S.C. § 2 is the proper point of departure for analyzing aiding and abetting questions under RICO, and not merely an illustrative example of the doctrine of aiding and abetting in action. Further evidencing the court's loosely reasoned analysis, the court observed that some courts have recognized aiding
The spectre of this new "incorporated association in fact," raised as a direct result of the person-enterprise rule, has apparently caused the American Bar Association's RICO Coordinating Committee to propose amending section 1962(c) to require that the "'person'. . . not be a part of an affiliated group whose membership also includes the "enterprise." While this amendment accomplishes the person-enterprise rule immunity for associations in fact which are really corporations, it also immunizes those associations in fact which are, in fact, associations in fact. Thus, where some courts apparently treat both person-enterprise rule immunized corporations and non-immunized associations in fact as associations in fact, the proposed amendment would treat both corporations and associations in fact like corporations immunized by the person-enterprise rule. The result would be to make make even the classic organized crime family immune from section 1962(c) liability. Interestingly, given Computer Sciences and progeny, this very result appears imminent in the Fourth Circuit even without such an amendment to RICO.

3. Intracorporate Conspiracies

Relying principally on antitrust intracorporate conspiracy cases, district courts have precluded similar actions under section 1962(d) as attempts to circumvent the person enterprise rule. In Landmark Savings and abetting liability under the federal securities laws. In an apparent attempt to underscore the openness of the aiding and abetting question under RICO, the court then proceeded to note that Petro-Tech was "not a securities case . . . ." Id. The fact that Petro-Tech was not a securities case, however, should have provided the court with even more reason to apply 18 U.S.C. § 2. RICO, unlike the federal securities laws, is codified along with the federal aiding and abetting statute as part of Title 18. See supra note 85. Notably, the Schofield court committed a similar analytical error. See Schofield, 793 F.2d at 33 ("The present case is unlike A.S.M.E. [an antitrust case] or Atlantic Financial Management [a securities case].").

189 See Blakey & Cessar, supra note 18, at 583.
190 "We conclude 'enterprise' was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designated to prohibit . . . ." United States v. Computer Sciences, 689 F.2d 1181, 1190 (4th Cir. 1982) [emphasis added]; Entre Computer Centers, Inc. v. FMG of Kansas City, Inc., 819 F.2d 1279, 1287 (4th Cir. 1987).
191 The intracorporate conspiracy doctrine traces its roots to Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953). In Nelson, the court declared it is "the basic law of conspiracy that you must have two persons or entities to have a conspiracy. . . . A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." Id. at 914. More recently, in Copperweld v. Independence Tube Corp., 467 U.S. 769 (1984), the Supreme Court reasoned that because "agreements among [officers of the same corporation] do not suddenly bring together economic power that was previously pursuing divergent goals," intracorporate conspiracies are outside the scope of Section 1 of the Sherman Act.

In relevant part, Section 1 of the Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared illegal shall be guilty of a felony . . . .

Section 2 also prohibits conspiracy. In relevant part, that section provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .
and Loan v. Rhoades, Hornblower & Co., the court held that a cause of action under section 1962(d) does not exist for conspiracies between a corporation and its employees acting within the scope of their employment. The Landmark decision has become the prevailing view.

Unlike the antitrust laws, however, RICO is not solely concerned with concerted action by distinct economic entities; RICO is concerned with eliminating sophisticated forms of crime. A rule that shields intracorporate conspiracies from the statute seriously impairs


["[Although it may be characterized as 'basic' that conspiracy requires two persons in the sense of two minds, it is not basic to all forms of conspiracy that two entities or two persons, in the sense of two business associations, be involved. Id. at 1162. See also supra note 146. Notably, Copperweld's decision that a parent corporation and its wholly owned subsidiary were "incapable of conspiring with each other for purposes of Section 1 of the Sherman Act," 467 U.S. at 777, was not based on any intracorporate conspiracy doctrine. Commenting on the doctrine, the court stated:"

The intra-enterprise conspiracy doctrine looks to the form of an enterprise's structure and ignores the reality. Antitrust liability should depend not on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary.

Id. at 772. See also Welling, supra at 1163 ("A more pertinent question is whether the corporation can be held as a conspirator for the acts of more than one of its agents.")."

Rather than relying on an intracorporate conspiracy doctrine, the Court based its decision on the purposes of the Sherman Act:

The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively.

Copperweld, 467 U.S. at 769. A similar analysis of the purposes behind RICO, however, would yield a different result. It is precisely because of the "reality" of organizations, namely that they can act only through their agents, that intracorporate conspiracies to commit unlawful acts should be recognized. Nevertheless, courts have extended the scope of Copperweld beyond the antitrust area and barred RICO intracorporate conspiracy claims. See Fabrico Mfg. Corp. v. Wilson Sporting Goods Co., No. 85 C 71 (N.D. Ill. May 22, 1985) (LEXIS, 1987 U.S. Dist. LEXIS 3413). The application of Copperweld to RICO was, however, properly rejected in Haroco, Inc. v. American Nat'l Bank and Trust Co., 747 F.2d 384, 403 n.22 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985).

Courts have also applied an anti-intracorporate conspiracy doctrine in civil rights cases. In Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972), the court stated that "the fact that two or more agents participated in the decision or in the act itself will not normally constitute the conspiracy contemplated by [42 U.S.C. § 1985(3) (1982)]." Although Dombrowski is the majority rule, see Welling, supra, at 1169, many courts have made exceptions, or abandoned it altogether. See Strathos v. Bowden, 728 F.2d 15 (1st Cir. 1984) (Dombrowski not followed); Novotny v. Great Am. Fed. Sav. and Loan Ass'n., 584 F.2d 1235 (3d Cir. 1978), vacated and remanded on other grounds, 442 U.S. 366 (1979) (Dombrowski not followed); Augst v. J. C. Penney Co., 456 F. Supp. 370 (W.D. Pa. 1978) (appearing to recognize an exception for continuing instances of discrimination); Beamon v. W.B. Saunders Co., 413 F. Supp. 1167, 1176-77 (E.D. Pa. 1976) (recognizing an exception when individuals represent distinct 8 decision-making units within corporation); Rackin v. University of Pa., 386 F. Supp. 992, 1005 (E.D. Pa. 1974) (recognizing an exception for continuing instances of discrimination); See generally Welling, supra, at 1171 & nn.83-89. Professor Welling labelled the Dombrowski rule a "manifestation of the court's desire to limit section 1985(3) [that] is not based on requirements of conspiracy law, but instead reflects a concern related exclusively to section 1985(3)." Welling, supra, at 1173. It appears a similar evaluation could be made of many courts' interpretation of RICO § 1962(d).

193 Id. at 209.
194 See cases cited supra note 122.
196 See supra note 12 and accompanying text.
RICO's effectiveness for this purpose. Recognizing this problem, some courts have rejected the intracorporate conspiracy prohibition.  

D. Expansion by Limitation

In a final irony, the person-enterprise rule threatens to encourage a "flood" of claims premised on the civil standard of entity liability. Courts, preoccupied with the "metaphysical or ontological" question of person-enterprise distinctness, have generally failed to clarify how a corporation may be held liable under RICO. In American Society of Mechanical Engineers v. Hydrolevel, the Supreme Court acknowledged that absent clear congressional indication to the contrary, the normal rules of agency apply to a federal statute.

Much of the ASME opinion may go too far for RICO purposes, however. If the civil rules applied, a corporation could be liable under an apparent authority theory without the requirement that the employee intended to benefit the corporation. Unlike the antitrust laws, RICO is codified as part of the criminal code. As such the normal rules of agency that should apply would appear to be those of the criminal, not the civil, law.

VI. An Alternative Approach

There is a need for a clear articulation of the standards of entity liability under RICO. To date, the courts have not only developed their own indiscriminate interpretation of RICO, but inspired others to do the

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201 See supra note 48.

202 See supra note 85 (discussing difference between code titles which have and have not been enacted into positive law).

203 See United States v. Local 560 Int'l Blvd. of Teamsters, 581 F. Supp. 279, 322 n.30, 337 (D. N.J.) (rules for aiding and abetting liability are those of the criminal, not the civil law despite civil character of case), aff'd, 780 F.2d 267, 284 (3d Cir. 1985), cert denied, 106 S. Ct. 2247 (1986).

204 Concededly, given the weight of authority, asserting that the "person" need not be distinct from the "enterprise" may be like arguing that anyone other than Columbus discovered America. Nevertheless, some courts appear to be moving away from the person-enterprise rule without acknowledging it directly. In Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, Nos. 86-5135, 86-5316 (D.C. Cir. Feb. 12, 1988) (LEXIS, 1988 U.S. App. LEXIS 1791), for example, the court recognized the person-enterprise rule but also noted that under the rule requiring distinct entities, "however, § 1962(c) liability usually cannot be imposed on those organizations created solely for illegal purposes and operated to the detriment of third parties by corrupt directors or controlling partners." Id., slip. op. at 14. The court went on to describe Hartley as "an exception to the non-identity rule [i.e., the person-enterprise rule]... for the institution that functions as both 'perpetrator' and 'victim'..." Id. Hartley, it seems, should not be the exception.
same. Defining the appropriate criteria involves avoiding two equally undesirable outcomes. On the one hand, complete denial of the existence rather the rule. Traditional criminal entity liability standards are already capable of distinguishing “perpetrators” from “victims” without the help of the person-enterprise rule.

Perhaps the most encouraging opinion is the Third Circuit’s Petro-Tech. There, the court seemed to recognize the possible existence of an association in fact comprised only of a corporation and its employees. While the exact consequences of this recognition remain uncertain, see supra notes 177-187 and accompanying text, the court conceded that any liability the corporation might incur would be based on theories of respondeat superior. See supra note 187.

By contrast, in D & S Auto Parts, Inc. v. Schwartz, No. 86-3140 (7th Cir. Feb. 4, 1987) (LEXIS, 1988 U.S. App. LEXIS 1535), the Court of Appeals for the Seventh Circuit ostensibly denied the existence of respondeat superior liability under RICO. However, the court’s holding appeared to rest upon its finding that the employee in question acted without the intent to benefit his corporate principal. Disturbingly, the court drew a distinction between “direct” and “vicarious” corporate liability in denying respondeat superior under RICO. As noted earlier, all corporate liability is necessarily vicarious. See supra notes 79-82 and accompanying text. Furthermore, corporate criminal liability traces its origin to the doctrine of respondeat superior. See supra notes 62, 81.

In Fed. Sav. and Loan Ins. Corp. v. Shearson-American Express, Inc., 658 F. Supp. 1313 (D. P.R. 1987), the court held that respondeat superior applied to RICO. Interestingly, the court started its analysis from section 1964(c), rather than from section 1962(c). “Certainly,” the court stated, “Section 1964(c) does not on its face restrict the possible range of defendants so as to exclude persons vicariously liable.” Id. at 1341. The court noted the liberal reading of RICO’s treble damages provision made by the Supreme Court in Sedima and also the “broad purpose” of the statute noted by the court in Turkette. Additionally, as the Bernstein court had done, the FSLIC court found ASME’s reasoning applicable to RICO actions.

Distinguishing Schofield, the Puerto Rico district court stated “the [Schofield] court did not reject the applicability of respondeat superior to . . . subsections of 18 U.S.C. § 1962 [other than § 1962(c)], and did not consider situations where the victimized enterprise was the plaintiff in the case. Id. at 1342. Commenting on the case before it, the FSLIC court noted, “According to the pleadings, the infiltration of Home Federal, a legitimate business, was accomplished under the cloak and status of defendant[s] . . . high position as a Shearson . . . employee and officer . . . it would be inconsistent with the remedial purposes of the Act not to permit Home Federal a § 1962(c) claim against its infiltration in these circumstances. Id.

Because the enterprise was the plaintiff in the case, Judge Acosta in FSLIC did not need to consider the person-enterprise rule. Nevertheless, the court’s recognition of vicarious corporate liability under § 1962(c) despite Schofield seems significant. RICO does not contain any qualification that the plaintiff be an enterprise any person injured in business or property as a result of a violation of § 1962(c) may sue. See supra note 89 and accompanying text. If vicarious corporate liability exists when the injured plaintiff is an enterprise: it ought also exist when the injured plaintiff is a person though not the enterprise. That is, after all, what the statute suggests. See 18 U.S.C. § 1964(c) (1982).

The seemingly endless potential for bizarre results created by the person-enterprise rule, coupled with the apparently baseless justifications for the rule itself, should argue strongly for the rule’s reconsideration. Some have proposed applying the superior agent rule, discussed supra note 62, to RICO. See Lacovara and Nicoli, Refocusing the “Racketeer Influenced and Corrupt Organizations Act” on “Corrupt Organizations,” 2 Civ. RICO Rep. (BNA) at 1 (May 5, 1987). Early RICO cases appeared to leave open the possibility of corporate liability under § 1962(c), despite a person-enterprise identity, for the acts of high managerial agents. See, e.g., Parnes v. Heinhold Commodities, 548 F. Supp. 20, 23-24 & n.9 (N.D. Ill. 1982) (“[The plaintiffs] have tried to reshape a conventional (alleged) fraud, perpetrated by lower-level corporate executives acting without corporate sanction (albeit conducting themselves within the scope of their authority for common-law purposes), into a § 1962(c) RICO violation by the corporation.”). See generally Starr, supra note 200, at 91-112. (“Alternatively, some of the cases may perhaps be read, not as precluding the application of respondeat superior but rather as precluding only the pristine form of the doctrine.”) Later cases, however, appear to foreclose even this possibility where the corporation is both “person” and “enterprise.” See, e.g., Schofield, at 32 n.3 (“We think even a conditional approach to respondeat superior is inconsistent with our prior conclusion on direct liability [under § 1962(c)] and so we choose not to adopt it.”). Notably, however, the superior agent rule is the general rule of entity liability in some jurisdictions that have adopted “little RICO” statutes. It must therefore be applied to such state law claims. Compare, supra note 62, with COLO. REV. STAT. §§ 18-17-101-109 (1986); GA. CODE ANN. §§ 26-3401-14 (1988). Moreover, for the situation where the entity is the defendant “person” though not an “enterprise,” at least one federal district court has recognized the potential...
of corporations that conduct their own affairs through racketeering reduces the statute's effectiveness toward "providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."205 On the other hand, it would be a perverse result indeed if RICO, the statute designed to eliminate the influence of organized crime, were to become the vehicle for allocating the damage done by racketeering activity as an inevitable cost of doing legitimate business.206

Achieving the proper medium between these two extremes requires understanding two equally complex schemes. On the one hand, there


The dual nature of statutory treble damages and the remedial purposes of RICO, however, argue against the wisdom of the additional layer of protection provided for corporations and other artificial entities by the superior agent rule. More importantly, the superior agent rule simply is not the general rule in the federal system. See supra note 62. Traditional principles already exclude entities from liability when employees act solely for their own benefit. They also exclude entities that are victims of their employees' actions. Those injured by a RICO violation committed for the benefit of the corporation should be entitled to a RICO remedy regardless of the corporate rank of the violator.

In addition to any policy reasons which might favor rejection of the superior agent rule under RICO, however, are more fundamental problems of statutory construction. Applying the superior agent rule to RICO would result in two different ways to "violate" RICO: a way for civil purposes, and a way for criminal purposes. See 18 U.S.C. § 1963(a) (1982) ("Whoever violates any provision of section 1962 of this chapter . . ."); 18 U.S.C. § 1964(c) (1982) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter . . ."). That such a result should be avoided is well established. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 488 (1985) ("§ 1963 and § 1964 impose consequences, criminal and civil for 'violations' of § 1962. We should not lightly infer that Congress intended the term to have wholly different meanings in neighboring subsections.") (footnote omitted). See also Northern Sec. Co. v. United States, 193 U.S. 197, 401-402 (1904) (Holmes, J., dissenting) ("[W]ords cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one of the other sort. . . . So I say we must read the words before us as if the question were whether two small exporting grocers should go to jail.").

The interpretive problem with applying the superior agent rule to civil RICO cases lies in the fact that Congress provided that prior criminal RICO convictions shall have preclusive effect in subsequent civil RICO suits. 18 U.S.C. § 1964(d) (1982). Given the absence of express language adopting the superior agent rule, and the fact that scope of employment plus intent to benefit has been the general rule since the turn of the century, it is highly doubtful that Congress intended the superior agent rule to govern criminal RICO cases. See supra note 62. Furthermore, if Congress had intended the superior agent rule to govern civil RICO cases, it seems equally doubtful that Congress would have provided that a criminal conviction under a less restrictive standard should have preclusive effect in a subsequent civil case.

Application of traditional criminal corporate liability principles should find favor with friends and enemies of RICO alike. For not only do such principles expand RICO to accomplish its remedial objectives, they also limit RICO. Mere apparent authority would not suffice for civil RICO liability as it does for civil antitrust liability. The conduct of the employee would also have to be undertaken with the intent to benefit the corporate principal. Where no such intent to benefit could be found, the corporation would be absolved. See infra note 215. Moreover, where the corporation is itself a victim of racketeering activity, it, like any other victim, would not be held liable. See supra note 59. Thus, plaintiffs could rejoice at the relatively uncomplicated, widely-accepted, principled avenue to recovery from corporations whose employees undertake to benefit their employers through racketeering. Similarly, traditionally legitimate corporations could revel in the layer of insulation, albeit not impermeable, provided by the criminal standards of liability. Such standards appear to border on the Machiavellian for the purpose of limiting civil RICO liability to its proper bounds due to criminal respondeat superior's relatively uncomplicated, widely-accepted, and principled rationale. Cf. D & S Auto Parts (LEXIS, 1988 U.S. App. LEXIS 1535) ("An employee violating RICO without his employer's knowledge is highly unlikely to be acting for his employer's benefit.").

205 See supra note 10 and accompanying text.
206 See Judicial Efforts, supra note 23, at 606.
are the common legal distinctions between theories of liability. On the other hand, there is RICO.

In their attempt to limit corporate liability under RICO to its proper bounds, courts appear to have sought opportunities to turn the statute's language against itself rather than to adapt traditional principles of entity liability to RICO. Thus, because a corporation fits the statutory definitions of both "person" and "enterprise," courts have pondered whether the same corporation may be both a "person" and an "enterprise" at the same time. Their answer to this question appears to be "sometimes," i.e., "under some subsections." Which subsections vary with the jurisdiction.\textsuperscript{207} With respect to subsection 1962(c), however, the answer is more uniform. Under that subsection, not only must there be a "person" and an "enterprise," but there must be an employment or associative relationship between the two. As a result courts have also posited the question whether a corporation may be "employed by or associated with" itself. Their answer to this other question appears to be a flat "no."\textsuperscript{208}

In sum, the majority approach has been to contemplate whether certain person-enterprise relationships may exist in statutory parlance, rather than to articulate when the actual existence of such relationships may result in statutory liability.

The proper inquiry is not whether a corporation may be both the "person" and the "enterprise" at the same time.\textsuperscript{209} When a corporation is precluded from playing both roles, it cannot violate RICO by investing in itself or conducting its own affairs through criminal activity. Nor is the proper question whether a corporation may be employed by or associated with itself through an employee. A corporation can act only through its employees and agents. Phrasing the issue in the majority's terms distorts this reality. The question should be whether, if a person is "employed by or associated with" the corporation, the corporation may be liable for that "person's" RICO violation.

Principles of agency and respondeat superior have historically provided the answer to the question whether a corporation may be liable for the illegal actions of its employees and agents. Courts appear to recognize, however, a distinction between the way agency and respondeat superior principles have been applied in criminal cases versus civil cases. In a recent civil antitrust case, for example, the Supreme Court suggested that vicarious civil liability may be imposed upon a corporation even though the employee may have acted without the intent to benefit the corporation.\textsuperscript{210} Courts hearing criminal cases, however, have historically insisted upon an intent to benefit requirement.\textsuperscript{211}

Generally, the criminal law attributes to the corporation the unlawful conduct of employees or agents who act within the scope of their em-

\textsuperscript{207} See supra notes 110-113 and accompanying text.
\textsuperscript{208} See supra note 110.
\textsuperscript{209} See Blakey & Cessar, supra note 18, at 582 ("In law ... the right answer usually depends on putting the right question.") (quoting Estate of Rogers v. Commissioner, 420 U.S. 410, 413 (1943) (Frankfurter, J.).)
\textsuperscript{210} See supra note 48 and accompanying text.
\textsuperscript{211} See supra note 62 and accompanying text.
ployment or authority and with the intent to benefit the corporation.\textsuperscript{212} Conversely, actions taken by employees or agents for purely personal motives are normally considered to be their actions alone.\textsuperscript{213} When corporations are themselves victims of their employees acts of racketeering, then an established doctrine of the criminal law excuses the corporation from liability.\textsuperscript{214} The penal component of civil RICO's treble damages remedy,\textsuperscript{215} and the independently criminal character of the underlying acts of racketeering RICO requires,\textsuperscript{216} favor the application of such criminal standards of entity liability to all RICO cases, civil and criminal.

VII. Conclusion

Clearly, RICO prohibits an employee from conducting or participating in the affairs of his corporate employer through a pattern of racketeering activity.\textsuperscript{217} Given a violation of the statute by the employee, the inquiry should focus on whether that violation may be attributed to the corporation. Established criminal principles provide a response to this inquiry when employees take advantage of their employer's corporate form for the purpose of organized criminal activity, and these principles do so in a manner that honors RICO's aims and avoids harsh results. Whether liability will be imposed upon a corporation turns on the facts of the particular case.\textsuperscript{218}

In fashioning the person-entreprise rule to protect victim corporations from derivative liability under RICO, the courts have embarked on a road that they ought not have taken and made a difference they should regret.\textsuperscript{219} The rule operates to immunize corporations from liability independent of the facts of a particular case. The rule thus precludes the

\textsuperscript{212} Id.
\textsuperscript{213} See, e.g., Standard Oil Co. of Tex. v. United States, 307 F.2d 120, 128 (5th Cir. 1962): 
"[W]hile benefit is not essential in terms of result, the purpose to benefit the corporation is decisive in terms of equating the agent's action with that of the corporation . . . . Thus the taking in or paying out of money by a bank teller, while certainly one of his regular functions, would hardly cast the corporation for criminal liability if in such 'handling' the faithless employee was pocketing the funds as an embezzler or handing them over to a confederate under some ruse."
\textsuperscript{214} See supra note 59 and accompanying text.
\textsuperscript{215} See supra text accompanying notes 88-92.
\textsuperscript{216} See statutory definition of racketeering activity quoted supra note 19.
\textsuperscript{217} See full text of § 1962(c) quoted supra note 2. Oddly enough, at least one court has taken the dubious position that, because corporations can act only through their agents, the agents themselves are also immune from personal liability when they act within the scope of their employment. See Ellis v. Merrill Lynch & Co., 664 F. Supp. 979, 982 (E.D. Pa. 1987).
\textsuperscript{218} See, e.g., Standard Oil Co. of Tex. v. United States, 307 F.2d 120 (5th Cir. 1962).
\textsuperscript{219} (With apologies to R. Frost, \textit{The Road Not Taken.}) The premise of this note has been a simple one: there is a way entity liability issues are normally handled, a way they have been handled under RICO, and a difference between the two. Common sense demands that courts should not make the job of the "private prosecutors" that RICO enlists any more difficult than the task of their public counterparts.

Since its inception in the early 1980s, the person-entreprise rule appears to have made everyone's task more difficult. It has drawn judicial attention away from considering the substance of a RICO violation, and toward contemplating a host of bizarre legal concepts. After judges first foreclosed "directly" naming the same corporation as both the "person" and the "enterprise," plaintiffs attempted to circumvent the rule by naming the employee as the "person" and the corporation as the "enterprise" vicariously liable under a theory of respondeat superior. Now that many judges have been forced to foreclose the respondeat superior alternative in order to protect their person-
consideration of potentially meritorious claims under section 1962(c) in particular, and confounds the application of entity liability standards under RICO in general. Existing criminal law principles distinguish the racketeer influenced from the racketeer victimized. The person-enterprise rule does not. Existing criminal law principles operate consistently with the purposes of RICO. The person-enterprise rule does not. Accordingly, courts should abandon the person-enterprise rule and apply established criminal principles of entity liability to RICO cases.

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enterprise rule, plaintiffs have responded, with varying degrees of success, by pleading intracorporate associations in fact.

Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, Nos. 86-5135, 86-5316 (D.C. Cir. Feb. 12, 1988) (LEXIS, 1988 U.S. App. LEXIS 1791) may foreshadow the next consequences of the person-enterprise rule. Plaintiffs, following the lead of those in Yellow Bus, may name themselves as the enterprise in order to get around the person-enterprise rule. Notably, the definition of enterprise includes individuals. 18 U.S.C. § 1961(4) (1982); see supra note 17 for full text.

Some plaintiffs who attempt to follow the Yellow Bus road, however, may run as well into the Yellow Bus wall. See generally, Cohen, In This Issue, [1988] 7 RICO L. Rep. 394, 395 (RLR). This is because § 1962(c) requires the plaintiff to demonstrate that the defendant conducted or participated in the affairs of the named “enterprise” (i.e., the plaintiff itself) through a pattern of racketeering activity. However, the plaintiff’s injury may have resulted from only a single act of racketeering, which, although comprising part of the defendant—“person’s” pattern of criminal behavior, arguably might not constitute the necessary “pattern” with respect to the affairs of the plaintiff—“enterprise.” Indeed, Yellow Bus suggests that if such a single act—even though part of a larger pattern—were to qualify as a pattern with respect to the plaintiff—“enterprise,” then § 1962(c)’s “conduct. . .through” language would be “reduced to surplusage.” Cohen, supra, at 395.

The Yellow Bus wall would not, however, be necessarily insuperable if the “pattern” of acts were held to include acts directed toward other enterprises or victims, as in Town of Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263, 1268 (3d Cir. 1987) (following Marshall & Ilsley Trust Co. v. Paye, 819 F.2d 806, 809 (7th Cir. 1987). Even without the person-enterprise rule’s prohibition against defendant—“enterprises”, if courts do not adopt this broader definition of pattern, then § 1962(c) itself would arguably reduced to surplusage as a pattern offense. See Cohen, supra, at 396.

For the most part, this note had discussed federal cases. Obviously, state courts, which have not yet interpreted the language of similar state legislation (“little RICOs”) ought not follow the misdirection of federal jurisprudence. Unfortunately but understandably, at least one federal court has looked to the federal RICO cases for “guidance” in interpreting an analagous state racketeering law. Michelson v. Merrill Lynch Pierce Fenner & Smith, Inc., 669 F. Supp. 1244, 1250 (S.D.N.Y. 1987) (interpreting New Mexico Racketeering Act). As unjustifiable as the rule is for federal RICO, however, it is arguably more so for state RICOs—especially in those states which have already expressly adopted the superior agent rule as their general rule of entity criminal liability. See supra note 204.

In addition to the possibility that state courts might reject the person-enterprise rule in state RICO cases, there is the hope that Congress will require federal courts to abandon the rule in federal RICO cases. Legislation has been introduced that would set aside the person-enterprise rule. See H.R. 3240, 100th Cong., 2d Sess. § 7 (1987); 133 Cong. Rec. E 3361-62 (Aug. 7, 1987) (statement of Rep. Conyers) (“If the [person-enterprise] rule were applied to the association in fact theory in a prosecution of an organized crime family, it would abort the prosecution.”)