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Philip A. Lacovara

David P. Nicoli

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# VICARIOUS CRIMINAL LIABILITY OF ORGANIZATIONS: RICO AS AN EXAMPLE OF A FLAWED PRINCIPLE IN PRACTICE

PHILIP A. LACOVARA & DAVID P. NICOLI\*

## INTRODUCTION

Under the current federal doctrine of vicarious criminal liability, an "organization"<sup>1</sup> is held criminally responsible for crimes committed by its agents within the scope of their employment and with the intent to benefit the organization.<sup>2</sup> The scope of the doctrine is exceedingly broad; it imposes liability regardless of the agent's position in the organization,<sup>3</sup> and even if the criminal conduct was in defiance of express company policy.<sup>4</sup> The doctrine also does not discriminate; the multinational corporation with thousands of employees whose field-level salesman commits a criminal act<sup>5</sup> is as criminally responsible as the small corporation

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\* Mr. Lacovara, former Deputy Solicitor General of the United States for criminal matters, is the managing director & general counsel of an investment banking firm. Mr. Nicoli practices law in the Washington, D.C. office of Arnold & Porter.

<sup>1</sup> Unless otherwise noted, the term "organization" refers to all types of profit and non-profit entities that the law recognizes as having a distinct existence separate from the people who own, direct, or operate them, with the exception of government units, their subdivisions, and agencies. Thus, the term refers to entities such as corporations, associations, partnerships, societies, and labor unions. Cf. 1 U.S.C. § 1 (1988) ("words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies and joint stock companies").

<sup>2</sup> See *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247 (1979) [hereinafter *Developments*]. The differing approaches that the various states take with respect to imputed criminal liability are beyond the scope of this Article. For a general discussion of this area, see Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 629-34 (1988).

<sup>3</sup> See, e.g., *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962) ("corporation may be criminally bound by the acts of subordinate, even menial, employees").

<sup>4</sup> See *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), cert. denied, 437 U.S. 903 (1978); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971).

<sup>5</sup> See generally 1 K. BRICKEY, *CORPORATE CRIMINAL LIABILITY* § 3:04, at 57-58 (1984) (because of corporate power to delegate authority to lower level employees, corporation

whose president and sole stockholder engages in criminal conduct.<sup>6</sup>

The current breadth of the imputed criminal liability doctrine has evolved because the federal courts have uncritically extended the common-law doctrine of *respondeat superior* into the criminal context.<sup>7</sup> In so doing, these courts have premised expanded criminal liability for organizations on a civil doctrine concerned first and foremost with the allocation of risk of loss caused by a harmful event.<sup>8</sup> The obvious flaw in this approach, however, is that liability based on *respondeat superior* does not require moral culpability,<sup>9</sup> which should be the basic and essential predicate underlying the imposition of virtually any criminal liability, even on an organization.<sup>10</sup>

The shortcomings of *respondeat superior* in the criminal context become particularly apparent when applied in conjunction with the "Racketeer Influenced and Corrupt Organizations Act" ("RICO").<sup>11</sup> Congress crafted RICO to play a very specific role in the fight against organized crime in the United States.<sup>12</sup> Through its severe criminal penalties and civil treble damage remedies, RICO was designed to thwart the infiltration of organized crime into legitimate businesses.<sup>13</sup> In actual practice, however, congressional intent has not been followed. Instead, legitimate businesses have become RICO's principal target. Perhaps no other factor has led more directly to this perverse result than the misguided rules of imputed organizational liability, *respondeat superior*, that many federal courts have adopted in interpreting the RICO statute.<sup>14</sup>

The American Law Institute's Model Penal Code ("MP Code")<sup>15</sup> and the Brown Commission's proposed Federal Criminal

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must remain responsible for their acts).

<sup>6</sup> See, e.g., *United States v. Empire Packing Co.*, 174 F.2d 16, 19-20 (7th Cir.), cert. denied, 337 U.S. 959 (1949) (act of president held to be act of corporation).

<sup>7</sup> See Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 39 (1957).

<sup>8</sup> See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS* § 70, at 500-01 (5th ed. 1984) [hereinafter PROSSER & KEETON].

<sup>9</sup> See Mueller, *supra* note 7, at 41-42.

<sup>10</sup> See, e.g., *United States v. United States Gypsum Co.*, 438 U.S. 422, 443 (1978) (court determined that "criminal offenses defined by the Sherman [Antitrust] Act should be construed as including intent as an element").

<sup>11</sup> See 18 U.S.C. §§ 1961-1968 (1988 & Supp. 1990). On October 15, 1970, President Nixon signed into law "The Organized Crime Control Act of 1970." See Pub. L. No. 91-452, 84 Stat. 941 (1970). Title IX of this package is the RICO statute. 18 U.S.C. §§ 1961-1968.

<sup>12</sup> See *United States v. Turkette*, 452 U.S. 576, 589 (1981).

<sup>13</sup> See *id.*

<sup>14</sup> See *infra* notes 71-111 and accompanying text.

<sup>15</sup> MODEL PENAL CODE (1985) (as adopted at 1962 annual meeting of American Law

Code ("FC Code")<sup>16</sup> urge the adoption of more discriminating standards of imputed criminal liability to remedy these serious flaws in our federal jurisprudence. Both codes focus on the conduct of high managerial officials in an organization to determine whether liability for criminal activity requiring intent should be imputed to the organization.<sup>17</sup> Essentially, this focus views high-level managerial officials as the "alter ego" of an organization because they establish and supervise the execution of the organization's policies.<sup>18</sup>

The MP Code and FC Code ensure that organizational criminal liability will turn appropriately on the moral culpability of those natural persons whose role in directing the affairs of the organization makes it fair and realistic to treat their conduct as a proxy for the organization's culpability.<sup>19</sup> This more discerning focus seems to represent sounder public policy and is better attuned to fundamental notions of criminal culpability. Thus, we urge in this Article that the federal courts, which have fashioned the existing rules of imputed criminal liability without congressional guidance or approval, reform those rules by adopting the principles embodied in the MP Code and FC Code.

We also urge here that the courts adopt the principles embodied in these approaches specifically with respect to organizational liability under RICO. As previously noted, legitimate businesses have become RICO's principal target, at least in applying the civil

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Institute in Washington, D.C., May 24, 1962).

<sup>16</sup> See *Final Report of the Nat'l Comm. on Reform of Federal Criminal Laws* (1971) [hereinafter *Final Report*].

<sup>17</sup> See MODEL PENAL CODE § 2.07(1)(c) (1985). The Model Penal Code and the proposed Code provide for broader rules of organizational liability for strict liability crimes. See *id.* § 2.07(1)(a), (5); *Final Report*, *supra* note 16, § 402(1)(d). These proposals recognize that, for some regulatory and health offenses, our jurisprudence permits criminal guilt without fault—strict liability—even for natural persons. See, e.g., *United States v. Park*, 421 U.S. 658, 676-78 (1975) (corporation's president criminally liable under federal Food and Drug Act for failing to correct unsanitary warehouse conditions even though unaware of such conditions). For a discussion of organizational liability for strict liability crimes and the standards for such liability, see Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View*, 35 VAND. L. REV. 1337, 1342-46 (1982).

<sup>18</sup> See, e.g., 1 K. BRICKEY, *supra* note 5, § 3:01, at 39-40 ("officers and directors at the policy-making level of the corporate hierarchy . . . responsible for the conduct of the company's business could be considered the 'alter ego' of the corporation and thus could be treated as extensions of the legal entity").

<sup>19</sup> MODEL PENAL CODE § 2.07 (1985) (explanatory note); *Final Report*, *supra* note 16, § 402 comment.

remedy tucked into this criminal statute.<sup>20</sup> Lenient and/or misguided approaches to organizational liability under RICO have been one of the main causes of the statute's errant aim.<sup>21</sup> The adoption of the principles embodied in the MP Code and proposed FC Code approaches to organizational liability for resolving such questions under RICO would go a long way toward redirecting the aim of the statute to its proper targets—those entities whose leaders engage in a morally culpable use of their organizational instruments, and thus fairly brand them as “corrupt organizations.”<sup>22</sup>

Part I of this Article will trace the development of current doctrines of imputed civil and criminal liability from their origin, and demonstrate how the criminal doctrine grew—mindlessly—out of the civil doctrine. Part II first will criticize this development in the criminal doctrine for its unjustifiable departure from the fundamental precepts of criminal law. Part II then will examine alternative approaches to the current federal imputed criminal liability doctrine and propose that the federal courts adopt the general approach suggested by the MP and FC Codes, which focus on the culpability of an organization's high-level managerial officials. Finally, Part III will discuss the rationale behind adopting this approach for RICO actions, since the indiscriminate use of *respondet superior* actually has distorted and confounded the statute's overarching goal of *protecting* legitimate organizations.

## I. THE GENESIS AND CURRENT SCOPE OF ORGANIZATIONAL LIABILITY STANDARDS IN THE CIVIL AND CRIMINAL CONTEXT

Organizations such as corporations are abstract, “artificial” entities<sup>23</sup> which typically lack the physical, mental, or moral capac-

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<sup>20</sup> See generally *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); *Report of the Ad Hoc Civil RICO Task Force*, ABA SEC. CORP., BANKING & BUS. LAW 55-56 (1985) [hereinafter *ABA Report*].

<sup>21</sup> See *Robinson v. Kidder, Peabody & Co.*, 674 F. Supp. 243, 248 (E.D. Mich. 1987); Lacovara & Nicoli, *Refocusing the “Racketeer Influenced and Corrupt Organizations Act” on “Corrupt Organizations.”* 2 Civil RICO Rep. (BNA) No. 47, at Part 2 (May 1987); Wright, *Organizational Responsibility for RICO Violations: Another Look*, 10 RICO L. Rep. 628, 629-30 (Nov. 1989); Note, *Judicial Efforts to Redirect an Errant Statute: Civil RICO and the Misapplication of Vicarious Corporate Liability*, 65 B.U.L. REV. 561, 598-605 (1985).

<sup>22</sup> Lacovara & Nicoli, *supra* note 21, at 1.

<sup>23</sup> *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (assumption of governmental power is improper act for corporation in violation of public policy).

ity to engage in wrongful conduct or to suffer punishment.<sup>24</sup> Consequently, early common law recognized that organizations could not be held directly liable for torts and crimes committed by their employees or agents.<sup>25</sup> Instead, the common law of torts applied the doctrine of "imputed" liability, more often called "vicarious" liability or *respondet superior*.<sup>26</sup>

### A. Organizational Liability for Torts

Under "primitive law," torts committed by servants, slaves, wives, and even inanimate objects were chargeable against their "owner."<sup>27</sup> Early English common-law courts, however, did not hold the master liable for his servant's torts unless the master had commanded the particular act at issue.<sup>28</sup>

The growing importance of commerce and industry and the concomitant rise in the importance of corporations and other business organizations, however, caused the common-law courts to revise their position.<sup>29</sup> Soon after 1700, common-law courts began to impose vicarious liability on organizations for the tortious acts of their agents.<sup>30</sup> From that point on, the inexorable march of the doctrine has been in the direction of more expansive organizational liability.

Under the modern civil doctrine of imputed liability, an organization will be held vicariously liable for those torts of its agents committed "within the scope of employment."<sup>31</sup> As Dean William Prosser and Professor Page Keeton have stated, however, "[t]his highly indefinite phrase . . . is obviously no more than a

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<sup>24</sup> 1 K. BRICKEY, *supra* note 5, § 2:01, at 14.

<sup>25</sup> *See id.*

<sup>26</sup> PROSSER & KEETON, *supra* note 8, § 70, at 500. Roughly translated, the term *respondet superior* means "let the higher up respond" to the demand for payment. Under this doctrine, organizations—among other entities—came to be held vicariously liable for their employees' tortious acts committed within the scope of employment. *Id.* Such vicarious liability "may well amount to absolute liability." Mueller, *supra* note 7.

<sup>27</sup> PROSSER & KEETON, *supra* note 8, § 70, at 500.

<sup>28</sup> F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 26.2, at 9 (2d ed. 1986) [hereinafter HARPER & JAMES]; PROSSER & KEETON, *supra* note 8, § 70, at 500.

<sup>29</sup> 1 K. BRICKEY, *supra* note 5, § 2:02, at 16-17; HARPER & JAMES, *supra* note 28; PROSSER & KEETON, *supra* note 8, § 70, at 500. *See generally* B. HUNT, *THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND 1800-67*, at 116-43 (1969) (tracing development of corporation as means for providing limited liability for owners of business).

<sup>30</sup> *See* PROSSER & KEETON, *supra* note 8, § 70.

<sup>31</sup> HARPER & JAMES, *supra* note 28, § 26.6, at 24; RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957).

bare formula to cover the unordered and unauthorized acts of the [employee] for which it is found to be expedient to charge the [employer] with liability."<sup>32</sup> As another commentator has put it, "[W]ithin the scope of employment' is a term of art signifying little more than that the employee's . . . [tort] must be committed in connection with his performance of some job-related activity."<sup>33</sup> Consequently, organizational liability under the "scope of employment" standard is extremely broad. Indeed, the "scope of employment" standard has been interpreted so broadly as to include acts by an employee expressly forbidden by the employer.<sup>34</sup>

Courts have provided numerous reasons to justify an organization's liability for the acts of its agents,<sup>35</sup> but the most widely accepted rationale is loss distribution.<sup>36</sup> The losses caused by an organization's employees are placed upon the organization because it is "just" that the organization, rather than the innocent party, bears any loss flowing from the employees' activities from which the organization seeks to profit.<sup>37</sup> Moreover, the organization is better able to absorb the losses as a cost of doing business since it can distribute the losses to society through increased prices for its products or by procuring insurance.<sup>38</sup>

A second rationale for vicarious liability that has emerged under modern law is its influence upon employer conduct. Although seen as a makeweight argument by some,<sup>39</sup> vicarious liability is deemed to give an organization greater incentive to be careful

<sup>32</sup> PROSSER & KEETON, *supra* note 8, § 70, at 502.

<sup>33</sup> 1 K. BRICKEY, *supra* note 5, § 3:01, at 40.

<sup>34</sup> HARPER & JAMES, *supra* note 28, § 26.7, at 24-25.

<sup>35</sup> PROSSER & KEETON, *supra* note 8, § 69, at 500.

[The principal] has a more or less fictitious "control" over the behavior of the servant; he has "set the whole thing in motion," and is therefore responsible for what has happened; he has selected the servant and trusted him, and so should suffer for his wrongs, rather than an innocent stranger who has had no opportunity to protect himself; it is a great concession that any man should be permitted to employ another at all, and there should be a corresponding responsibility as the price to be paid for it—or, more frankly and cynically, "In hard fact, the reason for the employers' liability is the damages are taken from a deep pocket."

*Id.* (quoting T. BATY, VICARIOUS LIABILITY 154 (1916)).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 500-01. The unstated premise underlying this justification is, of course, that the agent is likely to be judgment proof. See generally Note, *An Efficiency Analysis of Vicarious Liability Under the Law of Agency*, 91 YALE L.J. 168, 172 (1981) ("[a]nother proposed justification for vicarious liability is that it spreads the costs of torts to principals with 'deeper pockets' than their agents").

<sup>38</sup> PROSSER & KEETON, *supra* note 8, § 69, at 500-01.

<sup>39</sup> *Id.*

in the selection, instruction, and supervision of its employees, and to take every precaution to see that the organization's business is conducted safely.<sup>40</sup>

Notably, the majority of federal courts have not deemed it appropriate to impose vicarious liability on organizations with respect to punitive damages.<sup>41</sup> Punitive damages are awarded "for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example."<sup>42</sup> According to these courts, such purposes would not be fulfilled by making an employer automatically liable for the wanton acts of its low-level employees committed within the scope of their employment, particularly where the employees' acts contravene their employer's explicit policies and directions.<sup>43</sup> Accordingly, these courts permit the award of punitive damages

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<sup>40</sup> *Id.*; see P. ATIYAH, *VICARIOUS LIABILITY IN THE LAW OF TORTS* 16 (1967) (liability on employer encourages safer workplace); HARPER & JAMES, *supra* note 28, § 26.3, at 15 (liability imposed on employer is "pressure put in the right place to avoid accidents"); James, *Vicarious Liability*, 28 TUL. L. REV. 161, 163 (1954) (same). "[I]n more modern times it has been suggested that control is an important factor because the person in control is the person best placed to take precautions against accidents." P. ATIYAH, *supra*.

<sup>41</sup> See PROSSER & KEETON, *supra* note 8, § 2, at 12. The great majority of the federal courts follow this course as a result of the seminal decision of *Lake Shore & Michigan S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893), where the Supreme Court held that an organization had to authorize or ratify its agent's tortious acts before it could be held liable for punitive damages. *Id.* at 115; see, e.g., *Muratore v. M/S Scotia Prince*, 845 F.2d 347, 354-55 (1st Cir. 1988) (bareboat charterer not liable for punitive damages for employees' intentional infliction of emotional distress because of absence of authorization or ratification); *United States v. Ridglea State Bank*, 357 F.2d 495, 500 (5th Cir. 1966) (defendant employer not liable for double damages because "knowledge or guilty intent . . . will not be imputed to the employer"). *But cf.* *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982) (dicta criticizing *Prentice*). Some federal courts have somewhat expanded the *Prentice* rule to permit the imposition of punitive damages on an organization pursuant to section 217C of the RESTATEMENT (SECOND) OF AGENCY (1957) or section 909 of the RESTATEMENT (SECOND) OF TORTS (1977). Even those standards, however, are more restrictive than the conventional *respondent superior* doctrine. See *infra* note 44 and accompanying text; see also *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 67 (2d Cir. 1985) (reversal of punitive damages possible where there is "a lack of evidence connecting the [tort] with responsible officials"); *Protectus Alpha Navigation Co. v. Northern Pac. Grain Growers*, 767 F.2d 1379, 1385 (9th Cir. 1985) (grain terminal owner not liable for punitive damages for unauthorized or unratified acts of foreman).

On the other hand, a majority of the state courts have held that the vicarious liability of an organization for acts of an agent committed within the scope of his employment extends to punitive as well as compensatory damages, even in the absence of approval or ratification by the organization. PROSSER & KEETON, *supra* note 8, § 2, at 13.

<sup>42</sup> PROSSER & KEETON, *supra* note 8, § 2, at 9.

<sup>43</sup> Such courts also lay "stress upon the injustice of a punishment inflicted upon one who has been entirely innocent throughout." *Id.* § 2, at 12.



against employers only in situations where there is a showing of more than a mere employment relationship.<sup>44</sup> For example, managerial authorization, ratification or recklessness must be shown as well, or the tortfeasor himself must be a "managerial agent" acting within the scope of his employment.

In sum, with the possible exception of the punitive damages context, *respondeat superior* principles and their application in the civil law context arouse little controversy today.<sup>45</sup> Indeed, it is no exaggeration to say that "[n]o legal doctrine has been . . . so generally adhered to by the courts as the doctrine of *respondeat superior*."<sup>46</sup>

### B. Organizational Liability for Crimes

In sharp contrast to organizational liability for civil damages, organizational criminal liability in the United States is essentially a recent innovation; it began in earnest early in this century.<sup>47</sup> Since then, and particularly in the last several decades, society has witnessed a "sweeping expansion" of organizational criminal liability.<sup>48</sup> In fact, this sweeping expansion has come about—at least in the federal courts—largely because standards for organizational criminal liability have been borrowed directly, but uncritically, from the civil doctrine of *respondeat superior*.<sup>49</sup>

At common law, employees were indictable for criminal acts committed in the course of their employment.<sup>50</sup> The employing or-

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<sup>44</sup> See RESTATEMENT (SECOND) OF AGENCY § 217C (1957); RESTATEMENT (SECOND) OF TORTS § 909 (1977); see also *Muratore*, 845 F.2d at 354-56 ("[u]nder the strict complicity rule, the court [before awarding punitive damages] must determine whether or not there was knowledge or ratification on the part of the principal").

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if: (a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting with the scope of his employment, or (d) the principal or a managerial agent of the principal ratified or approved the act.

RESTATEMENT (SECOND) OF AGENCY § 217C (1957).

<sup>45</sup> PROSSER & KEETON, *supra* note 8, § 69, at 501 ("the tendency is clearly to justify [vicarious liability]. . . and gradually to extend it").

<sup>46</sup> Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 452 (1923).

<sup>47</sup> See *Developments*, *supra* note 2, at 1246.

<sup>48</sup> Miller & Levine, *Recent Developments in Corporate Criminal Liability*, 24 SANTA CLARA L. REV. 41, 41 (1984).

<sup>49</sup> *Id.*

<sup>50</sup> See generally 1 K. BRICKEY, *supra* note 5, § 1:05, at 11 ("corporate officers and agents . . . personally liable for criminal misconduct they engage in").

ganizations themselves, however, were immune from criminal liability.<sup>51</sup> They were viewed as abstractions that lacked both the physical and moral capacity to engage in criminal conduct and were unable to suffer punishment, such as jail or death, typically accorded to violators of the criminal laws.<sup>52</sup>

The increased economic and social role played by business organizations in the seventeenth and eighteenth centuries began to erode the doctrine, just as it had under the civil law.<sup>53</sup> Slowly but surely, courts began to impose criminal liability on organizations; by the mid-nineteenth century, municipal and commercial corporations commonly were convicted on charges of public nuisance and nonfeasance.<sup>54</sup> Organizational criminal liability was extended soon thereafter to acts of misfeasance.<sup>55</sup>

It took until the beginning of this century, however, for the principle to emerge that organizations are responsible for crimes that require a general or specific intent.<sup>56</sup> In *New York Central & Hudson River Railroad Co. v. United States*,<sup>57</sup> the Supreme Court of the United States, in an opinion written by Justice Day for a unanimous Court, expressly abandoned what it termed the "old and exploded doctrine" of corporate immunity from criminal prosecution; the Court emphasized its concern that many offenses might otherwise go unpunished.<sup>58</sup> The Court's conclusion was remarkable because it fashioned a whole new category of federal criminal liability, repudiating common-law principles, without direction from Congress. Stating that it could not "shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies,"<sup>59</sup> the Court asserted (in a characteristic burst of judicial activism) that it is "in the interest of public policy" to hold organizations vicariously liable for

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<sup>51</sup> See, e.g., *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 492 (1909) ("corporation is not indictable, although the particular members of it are") (citing Anonymous, 88 Eng. Rep. 1518, 1518 (K.B. 1701)); W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 464 (1765) ("corporation cannot commit treason [sic], or felony, or other crime in it's [sic] corporate capacity: though it's [sic] members may, in their distinct individual capacities").

<sup>52</sup> 1 K. BRICKEY, *supra* note 5, § 2:01, at 14.

<sup>53</sup> *Id.*; see *supra* notes 30-31 and accompanying text.

<sup>54</sup> 1 K. BRICKEY, *supra* note 5, § 2:01, at 15.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 212 U.S. 481 (1909).

<sup>58</sup> *Id.* at 495.

<sup>59</sup> *Id.* at 495-96.

intent-based crimes committed by employees or agents acting within the scope of their employment.<sup>60</sup>

In retrospect, it may not seem astounding that the Court rejected the old metaphysical notion that an organization is unable to bear responsibility for a crime; yet the Court's uncritical transference of tort principles into the criminal law context,<sup>61</sup> without recognizing or reconciling the important policy differences animating these distinct bodies of law, is unpersuasively indiscriminate. Indeed, the Court stated with virtually no analysis of these issues that it was merely extending the *respondeat superior* concept as a "step further" to the criminal law.<sup>62</sup> Under the new standard, the Court thus sanctioned holding organizations criminally liable for the acts of their employees when the employees (1) commit crimes (2) within the scope of employment and (3) with an intent to benefit the organization.<sup>63</sup>

Since that time, federal courts have read this judicially crafted standard of organizational criminal liability very broadly, despite the maxim of "strict construction" purportedly applied to criminal laws.<sup>64</sup> In effect, the intent and actions of agents are imputed directly to the organization for liability purposes; it is as though the agents were the organization.<sup>65</sup>

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<sup>60</sup> *Id.* at 494.

<sup>61</sup> *See id.*

<sup>62</sup> *Id.*

<sup>63</sup> *See id.*, see also *United States v. A & P Trucking Co.*, 358 U.S. 121, 124-27 (1958) ("treasury of the business may not . . . obtain the fruits of violations . . . committed knowingly by agents of the entity in the scope of their employment"); *Developments, supra* note 2, at 1247 ("*respondeat superior* doctrine of corporate criminal liability . . . is common-law rule in the federal . . . and most state courts").

<sup>64</sup> *See, e.g.*, *Crandon v. United States*, 110 S. Ct. 997, 1007 (1990) (in construing criminal statute leniency must be used and if any ambiguity over its scope remains, "it should be resolved in [defendant's] favor unless and until Congress plainly states that we have misconstrued its intent"); *United States v. Enmons*, 410 U.S. 396, 411 (1973) (criminal statute requires that "any ambiguity must be resolved in favor of lenity").

<sup>65</sup> *See, e.g.*, *Brickey, supra* note 2, at 628-29 (*respondeat superior* rule mandates that "if the corporation has entrusted the miscreant agent with responsibility for the function he is performing, he is deemed to act and speak for the corporation when he unlawfully transacts its business"). Indeed, some courts have gone so far as to adopt a "collective knowledge" theory of organizational criminal liability where the knowledge of an organization's agents is aggregated for purposes of demonstrating the requisite scienter for any given crime. *See, e.g.*, *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir.) ("collective knowledge instruction is entirely appropriate in the context of corporate criminal liability"), *cert. denied*, 484 U.S. 943 (1987); *United States v. T.I.M.E.-D.C. Inc.*, 381 F. Supp. 730, 738 (W.D. Va. 1974) ("corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly"). Under the

Proof of the agent's intent to commit an act to benefit the organization can be satisfied, at least in part, even if the employee was acting primarily for his own advantage<sup>66</sup> and the organization did not actually benefit from the agent's criminal acts.<sup>67</sup> Circumstantial evidence demonstrating that the agent had engaged in job-related activity will satisfy this element.<sup>68</sup>

Thus, under the current federal doctrine, the organization bears the stigma, penalties, and disqualifications flowing from criminal guilt if a low-level employee defies management's earnest efforts to comply with the law and misuses his position to commit a crime primarily motivated by a desire to benefit himself. Characterizing the organization's imputed responsibility as criminal is, at best, an artificial construction. To impute guilt in these circumstances is both unfair to the organization, and inconsistent with fundamental concepts of criminal culpability.

It is not surprising, therefore, that the expansive use of *respondeat superior* principles in the criminal context continues to spark controversy,<sup>69</sup> even though the doctrine has taken firm root in the federal courts.<sup>70</sup> A critical reexamination of the current doctrine is especially timely, since its sweeping use continues unabated and perversely taints the application of RICO, a statute intended to protect legitimate organizations from criminals.

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collective knowledge theory, an organization can be held criminally liable even where none of its agents or employees had the requisite scienter to be convicted of the same crime.

<sup>66</sup> See *United States v. Automated Medical Labs., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985) ("[t]o be acting within the scope of his employment, an agent must be 'performing acts of the kind he is authorized to perform, and those acts must be motivated—at least in part—by an intent to benefit the corporation'" (quoting *United States v. Cincotta*, 689 F.2d 238, 242 (1st Cir.), *cert. denied*, 459 U.S. 991 (1982)) (emphasis added)).

<sup>67</sup> See, e.g., *Standard Oil Co. v. United States*, 307 F.2d 120, 128-29 (5th Cir. 1962) ("act is no less the principal's if from such intended conduct either no benefit accrues, a benefit is undiscernible, or, for that matter, the result turns out to be adverse").

<sup>68</sup> See, e.g., *Developments*, *supra* note 2, at 1250 (engaging in job-related activity, by definition, is designed to benefit employer).

<sup>69</sup> See, e.g., Brickey, *supra* note 2, at 596 ("corporate criminal responsibility [is] a weed"); Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions*, 56 S. CAL. L. REV. 1141, 1144 (1983) (many commentators urge replacement of corporate criminal sanctions with civil remedies); Mueller, *supra* note 7, at 23 ("rationale of corporate criminal liability is all but clear").

<sup>70</sup> Brickey, *supra* note 2, at 593.

## II. ORGANIZATIONAL CRIMINAL LIABILITY AND THE NEED FOR MORALLY CULPABLE CONDUCT

### A. *The Misapplication of Respondeat Superior in the Criminal Law Context*

When the Supreme Court extended *respondeat superior* principles into the criminal context,<sup>71</sup> it also commented that "the law should have regard to the rights of all, and to those of corporations no less than to those of individuals."<sup>72</sup> Such a concept is consistent with the principle that a corporation is a "person" entitled to most of the same constitutional rights as are extended to natural persons, including the guarantees of the first amendment, the fourth amendment, and the due process clause.<sup>73</sup>

The Court's holding in *New York Central*, however, did not adequately protect the rights of the corporate "person." Instead, organizations have come to be held vicariously liable under the criminal law based solely on the conduct of other persons, i.e., their employees or agents. Individuals, in dramatic contrast to organizations, are exposed to criminal liability only for their own illegal conduct when accompanied by a mental state evincing some personal moral culpability.<sup>74</sup>

An intellectually defensible rationale for this disparate treatment is sorely lacking.<sup>75</sup> The primary objectives of the criminal law

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<sup>71</sup> *New York Central*, 212 U.S. at 494; see *supra* notes 57-63 and accompanying text.

<sup>72</sup> *New York Central*, 212 U.S. at 495.

<sup>73</sup> See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (corporation protected by first amendment); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (fourth amendment protection); *Pembina Consol. Silver Mining and Milling Co. v. Pennsylvania*, 125 U.S. 181, 188-89 (1888) (corporations are properly considered persons under due process clause).

<sup>74</sup> See, e.g., *Developments*, *supra* note 2, at 1241 (mental state of defendant "determines his moral culpability . . . [b]ut mental state has no meaning when applied to a corporate defendant, since an organization possesses no mental state"). Individuals may be held criminally liable for the acts of others with respect to a limited class of "provision[s] safeguarding the public welfare" even "though consciousness of wrongdoing be totally wanting." *United States v. Dotterweich*, 320 U.S. 277, 284 (1943); see *United States v. Park*, 421 U.S. 658, 671-72 (1975). Aside from this limited context, however, "criminal offenses requiring no *mens rea* have a 'generally disfavored status.'" *Liparota v. United States*, 471 U.S. 419, 426 (1985). Individuals would likely have a strong due process argument were they to be held strictly liable for the criminal acts of others. No case has yet addressed this issue for organizations, but there is no reason why an organization could not make a similarly strong due process argument. See *supra* note 73 and accompanying text.

<sup>75</sup> Mueller, *supra* note 7, at 37-38; see also MODEL PENAL CODE § 2.07 comment at 332 (1985). Modern development of corporate criminal liability "has proceeded largely without

are deterrence and retribution. Deterrence is the effort to coerce "the actual or potential wrongdoer to compliance with the set standards of society through the threat or application of sanctions, which are actual deterrent influences *acting upon the minds of potential or actual wrongdoers*."<sup>76</sup> Retribution is the theory "that every crime demands payment in the form of punishment."<sup>77</sup> These twin goals are interdependent; when deterrence fails, the criminal law imposes liability, but only where the actor has engaged in "conscious wrongdoing" which is, in the eyes of the law, "morally culpable."<sup>78</sup>

Since the element of moral culpability is fundamental to the proper application of the criminal law, generally deterrence is not sufficient to justify criminal prosecution and punishment unless the defendant actually engaged in the misconduct personally or expressly authorized and directed the misconduct. As the Supreme Court explained in *United States v. United States Gypsum Co.*,<sup>79</sup> the element of moral culpability must be present if a criminal sanction is to "square with the generally accepted functions of the criminal law."<sup>80</sup>

Instead of employing the doctrine of imputed guilt when a natural person is involved, the federal criminal law properly limits culpability only to a person who actively "conspires" with the wrongdoer,<sup>81</sup> or "willfully causes" the offense, or actively "aids,

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reference to any intelligible body of principle and the field is characterized by the absence of articulate analysis of the objectives thought to be attainable by imposing criminal fines on corporate bodies." *Id.*; see also Mueller, *supra* note 7, at 23 (reasoning behind corporate criminal liability is highly unclear and appears to be "without rationale whatsoever"); *Developments*, *supra* note 2, at 1241 ("no single, broadly accepted theory of corporate blame-worthiness . . . justifies the imposition of criminal penalties on corporations").

<sup>76</sup> Mueller, *supra* note 7, at 37-38 (emphasis added).

<sup>77</sup> BLACK'S LAW DICTIONARY 1184 (5th ed. 1979).

<sup>78</sup> Mueller, *supra* note 7, at 38; see also Miller, *Corporate Criminal Liability: A Principle Extended to its Limits*, 38 FED. B.J. 49, 49 n.3 (1979) (basic premise of criminal jurisprudence that guilt requires personal fault).

<sup>79</sup> 438 U.S. 422 (1978).

<sup>80</sup> *Id.* at 442 (citations omitted); see *Liparota v. United States*, 471 U.S. 419, 425 (1985).

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

*Id.* (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)); see also Mueller, *supra* note 7, at 29 (*mens rea* is "basis of all criminal law"); *Developments*, *supra* note 2, at 1238 (criminal sanctions only proper when perpetrator is morally culpable).

<sup>81</sup> See 18 U.S.C. § 371 (1988).

abets, counsels, commands, induces, or procures its commission."<sup>82</sup> Thus, for example, one would never expect the prosecution of the dean of a law school because one of his employees—a faculty member, perhaps—tried to increase the passing rate of the school's graduates on the bar exam by bribing the bar examiners. In the absence of the dean's personal participation in the scheme, the mere employer-employee relationship or even a negligent failure to prevent the crime would not serve as an adequate basis for branding the dean a criminal. Quite properly, then, the concept of *respondeat superior* liability is not extended into the criminal law context when an individual employer is involved.<sup>83</sup> Yet, the critical test of personal culpability vanishes when the employer is a corporate, rather than natural, person.

Imputed liability of an employer should only apply civilly. The primary function of tort law is compensation—"distributing the loss of a harmful occurrence."<sup>84</sup> The ability to pay for injury caused by wrongful conduct is the paramount policy concern governing civil imputed liability.<sup>85</sup> Unlike criminal law, tort liability does not necessarily turn on the moral blameworthiness of the offending actor. As one commentator has stated: "*Moral culpability is of secondary importance in tort law*—immoral conduct is simply one of the various ways by which individuals suffer economic damage. But in penal law . . . the immorality of the actor's conduct is essential—whereas pecuniary damage is entirely irrelevant."<sup>86</sup>

Given the differing purposes of tort law and criminal law, it is not entirely unexpected that uncritically applying principles from the former to the latter may lead to absurd results. For instance, it is difficult to discern how an organization may be considered morally culpable for the acts of low-level agents who engaged in criminal conduct that violated well-known and strictly enforced organizational policy.<sup>87</sup> Similarly, it is difficult to perceive the logic

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<sup>82</sup> *Id.* § 2.

<sup>83</sup> See, e.g., *United States v. Wise*, 370 U.S. 405, 416 (1962) (company official liable for antitrust conspiracy only when he "authorizes, orders, or helps perpetrate" offense).

<sup>84</sup> Mueller, *supra* note 7, at 38; see *supra* notes 36-38 and accompanying text (innocent plaintiff should not bear loss where there is party closer to fault and able to bear cost of injury).

<sup>85</sup> See, e.g., PROSSER & KEETON, *supra* note 8, § 69, at 500 (deep pocket is reason for placing liability on employer).

<sup>86</sup> J. HALL, *PRINCIPLES OF CRIMINAL LAW* 203 (1947) (emphasis added).

<sup>87</sup> See *Developments*, *supra* note 2, at 1242 ("it is unfair to impute to the corporation the intent of a lone agent without also considering whether conscientious efforts were made

behind holding an organization morally culpable for the criminal acts of agents who disregard express instructions from a diligent supervisor or who commit crimes despite the organization's good faith efforts to prevent such conduct. Yet, criminal liability in those circumstances is precisely what the application of *respondeat superior* in the criminal context permits.<sup>88</sup>

It is no answer for proponents of *respondeat superior*—based criminal liability to say that the organization is morally culpable in these scenarios merely because an organizational agent—regardless of his level—committed a crime.<sup>89</sup> Even the federal common law of torts is not so harsh in this regard, since an organization traditionally is not subject to vicarious liability for punitive damages assessed against an organization's agent who acted within the scope of employment.<sup>90</sup> Since punitive damages in a civil case ordinarily require a showing of managerial-level involvement (at least the reckless disregard for the subordinate's wrongdoing), imputation of criminal liability should, at a minimum, require a showing of similar managerial involvement.

Further, to “whose *actus reus*,” and to “whose *mens rea*” should the law logically turn in its search for the moral culpability that should accompany any finding of criminal liability?<sup>91</sup> The current application of *respondeat superior* does not adequately answer this question. It fails to explain why an organizational employer should be deemed “morally culpable” when it is unfair and unconscionable automatically to attribute moral culpability to an individual employer absent evidence of his personal complicity.

Of course, the fact that *respondeat superior* does not fit neatly

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by other agents to prevent the crime”); *cf.* *Holland Furnace Co. v. United States*, 158 F.2d 2, 8 (6th Cir. 1946) (corporation not liable for unauthorized act of its agent); *John Gund Brewing Co. v. United States*, 204 F. 17, 20 (8th Cir.) (corporation not liable when agent acts in direct violation of orders), *modified*, 206 F. 386 (8th Cir. 1913).

<sup>88</sup> See, e.g., *United States v. Automated Medical Labs., Inc.*, 770 F.2d 339, 407 (4th Cir. 1985) (employer liable for acts of agents within scope of employment, even if actions are contrary to policy of employer); *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (5th Cir.), *cert. denied*, 464 U.S. 956, 1008 (1983) (corporate intent shown by acts of employees, even if corporate officers are without knowledge); *United States v. Hilton Hotel Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (liability may attach without proof that conduct was within agent's actual authority, and even if contrary to express instructions).

<sup>89</sup> See, e.g., *Developments*, *supra* note 2, at 1242 (*respondeat superior* theory “considers the corporation morally responsible for the acts and intents of each of its agents”).

<sup>90</sup> See *supra* notes 41-44 and accompanying text (discussing purpose behind punitive damages and why not appropriate here).

<sup>91</sup> Mueller, *supra* note 7, at 40.



into any particular conceptual model is not dispositive. As one court has aptly stated, the "law as a useful tool must accommodate pure theoretical logic to the demands of common sense."<sup>92</sup> Thus, the application of *respondeat superior* in the criminal law context might be proper if such liability were "a necessary and useful thing."<sup>93</sup> *Respondeat superior* liability, however, is neither; no justification can possibly overcome criminal law's fundamental requirement that a finding of moral culpability accompany any imposition of criminal liability.

As previously stated, the principal reason that the *New York Central* Court incorporated the *respondeat superior* doctrine into the criminal law context was to deter unlawful corporate conduct.<sup>94</sup> The deterrence rationale, however, cannot survive even a moment's scrutiny. Assuming, arguendo, that *some* offenses go unpunished if organizations are not held vicariously liable for their employees' criminal acts, it is nonetheless an insufficient justification to impose vicarious criminal liability on organizations for *all* crimes committed by their agents within the scope of employment. *Respondeat superior* in the criminal context, nonetheless, imposes criminal liability on organizations irrespective of any mitigating circumstances that may exist on the organization's behalf.

The major flaw in the rationale is that it is simply wrong to assert that, unless the *organization* is prosecuted, the offense "may go unpunished." The primary focus of criminal prohibitions and penalties is on controlling the behavior of human actors. Thus, even without organizational liability, criminal law deters *agents* of organizations by punishing the agents in their individual capacities for *their* criminal activity.<sup>95</sup> It is well settled that the individual actor cannot escape personal criminal liability merely because he was acting on behalf of an organization. How, then, does *respondeat superior* liability, resulting only in fines to organizations, provide any greater deterrence to employees than does the threat of personal liability, which potentially could result in

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<sup>92</sup> *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962).

<sup>93</sup> Mueller, *supra* note 7, at 23.

<sup>94</sup> See, e.g., *New York Central*, 212 U.S. at 493-95 (rejecting doctrine that corporation cannot commit crime); Miller, *supra* note 78, at 50 (primary justification for placing criminal liability on corporations is to deter criminal behavior); Comment, *Is Corporate Criminal Liability Really Necessary?*, 29 Sw. L.J. 908, 919-20 (1975) (deterrence should be principle purpose underlying imposition of corporate criminal liability); *Developments*, *supra* note 2, at 1246 (*respondeat superior* provides high level of deterrence).

<sup>95</sup> See MODEL PENAL CODE § 2.07, at 148 (Tent. Draft No. 4, 1955).

imprisonment?<sup>96</sup>

Moreover, the Supreme Court's original rationale for imputed criminal liability—the need for deterrence—finds only slim support in modern practicalities. Numerous other civil, regulatory, and societal penalties now deter undesirable organizational criminal conduct in ways that make superfluous the imposition of organizational criminal liability based on *respondeat superior*. Indeed, many criminal offenses attributed to corporations involve conduct subject to close government supervision under various regulatory schemes. Moreover, for the sake of reputation and good business practice, an organization has a strong and even compelling incentive to prevent its agents from committing crimes in its name, even without facing criminal exposure itself.

Since the Supreme Court first extended *respondeat superior* into the criminal arena, legislatures have empowered both governments and private parties with a significant arsenal of civil remedies for improper conduct committed by representatives of organizations. State and federal statutes dealing with racketeering,<sup>97</sup> antitrust,<sup>98</sup> labor union activities,<sup>99</sup> and consumer protection<sup>100</sup> exist to punish organizations. Such statutes provide civil penalties or treble damages, costs, and attorneys' fees for public and private actions against offending organizations.<sup>101</sup> In addition, both public and private parties may bring to bear against offending organizations scores of double-damage and single-damage statutory remedies, as well as innumerable common-law causes of action that provide for the award of punitive damages against miscreant agents and truly culpable organizations.<sup>102</sup>

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<sup>96</sup> See, e.g., Liman, *The Paper Label Sentences: Critiques*, 86 YALE L.J. 630, 630-31 (1977) (to business person "prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail"); *Developments*, *supra* note 2, at 1245 (possibility of jail term encourages employees to forego illegally-obtained corporate profits).

<sup>97</sup> See, e.g., 18 U.S.C. §§ 1961-1964 (1988 & Supp. 1990); N.Y. PENAL LAW § 460.20 (McKinney 1989).

<sup>98</sup> See, e.g., 15 U.S.C. §§ 12-27 (1988); N.Y. GEN. BUS. LAW §§ 340-347 (McKinney 1988).

<sup>99</sup> See, e.g., 29 U.S.C. §§ 141-158 (1988); N.Y. LAB. LAW §§ 720-732 (McKinney 1988).

<sup>100</sup> See, e.g., 15 U.S.C. §§ 205-265 (1988); N.Y. EXEC. LAW §§ 550-553 (McKinney 1982).

<sup>101</sup> See, e.g., ILL. ANN. STAT. ch. 38, para. 60-67 (Smith-Hurd 1977) (any person may maintain action for damages against any person who has committed antitrust violation); N.J. STAT. ANN. § 2C:41-4 (West 1982 & Supp. 1990) (civil remedy available to any person against another person or organization violating racketeering statute); N.Y. CIV. PRAC. L. & R. 1353 (McKinney 1986 & Supp. 1991) (civil remedy after person or enterprise convicted under § 460.20 of Penal Law).

<sup>102</sup> See, e.g., *American Soc'y of Mechanical Eng'rs., Inc. v. Hydrolevel Corp.*, 456 U.S.

Since the government and private parties generally can prove these "offenses" by a preponderance of the evidence, rather than by the criminal "beyond a reasonable doubt" standard, *respondeat superior* simply provides no additional deterrence.<sup>103</sup> If anything, the less burdensome evidentiary standard by which organizations can be held liable in the civil context justifies the expectation that the prospect of substantial civil liability would serve as a greater deterrent to organizations and their agents than possible criminal organizational liability.

Furthermore, societal penalties are significantly higher today than they were when the Supreme Court extended general *respondeat superior* principles to criminal law. Mass communication has made it far less likely that an organization can escape the opprobrium that accompanies the public discovery that an organization's agents have engaged in criminal activity.<sup>104</sup> In the criminal context, therefore, *respondeat superior* does not provide enough additional deterrence to justify disregarding criminal law's traditional requirement of moral culpability. In fact, alternative organizational

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556, 565-66 (1982) (agency law concepts apply to civil antitrust violations); *United States v. O'Connell*, 890 F.2d 563, 568 (1st Cir. 1989) (agency theory applied to False Claims Act, holding corporation liable); *Petro-Tech, Inc. v. Western Co. of N. Am.*, 824 F.2d 1349, 1361-62 (3rd Cir. 1987) (vicarious liability for employer of RICO persons appropriate even if employer is RICO enterprise).

<sup>103</sup> Given the availability of these civil remedies to governments and private individuals, there is also little reason to believe that, without *respondeat superior* in the criminal context, organizations would "benefit from what is ostensibly [their] own wrongdoing." 1 K. BRICKEY, *supra* note 5, § 1:04, at 10.

<sup>104</sup> See *The Consumer and the Federal Trade Commission—A Critique of the Consumer Protection Record of the FTC*, 115 CONG. REC. E370, 2389 (daily ed. Jan. 22, 1969) ("threat of prompt, effective and widespread publicity about objectionable corporate behavior must finally be recognized" as "large corporations are remarkably thin-skinned").

The FTC is "empowered and directed to prevent persons, partnerships, or corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C.A. § 45(2) (West Supp. 1990). Such methods are declared unlawful. *Id.* § 45(1). The FTC has the power "to gather and compile information and to investigate . . . any . . . corporation engaged in [such]." *Id.* § 46(a). Also, the FTC has the power "to make public . . . such portions of the information obtained by it hereunder as are in the public interest." *Id.* § 46(f); see, e.g., *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1313-14 (D.C. Cir. 1968) (FTC authorized to alert public by "factual press releases" when defendant suspected of illegal activities). The purpose of the Federal Trade Commission Act is to protect the public and may at its own discretion publicize information to alert the public to "suspected violations of the law by factual press releases whenever [corporation] is engaged in activities made unlawful by the Act." *Id.*; see also *Study Draft of the National Commission on Reform of Federal Criminal Laws* 33 (1970) (adverse publicity authorized by proposed § 405 would be "particularly feared by organizations that depend heavily on good public relations").

penalties provide a more effective deterrent than does artificially attributed *respondeat superior* criminal liability.

Courts and commentators have proffered other subsidiary justifications in support of *respondeat superior* criminal liability despite criminal law's traditional moral culpability requirement. For instance, some argue that the *respondeat superior* criminal standard will encourage better employer supervision of employee conduct<sup>105</sup> by using the threat of criminal liability to force one person to control the conduct of another. However, its current application extends imputed criminal liability well beyond any reasonable boundaries; the organization may bear criminal guilt for the agent's offense, even if it has done everything possible to encourage the agent's compliance with the law.

Others have argued that *respondeat superior* is necessary to prevent organizations from evading criminal liability by delegating to low-level subordinates full responsibility for activities that may lead to criminal violations.<sup>106</sup> A similar argument has been asserted that *respondeat superior* liability is necessary lest managerial agents convey to low-level employees an implicit understanding that they wish to remain insulated from information that would infect them with knowledge of those employees' criminal conduct.<sup>107</sup> Although criminal law undoubtedly should punish the organization and its managers when they purposefully induce their subordinates to commit crimes or to keep management ignorant of foreseeable misconduct, *respondeat superior* is unfairly overbroad in the criminal arena. The standard for attributing guilt to the organization should not be the automatic, inflexible, and sweeping doctrine of *respondeat superior*.

Finally, proponents of *respondeat superior* liability assert that in large, modern-day business organizations, "high ranking officers

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<sup>105</sup> See Miller, *supra* note 78, at 50 ("main justification" for *respondeat superior* criminal liability is it promotes careful supervision over corporate affairs by managers); 1 U.S. National Commission on Reform of Federal Criminal Laws, *Working Papers* 190 (1970) [hereinafter *Working Papers*] (sanctioning corporations directly assumes primary goal of corporate penalty is diligent supervision over corporate personnel by corporate managers where corporation bound by behavior of inferior personnel).

<sup>106</sup> See *Commonwealth v. Beneficial Fin. Co.*, 360 Mass. 188, 277, 275 N.E.2d 33, 84 (1971) ("[w]e believe that stringent standards must be adopted to discourage any attempt by 'endocratic' corporations' executives to place the sole responsibility for criminal acts on the shoulders of their subordinates"), *cert. denied*, 407 U.S. 914 (1972); 1 K. BRICKEY, *supra* note 5, § 1:04, at 9; *Developments*, *supra* note 2, at 1254.

<sup>107</sup> *Developments*, *supra* note 2, at 1254.

and executives may have little or no involvement with many important aspects of the business, whereas lower echelon employees may exercise broad responsibility in carrying out the corporation's day-to-day operations."<sup>108</sup> Thus, they object, large organizations would, in all likelihood, be immune from criminal liability unless courts apply the strict liability *respondeat superior* standard.<sup>109</sup>

This argument is clearly overbroad; it erroneously assumes that any narrower standard of organizational liability would lead to de facto immunity for large organizations. More legitimate standards would preserve significant and more carefully crafted areas of organizational liability.<sup>110</sup> Indeed, quite the opposite makes more sense: it is less justifiable to impute the unauthorized acts of low-level employees to larger organizations. Thus, if the exclusive agent of a small organization commits a crime in the course of conducting its affairs, there is at least some superficial reason to conclude that the criminal act reflects the way the organization is pursuing its goals. By contrast, if one low-level employee in an enterprise with several thousand employees commits an offense, the misconduct may be so aberrational that it is inequitable to equate the employee's guilt with the organization's culpability.

Simply put then, no logical or practical rationale justifies the application of traditional *respondeat superior* principles to the criminal context, or its concomitant disregard for criminal law's essential precept that criminal guilt should reflect genuine moral culpability. Because *mens rea* "is the very fundament of our Anglo-American criminal law,"<sup>111</sup> it should provide the necessary touchstone of any legal doctrine that imputes criminal liability to an organization.

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<sup>108</sup> Brickey, *supra* note 2, at 626; see *Beneficial*, 360 Mass. at 275, 275 N.E.2d at 83 (lower-level employees often have more responsibility in everyday activities within corporation than directors or officers); *Developments*, *supra* note 2, at 1254. "Larger, multidivisional organizations generally maintain a layer of top managers who reserve their own energies for policymaking, coordination, and program evaluation, and delegate responsibility for day-to-day operations to middle-level employees." *Id.*

<sup>109</sup> See Brickey, *supra* note 2, at 626 (adopting standard narrower than *respondeat superior* for large organizations will result in rule of non-liability); *Developments*, *supra* note 2, at 1254-55 (narrowing of *respondeat superior* standard would allow large corporations, whose top officials are too removed from daily operations, to avoid conviction).

<sup>110</sup> See *supra* notes 97-100 and accompanying text.

<sup>111</sup> Mueller, *supra* note 7, at 46.

*B. The Necessity of Focusing on the Conduct of an Organization's Management*

Once moral culpability is elevated to its rightful place in fashioning organizational criminal liability, the crucial question can be accurately framed: Which agent's conduct should be examined in order to determine the propriety of imposing imputed liability? British courts have provided an answer similar to our own common law: Through an "anthropomorphic sleight of hand," the inanimate organization is transformed "into a 'person' capable of committing criminal delicts and harboring criminal intent."<sup>112</sup> British law, however, has been far more exacting and discriminating in its examination of the actual workings of the organizational "person." Specifically, British courts have observed:

Some of the people in the company are mere servants and agents who are nothing more than hands to do the work . . . . Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of the mind of the company and is treated by the law as such.<sup>113</sup>

The drafters of the MP Code and the FC Code have provided a similar answer: Both codes would limit organizational criminal liability to situations where "high managerial agents" responsible for making and supervising the implementation of company policy were personally involved in performing or sanctioning the criminal deeds.<sup>114</sup> We advocate the adoption of this same approach for organizational criminal liability in the federal courts. If this suggested approach is followed, organizational criminal liability will then return to the fundamental mooring of criminal law—moral culpability.

The FC Code grew out of a commission established by Congress and appointed by the President to review the substantive

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<sup>112</sup> Brickey, *supra* note 2, at 593.

<sup>113</sup> *H.L. Bolton Eng'r Co. v. T.S. Graham & Sons*, 1 Q.B. 159, 172 (C.A. 1957). "[A]ll those officers, whether elected or appointed, who direct, supervise and manage the corporation within its business sphere and policy-wise [are] the 'inner circle.' They are the *mens*, the mind or brain, of the corporation." Mueller, *supra* note 7, at 41.

<sup>114</sup> See MODEL PENAL CODE § 2.07(1)(1985); see also Brickey, *supra* note 2, at 596 (MP Code adopts scheme of organizational liability that distinguishes between "'hands' of the corporation and the policy makers who constitute its 'mind'"); *Final Report*, *supra* note 16, § 402 comment at 35 (vicarious liability of corporations should approximate accomplice liability).

federal criminal law.<sup>115</sup> Although the commission could hardly be called a tool of large organizations, one of its most fundamental reforms, in its Final Report in 1971, was to revise significantly the federal standards for imputing criminal liability to corporations.<sup>116</sup>

The FC Code standard for corporate liability is premised on the view that vicarious liability of corporations should resemble ordinary accomplice liability.<sup>117</sup> The FC Code corporate liability standard identifies the persons in management whose complicity is required before the courts may impose criminal liability for felonies.<sup>118</sup> The proposed FC Code specifically lists the board of direc-

<sup>115</sup> The National Commission on Reform of Federal Criminal Laws was established by Congress in 1966 to undertake a complete review and to recommend revision of the federal criminal laws. The Commission became popularly known as the "Brown Commission," because its Chairman was the former Democratic Governor of California, Edmund G. Brown. Brown was appointed Chairman of the Commission by President Lyndon Johnson. The remaining members of the Commission consisted of a bipartisan array of congressmen and senators, three federal judges, and two practicing attorneys. See *Final Report*, *supra* note 16, at app. B. The composition of the Commission most assuredly protected it against accusations of being a tool of Fortune 500 companies.

<sup>116</sup> The drafters of the proposed FC Code, without explanation, limited their revised standards to corporations. See *id.* at 37 (unincorporated association liability "is left to specific statutory provisions and judicial development"). The Commission's staff, on the other hand, had concluded that incorporated and unincorporated associations should be subject to the same standards. See *Working Papers*, *supra* note 105, at 165, 182 n.58.

<sup>117</sup> See *Final Report*, *supra* note 16, § 402, at 35. The Report provides that corporations may be convicted of felonies as follows:

(1) Liability Defined. A corporation may be convicted of: (a) any offense committed by an agent of the corporation within the scope of his employment on the basis of conduct authorized, requested or commanded, by any of the following or a combination of them:

(i) the board of directors;

(ii) an executive officer or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees;

(iii) any person, whether or not an officer of the corporation, who controls the corporation or is responsibly involved in forming its policy; [and]

(iv) any other person for whose acts or omissions the statute defining the offense provides corporate responsibility for offenses.

*Id.* § 402(1)(a)(i)-(iv). In addition, the proposed FC Code would permit corporations to be convicted of any offense, including a felony, "consisting of an omission to discharge a specific duty of affirmative conduct imposed on corporations by law." *Id.* § 402(1)(b). The proposed FC Code also would permit the imposition of liability for misdemeanors and strict liability offenses arising from the conduct of any agent of the corporation who commits such offenses within the scope of his employment. *Id.* § 402(1)(c)-(d).

<sup>118</sup> *Final Report*, *supra* note 16, at 35. Significantly, the FC Code requires actual complicity of management personnel; management's subsequent "ratification" of the agent's misconduct or management's reckless toleration of the conduct in violation of a duty to maintain effective supervision of corporate affairs is insufficient for criminal liability. *Id.*

In rejecting organizational liability based on "ratification" of an agent's conduct, the

tors and executive officers as the *de jure* actors whose conduct causes a corporation to incur criminal liability. Significantly, however, the FC Code goes further and also takes a *functional* approach to the question of who constitutes management in an organization. The acts of *de facto* management personnel, such as employees without titles who are heavily involved in formulating company policy or persons who supervise subordinate employees in a managerial capacity, likewise may impose criminal liability on the corporation.

Under this approach, corporate criminal liability may reach actors embedded deep within a large corporate hierarchy.<sup>119</sup> The controlling inquiry focuses on the highest level person in the enterprise who bears individual criminal culpability for the acts. The test, then, is whether the nature of that person's policy-making or managerial responsibilities makes it fair and realistic to treat him as a proxy for the *persona* of the organization, someone whose character essentially reflects the character of the organization. Under this test, the officers and key senior managers of a large organization would be viewed as the *alter ego* of the organization for purposes of imputing criminal liability.

The MP Code takes a slightly broader approach, setting forth two different standards<sup>120</sup> under which to convict organizations of crimes that require proof of a culpable mental state. The first standard applies to corporations for *malum in se* crimes, such as mail fraud, larceny, and manslaughter, all of which are typically committed by individuals.<sup>121</sup> Under this standard, a corporation may be held liable for a crime committed by an agent, but *only* if the offense "was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a *high managerial agent* acting on behalf of the corporation within the scope of

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proposed FC Code follows traditional notions of criminal law holding that one may not be held criminally liable for another's acts merely because the act was approved of after the fact. See, e.g., Note, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 708 (1930) (ratification of another's criminal act cannot form basis of criminal liability).

<sup>119</sup> See *infra* notes 124-25 and accompanying text (under MP Code, corporation liable for acts within authority of agent and which benefit corporation).

<sup>120</sup> See MODEL PENAL CODE § 2.07 comment at 150 (Tent. Draft No. 4, 1955); *Developments*, *supra* note 2, at 1251.

<sup>121</sup> See MODEL PENAL CODE § 2.07(1)(c) (1985). Eight states have adopted the MP Code's standards of organizational liability. See Brickey, *supra* note 2, at 631. Another twenty-one states have judicially or legislatively recognized a similar but more expansive version of MP Code section 2.07(1)(c). *Id.*



his office or employment."<sup>122</sup>

Like the FC Code, the MP Code defines "management" functionally; organizational liability is not limited merely to acts of the company's formal management, such as the board of directors and executive officers. Mere supervisory authority, though, is insufficient. The culpable actor's role must be high enough and broad enough to justify treating his decisions as establishing the "policy," or the essential character, of the organization.

In contrast to the FC Code, however, the MP Code standard permits the conviction of an organization if a lower-level agent committed an offense that was "recklessly tolerated" by management. Accordingly, the MP Code ensures that managers cannot avoid organizational criminal liability by deliberately closing their eyes to serious warning signals.<sup>123</sup>

The second MP Code standard applies to crimes for which the legislature clearly intended to hold organizations liable.<sup>124</sup> Because antitrust, environmental, and federal securities laws are essentially economic regulatory offenses, the focus of criminal prohibition is on how the organization conducts its affairs. In this limited context, the MP Code preserves *respondeat superior* as the standard.

<sup>122</sup> MODEL PENAL CODE § 2.07(1)(c) (1985) (emphasis added). The MP Code flexibly defines "high managerial agent" in the corporate context as "an officer of a corporation . . . or any other agent . . . having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation." *Id.* § 2.07(4)(c).

<sup>123</sup> MODEL PENAL CODE § 2.07 comment at 150 (Tent. Draft No. 4, 1955); see *Working Papers*, *supra* note 105, at 207-08 (collection of pertinent federal statutes).

<sup>124</sup> MODEL PENAL CODE § 2.07(1)(a) (1985). This section states:

(1) A corporation may be convicted of the commission of an offense if: (a) . . . the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and *the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment.*

*Id.* (emphasis added).

Model Penal Code section 2.07(3)(a) establishes the standard for unincorporated associations. It states, in pertinent part, as follows:

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

(a) the offense is defined by a statute other than the Code that expressly provides for the liability of such an association and *the conduct is performed by an agent of the association acting in behalf of the association within the scope of his office or employment.*

*Id.* § 2.07(3)(a) (emphasis added). Under either section, the MP Code provides that the *respondeat superior* standard should be displaced whenever a law defining an offense designates a particular agent or agents for whose conduct the organization should be held accountable. *Id.* § 2.07(1),(2),(3)(a).

An organization is held criminally responsible if an agent at any level committed the offense within the scope of his employment and with the intent to benefit the organization.<sup>125</sup>

Significantly, however, the drafters of the MP Code added an affirmative defense to *respondeat superior*: an organization may avoid liability if it proves by a preponderance of the evidence that a "high managerial agent"<sup>126</sup> having supervisory responsibility over the subject matter of the offense acted with "due diligence" to prevent the crime.<sup>127</sup> According to the drafters of the MP Code, if the appropriate officials actually have exercised "due diligence," then imputed criminal liability serves no legitimate purpose in encouraging managerial supervision. If, however, management fails to take reasonable steps to assure compliance with laws directed at the organization's conduct, it is proper to hold the organization itself responsible for those crimes that are defined as uniquely organizational offenses.

Although there are some differences between the two Codes, both the MP Code and FC Code recognize the importance of restructuring the federal courts' standards for organizational liability. Each bases organizational liability more closely on the real moral culpability of the organization. Under the principles embodied in both the MP Code and FC Code approaches, personnel in policymaking roles would have to be involved culpably in criminal conduct, either by personal complicity or by a deliberate failure to prevent the offense, before organizational liability would attach. The organization would have, in essence, the prerequisite *mens rea* for the imposition of criminal liability.

Under either Code, no longer could low-level employees thrust criminal liability on their employing organization *solely* because of their employment relationship. No longer could these same em-

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<sup>125</sup> See *supra* note 122 and accompanying text (definition of "high managerial agent" in MP Code).

<sup>126</sup> MODEL PENAL CODE § 2.07(5) (1985). Section 2.07(5) provides, in pertinent part: (5) In any prosecution of a corporation or an unincorporated association for the commission of an offense included within the terms of Subsection (1)(a) or Subsection (3)(a) . . . it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.

*Id.* (emphasis added).

<sup>127</sup> MODEL PENAL CODE § 2.07 comment at 154 (Tent. Draft No. 4, 1955). Approximately six states have adopted the "due diligence" defense to *respondeat superior* criminal liability. See Brickey, *supra* note 2, at 630.

ployees impose criminal liability on their employers by acting in derogation of company policy or in defiance of express orders from their supervisors.

Although these proposals take the form of statutory revisions to the criminal law, the federal courts should adopt them without awaiting congressional action. The quest for a general congressional overhaul of federal criminal law seems doomed because of debates over controversial, but unrelated issues (such as the death penalty). Since the federal courts as a matter of federal common law created and defined the contours of vicarious criminal liability, the federal judiciary has ample authority to draw on the principles that animate the MP Code and the FC Code in reforming the doctrine.

### III. ORGANIZATIONAL LIABILITY UNDER THE RICO STATUTE

The best place to begin the reformation of *respondeat superior* is with RICO. Congress crafted RICO to play a very specific mission in the overall fight against organized crime: through its severe criminal penalties and treble damage civil remedies, RICO was to thwart the infiltration of organized crime into *legitimate businesses*.<sup>128</sup> Both the structure of the statute and its legislative history "establish without a doubt" that this was the principal purpose underlying RICO's enactment.<sup>129</sup> Courts and commentators thus have recognized that Congress intended legitimate businesses to be the main *beneficiaries* of RICO's provisions.

In actual practice, however, Congress' intent in this regard has been thwarted. Indeed, legitimate businesses have become RICO's principal *target*. Perhaps no other factor has led more directly to this perverse result than the misguided rules of imputed organizational liability that many federal courts have adopted in interpreting the RICO statute. Specifically, through two different doctrines, these courts have imposed criminal and civil liability on organizations for the criminal acts of their agents and employees, regardless of their level in the organizational hierarchy and regardless of whether they engaged in activity detrimental to the organization's interest.

The first doctrine grows out of interpretations of RICO's substantive provision, which prohibits certain activities of "persons"

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<sup>128</sup> *United States v. Turkette*, 452 U.S. 576, 589 (1981).

<sup>129</sup> *ABA Report*, *supra* note 20, at 105; *see Turkette*, 452 U.S. at 589-90.

in connection with their acquisition of, investment in, or conduct of an "enterprise."<sup>130</sup> On its face, RICO's statutory prohibition seems to make clear that two differently defined entities must be involved in any RICO action—a wrong-doing "person" and a separate "enterprise"—and that only the former can incur RICO liability.<sup>131</sup> Nevertheless, legitimate businesses alleged to be the affected "enterprise" repeatedly have incurred RICO liability; many courts allow claimants to join them as defendants by imputing to them the *acts* of their agents. By directly attributing the agents' acts to the organization, these courts treat the organization as the "person" committing the proscribed act.<sup>132</sup>

Under the second doctrine, some courts have concluded that a legitimate business cannot be named as both the "person" and the "enterprise," but permit the same result through the application of *respondeat superior*, or some other modified version.<sup>133</sup> If employees or agents of a legitimate organization are found to be "persons" liable under RICO, their employing organization becomes vicariously liable.

Courts adopting either of these doctrines have justified imposing RICO liability vicariously on legitimate businesses because "culpable" organizations should not escape liability.<sup>134</sup> Yet, this judicial characterization of "culpable" organizations, uncritically incorporates the current federal rule on organizational criminal liability into the RICO context.<sup>135</sup> While we have explained above why this approach is objectionable with respect to federal criminal law generally, it is particularly objectionable in the RICO context. Indeed, the result of the incorporation of *respondeat superior* into RICO has turned Congress' intent in enacting the statute on its head. Instead of protecting legitimate businesses from infiltration

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<sup>130</sup> 18 U.S.C. § 1962 (1988).

<sup>131</sup> See *id.*

<sup>132</sup> See *infra* note 166 and accompanying text.

<sup>133</sup> See *Morley v. Cohen*, 610 F. Supp. 798, 811 (D. Md. 1985) (alleged fraudulent acts of sole shareholder and president of corporation imputed to corporation); *Bernstein v. IDT Corp.*, 583 F. Supp. 1079, 1083 (D. Del. 1984) ("doctrines of apparent authority and *respondeat superior* will . . . further the statutory goals").

<sup>134</sup> See *Schofield v. First Commodity Corp.*, 793 F.2d 28, 32 (1st Cir. 1986) ("where the language in RICO permits liability against a culpable entity, courts should find that such liability exists"); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 402 (7th Cir. 1984) (RICO's primary purpose is to control those who actually profit from racketeering activity and not their victims), *aff'd on other grounds*, 473 U.S. 606 (1985).

<sup>135</sup> See *supra* notes 57-65 and accompanying text (explanation and description of federal rule on criminal liability of corporations).

by criminals, courts punish legitimate businesses with RICO's harsh civil and criminal penalties for having been infiltrated or abused by these criminals.

Legitimate organizations should receive the protections of RICO that Congress originally intended. Courts can achieve this result by properly interpreting the statute and understanding and applying *respondeat superior* principles correctly within the RICO context. As later explained, courts should not, under any circumstances, treat organizations as both a liable "person" and an "enterprise" for purposes of RICO as some currently do. Rather, RICO liability should be imposed on organizations only when the conduct satisfies the standard for organizational liability embodied in the FC Code and the MP Code: when an organization's high-level managerial agents, officers, or directors have been directly and culpably involved in criminal activity. Legitimate organizations would thus be protected from the "friendly fire" of RICO, leaving only truly "corrupt organizations" subject to the statute's harsh penalties, in accord with Congress' original intent.

*A. Organizational Liability Under the "Person/Enterprise" Rubric*

RICO broadly defines "person" as "any individual or entity capable of holding a legal or beneficial interest in property."<sup>136</sup> Similarly, the statute broadly defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."<sup>137</sup> Under the RICO statute, "persons" may not, in connection with a pattern of racketeering activity, acquire, invest in, or conduct the affairs of an "enterprise," or conspire to do any of these prohibited acts.<sup>138</sup> Thus, the statute by its terms indicates that only the wrongdoing "person" who engages in the prohibited conduct may be held liable for a RICO violation.<sup>139</sup>

Given the broad definitions of "person" and "enterprise," virtually any legitimate business organization can satisfy each defini-

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<sup>136</sup> 18 U.S.C. § 1961(3) (1988).

<sup>137</sup> *Id.* § 1961(4).

<sup>138</sup> *Id.* § 1962(a)-(d).

<sup>139</sup> See *Schofield v. First Commodity Corp.*, 793 F.2d 28, 30 (1st Cir. 1986) (person, not enterprise, violates RICO); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982) (person cannot be same as or part of enterprise), *cert. denied*, 459 U.S. 1105 (1983).

tion simultaneously.<sup>140</sup> As a result, from RICO's earliest usage, courts have been forced to grapple with whether organizations may properly be named as both the liable "person" and the affected "enterprise." Specifically, courts have had to determine whether, based on the acts of its agents, an organization may be the RICO "person" who, in connection with a pattern of racketeering activity, acquires, invests in, or conducts its own affairs as an "enterprise." Although the language, structure, and legislative history of RICO indicate that the same organization should not be chargeable in both roles simultaneously, courts currently are split on this critical issue.

### 1. The Current State of the Law

Section 1962(c), the most frequently utilized RICO section, has generated the greatest discussion among the courts on this issue.<sup>141</sup> Section 1962(c) provides, in pertinent part: "It shall be unlawful for any *person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . .*"<sup>142</sup>

In civil actions brought under section 1962(c), the classification issue is typically framed in the following manner: the complaint first alleges that a legitimate business, through its employees or agents, is the liable "person"; this "person," in turn, has conducted the affairs of the "enterprise," which is the business organization itself.<sup>143</sup> Courts are urged to condone such pleading not only because it is arguably permitted by the broad definitions of the terms "person" and "enterprise," but also because "Congress intended to make a 'deep pocket' (in the person of the corporation) liable where corporate agents engage in a pattern of racketeering activity redounding to the benefit of the corporation."<sup>144</sup>

Ten of the eleven United States Courts of Appeals addressing the issue have squarely held that the liable person and the enter-

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<sup>140</sup> See *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 400 (7th Cir. 1984) (language of § 1961 indicates that corporation satisfies definition of "person" and "enterprise"), *aff'd*, 473 U.S. 606 (1985).

<sup>141</sup> See *ABA Report*, *supra* note 20, at 57.

<sup>142</sup> 18 U.S.C. § 1962(c) (1988) (emphasis added).

<sup>143</sup> See *Haroco*, 747 F.2d at 387.

<sup>144</sup> *Id.* at 401.

prise cannot be the same entity under section 1962(c).<sup>145</sup> These courts have rested this holding on two grounds. First, section 1962(c) expressly speaks in terms of a "relationship"<sup>146</sup> between two distinct entities, since the "person" must be "employed by or associated with" the enterprise. Some courts have held that this language "logically" leads to the conclusion that the same entity cannot serve as both the enterprise and the person associated with it.<sup>147</sup> As the Seventh Circuit has stated in this regard: "you cannot associate with yourself, any more than you can conspire with yourself."<sup>148</sup>

Second, these courts view RICO's legislative history as sup-

<sup>145</sup> See, e.g., *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1489 (6th Cir. 1989) (RICO claim properly dismissed where plaintiff alleged defendant was both "person" and "enterprise"); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 839 F.2d 782, 790 (D.C. Cir.) ("Logic alone dictates that one entity may not serve as the enterprise and the person associated with it"), *cert. denied*, 488 U.S. 926 (1988); *Garbade v. Great Divide Mining & Milling Corp.*, 831 F.2d 212, 213 (10th Cir. 1987) (cannot be both "person" and "enterprise" within wording of section); *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 122-23 (5th Cir. 1986) (same); *Schofield v. First Commodity Corp.*, 793 F.2d 28, 30 (1st Cir. 1986) ("statute envisions liability only when there is the specified interaction between two entities"); *Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985) (§ 1962(c) envisions two entities), *cert. denied*, 474 U.S. 1058 (1986); *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628, 634 (3d Cir. 1984) ("violation of section 1962(c) by a corporate entity requires an association with an enterprise that is not the same corporation"); *Haroco*, 747 F.2d at 400 (statutory terms "contemplate a person distinct from the enterprise"); *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984) (enterprise cannot also be RICO defendant); *Bennett v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982) (RICO claim dismissed for failure to plead "enterprise" separate from "person"), *aff'd en banc in pertinent part*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982) (" 'enterprise' was meant to refer to a being different from . . . the person whose behavior the act was designed to prohibit"), *cert denied*, 459 U.S. 1005 (1983). *But see* *United States v. Hartley*, 678 F.2d 961, 989 (11th Cir. 1982) (aggregate and entity theories of corporations allow corporation to be both "person" and "enterprise"), *cert. denied*, 459 U.S. 1183 (1983).

<sup>146</sup> *Schofield*, 793 F.2d at 30-31.

<sup>147</sup> See, e.g., *Yellow Bus Lines*, 839 F.2d at 790 (one entity is not enterprise and person associated with it); *Hirsch*, 751 F.2d at 633 (enterprise must be independent from defendant); *Haroco*, 747 F.2d at 400 (statutory terms "contemplate a person distinct from the enterprise").

<sup>148</sup> *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985). The Fourth Circuit stated the issue in somewhat more colorful terms:

We conclude that 'enterprise' was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit, and, failing that, to punish. . . . [W]e would not take seriously, in the absence, at least, of very explicit statutory language, an assertion that a defendant could conspire with his right arm, which held, aimed and fired the fatal weapon.

*Computer Sciences Corp.*, 689 F.2d at 1190.

porting this reading of section 1962(c).<sup>149</sup> Recognizing that the purpose of the statute was to prevent the "infiltration" of legitimate businesses by corrupt individuals, courts have reasoned that section 1962(c) was crafted to punish only the natural person who conducts the affairs of a legitimate business in an illegal manner.<sup>150</sup> Thus, in light of RICO's legislative history, one court concluded "that Congress . . . designed section 1962(c) so that it reached the criminal ["person"] but protected the victimized enterprise from liability."<sup>151</sup>

Thus, courts have been virtually unanimous in agreeing that the principal purpose of RICO would be thwarted if the "enterprise" were treated as the wrongdoing "person" under section 1962(c) and was subject to the criminal and civil penalties that such a "person" incurs.<sup>152</sup> Surprisingly, however, many of the same courts which argue that RICO's main purpose would be defeated by application of *respondeat superior* principles fail to consider this consequence when examining claims under sections 1962(a), (b), and (d).

The Seventh Circuit's decision in *Haroco, Inc. v. American National Bank & Trust Co.*<sup>153</sup> has been the most influential case in the development of this peculiar dichotomy. In *Haroco*, the court indicated that an organization cannot simultaneously be named as both the culpable "person" and the victim "enterprise" in a section 1962(c) claim.<sup>154</sup> In dictum, however, the court suggested that this conclusion is not proper when a section 1962(a) claim is at issue.<sup>155</sup> Section 1962(a) provides that it is "unlawful for any person who

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<sup>149</sup> See, e.g., 116 CONG. REC. 35,204 (1970) (remarks of Rep. Robert McClory) (RICO intended to "deal fairly with all who might be affected" by it).

<sup>150</sup> See *Yellow Bus Lines*, 839 F.2d at 790; *Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985) (such distinction focuses on culpable party, recognizing that actual enterprise often passive victim of racketeer), *cert. denied*, 474 U.S. 1058 (1986); *Hirsch*, 751 F.2d at 634 (congressional intent was to punish infiltrating criminals, not legitimate corporations).

<sup>151</sup> *Schofield v. First Commodity Corp.*, 793 F.2d 28, 31 (1st Cir. 1986). Conceivably, an artificial person such as a "front" or "dummy" corporation also could be the distinct "person" charged with using the victim "enterprise" in a corrupt manner. The breadth of the definition of "person" simply assures that RICO will reach this kind of corrupt actor as well. But see *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985) (legitimate businesses not immune from consequences of criminal activity).

<sup>152</sup> But see *United States v. Turkette*, 452 U.S. 576, 590 (1981) (courts all but unanimous in refusal to read RICO as prohibiting only infiltration of legitimate businesses).

<sup>153</sup> 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985).

<sup>154</sup> *Id.* at 400.

<sup>155</sup> *Id.* at 401-02.



has received any income derived . . . from a pattern of racketeering activity . . . to use or invest, . . . any part of such income . . . in acquisition of any interest in, or the establishment or operation of, any *enterprise*.”<sup>156</sup>

The court first recognized that the enterprise may play the various roles of “victim, prize, instrument or perpetrator” under the various subsections of section 1962.<sup>157</sup> The court then determined that, as a matter of policy, organizational enterprises should be held liable under RICO when they operate as the “perpetrator” or “central figure in the criminal scheme.”<sup>158</sup> Although the Seventh Circuit’s holding under section 1962(c) insulates an enterprise playing such a role from direct liability under that subsection, it opined on the basis of section 1962(a)’s language that a similar result should not obtain:

As we read subsection (c), the “enterprise” and the “person” must be distinct. . . . [However,] [s]ubsection (a) does not contain any of the language in subsection (c) which suggests that the liable person and the enterprise must be separate. Under subsection (a), therefore, the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations. This approach to subsection (a) thus makes the corporation-enterprise liable under RICO when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim, prize, or passive instrument of racketeering. This result is in accord with the primary purpose of RICO, which, after all, is to reach those who ultimately profit from racketeering, not those who are victimized by it.<sup>159</sup>

Many courts have aped the Seventh Circuit’s disparate treatment of sections 1962(a) and (c) with respect to the person/enterprise issue.<sup>160</sup> Many courts also have extended the result reached in

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<sup>156</sup> 18 U.S.C. § 1962(a) (1988) (emphasis added).

<sup>157</sup> See *Haroco*, 747 F.2d at 401.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 401-02 (emphasis added) (citation omitted). The Seventh Circuit subsequently adopted the dictum in *Haroco* in its interpretation of section 1962(a). See *Masi v. Ford City Bank & Trust Co.*, 779 F.2d 397, 401-02 (7th Cir. 1985) (literal meaning of statute in accord with *Sedima*).

<sup>160</sup> See, e.g., *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 841 (4th Cir. 1990) (en banc); *Official Publications, Inc. v. Kable News Co.*, 884 F.2d 664, 668 (2d Cir. 1989); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union* 639, 839 F.2d 782, 790 (D.C. Cir.), cert. denied, 480 U.S. 926 (1988); *Garbade v. Great Divide Mining & Milling Corp.*, 831 F.2d 212, 213 (10th Cir. 1987); *Petro-Tech, Inc. v. Western Co. of N. Am.*, 824 F.2d 1349, 1358

*Haroco* on the person/enterprise issue under section 1962(a) to claims brought under section 1962(b).<sup>161</sup> That section provides, in

(3d Cir. 1987); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1396 (9th Cir. 1987); *Schofield v. First Commodity Corp.*, 793 F.2d 28, 29 (1st Cir. 1986); *Long Island Lighting Co. v. General Elec.*, 712 F. Supp. 292, 297 (E.D.N.Y. 1989); *Fillorama v. Johnstone, Lemon & Co.*, 697 F. Supp. 517, 523 (D.D.C. 1988); *Philadelphia TMC, Inc. v. AT&T Information Sys., Inc.*, 5 RICO L. Rep. 603, 606-07 (E.D. Pa. Dec. 12, 1986); *Bateman v. Blaum*, No. 86-2620 (E.D. La. Dec. 2, 1986) (LEXIS, Genfed library, Dist file); *Leavey v. Blinder, Robinson & Co.*, No. 85-7018 (E.D. Pa. Oct. 15, 1986) (LEXIS, Genfed library, Dist file); *Mix v. E.F. Hutton & Co.*, No. 85-3108 (D.D.C. Oct. 29, 1986) (LEXIS, Genfed library, Dist file); *Vietnam Veterans of Am., Inc. v. Guerdon Indus., Inc.*, 644 F. Supp. 951, 955-56 (D. Del. 1986); *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 4 RICO L. Rep. 764, 772-73 (E.D. La. Aug. 15, 1986); *United States v. Freshie Co.*, 639 F. Supp. 441, 441-42 (E.D. Pa. 1986); *Roche v. E.F. Hutton & Co.*, 4 RICO L. Rep. 439, 444 (M.D. Pa. May 20, 1986); *Gilbert v. Prudential-Bache Sec.*, 643 F. Supp. 107, 109 (E.D. Pa. 1986); *Conan Properties, Inc. v. Mattel, Inc.*, 619 F. Supp. 1167, 1172 (S.D.N.Y. 1985); *Commonwealth of Pennsylvania v. Derry Const. Co.*, 617 F. Supp. 940, 943 (W.D. Pa. 1985); *Fieldcrest Mills, Inc. v. Congo Agencies, Inc.*, 2 RICO L. Rep. 181, 187-88 (D.N.J. 1985). *But see United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982) (in reality, no distinction between corporate and individual), *cert. denied*, 459 U.S. 1105 (1983); *In re Wedtech*, 85 Bankr. 285, 291 (S.D.N.Y. 1988) ("person" liable under RICO must be distinct from "enterprise"); *Atlas Pile Driving Co. v. Financial Co.*, 697 F. Supp. 1058, 1067 (D. Minn. 1988) (same), *aff'd*, 886 F.2d 986 (8th Cir. 1989); *In re Cantanella Sec. Litig.*, 5 RICO L. Rep. 562, 565 (E.D. Pa. Jan. 16, 1987); *H.J. Inc. v. Northwestern Bell*, 648 F. Supp. 419, 427-29 (D. Minn.) (§ 1962(a) construction obviating enterprise/person requirement contrary to Eighth Circuit reading of RICO), *aff'd on other grounds*, 829 F.2d 648 (8th Cir. 1987), *rev'd on other grounds*, 109 S. Ct. 2893 (1988); *Rush v. Oppenheimer & Co.*, 628 F. Supp. 1188, 1196 (S.D.N.Y. 1986) (§ 1962(a) requires same elements as § 1962(c)); *Kredietbank N.V. v. Joyce Morris, Inc.*, No. 84-1903 (D.N.J. Oct. 30, 1985) (LEXIS, Genfed library, Dist file), *aff'd mem.*, 808 F.2d 1516 (3d Cir. 1986); *Kaufman v. Chase Manhattan Bank*, 581 F. Supp. 350, 357-58 (S.D.N.Y. 1984); *Williamette Sav. & Loan v. Blake & Neal Finance Co.*, 577 F. Supp. 1415, 1427 (D. Ore. 1984) ("person" under § 1962(a) is not same as "enterprise").

<sup>161</sup> See, e.g., *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1307 (7th Cir. 1987); *Schreiber Distributing Co.*, 806 F.2d at 1398; *In re Dow Co. "Sarabond" Prods. Liab. Litig.*, 666 F. Supp. 1466, 1474 (D. Colo. 1987); *Faberge, Inc. v. Wyman*, No. 82-6915 (S.D.N.Y. Mar. 24, 1987) (LEXIS, Genfed library, Dist file); *Vietnam Veterans of Am.*, 644 F. Supp. at 957; *Derry Constr. Co.*, 617 F. Supp. at 943-44 ("It is perhaps arguable that [an enterprise], through a pattern of racketeering activity, might gain an interest in or control of itself through the purchase of outstanding shares of stock with the money from the pattern of racketeering"). *But see Official Publications*, 884 F.2d at 668 (*dictum*) (§ 1962(b) should follow construction of § 1962(c)); *Computer Sciences Corp.*, 689 F.2d at 1190 ("enterprise" refers to different being than "person"); *Pru-Bache Sec. v. Cullather*, 678 F. Supp. 601, 609 (E.D. Va. 1987); *Medallion TV Enterprises, Inc. v. SelecTV, Inc.*, 627 F. Supp. 1290, 1294 (C.D. Cal. 1985) (cannot be "enterprise" and "person" sued under § 1962(b)), *aff'd*, 833 F.2d 1360 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 3241 (1989); *Louisiana Power & Light Co.*, 4 RICO L. Rep. at 772; *Von Bulow v. Von Bulow*, 634 F. Supp. 1284, 1308 (S.D.N.Y. 1986) (defendant could not be both "enterprise" and "person" "seeking to subvert that enterprise" under § 1962(b)); *Kredietbank N.V.*, No. 84-1903; *Bruss Co. v. Allnet Communications Serv., Inc.*, 606 F. Supp. 401, 407 (N.D. Ill. 1985) (applying *Haroco* analysis, § 1962(b) is construed same as § 1962(c)); *Umstead v. Durham Hosiery Mills, Inc.*, 592 F. Supp. 1269,

pertinent part: "It shall be unlawful for any *person* through a pattern of racketeering activity . . . to acquire or maintain control of an *enterprise* . . . ." <sup>182</sup>

Like *Haroco's* interpretation of section 1962(a), these courts have reached the same result based on section 1962(b)'s language: in their view, it does not contain any of the language of section 1962(c) that would suggest that the liable person and the enterprise must be distinct.<sup>183</sup> Consistent with the principle established in *Haroco* that only "perpetrator" enterprises should suffer RICO liability, these courts deem liability proper under section 1962(b) if the enterprise was the "direct or indirect" beneficiary of its agents' or employees' criminal activities.<sup>184</sup>

The result reached in *Haroco* also has been reached by some courts with respect to the person/enterprise issue under section 1962(d), RICO's conspiracy provision. That subsection provides as follows: "It shall be unlawful for any *person* to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section."<sup>185</sup>

Section 1962(d) does not refer expressly to an "enterprise" like the other subsections of section 1962. As a result, some courts have concluded, as *Haroco* did with respect to section 1962(a), that section 1962(d) is not subject to the person/enterprise rule of section 1962(c).<sup>186</sup> As one court has stated in this regard: "In contrast

1271 (M.D.N.C. 1984) (enterprise must be wholly different from person statute was designed to punish).

<sup>182</sup> 18 U.S.C. § 1962(b) (1988) (emphasis added).

<sup>183</sup> See, e.g., *Liquid Air Corp.*, 834 F.2d at 1307 ("Unlike subsection (c), which requires a relationship between the 'person' and the 'enterprise' (employer-employee), subsections (a) and (b) require only the use of an 'enterprise' by a person").

<sup>184</sup> See *id.*; *Schreiber Distrib. Co.*, 806 F.2d at 1397-98.

<sup>185</sup> 18 U.S.C. § 1962(d) (emphasis added).

<sup>186</sup> See *Barkman v. Wabash*, 7 RICO L. Rep. 289, 298 (N.D. Ill. 1987); *Faberge, Inc. v. Wyman*, No. 82-6915 (S.D.N.Y. 1987) (LEXIS, Genfed library, Dist file); *HGN Corp. v. Chamberlain, Hrdlicka, White, Johnson & Williams*, 3 RICO L. Rep. 757, 758 (N.D. Ill. Dec. 17, 1985); *Fieldcrest Mills, Inc. v. Congo Agencies, Inc.*, 2 RICO L. Rep. 181, 188-89 (D.N.J. 1985); *Onesti v. Thomson McKinnon Sec., Inc.*, 619 F. Supp. 1262, 1266 (N.D. Ill. 1985). But see *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982) ("enterprise" refers to different being from "person"), *cert. denied*, 459 U.S. 1105 (1983); *Pru-Bache Sec. v. Cullather*, 678 F. Supp. 601, 608-09 (E.D. Va. 1987) (proposition that RICO enterprise cannot simultaneously be RICO defendant finds "compelling" support); *Gaudette v. Panos*, 650 F. Supp. 912, 914 (D. Mass. 1987) (requirement of separation of "person" and "enterprise" would be diminished if not imposed on § 1962(d)); *Morris v. Gilbert*, 649 F. Supp. 1491, 1500-01 (E.D.N.Y. 1986) (corporate entity may not simultaneously be "enterprise" and "person"); *Kredietbank N.V. v. Joyce Morris, Inc.*, No. 84-1903 (D.N.J. Oct. 30, 1985) (LEXIS, Genfed library, Dist file) (pattern of racketeering activity within meaning of

to section 1962(c), there is no language in section 1962(d) suggesting that the person and the enterprise must be distinct."<sup>167</sup> Under this reading, the courts uphold a charge of conspiracy to violate section 1962(c) where the enterprise and the person are the same entity, so long as there is a sufficient indication that the enterprise was a "perpetrator."

Although most of these cases have involved civil damage suits, their rationales and conclusions apply equally in criminal prosecutions. Section 1962 simply defines the conduct that is forbidden, and other sections<sup>168</sup> prescribe the civil and criminal penalties accompanying violations. Without minimizing the adverse impact of civil treble damage liability that these decisions so cavalierly impose on even legitimate organizations, their equal application to criminal prosecutions makes them especially ominous.

Also, they are fundamentally unsound. Indeed, it is difficult to understand why courts are so facile in expanding the restricted liability under section 1962(c) when they interpret the other subsections. In the section 1962(c) context, the courts aptly recognize that they should not contravene Congress' overarching goal by imposing liability on the very type of legitimate organization that RICO was designed to protect.<sup>169</sup> Yet, they brush aside that concern when considering RICO claims under sections 1962(a), (b), and (d), casually applying principles of imputed liability because the statutory language does not unmistakably forbid that result.<sup>170</sup> By contrast, we submit that there are compelling reasons to treat the distinction so clearly manifested in section 1962(c) as representing a pervasive restriction on imputed liability that should apply across the RICO landscape. Under this interpretation, an organization bears imputed liability only under standards similar to those discussed in Part II. B. of this Article.

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RICO not established because defendants failed to distinguish between "person" and "enterprise"), *aff'd mem.*, 808 F.2d 1516 (3d Cir. 1986); *Wilcox Dev. Co. v. First Interstate Bank*, 590 F. Supp. 445, 451 (D. Or. 1984) (statute is clear that enterprise cannot be RICO defendant), *rev'd*, 815 F.2d 522 (9th Cir. 1987).

<sup>167</sup> *Fieldcrest Mills, Inc.*, 2 RICO L. Rep. at 187.

<sup>168</sup> 18 U.S.C. §§ 1963-1964 (1988).

<sup>169</sup> See *supra* notes 150-51 and accompanying text.

<sup>170</sup> See *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 839 F.2d 782, 791 (D.C. Cir.), *cert. denied*, 480 U.S. 926 (1988).

## 2. A Solution: A Uniform Person/Enterprise Rule

Courts should interpret sections 1962(a) and (b) consistently with section 1962(c), which requires that the person and the enterprise be distinct entities. Moreover, RICO's legislative history demonstrates that, if anything, the case for requiring a separation between the person and the enterprise is even stronger for sections 1962(a) and (b) than it is for section 1962(c).<sup>171</sup> The fact that sections 1962(a) and (b) do not contain the additional element that the alleged person "be employed or associated with" the enterprise,<sup>172</sup> does not inexorably lead to the conclusion that the person and the enterprise do *not* have to be distinct under those subsections.

Sections 1962(a) and (b) facially indicate, in their use of the distinct terms "person" and "enterprise," Congress' desire to separate the wrongdoing "person" from an "enterprise" which may be the victim or the instrument of the wrongdoing. Like section 1962(c), these subsections expressly speak in terms of two distinct actors: the culpable "person" and the "enterprise" in which the person invests his illicit proceeds or which he acquires or controls through his illegal acts.<sup>173</sup> It is perverse to disregard this distinction simply because section 1962(c) happens to include another el-

<sup>171</sup> See *Final Report*, *supra* note 16.

<sup>172</sup> See *supra* note 142 and accompanying text.

<sup>173</sup> See, e.g., *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982) (enterprise refers to "a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit"), *cert. denied*, 459 U.S. 1105 (1983); *CATV Support Serv., Inc. v. Magnavox CATV Sys., Inc.*, No. 3587 (S.D.N.Y. May 4, 1987) (LEXIS, Genfed library, Dist file) ("subsections of 1962 should be construed uniformly and . . . the requirement of a distinct 'person' and 'enterprise' applies to each alike"); *Neville v. Logicon*, 6 RICO L. Rep. 423, 423 (D.D.C. 1987) (corporation cannot be named both liable individual and enterprise under any subsection of § 1962); *In re Cantanella Sec. Litig.*, 5 RICO L. Rep. 562, 565 (E.D. Pa. Jan. 16, 1987) (not requiring person and enterprise to be distinct entities under all subsections of § 1962, "would indeed warp the principles of statutory construction, which is to interpret terms in a consistent manner and in harmony with RICO's purpose"); *H.J. Inc. v. Northwestern Bell*, 648 F. Supp. 419, 428 (D. Minn. 1986) ("consistent use of the two different terms 'person' and 'enterprise' throughout section 1962 indicates an intent to distinguish those actors throughout"), *aff'd*, 829 F.2d 648 (8th Cir. 1987), *rev'd*, 109 S. Ct. 2893 (1989); *Rush v. Oppenheimer & Co.*, 628 F. Supp. 1188, 1197 (S.D.N.Y. 1986) (statutory language indicates that person and enterprise were meant to be distinct entities under each subsection of § 1962); *Kredietbank N.V. v. Joyce Morris, Inc.*, No. 84-1903 (D.N.J. Jan. 9, 1986) (LEXIS, Genfed library, Dist file) ("consistent use of the words 'person' and 'enterprise' in the statute represents an intention to distinguish between those actors throughout the statute"); *Bays v. Hunter Sav. Ass'n*, 539 F. Supp. 1020, 1024 (S.D. Ohio 1982) ("in all cases the person defined by the Act is the defendant and is always distinct from the enterprise").

ement that *presupposes* the distinction that sections 1962(a) and (b) already draw.<sup>174</sup>

Apart from the exegetical point that Congress' use of two distinct terms implies two different entities, the contrary interpretation of sections 1962(a) and (b) leads to rhetorical nonsense. A sensible reading of section 1962(c) has led virtually all courts to reject the notion that an organization can "associate with itself."<sup>175</sup> Similarly, however, "[t]here seems to be little distinction between an [organization] associating with its own business affairs and an [organization] receiving illegal income to invest in itself."<sup>176</sup> Yet, that strained and artificial result flows from blurring the person/enterprise distinction under section 1962(a).

A moment's reflection exposes a similar flaw in merging the person and the enterprise under section 1962(b). One noted RICO commentator has explained: "[b]ecause it is the shareholders who own interests in a corporation or who control the corporation, it is conceptually absurd to regard a corporation as owning an interest in itself or controlling itself as contemplated by § 1962(b)."<sup>177</sup>

At the very least, the language of sections 1962(a) and (b) is not so clear that the courts are ineluctably forced to treat the "enterprise" as the same entity as the "person." Even if we concede some abiquity on the point, settled principles of statutory construction dictate that courts resort to RICO's legislative history.<sup>178</sup> Courts which have relied on legislative history consistently have held that the person and the enterprise must be distinct under section 1962(c).<sup>179</sup> In reaching a contrary result under sections 1962(a) and (b), however, many of these same courts have neglected the

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<sup>174</sup> Some courts have relied on RICO's liberal construction clause as authority for reading subsections 1962(a) and (b) differently from subsection 1962(c), because a broad reading of the former provisions makes it easier for plaintiffs to recover treble damages. *See, e.g.*, *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 838-39 (4th Cir. 1990) (citing explicit policy that RICO be liberally interpreted as reason why plaintiffs who do not meet § 1962(c) requirements still have section (a) relief available) (en banc). *But cf.* *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1150 (10th Cir.) ("general principle that RICO is to be accorded a liberal interpretation cannot justify expanding section 1962(a) beyond the limits of that subsection's own language"), *cert. denied*, 110 S. Ct. 76 (1989).

<sup>175</sup> *See supra* notes 145-47 and accompanying text.

<sup>176</sup> Note, *supra* note 21, at 595.

<sup>177</sup> Tarlow, *Criminal RICO Report*, 5 RICO L. Rep. 214, 216 (Feb. 1987).

<sup>178</sup> *See, e.g.*, *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201-02 (1979) (citing rule of statutory construction that something within letter of statute may not be within intention of makers).

<sup>179</sup> *See supra* note 146 and accompanying text.

critical task of examining the statute's legislative history.<sup>180</sup>

RICO's legislative history unambiguously demonstrates that, in its *entirety*, section 1962—not just subsection (c)—was aimed at persons acting upon or through an enterprise. As explained by the relevant legislative material discussing the general goal of section 1962: "Section 1962 establishes a *threefold* prohibition aimed at the infiltration of legitimate organizations."<sup>181</sup> This explanation indicates that sections 1962(a) and (b) were designed by Congress so that they, like subsection (c), would reach the criminal actor—the "person" whose conduct is defined and penalized under each subsection—but protect the legitimate enterprise.<sup>182</sup> Congress' legislative goal is best promoted if sections 1962(a) and (b) are interpreted in the same manner as section 1962(c).

This conclusion is buttressed further when one considers the differing transactions that Congress designed sections 1962(a), (b), and (c) to regulate. Congress specifically designed sections 1962(a) and (b)—in contrast to section 1962(c)<sup>183</sup>—to protect legitimate businesses from "infiltration" by outside criminal interests. Section 1962(a), for instance, was designed to prohibit criminals from "laundering" ill-gotten gains derived from a pattern of racketeering activity through investing them in a legitimate enterprise.<sup>184</sup> Under subsection (a), the enterprise plays the role of "prize" of outside criminal interests or, at worst, a passive instrument, when criminal interests are ensconced inside the enterprise and use it as the receptacle of their "dirty" money. Congress viewed the legitimate enterprise as worthy of protection, even though such an enterprise may have been nominally "benefited" by the infusion of

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<sup>180</sup> See *supra* text following note 150.

<sup>181</sup> S. REP. NO. 617, 91st Cong., 2d Sess. 159 (1969) [hereinafter SENATE REP.] (emphasis added); see also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 488 (1985) (relying on Senate Report No. 617 for congressional intent behind term "pattern"); SENATE REP., *supra*, at 79 (where organization run by racketeering, persons involved are separable from organization).

<sup>182</sup> Cf. *Schofield v. First Commodity Corp.*, 793 F.2d 28, 31 (1st Cir. 1986) (in light of RICO's purpose, logical that Congress would have designed § 1962(c) to reach criminal but protect victimized enterprise).

<sup>183</sup> See *infra* note 190 and accompanying text.

<sup>184</sup> See, e.g., *H.J. Inc. v. Northwestern Bell*, 648 F. Supp. 419, 428 (D. Minn. 1986) (§ 1962(a) "portrays the enterprise as the investment object of the criminal violators"), *aff'd*, 829 F.2d 648 (8th Cir. 1987), *rev'd*, 109 S. Ct. 2893 (1989); *Rush v. Oppenheimer & Co.*, 628 F. Supp. 1188, 1197 (S.D.N.Y. 1985) (§ 1962(a) "enterprise" is bounty purchased with racketeering profits); *United States v. Loftin*, 518 F. Supp. 839, 854 (S.D.N.Y. 1981) (§ 1962(a) proscribes investment of "dirty money"); see also Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 YALE L.J. 1491, 1495 (1974).

money into its operations.<sup>185</sup> Simply put, RICO's legislative history indicates that section 1962(a) was not meant to impose liability on a legitimate business "enterprise."<sup>186</sup>

Similarly, Congress drafted section 1962(b) to prevent criminal interests from taking over a legitimate business or controlling it through criminal activities directed at that business.<sup>187</sup> Indeed, it is under section 1962(b) that Congress' intent to protect legitimate organizations—businesses and labor unions—against infiltration by criminal interests is most apparent.<sup>188</sup> Indeed, it is hard to fathom how a legitimate business enterprise could be the "perpetrator" or "central figure" in the criminal activity contemplated under section 1962(b). Instead, such an enterprise's role invariably would be that of the "prize" of outside criminal interests, or the "victim" of racketeers who have already insinuated themselves into the enterprise.

Thus, the *raison d'être* of sections 1962(a) and (b) was to protect legitimate enterprises from infiltration, attempted takeover, or actual control by criminal interests.<sup>189</sup> If anything, therefore, courts should be most hesitant to impute criminal and civil liability on them, unless Congress unmistakably signaled a desire to do so. Neither RICO's statutory language nor its legislative history contains such a clear—and self-defeating—command.

The history of section 1962(c) underscores this point. Unlike sections 1962(a) and (b), Congress did not design section 1962(c) principally to protect legitimate businesses against infiltration by outside criminal interests. Rather, Congress added it at the request of the Department of Justice, primarily to create a means by which to prosecute a criminal within the enterprise from using it as a tool to commit or further conduct criminal activity.<sup>190</sup> Typically, a section 1962(c) "enterprise" is the "perpetrator" or "central figure" in

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<sup>185</sup> See *Rush*, 628 F. Supp. at 1197.

<sup>186</sup> See *supra* notes 150-59 and accompanying text.

<sup>187</sup> See, e.g., *United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir. 1987) (§ 1962(b) does not forbid enterprise from engaging in predicate acts, but forbids those predicate acts aimed at consuming enterprise); Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 313 (1983) ("section 1962(b) prosecutions involved . . . 'muscling' into businesses through loansharking, bribery, extortion, or fraud").

<sup>188</sup> See generally Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 689-90 (1987) (violation of § 1962(b) does not require prior criminal activity).

<sup>189</sup> See e.g., Tarlow, *supra* note 177.

<sup>190</sup> See generally Lynch, *supra* note 188, at 682 (§ 1962(c) does not prohibit act of infiltration per se, but criminal activities of racketeers).



the criminal scheme because it has already been infiltrated, taken over, or used by the "person" for criminal purposes.<sup>191</sup> Despite this fact, courts have almost uniformly—and correctly—found that a section 1962(c) enterprise presumptively falls within the class of victims that Congress sought to protect and thus bears no imputed liability for the crimes the "person" commits through it.<sup>192</sup>

Since an infiltrated enterprise is properly protected from liability under section 1962(c), there is little doubt that legitimate enterprises which are attempting to fight off infiltration also should be protected from RICO liability under sections 1962(a) and (b).<sup>193</sup> Legitimate enterprises covered under sections 1962(a) and (b) are much more likely to be the innocent victims of a racketeer's freestanding pattern of wrongdoing, which may have little or nothing to do with the enterprise's affairs.<sup>194</sup>

Thus, upon closer examination, the distinction some courts have drawn between section 1962(c) and sections 1962(a) and (b) contravenes RICO's statutory language, Congress' intent in passing the statute, and the particular purposes sought to be served by the various subsections of section 1962. Accordingly, the only legitimate solution for a proper interpretation of section 1962 is to adopt a uniform rule: under any properly pleaded RICO count, the "person" violating the statute and the "enterprise" affected must be separate entities.<sup>195</sup>

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<sup>191</sup> *Id.*

<sup>192</sup> *See, e.g.,* B.F. Hirsch v. Enright Refining Co., 751 F.2d 628, 634 (3d Cir. 1984) (one of RICO's congressional purposes "was to prevent the takeover of legitimate businesses by criminals and corrupt organizations"). "It is in keeping with that Congressional scheme to orient section 1962(c) toward punishing the infiltrating criminals rather than the legitimate corporation which might be an innocent victim of the racketeering activity." *Id.*

<sup>193</sup> *See* Lacovara & Nicoli, *supra* note 21, at 3.

<sup>194</sup> *See, e.g.,* United States v. Cauble, 706 F.2d 1322, 1331 n.11 (5th Cir. 1983) ("[s]ection 1962(b) forbids the takeover of an enterprise by illegal means"), *cert. denied*, 465 U.S. 1005 (1984); Rush v. Oppenheimer & Co., 628 F. Supp. 1188, 1197 (S.D.N.Y. 1985) (§ 1962(a) "contemplates an enterprise which can be entirely unrelated to the predicate acts").

<sup>195</sup> Some courts deem the distinct person/enterprise rule satisfied where the organization is named as the liable "person" while at the same time being named along with its employees as the supposedly distinct "association in fact" enterprise. *See, e.g.,* Petro-Tech Inc. v. Western Co. of N. Am., 824 F.2d 1349, 1361 (3d Cir. 1987) ("vicarious liability for the employer of RICO persons may be appropriate . . . even if the employer is also the RICO enterprise"); Cullen v. Margiotta, 811 F.2d 698, 729-30 (2d Cir.), *cert. denied*, 483 U.S. 1027 (1987); LSC Assoc. v. Lomas & Nettleton Fin. Corp., 629 F. Supp. 979, 983 (E.D. Pa. 1986). *But see* Puckett v. Tennessee Eastman Co., 889 F.2d 1481, 1489 (6th Cir. 1989) (plain language of statute precludes person from simultaneously being enterprise); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 839 F.2d 782, 789 (D.C. Cir.) ("logic dictates that one entity may not serve as the enterprise and the person associated with it"),

The "separate entities" rule should also encompass RICO conspiracy claims brought pursuant to section 1962(d). Courts which have not required a separate person and enterprise under section 1962(d) fail to recognize that section 1962(d) is derivative; it merely relates back to conduct prohibited by sections 1962(a) through (c). Because of its derivative nature, it is nonsensical to interpret section 1962(d) as criminalizing a conspiracy to engage in conduct for which the enterprise would bear no substantive criminal liability.

Moreover, if a court interprets section 1962(d) inconsistently with sections 1962(a) through (c), plaintiffs or the government could "end-run" that prohibition under those subsections merely by alleging a RICO conspiracy under subsection (d).<sup>196</sup> In this respect, the antitrust laws, after which many aspects of RICO were modeled,<sup>197</sup> provide a useful insight: a corporation cannot "conspire" with its own employees.<sup>198</sup> Accordingly, courts should apply the same analysis to a section 1962(d) claim with respect to the "person/enterprise" rule as is applied to the substantive subsection on which the conspiracy claim is based.<sup>199</sup> A nonculpable enter-

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*cert. denied*, 480 U.S. 926 (1988); *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir. 1985) (evidence of enterprise separate and apart from pattern of activity must be presented to jury), *cert. denied*, 483 U.S. 1032 (1987); *American Bonded Warehouse Corp. v. Compagnie Nationale Air France*, 653 F. Supp. 861, 867 (N.D. Ill. 1987) (complaint that defendant corporation was both enterprise and liable person dismissed); *Tarasi v. Dravo Corp.*, 613 F. Supp. 1235, 1236 (W.D. Pa. 1985) (application of agency theory violates *Hirsch* rule that "enterprise" and "person" must be distinct); *Rokeach v. Eisenbach*, No. 85-C-1106 (N.D. Ill. Dec. 3, 1985). The courts following this approach, however, have misunderstood a crucial point: an "association in fact" consisting of a legitimate business and its employees is no different from the legitimate business itself, since a business cannot operate other than through its employees or agents. *See American Bonded*, 653 F. Supp. at 867; *Tarasi*, 613 F. Supp. at 1237. Accordingly, an "association in fact" enterprise consisting solely of a legitimate business and its employees should be subject to the separate person/enterprise rule, because the person and the enterprise are really one and the same.

<sup>196</sup> *Cf. Petro-Tech*, 824 F.2d at 1361 (rejecting use of *respondeat superior* in § 1962(c) context on same grounds); *Schofield v. First Commodity Corp.*, 793 F.2d 28, 33 (1st Cir. 1986) (same).

<sup>197</sup> *See, e.g., Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (RICO and Clayton Act are both aimed at compensating same injuries with same penalties); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 n.8 (1985) (RICO legislative history indicates reliance on Clayton Act).

<sup>198</sup> *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984) (under § 1 of Sherman Act, corporation cannot conspire with subsidiary).

<sup>199</sup> *See Rush v. Oppenheimer & Co.*, 628 F. Supp. 1188, 1198 n.5 (S.D.N.Y. 1985) (corporation generally incapable of engaging in RICO conspiracy when only other conspirators are employees); *McClendon v. Continental Group*, 602 F. Supp. 1492, 1510-11 (D.N.J. 1985) (same); *Chambers Dev. Co. v. Browning Ferris Indus.*, 590 F. Supp. 1528, 1541-42 (W.D. Pa.

prise cannot be treated as conspiring with the "person" who plans to misuse it.

### B. *Imputed Liability Under Respondeat Superior Principles*

Resolution of the question of organizational liability raised by the "person/enterprise" issue does not answer fully whether organizations may be held liable under RICO for the acts of their employees and agents. The Supreme Court has indicated that where a federal statute proscribes conduct and explicitly imposes liability, in the absence of contrary congressional intent, normal rules of agency law should apply.<sup>200</sup>

The federal courts are sharply divided in deciding whether Congress intended to narrow the scope of imputed liability under RICO.<sup>201</sup> The answer to this question, however, need not turn on the presence or absence of specific congressional attention to the issue; statutory language, structure, and purpose mark a clear enough path.<sup>202</sup>

The signposts under RICO suggest a distinctly narrowed scope of imputed criminal or civil liability. Presumptively, the person/enterprise dichotomy suggests that the legitimate organizational enterprise is to be protected against the consequences of the wrongdoing "person's" crimes, including resultant penalties. RICO's severe penalties were aimed only at "corrupt" or truly "culpable" organizations. Adoption of the principles embodied in the FC Code and MP Code approaches to organizational liability would harmonize interpretation of RICO with its legislative intent.

#### 1. The Current State of the Law

Courts are split on whether legitimate businesses may be held vicariously liable under RICO for the misconduct of their employ-

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1984) (same).

<sup>200</sup> *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 569 (1982).

<sup>201</sup> Compare *Schofield v. First Commodity Corp.*, 793 F.2d 28, 32 (1st Cir. 1986) ("there is unlikely to be a situation, in the absence of an express statement, in which Congress more clearly indicates that *respondeat superior* is contrary to its intent") with *Bernstein v. IDT Corp.*, 582 F. Supp. 1079, 1083 (D. Del. 1984) ("nothing in RICO [n]or its legislative history . . . suggest[s] that the normal rules of agency law should not apply to the civil liability created by that statute").

<sup>202</sup> See *American Soc'y of Mechanical Eng'rs*, 456 U.S. at 570; see also *Petro-Tech, Inc. v. Western Co. of N. Am.*, 824 F.2d 1349, 1356 (3d Cir. 1987) (common-law doctrines will be applied in federal litigation to extent they advance goals of relevant statute).

ees, and if so, what standard should apply.<sup>203</sup> Thus far, the decisions addressing the issue primarily involve civil treble damage cases, but the split affects criminal RICO prosecutions as well.

Roughly five different judicial approaches have emerged. First, some courts have held that organizations are liable under the traditional common-law doctrine of *respondeat superior*.<sup>204</sup> Under this doctrine, an organization is liable for the torts of its agent if (1) the agent's conduct comes within the scope of his employment; (2) the agent acts with apparent authority; or (3) the organization ratifies the agent's wrongful conduct.<sup>205</sup> Thus, an organization may be held vicariously liable for treble damages under RICO according to this approach, even when its employee did not act for the benefit of the employer, or acted in defiance of organizational policy.<sup>206</sup>

The rationale for adopting the *respondeat superior* standard in the RICO context is set forth in *Bernstein v. IDT Corp.*,<sup>207</sup> the seminal decision advocating this approach. In *Bernstein*, the plaintiff had named an organization both as the liable person and the affected enterprise under section 1962(c). The defendant organization sought to dismiss the claim on the grounds that the plaintiff's pleading violated the "person/enterprise" rule. The court, however, declined to resolve the issue, discarding it as academic because the organization, in any event, would bear responsibility for the wrongful acts under *respondeat superior*.<sup>208</sup>

The *Bernstein* court noted that the Supreme Court in *American Society of Mechanical Engineers v. Hydrolevel Corp.*,<sup>209</sup> has held that normal rules of agency law should apply to violations of federal antitrust statutes unless Congress evidenced a contrary re-

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<sup>203</sup> See *infra* notes 204-35 and accompanying text.

<sup>204</sup> See, e.g., *In re U.S. Oil & Gas Sec. Litig.*, No. 2217 (S.D. Fla. Feb. 8, 1988) (LEXIS, Genfed library, Dist file); *Connors v. Lexington Ins. Co.*, 666 F. Supp. 434, 446-47 (E.D.N.Y. 1987); *Federal Sav. & Loan Ins. Corp. v. Shearson-American Express*, 658 F. Supp. 1331, 1342 (D.P.R. 1987); *Tryco Trucking Co. v. Belk Store Serv., Inc.*, 634 F. Supp. 1327, 1336 (W.D.N.C. 1986); *Morley v. Cohen*, 610 F. Supp. 798, 811 (D. Md. 1985); *Bernstein*, 582 F. Supp. at 1083; cf. *United States v. Hartley*, 678 F.2d 961, 987-89 (11th Cir. 1982) (applying same standard in context of criminal RICO liability), *cert. denied*, 459 U.S. 1170 (1983).

<sup>205</sup> See, e.g., *American Soc'y of Mechanical Eng'rs*, 456 U.S. at 556-67; Nathan, *Corporations as Defendants and Enterprises Under Civil RICO: What's in a Name?*, 1 RICO L. Rep. 213 (July 1984).

<sup>206</sup> See, e.g., *Bernstein*, 582 F. Supp. at 1083 (applying general rules of agency to impose liability on wrongdoer's employer).

<sup>207</sup> 582 F. Supp. 1079 (D. Del. 1984).

<sup>208</sup> *Id.* at 1083-84.

<sup>209</sup> 456 U.S. 556 (1982).

sult.<sup>210</sup> The *Bernstein* court determined that the same rules of agency should apply in the RICO context as well. The court concluded:

I perceive nothing in RICO or its legislative history which would suggest that the normal rules of agency law should not apply to the civil liability created under the statute. To the contrary, as in *American Society of Mechanical Engineers*, it appears to me that application of the doctrines of apparent authority and *respondeat superior* will, at least in most instances, further the statutory goals.<sup>211</sup>

Thus, *Bernstein* reflects the most expansive approach to organizational liability under RICO; even if an enterprise has been infiltrated, and even if it has been a *victim* of its employees' criminal conduct, it is subject to RICO treble damage liability just as it would be for any other common-law tort.

A second approach taken by some courts is slightly more restrictive. Under this approach, vicarious RICO liability is imposed on organizations when their employees or agents act within the scope of their employment with the intent, at least in part, to benefit the organization.<sup>212</sup> This standard is essentially similar to the standard that federal courts traditionally have applied to organizations in the criminal law context.<sup>213</sup>

In practical terms, this approach is also very expansive. As previously discussed, liability under this standard is thrust on a legitimate business even for acts of low-level employees that contravene company policy, and acts that may amount to infiltration

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<sup>210</sup> *Bernstein*, 582 F. Supp. at 1083 (citing *American Soc'y of Mechanical Eng'rs*, 456 U.S. at 569).

<sup>211</sup> *Id.* at 1083-84. Another court has stated that *respondeat superior* liability under RICO "is simply a reality to be faced by corporate entities. With the advantages of incorporation must come the appendant responsibilities." *In re U.S. Oil & Gas Sec. Litig.*, No. 2217 (S.D. Fla. Feb. 8, 1988) (LEXIS, Genfed library, Dist file).

<sup>212</sup> See, e.g., *San Jacinto Sav. Ass'n v. TDC Corp.*, 707 F. Supp. 1579, 1580 (M.D. Fla. 1989) (where employees acted with intent to benefit corporation, motion to dismiss on *respondeat superior* grounds inapplicable to RICO denied); *Woods v. Piedmont*, 676 F. Supp. 143, 147 (E.D. Mich. 1987) (brokerage house liable under RICO where investment broker took money from customers but did not make requested investments); *Hunt v. Weatherbee*, 626 F. Supp. 1097, 1103 (D. Mass. 1986) (liability imposed if agent motivated by any appreciable extent by principal's business); *D & S Auto Parts, Inc. v. Schwartz*, No. 82-C-5279 (N.D. Ill. Sept. 4, 1985) (LEXIS, Genfed library, Dist file); *Wagman v. FSC Sec. Corp.*, Fed. Sec. L. Rep. (CCH) ¶ 92,445 (N.D. Ill. July 23, 1985); *In re Olympia Brewing Co. Sec. Litig.*, 1 RICO L. Rep. 823, 837-38 (N.D. Ill. Dec. 18, 1984).

<sup>213</sup> See *supra* notes 47-70 and accompanying text (discussing development of organizational liability in criminal law context).

or other activities that ultimately may have victimized the business.<sup>214</sup> If some intent to benefit the company is shown, even if no actual benefit was ultimately realized, a legitimate business may suffer the penalty of treble damage liability as well as exposure to criminal prosecution.<sup>215</sup>

A third approach taken by some courts imposes vicarious liability on legitimate businesses only when the evidence is sufficient to show that high-level organizational personnel or agents were involved in the criminal activity. Under this approach, high-level managerial involvement is critical because it establishes that the organization itself was a "central figure" in the alleged criminal activity.<sup>216</sup>

Representative of this approach is *Gruber v. Prudential-Bache Securities, Inc.*<sup>217</sup> In *Gruber*, the plaintiffs sought to impose liability on a brokerage house for the alleged wrongful acts of non-managerial employees. In determining whether the brokerage house should be held vicariously liable, the court noted that the federal policy underlying RICO was to protect legitimate businesses from outside criminal interests.<sup>218</sup> The court approved the distinction drawn by other courts between "aggressor" organizations—the "central figures" in the criminal scheme—and "conduit" organizations—those unknowingly facilitating illegal behavior.<sup>219</sup> Imposition of vicarious RICO liability is proper in the former case, the court reasoned, because RICO's purpose of

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<sup>214</sup> See *id.*

<sup>215</sup> See Wright, *supra* note 21, at 630. As other courts have pointed out, even where some actual benefit has been accorded an organization by its low-level employees' criminal conduct, it does not follow that the imposition of RICO treble damage liability is appropriate. See, e.g., *Gruber v. Prudential-Bache Sec., Inc.*, 679 F. Supp. 165, 181 (D. Conn. 1987) (corporation's benefitting from illegal behavior not equivalent to corporation's participation as "central figure" in illegal behavior).

<sup>216</sup> See, e.g., *Greyhound Fin. Corp. v. Willyard*, No. 16040 (D. Utah Dec. 23, 1989) (LEXIS, Genfed library, Dist file) (summary judgment where defendant had no knowledge of or participation in fraud of employees); *K & S Partnership v. Continental Bank, N.A.*, 127 F.R.D. 664, 670 (D. Neb. 1989) (judgment for defendant N.O.V. because evidence established that employees' activities did not further corporate policy); *Capalbo v. Paine Webber, Inc.*, 694 F. Supp. 1315, 1319-21 (N.D. Ill. 1988) (claim dismissed as plaintiff failed to allege acquisition of enterprise by defendant employer through racketeering activities); *Gruber*, 679 F. Supp. at 181 (corporation liable where it is "central figure"); *Onesti v. Thomson McKinnon Secs., Inc.*, No. 85-C-4375 (N.D. Ill. Jan. 26, 1987) (LEXIS, Genfed library, Dist file); *Dakis v. Chapman*, 574 F. Supp. 757, 759-60 (N.D. Cal. 1986) (low-level corporate executive acting without sanction, insufficient for RICO application against corporation).

<sup>217</sup> 679 F. Supp. 165 (D. Conn. 1987).

<sup>218</sup> *Id.* at 180.

<sup>219</sup> *Id.*

thwarting the infiltration by organized crime would be well served; in contrast, that purpose would not be served if "malefactors at a low corporate level could thrust [RICO] treble damage liability on a wholly unwitting corporate management and shareholders."<sup>220</sup>

With these principles in mind, the *Gruber* court determined that an organization could be deemed a "central figure" or "aggressor" only where an "officer or director had knowledge of, or was recklessly indifferent toward, the unlawful activity."<sup>221</sup> The plaintiffs failed to meet this standard and the court refused to impose vicarious liability.<sup>222</sup> Under this approach, organizations may face single-damage tort liability for the acts of their low-level employees and agents; organizations will not, however, have RICO's "punitive, financially ruinous treble damage remedy"<sup>223</sup> or criminal exposure thrust upon them for activity their management neither encouraged, nor condoned.

The fourth approach to organizational liability follows the "person/enterprise" debate.<sup>224</sup> In section 1962(c) cases, RICO's underlying purpose of protecting legitimate businesses from RICO treble damage liability is given full effect. Under this approach, a business may not be named as both a "person" and an "enterprise" in the same count under section 1962(c), nor may it be held derivatively liable under traditional or modified agency principles.<sup>225</sup> While applying this bright line rule with respect to section 1962(c), many of the same courts do in fact hold legitimate businesses liable, either directly or vicariously, under the remaining subsections of 1962 for the acts of their low-level employees so long as the business was the direct or indirect beneficiary of those

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<sup>220</sup> *Id.* at 181 (quoting *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20, 24 n.9 (N.D. Ill. 1982)); see also *Dakis v. Chapman*, 574 F. Supp. 757, 760 (N.D. Cal. 1983) ("it would be an anomalous result indeed if, because [the employee] had misused his authority . . . and had actually violated internal guidelines of the [organization] by so doing, the [organization was] nonetheless deemed 'aggressor' enterprises liable under RICO").

<sup>221</sup> *Gruber*, 679 F. Supp. at 181. The *Gruber* court also suggested an alternative basis for imputing RICO liability to an organization. If an organization's "policies foster the racketeering activity that is at the heart of RICO's prohibitions," then the organization can be held liable for those policies. *Id.* (quoting *Schofield v. First Commodity Corp.*, 793 F.2d 28, 30 n.33 (1st Cir. 1986)). In the facts before the *Gruber* court, however, the court found that none of the brokerage house's policies fostered the alleged scheme. *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> See *supra* notes 136-40 and accompanying text.

<sup>225</sup> See *Schofield v. First Commodity Corp.*, 793 F.2d 28, 33-35 (1st Cir. 1986).

acts.<sup>226</sup>

The Third Circuit's decision in *Petro-Tech v. Western Co. of North America*<sup>227</sup> best illustrates the fourth approach. In *Petro-Tech*, the Third Circuit, which previously had held that an organization could not be both the "person" and the "enterprise" under section 1962(c),<sup>228</sup> rejected the plaintiff's argument that *respondeat superior* principles should be invoked to hold the "enterprise" liable for the acts of its employees who were named as "persons" under such a count. The court reasoned that Congress did not intend enterprises to be held liable under any circumstances under section 1962(c).<sup>229</sup> Accordingly, the court declined to use *respondeat superior* to circumvent that rule.<sup>230</sup>

The court, however, did not evidence equal concern for legitimate businesses named as enterprises under section 1962(a). The Third Circuit joined the Seventh and Ninth Circuits by holding that an organization can be named as both the liable "person" and the affected "enterprise" under section 1962(a) when the organization is either the direct or indirect beneficiary of its employees' pattern of racketeering activity.<sup>231</sup> Moreover, the Third Circuit expressly approved the use of *respondeat superior* principles under section 1962(a), even where the enterprise is a legitimate business.<sup>232</sup> Accordingly, through either route, the Third Circuit ensured that legitimate businesses may incur liability under section 1962(a) if they gain a "direct or indirect" benefit from their employees' wrongdoing. The net effect of this approach channels RICO claims away from section 1962(c) and toward other subsec-

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<sup>226</sup> See, e.g., *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 839 F.2d 782, 791 (D.C. Cir.), cert. denied, 480 U.S. 926 (1988); *Petro-Tech, Inc. v. Western Co. of N. Am.*, 824 F.2d 1349, 1361 (3d Cir. 1987); *D&S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 967 (7th Cir.), cert. denied, 486 U.S. 1061 (1988); *SK Hand Tool Corp. v. Dresser Indus. Inc.*, 852 F.2d 936, 941 (7th Cir. 1988), cert. denied, 109 S. Ct. 3241 (1989); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1307 (7th Cir. 1987), cert. denied, 109 S. Ct. 5241 (1989); *Schofield*, 793 F.2d at 33; *Haroco*, 747 F.2d at 401-02 n.18; *Reinfeld v. Riklis*, 722 F. Supp. 1077, 1086 (S.D.N.Y. 1989); *Grimsley v. First Alabama Bank*, No. 16042 (S.D. Ala. Dec. 15, 1988) (LEXIS, Genfed library, Dist file); *In re Posey*, 81 Bankr. 416, 421-22 (N.D. Miss. 1987); *Herman v. Jefferson Bancshares, Inc.*, No. 9977 (E.D. La. Oct. 26, 1987) (LEXIS, Genfed library, Dist file).

<sup>227</sup> 824 F.2d 1349 (3d Cir. 1987).

<sup>228</sup> *Id.* at 1358 (citing *E.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628 (3d Cir. 1984)).

<sup>229</sup> *Id.* at 1359.

<sup>230</sup> *Id.* at 1359 & n.11.

<sup>231</sup> *Id.* at 1360-61; see *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1398 (9th Cir. 1986); *Haroco*, 747 F.2d at 402.

<sup>232</sup> *Petro-Tech*, 824 F.2d at 1361.



tions of section 1962, where RICO plaintiffs can bring broad principles of imputed liability to bear against legitimate businesses.

The fifth and final approach completely rejects the application of *respondeat superior* to RICO claims. Some of the courts following this approach have reasoned that RICO's emphasis on punishing the individual malefactor rather than the legitimate business by whom he is employed leaves no room for vicarious liability.<sup>233</sup> Representative of this approach is a decision by the United States District Court for the Eastern District of Michigan, where, quoting the authors of this Article, the court stated:

Alternative theories of imposing liability on an enterprise, such as *respondeat superior*, are at odds with the purpose and language of RICO: [S]ome courts have imposed *direct* RICO liability on legitimate businesses when they are alleged to be both the person violating the statute (through the acts of their employees and agents) and the affected "enterprise" . . . [S]ome courts have held legitimate businesses *vicariously* liable under RICO for the acts of their lower-level employees and agents under traditional principles of *respondeat superior*.

Under both lines of authority, courts have justified the imposition of liability on legitimate businesses for the acts of their agents or employees on the ground that "culpable" entities should not escape liability under RICO. In attempting to effectuate that goal, however, these courts have paid insufficient attention to what actually constitutes a "culpable" entity under RICO, as evidenced by RICO's express statutory language and its underlying purposes. Indeed, these courts have painted with such a broad brush that they have created a costly anomaly: a statute

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<sup>233</sup> See, e.g., *Luthi v. Tonka Corp.*, 815 F.2d 1229, 1230 (8th Cir. 1987) (corporate RICO liability cannot be based on *respondeat superior* alone); *First Nat'l Bank v. Lustig*, 727 F. Supp. 276, 280 (E.D. La. 1989) ("respondeat superior can never be the basis for liability for a civil RICO suit"); *Robinson v. Kidder, Peabody & Co.*, 674 F. Supp. 243, 248 (E.D. Mich. 1987) (liability not imposed on corporation absent showing that it exists "to insulate a wrongdoer"); *Rush v. Oppenheimer & Co.*, 628 F. Supp. 1188, 1196-97 (S.D.N.Y. 1985) (§ 1962(a) "was not intended to convict the infiltrated enterprise, but the violator of the predicated acts"); *Intre Sport Ltd. v. Kidder Peabody & Co.*, 625 F. Supp. 1303, 1309 (S.D.N.Y.) (corporation only liable when also perpetrator), *aff'd*, 795 F.2d 1004 (2d Cir. 1986), *vacated*, 482 U.S. 922 (1987); *Kredietbank N.V. v. Joyce Morris, Inc.*, No. 84-1903 (D.N.J. 1985) (LEXIS, Genfed library, Dist file) ("liability under RICO may not rest on theory of *respondeat superior*"), *aff'd mem.*, 808 F.2d 1516 (3d Cir. 1986); *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F. Supp. 828, 835 (N.D. Ill. 1985) ("*Respondeat superior* is clearly an insufficient basis for liability under RICO"); *Parnes v. Heinhold Commodities, Inc.*, 548 F. Supp. 20, 24 n.9 (N.D. Ill. 1982) (low-level employees should be unable to thrust RICO liability on "unwitting corporate management").

enacted for the primary purpose of protecting legitimate businesses from infiltration by outside criminal interests has created liability for the infiltrated entity.<sup>234</sup>

Other courts rejecting the application of *respondeat superior* in the RICO context typically do so in conjunction with their holding that an organization may not be both a "person" and an "enterprise" under the various subsections of section 1962. Its use is barred because, otherwise, plaintiffs could circumvent the required distinction between the affected enterprise and the person who is the violator of the statute.<sup>235</sup>

This final approach provides legitimate businesses full protection from RICO liability, essentially barring *all* organizational liability under RICO. It also extends protection from RICO liability to "aggressor" enterprises and other organizations that, through their high-level managerial personnel, are central figures in criminal activity. Drawing a circle of protection that broadly, however, frustrates Congress' goal of punishing the corrupt while protecting legitimate organizations.

## 2. Resolution of the Issue: Organizational Liability Based on the Principles Embodied in the Proposed FC Code and MP Code

The five judicial approaches to organizational liability in the RICO context all, to a certain degree, attempt to answer the relevant inquiry posed by the Supreme Court: Will the application of traditional agency principles, or some variation thereof, advance the goals of RICO?<sup>236</sup> Most approaches, however, fail to focus sufficiently on what are the principal goals of the RICO statute. The goals warrant application of the revised standards for imputed liability proposed in the FC Code and the MP Code.

Undoubtedly, the principal goal of the statute is to protect le-

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<sup>234</sup> *Robinson*, 674 F. Supp. at 247-48 (quoting *Lacovara & Nicoli*, *supra* note 21, at 1 & n.26).

<sup>235</sup> See *Beverly Hills Sav. v. Highfield Assocs.*, No. 14019 (D.N.M. Aug. 28, 1987); (LEXIS, Genfed library, Dist file); *Brent Liquid Transp., Inc. v. GATX Leasing Corp.*, 650 F. Supp. 467, 474-75 (N.D. Miss. 1986); *Gaudette v. Panos*, 644 F. Supp. 826, 841 (D. Mass. 1986), *modified*, 650 F. Supp. 912 (D. Mass. 1987); *Continental Data Sys., Inc. v. Exxon Corp.*, 638 F. Supp. 432, 439-40 (E.D. Pa. 1986); *Lynn Elecs. v. Automation Mach. & Dev. Corp.*, No. 86-2301 (E.D. Pa. Oct. 6, 1986) (LEXIS, Genfed library, Dist file); *Walso Bureau, Inc. v. Underwriters Adjusting Co.*, No. 85-5896 (E.D. Pa. Aug. 14, 1986) (LEXIS, Genfed library, Dist file).

<sup>236</sup> See *Petro-Tech*, 824 F.2d at 1360; *Schofield v. First Commodity Corp.*, 793 F.2d at 33; *Haroco*, 747 F.2d at 402.

gitimate organizations from the infiltration of organized crime and other criminal activity. Yet, the approaches discussed above that permit the broad application of *respondeat superior* principles defeat this goal by thrusting ruinous criminal responsibility and treble damage liability on legitimate organizations whose low-level employees engaged in criminal activity without the knowledge or acquiescence of the organization's management.

Another frequently identified goal is to strip the ill-gotten gains from those who ultimately profit from racketeering activities associated with a RICO violation.<sup>237</sup> Some of the approaches described above, however, leave no room for organizational liability principles in the RICO context, or do so in a niggardly fashion, which defeats this goal as well.

One approach, however, fully squares with both of these purposes underlying the RICO statute. Specifically, the approach which imposes criminal and civil RICO liability on organizations, but only when their high-level managerial agents, officers, or directors are culpably involved in the alleged racketeering activity, best satisfies both policy goals of RICO.<sup>238</sup> Such an approach, consistent with the principles embodied in the MP Code and the FC Code, is the correct approach under RICO for the same reasons that it is the soundest approach under federal criminal law generally.<sup>239</sup>

Indeed, RICO dramatically illustrates the wisdom of the MP Code and FC Code focus on the existence of an organization's "moral culpability." RICO purportedly was designed to protect legitimate businesses, and to punish "corrupt organizations;" the liability principles embodied in the Codes do precisely that. Each approach recognizes that high-level organizational personnel such as officers and directors occupy policy-making positions which, in practicality, establish the organization's goals, methods, and essential character. People at that level are actually the "soul" or "brain" of the organization. If they decide to commit a crime in their organizational capacity, the organization by definition loses its right to be considered a "legitimate business" worthy of protection under RICO; it is, instead, a "corrupt organization" and is properly subject to the full force and effect of RICO's penalties.<sup>240</sup>

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<sup>237</sup> See *supra* note 151 and accompanying text.

<sup>238</sup> See *supra* notes 216-23 and accompanying text (discussing third approach set forth in this article).

<sup>239</sup> See Lacovara & Nicoli, *supra* note 21, at 4.

<sup>240</sup> *Id.*

In contrast, if the organization's agent who engaged in the criminal activity does not occupy a position that involves establishing the organization's policies, his criminal activity simply cannot be deemed sufficient to cause the organization itself to be deemed corrupt. Rather, his criminal activity should be regarded, at least for RICO's purposes, as a personal frolic. This rule should apply even though the employee holds a title, such as vice president or partner, that in fact does not entitle him to determine the organization's fundamental policies and, thus, its character.<sup>241</sup>

At the same time, the Codes' standards amply satisfies RICO's concern for recovering the illicit financial rewards derived from racketeering. Injured parties will be able to recover treble damages from corrupt organizations whose management directed or set in motion the criminal activities in question. Unlike other approaches to organizational liability under RICO, the proffered approach even permits injured parties to recover treble damages from corrupt organizations in a section 1962(c) action.

Similarly, under the MP Code and FC Code standards, the burden of criminal fines and civil treble damage actions will fall on those organizations—and only those organizations—whose management uses the organization for purposes prohibited by RICO. Under such circumstances, it is entirely fair to have the organization, and thereby its owners, pay the consequences for its management's culpable conduct.

When a non-policy-making agent or employee engages in RICO criminal activity, he may be compelled, like the corrupt organizations described above, to give up the financial fruits of his crime and twice that amount again. Not holding the employing organization vicariously liable for RICO treble damages in such a circumstance, however, does not leave that entity with a windfall of ill-gotten gains, even if the organization benefited from its agent's criminal conduct. Virtually any RICO violation causing injury or generating gain also will constitute an actionable tort such as fraud, arson, or extortion. As a result, the organization will be liable for single damages under traditional *respondeat superior* stan-

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<sup>241</sup> See, e.g., *Gruber*, 679 F. Supp. at 181 n.31 (vice president at brokerage house had less authority than name of title would suggest); *Intre Sport Ltd. v. Kidder, Peabody & Co.*, 325 F. Supp. 1303, 1309 (S.D.N.Y.) (although defendant employee was "vice president" of defendant employer, he was only one of "hundreds" of such vice presidents at company, many of whom not involved in company management), *aff'd*, 795 F.2d 1004 (2d Cir. 1986), *vacated*, 482 U.S. 922 (1987).

dards applicable to other federal and state common-law tort claims.<sup>242</sup>

In sum, our proffered standard is neither over-inclusive nor under-inclusive. The MP Code and FC Code standards targets RICO's severe criminal penalties and civil liabilities on organizations that have, in both legal and practical terms, exhibited characteristics of a corrupt organization; at the same time, the standard protects legitimate businesses and labor unions from the use of RICO against them. This proffered approach advances the principal goals of RICO better than other approaches. Consequently, it should be the approach adopted by courts that endeavor to determine whether and when to impose organizational liability under RICO.

### CONCLUSION

The current imputed criminal liability doctrine that holds sway in the federal courts is fundamentally flawed. It is premised on *respondeat superior* principles that are concerned with distributing loss caused by tortious acts; it has virtually no connection to "moral culpability," an indispensable element of criminal liability for any intent-based crime. Under federal criminal law, therefore, organizations are improperly tainted in this crucial respect.

The approaches for organizational liability urged by the Model Penal Code and the proposed Federal Criminal Code would remedy this patent flaw in our federal criminal jurisprudence. These approaches, which judge an organization's moral culpability by the actions of its officers, directors, and other high-level managerial agents, would ensure that the criminal liability of organizations turns on the actual blameworthiness of those persons who may fairly be regarded as proxies for the organization's policy and character. Thus, a standard that would embody this crucial principle should be adopted as the general rule in the federal courts for judging organizational criminal liability.

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<sup>242</sup> See, e.g., *Luthi v. Tonka Corp.*, 815 F.2d 1229, 1230 (8th Cir. 1987) (corporation suffered financial loss from frauds of subsidiary's employees); *Gruber*, 679 F. Supp. at 181 (conduit businesses made to bear liability for acts of employees that are basis for RICO claim); *Kosch v. Parkway Bank & Trust Co.*, No. 83-C-4832 (N.D. Ill. Mar. 9, 1984) (LEXIS, Genfed library, Dist file) (corporations liable for frauds of high-level employees); see also *ABA Report*, *supra* note 20, at 360 (federal civil rules regarding *respondeat superior* govern liability of corporation for tort damages of even low-level employees); Note, *supra* note 21, at 605 (corporations bear civil liability for agent's torts).

This approach further provides the correct standard for determining organizational liability under RICO in both criminal and civil cases. Congress intended that RICO protect legitimate organizations from persons using the organizations as part of their pattern of racketeering. The principles embodied in the Model Penal Code and Federal Criminal Code provide ample protection for legitimate organizations, while simultaneously imposing the full weight of RICO's penalties on the principal target of the statute—truly corrupt organizations.

