



May 2014

## What's Next: The Future of RICO

G. Robert Blakey

John C. Coffee

Paul E. Coffey

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

---

### Recommended Citation

G. R. Blakey, John C. Coffee & P. E. Coffey, *What's Next: The Future of RICO*, 65 Notre Dame L. Rev. 1073 (1990).  
Available at: <http://scholarship.law.nd.edu/ndlr/vol65/iss5/10>

This Commentary is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# What's Next?: The Future of RICO

G. Robert Blakey\*  
John C. Coffee, Jr.\*\*  
Paul E. Coffey\*\*\*  
L. Gordon Crovitz\*\*\*\*

I. Debate .....	1073
A. Opening Statement of Mr. Crovitz .....	1073
B. Opening Statement of Professor Blakey .....	1079
C. Rebuttal of Mr. Crovitz .....	1085
D. Rebuttal of Professor Blakey .....	1087
II. Discussion .....	1088

*Editor's Note: After the presentation of the articles, the symposium concluded with a structured debate and an open discussion. The participants in the debate were Professor Blakey and Mr. Crovitz. The ensuing discussion was moderated by Professor Coffee and featured Professor Blakey, Mr. Coffey, and Mr. Crovitz, as well as questions from the audience. The edited transcript is presented below.<sup>1</sup>*

## I. Debate

### A. Opening Statement of Mr. Crovitz

Coming to the Notre Dame Law School to debate Robert Blakey on the Racketeer Influenced and Corrupt Organizations law makes me feel like Daniel approaching the lion's den. I'm tempted to offer my own prayer, "Yea, though I walk through the valley of the shadow of death, I will fear no RICO."

The best analysis of what the Racketeer Influenced and Corrupt Organizations law has done in the uncontrolled hands of federal prosecutors and plaintiffs' lawyers was written years before the legislative scandal of 1970, RICO. This analysis came not in any law-review article or court opinion, but in a book-length poem written in 1966 by a libertarian named R.W. Grant. Mr. Grant's book entitled *The Incredible Bread Machine* is a political and economic allegory. The hero of our story is Tom Smith, and he has made an invention that produces, wraps and slices loaves of bread for less than a penny. A wonderful discovery, but with unfortunate consequences for Mr. Smith. The government raises taxes on business, and the price goes up to a full cent per loaf. Of course he is still under-

\* William J. and Dorothy O'Neill Professor of Law, Notre Dame Law School.

\*\* Adolf A. Berle Professor of Law, Columbia University School of Law.

\*\*\* Deputy Chief, Organized Crime and Racketeering Section, Criminal Division, United States Department of Justice.

\*\*\*\* Assistant Editorial Page Editor, Wall Street Journal.

<sup>1</sup> The participants were given the opportunity to review the transcript and provide citations where appropriate. The Law Review extends special thanks to Bonnie Grimslid for her selfless assistance in transcribing the proceedings.

selling any of his competitors, but there is much consternation because people had grown used to paying less than one cent per loaf. Here's what happened, as the poem says:

To comprehend confusion,  
 We seek wisdom at its source!  
 To whom, then did the people turn?  
 The INTELLECTUALS of course!  
 And what could be a better time  
 For them to take the lead,  
 Than at their INTERNATIONAL CONFERENCE  
 ON INHUMANITY AND GREED!. . .  
 "The time has come," the chairman said,  
 "To speak of many things:  
 Of duty, bread and selfishness,  
 And the evil that it brings.  
 For speaking thus we can amend  
 That irony of fate  
 That gives to unenlightened minds  
 The power to create!". . .  
 And so it went, one by one,  
 Denouncing private greed  
 Denouncing those who profit thus  
 From other people's need!<sup>2</sup>

Then the press picked up the clamor against Tom Smith:

One night a TV star cried out,  
 "Forgive me if I stumble,  
 But I don't think, I kid you not,  
 That Smith is very humble!"  
 Growing bolder, he leaped up,  
 (silencing the cheers)  
 "Humility!" he cried to all—  
 And then collapsed in tears!<sup>3</sup>

Then it was the politicians' turn:

The clamor rises all about;  
 Now hear the politicians shout:  
 "What's Smith done, so rich to be?  
 Why should Smith have more than thee?  
 So, down with Smith and down with greed;  
 I'll protect your right to *need!*"<sup>4</sup>

Then it was the turn of other businessmen, those who couldn't compete with Tom Smith:

Then Tom found to his dismay  
 That certain businessmen would say,  
 "The people now should realize  
 It's time to cut Smith down to size,  
 For he's betrayed his public trust

---

2 R.W. GRANT, *THE INCREDIBLE BREAD MACHINE* (1960).

3 *Id.*

4 *Id.*

(and taken all the bread from us")<sup>5</sup>

Finally, it was the turn of the government, in the form of antitrust prosecutors:

"Smith has too much crust," they said.  
 "A deplorable condition  
 That Robber Barons profit thus  
 From cutthroat competition!"  
 Well!  
 Now this was getting serious!  
 So Smith felt he must  
 Have a friendly interview  
 With the men in Antitrust.  
 So, hat in hand, he went to them.  
 They'd surely been misled!  
 No rule of law had he defied!  
 But then their lawyer said:  
 "The rule of law, in complex times,  
 Has proved itself deficient.  
 We much prefer the rule of men!  
 It's vastly more efficient!"<sup>6</sup>

Tom Smith is indicted, tried and sentenced to five years.

As I indicated, yesterday, in the 1980s, we had a real-life Tom Smith in Michael Milken. An investment banker who, instead of sticking to the usual activities of underwriting and brokerage, made a discovery every bit as important to the economy as bread loaves that would sell for less than a penny. Hundreds of small firms found access to capital they never had before, and many jobs were created. Then some intellectuals, some in the press, many in Congress, many Wall Street competitors who resented Drexel Burnham Lambert and finally the Securities and Exchange Commission and the U.S. Attorney's Office in Manhattan decided that Michael Milken had to be brought down. There was nothing illegal in junk bonds or hostile takeovers, but RICO was the way out of this inefficiency.

Similarly, it is not a crime to engage in civil disobedience against an abortion clinic. Yet it is a RICO offense, according to a Third Circuit case. Robert Blakey helped draft the appeal to the Supreme Court, which failed. This proved that even Dr. Frankenstein cannot control his RICO monster. Nor is there any reason to think that Congress meant to make all state common law actions involving a telephone or the mails a potential federal offense, or meant to make half of all federal criminal prosecutions potential RICO cases, as Paul Coffey told us yesterday is now the current situation.

Rather than get bogged down in which RICO reform package in Congress I prefer, if any, and what the prospects for passage might be, I want to try to broaden the debate. My thesis this morning is that the future of RICO is inversely related to the future health of the notion of the Rule of Law.

---

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

We now have the remarkable spectacle of people throughout Eastern Europe throwing off their former systems and declaring that they want a system a lot more like ours. They want democracy, and elections, and freer markets, and, they say, the Rule of Law and not the rule of men. So it's an appropriate time to think about how well we have protected our priceless heritage of law.

Here is the description of a Rule of Law that I have in mind. This is a concept chiefly aimed at protecting the liberty and autonomy of the individual against government actions that are either obviously or rather subtly illegitimate. Some rule-of-law protections are very familiar: due process, equal protection, speedy justice. Some rule of law protections are less well understood and, in this country, less well enforced than perhaps they once were. The one I have in mind is that no person can legitimately be punished or fined or forced to pay damages for any conduct not clearly forbidden by law.

This means that our civil and criminal laws should be reasonably clear to people; that people know with some certainty what behavior is permissible and what behavior is impermissible; that we have bright-line standards for behavior and not judicial or legislative arbitrariness; that there is some predictability and certainty in our law; and that there is a minimum of vagueness or changeable standards. Anything less is arbitrary law, counter to the rule of law.

My thesis is that we in the United States are in danger of losing our inheritance of the Rule of Law—and that Public Enemy Number One of the Rule of Law is RICO. It was passed as part of the Organized Crime Control Act, yet on the civil side more than 90% of the RICO cases are now against legitimate businesses, and increasingly, prosecutors are using criminal RICO against legitimate outfits such as investment banks, trading firms, and labor unions. Pre-trial punishments raise due process and other fairness issues. As I said yesterday, as a result of RICO's extraordinary threat against Drexel Burnham Lambert, no one knows whether the plea was for actual lawbreaking or simply to avoid the much worse effects on its business from an indictment, even if no one was ever found guilty of anything. No one on Wall Street was able to learn from the Drexel plea what behavior, if any, of Drexel's was illegal. The case, for all its hoopla, did nothing to alert people to what behavior is permissible and what is impermissible.

The predicate acts of RICO, especially the vague wire and mail fraud statutes, make RICO, with its twenty-year sentence, as vague as a charge of undefined "fraud." Who could know that one may be sued and convicted as a "racketeer" for making two phone calls, or mailing two letters, or making one phone call and mailing one letter, or sending one fax and making one modem transmission? The RICO Guidelines of the Justice Department are honored more in their breach, giving us a government of men, not of laws, with the very real danger of selective prosecution. The Supreme Court has suggested that there may be due process considerations here, but the Justices continue to routinely uphold RICO cases.

I think the Supreme Court is largely to blame for the breakdown in the Rule of Law. It is the court of last resort for many disputes, but just as importantly it sets the tone and style of judging for the lower federal courts and for the state courts as well. By its very selection of cases in recent years, it is clear that the Supreme Court does not have on its agenda any emphasis on insuring clear, predictable, certain rules. It has not clarified "pattern," "enterprise," or "racketeering." Justice Antonin Scalia, writing for three other justices, noted that RICO is so vague it is like saying, "life is a fountain."<sup>7</sup>

Consider how the Supreme Court has considered one minor controversy: What kind of religious symbols can be exhibited by local governments on public land during the December holidays? The clarity of the rules on this issue given by the Justices stands in inverse proportion to the high number of these cases they hear. The current jurisprudence on this issue, I think, is that a city can have a Christmas tree and Menorah so long as it also has a few plastic Frosty-the-Snowmen. Or maybe a city could have a creche so long as two of the Three Wise Men were Santa Claus and Rudolph the Red-Nosed-Reindeer.

Last year just before his untimely death, University of Chicago law professor Paul Bator gave a very important speech at the University of Pittsburgh entitled, "What is Wrong With the Supreme Court?" Professor Bator framed the issue this way, which I think applies perfectly to RICO:

Does the American legal system now possess an acceptable and adequate institutional system for the essential professional tasks of stabilizing, clarifying, and improving the national law, so as to make it usable and useful for its consumers?<sup>8</sup>

Professor Bator continued:

By "consumers" I mean citizens and firms who have to obey rules or plan in the context of these rules; lawyers who have to give advice with respect to them; and administrative and trial judges who must apply them in the first instance.<sup>9</sup>

Professor Bator concluded that the Supreme Court has not done a very good job of providing reasonably intelligible and reasonably sensible guidelines for consumers of law. He mentioned among other problems the extraordinarily vague standards of behavior now routinely issued by Congress. Certainly RICO practitioners know what Professor Bator meant. The same is true with inside-trading laws, where Congress actually has a policy of not issuing clear rules, with the telling explanation that people would just get around them if there were clear rules.

Professor Bator made another point as well. He said that allowing "uncertainty and disuniformity and contradiction and malfunction to persist exacts costs, paid for, precisely, by the consumers of law."<sup>10</sup> He said that it was "intolerable arrogant and elitist to be unconcerned about

7 *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2907 (1989) (Scalia, J., concurring).

8 Bator, *What is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 674 (1990).

9 *Id.*

10 *Id.*

these costs,"<sup>11</sup> singling out fellow legal academics and others whose concern is more with changing the law than with providing clear rules.

There is also an important characteristic of our legal system that makes it very different from the systems of our common-law cousins elsewhere, and that helps explain why a breakdown in the Rule of Law has occurred here and not in those countries. We have a legal system with economic incentives in favor of litigating. We have abolished almost all rules of champerty, barratry and maintenance, to allow contingency fee litigation. We have relaxed rules to allow class action suits. Discovery can be an enticement to fish for damages. RICO has its treble damages and lawyers' fees, with huge settlement value for the libelous term "racketeering." The problem is this: The more uncertainty and contradiction in the law, the greater the need incentive to litigate, the more new cases there will be. This is a downward-sloping circle that does great damage to the Rule of Law.

Some RICO apologists acknowledge all this, but say that RICO is still needed to protect people from the evils of the marketplace. Many of you may be familiar with the work from earlier this century by the English scholar and novelist G.K. Chesterton. I have in mind particularly his very entertaining novel, *The Man Who Was Thursday*, which is about a group of anarchists set on taking over England. There is a discussion of anarchy by one of the characters in this novel that makes the case for the opposite, for the Rule of Law as an important consideration, especially for the least advantaged people among us:

So you talk about mobs and the working classes as if they were the question. You've got that eternal idiotic idea that if anarchy came it would come from the poor. Why should it? The poor have been rebels, but they have never been anarchists; they have more interest than anyone else in there being some decent government. The poor man really has a stake in the country. The rich man hasn't; he can go away to New Guinea in a yacht.<sup>12</sup>

We all know that rich Americans don't go away to New Guinea in yachts. Instead, they hire the best lawyers they can find to protect them from our version of anarchy, uncertain laws. This might be good for some lawyers, especially RICO lawyers. But the life of the law—and of lawyers—would be more beneficial and more gratifying if it did more good. Doing good today, I think, means recasting our legal system and our laws to give people the clear, commonsensical laws that they deserve. This surely includes abolishing RICO and starting over.

I want to leave you with the best evidence I have seen of RICO's threat to the notion of a Rule of Law. For anyone who still thinks that RICO is viewed primarily as a tool against legitimate business, let the experts speak for themselves. Boston mob leader Gennaro Angiulo and four of his associates were tried and ultimately convicted under RICO. But the following is an excerpt from an FBI wiretap in April, 1981, played at the trial on August 23, 1985. On the tape are Mr. Angiulo and

---

<sup>11</sup> *Id.*

<sup>12</sup> G.K. CHESTERTON, *THE MAN WHO WAS THURSDAY* 189-90 (1908).

his deputy, Ilario M.A. Zannino discussing RICO. The two obviously seriously believed that the statute only applies to legitimate business and not to them; they could only be accused of engaging in acts such as murder and arson and not RICO because they never got involved in infiltrating legitimate business:

Angiulo: "Our argument is we're illegitimate business."

Zannino: "We're a shylock [loan shark]."

Angiulo: "We're a shylock."

Zannino: "Yeah."

Angiulo: "We're a [expletive] bookmaker."

Zannino: "Bookmaker."

Angiulo: "We're selling marijuana."

Zannino: "We're not infiltrating."

Angiulo: "We're illegal here, illegal there. We're arsonists. "We're every [expletive] thing."

Zannino: "Pimps."

Angiulo: "So what?"

Zannino: "Prostitutes."

Angiulo: "The law does not cover us, is that right?"

Zannino: "We're not infiltrating legitimate business for all the [expletive] money in the world."<sup>13</sup>

Or, as R.W. Grant wrote: "The rule of law, in complex times,/Has proved itself deficient./We much prefer the rule of men!/It's vastly more efficient!"<sup>14</sup>

### B. *Opening Statement of Professor Blakey*

There is no argument between us. He has basically conceded my point. He suggests that we should have a Rule of Law. I agree, and I suggest that I, too, take my stand with those barons at Runnymede in 1215 who insisted that those who held and exercised power should be subject to the Rule of Law.

And that was precisely what Congress attempted in 1970. It enacted the Organized Crime Control Act, Title 9 of which is known as the Racketeer Influenced and Corrupt Organizations Act, or "RICO" for short. RICO applies to patterns of violence, the provision of illegal goods and services, corruption in government and in unions, and commercial fraud—by, through, or against enterprises. It provides criminal and civil remedies for the government, and yes, it gives to individuals the right—in the American way—to help themselves through treble damages and counsel fees—to sue those people who do not simply engage in crime, but engage in patterns of crime.

The RICO statute was not initially used by either the federal government or private people. Today, however, it is widely used. The federal government has found it to be the prosecutive tool of choice in organized crime, white collar crime, and other areas. Approximately thirty-seven percent of the indictments is in the area of organized crime—not

<sup>13</sup> Butterfield, *Jury Hears Tape on Gang Wars in Boston Trial*, N.Y. Times, Sept. 8, 1985, at A26, col. 1.

<sup>14</sup> R.W. GRANT, *supra* note 2, at 34.



just the Mafia, but other sophisticated criminal groups. Forty-four percent is in the area of white collar crime—corrupt governmental officials, union officials, and others who abuse their power in our society. Another nineteen percent is in the area of terrorism: the prosecution, for example, of the anti-semitic white hate group in the West responsible for the murder of Alan Berg took place under the RICO statute.

Today, after precisely the same kind of arguments and debates you will hear today, twenty-nine states have adopted little RICO statutes, twenty-one of which also have the private civil remedies provision.

This statute's character can be judged by the character of its enemies—who objects to it. As my good friend, Gordon, puts it so well, mob figures object to it. They actually took the position that this statute only applied to legitimate business. The Angiulos lost that case in the Supreme Court in a case called *United States v. Turkette*<sup>15</sup> by a vote of eight to one.

On the other side, legitimate business people took precisely the opposite position and argued that RICO applied only to organized crime. And they are persistent. They took that issue to the Supreme Court, not once, but twice. In *Sedima*,<sup>16</sup> a unanimous Supreme Court on this question said that the statute did not only apply to organized crime but also to legitimate business. RICO says "any person"—not any person whose name happened to end with a vowel—not any person whose collar happened to be blue—RICO applies to anyone with a white collar—or a blue collar—or no collar at all—or—and let me go further and take this example of anti-abortionists who demonstrate—people whose collars are turned around. It makes no difference if you walk in a doctor's office whether your name is O'Neill or Corleone: if you engage in a pattern of extortion against the good doctor, RICO applies to you. No inculcation for Italians and no exculpation for Catholics.

Let me read to you what the Supreme Court said in response to the argument that somehow that this statute did not apply outside the organized crime area. This argument, the Court says—unanimously says—in *H.J. Inc.* :

[F]inds no support in the Act's text, and is at odds with the tenor of the legislative history. . . .

. . . .  
 . . . The Congress for cogent reasons chose to enact a more general statute, one which although it had organized crime as its focus, was not limited in application to organized crime. . . .

. . . .  
 . . . Congress realized that the stereotypical view of organized crime as consisting of a circumscribed set of illegal activities, such as gambling and prostitution, was no longer satisfactory because criminal activity had expanded into legitimate enterprises.<sup>17</sup>

RICO acknowledges, the Court said:

15 452 U.S. 576 (1981).

16 *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1984).

17 *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2903, 2905 (1989).

[T]he breakdown of the traditional conception of organized crime and responds to a new situation in which persons engaged in long-term criminal activity often operate wholly within legitimate enterprises. Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms, and likely to attract a broad array of perpetrators operating in different ways.<sup>18</sup>

The argument that somehow the statute is only for those people whose names' end in vowels is obscene and ought to be rejected.

The objection, though, is as to its application to white collar crime. Let's look for a moment at white collar crime. The Chamber of Commerce, in 1974, suggested that white collar crime—principally fraud—inflicted on this country approximately \$41 billion in damages. The Attorney General in 1985 raised that estimate to \$200 billion.

I am not saying million, I am saying billion. What's the difference between a billion and a million dollars? Its more than a "g" or "m." Four inches of \$1,000 dollar bills is a million dollars. A billion dollars is three quarters of the way up the Washington Monument.

We are talking about \$200 billion a year. That's about what the illegal traffic in drugs—retail—is.

And that is an understatement, because in 1985 we did not know about the white collar crime wave occurring not only on Wall Street, and LaSalle Street, but on every Main Street in this country. It's called the savings and loan crisis.

Let's discuss the savings and loan crisis. It is going to cost us \$500 billion over the next 30 years to shut down as many as 600 savings and loans. Three-fourths of those savings and loans, all the studies agree, went down not because of the collapse in the real estate market, not because of the collapse in international oil, but because of fraud by insiders.

Let's talk about one of the cases, not because it is the only case, but because it is illustrative. Lincoln Savings and Loan went down and it cost us \$2.5 billion. Shortly before it went down, the accounting firm of Arthur Young & Co. gave it unqualified audit approval. Nothing was wrong with its books. And based on that unqualified approval, 23,000 people invested their life savings in over \$200 million worth of junk bonds. Today, the Resolution Trust Corporation and those 23,000 people in a class action are suing Mr. Keating under RICO. And those people who suggest that RICO ought to be rolled back or rewritten are saying that us, those of us who have got to come up with the \$2.5 billion—or the 23,000 people—ought not have an effective criminal and/or civil remedy to vindicate ourselves.

This is not the only illustration I can raise. EMS Securities, a broker-dealer selling government bonds in Florida, was corrupt, and it corrupted an accountant who was with Grant Thornton. It continued in business long after it should have been shut down. And when it fell, it took down 69 thrifts in the State of Ohio. It cost those people \$315 million.

I could continue. I could talk about the scandals in Chicago, the traders who were recorded by the FBI discussing their attitude towards

---

18 *Id.* at 2905.

the people they dealt with, “[expletive deleted] the customers. I’m going to take it for me.”

I could talk about the brokers who were recorded on their own tapes in Princeton/Newport, who talked about, “Welcome to the world of sleaze.”

We are facing in this country today a crisis, not only in lack of physical integrity—because our streets are not safe—but also in lack of fiscal integrity.

Our financial markets are losing that essential glue that is required to make a capitalist system work. And that is trust.

Let’s talk about trust. The *Wall Street Journal*—at least in its news sections a reliable newspaper—reports a study indicating that only one industry is worse—in the sense of confidence of the American people—than insurance, banking, and brokers. Well, that industry is the airlines. Of those American industries that we have the least confidence in, only airlines is worse than insurance, banking and brokers.<sup>19</sup>

And it is not just our financial institutions, it is our political institutions. The *Wall Street Journal* also reports a poll, in 1964, that 64% of the American people asked said that they believed that this country was run for the benefit of all. At that time, only 29% thought that it was run by a few for the benefit of the few. In 1988, those figures were exactly reversed. The poll indicated that 31% of the American people believed that this country was run for the benefit of all, but 64% thought it was run by the few for the benefit of the few.<sup>20</sup>

That lack of trust can only be restored by an effective enforcement of the law that holds everyone accountable for what he does.

I am insisting here not on a Rule of Law that cannot be understood, but on a Rule of Law that applies with an even hand to everyone.

Gordon suggested RICO is hard to understand. Let’s get down to the particulars. RICO does not apply unless you violate the predicate offenses. And the predicate offenses he is deeply disturbed about are the fraud offenses. Nobody falls into fraud accidentally. It is unequivocally the case that good faith is an excuse.

And they question a lack of clarity: let me give you two concrete examples from Supreme Court cases.

What constitutes an unreasonable deduction under the Internal Revenue Code? Lawyers don’t know. The answer is ask your accountant, maybe he knows. But nobody goes down for willful evasion of taxes unless he does it with intent to defraud under *United States v. Ragen*.<sup>21</sup> And it was because of the presence of, and the requirement of, “intent to defraud” that must be shown by proving a double set of books and other indicia of bad faith that led the Supreme Court to sustain the tax evasion statute because it required an appropriate state of mind.

Let me turn to another concrete example: selling kosher meat. Is that a definite standard? Ask five rabbis what kosher is and you will get at

19 Wall St. J., Sept. 20, 1989, at B1, col. 3.

20 Wall St. J., Aug. 4, 1989, at A1, col. 1.

21 314 U.S. 513 (1942).

least seven answers. But the Supreme Court sustained in *Hygrade Provision Co. v. Sherman*<sup>22</sup> a statute prohibiting selling kosher meat that wasn't kosher because the legislature said you had to sell the kosher meat with the intent to defraud. And it was precisely that intent that gave concrete meaning and prevented the innocent from accidentally falling into it.

Gordon suggested that the antitrust statutes were somehow not a terribly good idea. A similar business coalition fought the antitrust statutes, and it took it up to the Supreme Court. Mr. Justice Holmes, in the *Nash* decision,<sup>23</sup> upheld a statute that prohibited "unreasonable restraint of trade," and he sustained it on an analogy to the law of homicide. It said that when we give to a person a defense of self-defense, that is, the right to use reasonable force, and that line defines the difference between "in and out" for murder, then we need not give a more concrete standard to people who cheat in business when they deny us access to markets.

To give "more" to the businessman and "less" to those who engage in street crime is not what the American system is all about.

When Gordon says he wants rules—mathematical rules—he wants them because he wants to have a system where he can play the rules in order to beat the system, and not live up to the system.

Mr. Justice Brandeis suggested in *American Column & Lumber Co. v. United States*<sup>24</sup> that there were three ways that you could exercise illicit power in the market: agreement, force or fraud. The antitrust acts, enacted in 1890, deal with freedom in the marketplace: no illegal agreements. RICO was enacted in 1970 to deal with the other two elements: force and fraud. It protects not only physical integrity, it also protects fiscal integrity. Those people who would suggest that we ought not have RICO or the antitrust statutes are standing against not only integrity, but freedom. I am for autonomy too, but I want it balanced by intergrity and freedom.

I am for the antitrust laws fairly interpreted and fairly enforced.

I am also for RICO, fairly interpreted and fairly enforced.

What are we doing in the law in the 20th century? The 20th century is being spent modifying the 19th century. We had laissez-faire capitalism and caveat emptor in the 19th century. We put the thumb of the law on the scale for the entrepreneur capitalists. We set up rules of limited liability for corporations. We set up rules that externalize the cost of development. You know them from torts. The three wicked sisters: assumption of risk, the fellow servant rule, and contributory negligence. What was the impact of these rules? It meant the that the Vanderbilts of this country grew rich and the Wongs in the West and the Kellys in the East lost their arms and legs uncompensated: they paid for the railroads with their bodies. The law externalized the cost from the entrepreneur capitalist to his employees, or his customers.

<sup>22</sup> 266 U.S. 497 (1925).

<sup>23</sup> *United States v. Nash*, 229 U.S. 373 (1913).

<sup>24</sup> 257 U.S. 377, 414 (1921).

The same thing happened in the 19th century law of fraud. We wrote it from the perspective of the person attracting capital, not investing capital.

We have modified those doctrines, we now have workmen's compensation and other similar laws.

We tried to face up to the fact of the large trust when we enacted the Sherman Act in 1890. And yes we tried to face up to corruption and fraud on the securities markets in '33 and '34. Senator Duncan Fletcher at the time said that the federal securities statutes were designed to "protect the public from financial racketeering" on Wall Street.<sup>25</sup> And that's a quote. And what did we hear from Wall Street at the times? These statutes were so draconian, they would dry up capital. They would drive investment bankers out of business; they would end the ability to raise capital. They were wrong then, and they're wrong now.

Gordon mentioned Michael Milken, and I don't want to try Mr. Milken. I don't even want to try Drexel who, incidently, plead guilty. I don't think it is necessary to do that. But if you want to read a little book, by Connie Bruck called the *Predator's Ball*. It is a detailed study of the rise and fall of Mr. Milken and Drexel, and this is its conclusion:

[I]f ever there was a case outside of the organized crime area that seemed appropriate for RICO prosecution, it is the case against Milken and Drexel. If the SEC's allegations are true, Drexel under Milken was a major, ongoing criminal enterprise where continuing violations of security and mail fraud statutes were perpetrated over a period of years, accumulating hundreds of millions of dollars.<sup>26</sup>

Indeed, if one puts aside violence—I don't suggest to you organized crime and white collar crime are the same—violence does draw a distinction between them—, but, on the other hand, let's not suggest that white collar crime is not violent.

Talk to people who are dying of cancer because of asbestos, when the industry never told us what they knew—that it was dangerous.

Talk to the people in Denver who are now going to die of radioactive fallout. Rocky Flats was administrated in a dangerous fashion and they never told us that it was that way.

Talk to other people just like them in Ohio who are going to die of cancer.

I think, maybe, I would prefer to be shot by organized crime than go out by degrees with cancer. I am not equating organized crime and white collar crime, but they are not wholly different.

Apart from the question of violence, there are parallels between traditional organized crime and the organization that the patriarch of Drexel built. Quoting from Bruck, she says Drexel was the "brass-knuckles threatening, market-manipulating, Cosa Nostra of the securities world."<sup>27</sup> That was her description of the company that Milken put together.

25 77 CONG. REC. 3801 (1933).

26 C. BRUCK, *THE PREDATORS' BALL* 370 (1989).

27 *Id.*

There was a suggestion that somehow Milken might have to plead guilty or Drexel plead guilty because of RICO. This is her comment on that:

[I]f Drexel and its lawyers had believed that the government had no case, they surely would have elected to fight even against the formidable might of RICO. (With over \$2 billion in capital the firm could easily have posted the bond to satisfy the government's pretrial forfeiture claims.)<sup>28</sup>

What really happened by the end of 1988 was not that Giuliani's threat of a RICO indictment deprived Drexel of a fair trial, but that the government's case had grown immeasurably stronger.

Drexel plead guilty because it was guilty. Let's talk about what it was guilty of. The indictment Drexel fought was worth \$1.85 billion of forfeiture. What did Drexel settle the case for? \$650 million. Instead of being shocked at the amount of money Drexel had to pay out, why don't you ask for the grounds on which Drexel was given a discount. From \$1.85 billion to \$650 million. Gordon suggests that Drexel got a raw deal. I think we got a raw deal. This case was plea-bargained away. I wish they had tried it; they should have taken the \$1.85 billion from Drexel.

That's what the appropriate penalty was.

Let's look at RICO's forfeitures. What does RICO say about forfeitures?

Two simple propositions. If you steal it, you give it back. That's hardly draconian, that's poetic.

If you misuse it, you lose it.

That's poetic too. If a dope dealer can lose a car, a boat, an airplane, or a condo because he uses it in dealing in dope, why can't a securities broker lose his car, his boat, his airplane and, yes, his broker dealership, if that happens to be the instrumentality through which he perpetrates the fraud?

I'm for the Rule of Law.

I'm for an evenhanded application of the law.

Let me end with another illustration. In 1978, an organized crime led by John Gotti set up a heist on the Lufthansa airlines. They made \$8 million, the largest cash haul in the history of organized crime. Yesterday, in testimony in the federal court in Washington, dealing with Keating's corrupt S & L, Leventhal & Co. testified that in fifteen transactions, Keating sucked out of it \$155 million by giving away money to generate false profits.

I ask you. Who does more harm to us—Gotti stealing eight, or Keating stealing 155?

### C. *Rebuttal of Mr. Crovitz*

Professor Blakey, it seems to me, equates mobsters roaming the streets to inside traders corrupting Wall Street. I do not. I want to talk just a second about that. You say that a drug dealer ought to have his

proceeds from his illegal transactions taken. I think that a white-collar criminal who engages in white collar crime ought to have his profits taken. I want equal justice for violent criminals and white collar criminals. Let's take the case of Princeton/Newport. The original allegation against Princeton/Newport was the government thought they had underpaid taxes by \$13 million. The government wanted a bond of \$23 million. The government ended up by getting a forfeiture of the entire company worth \$300 million. When it was all over the IRS sent a letter to Princeton/Newport saying: "Gee fellows, I am awful sorry, you overpaid your taxes." I don't think there is justice in that case. I think that one reason was that Rudolph Giuliani, during his time in the U.S. Attorney's office in the last few years, due to remarkable lack of supervision by the Justice Department, did allow people to accidentally fall into fraud, contrary to what Professor Blakey said.

Charles Keating, according to allegations, did what a lot of other S & L owners did, and he did something else. What he did, along with a lot of other S & L operators and with their accountants, was he took the government's invitation to have guaranteed deposits and gambled with investors' money. The government said: you get the money, if you lose it, we will pay you back; if you make money, you get to keep it. Now I know what I would do in that situation. I think I know what you would do, and that is what a lot of the thrift operators did.

But Arthur Young said the books look fine under the government rules. The same Congress that wrote RICO wrote the rules governing the S & L's. They are both terrible, and quite honestly, stupid laws. One of the true offenses in the Keating case appears to be misrepresentation, which is a classic common law offense. One of the allegations is misrepresentation in which he supposedly told retired people, nuns, and others that some debentures that were not in fact guaranteed were covered by a government guarantee. Classic misrepresentation that's been in the courts for 500 years: we don't need RICO for that.

Now I think what is going on here is something quite different. I think what we have here is a deeper, social and political problem. I want to invoke here a social commentator named Tom Wolfe, who captured the spirit that defends RICO the way Robert Blakey defends RICO in his description of the attitude of prosecutors towards their targets in his book *The Bonfire of the Vanities*. These prosecutors had all hoped to find some target other than the street punk, the violent criminal, the drug dealer, and the mobster who make up the vast bulk of their seemingly endless, and perhaps, they even come to think futile caseloads. Tom Wolfe refers to the "Great White Defendant." He does not mean this as a racial matter; what he means is that prosecutors naturally feel somewhat uneasy these days that so many criminal defendants in big cities happen to be black or Hispanic; it's also true that victims happen to be black or Hispanic. The phrase also refers to those defendants—the Princeton/Newports, the Drexels, the Michael Milken—that our criminal justice system can still pursue and punish. This passage describes the thoughts of a young prosecutor on his way to work in the Bronx. I think you

should keep this passage in mind when ever you think about RICO. It has tremendous power.

Every assistant DA in the Bronx from the youngest Italian just out of St. John's Law School to the oldest Irish bureau chief . . . shared Captain Ahab's mania for the Great White Defendant . . . . And he understood what it was that gave him a momentary lift each morning as he saw the island fortress rise at the crest of the Grand Concourse from the gloom of the Bronx. For it was nothing less than the Power . . . the power of the government over the freedom of its subjects. To think of it in the abstract made it seem so theoretical and academic, but to *feel* it . . . now to see that *little swallow of fright* in a perfect neck worth millions, well the poet has never sung of that ecstasy, or even dreamed of it, and no prosecutor, no judge, no cop, no income tax auditor will ever enlighten him, for we dare not even mention it to one another, do we? And yet we *feel* it and we know it, every time they look at us with those eyes and beg for mercy or, if not mercy, Lord, dumb luck or capricious generosity. (Just one break!). What are all the limestone facades of Fifth Avenue and all the marble halls and stuffed-leather libraries and all of the riches of Wall Street in the face of *my* control over your destiny and your helplessness in the face of the Power?<sup>29</sup>

#### D. *Rebuttal of Professor Blakey*

Mr. Crovitz reads fiction to you. I would like to talk facts and logic with you. The logic is this: it is an example of the use of an illicit major to state a single example and to go from that single example to argue for the repeal of the entire statute. What you would have to do with Princeton/Newport is establish that this case is representative of the administration of the statute as a whole that it is illustrative, and not exceptional. I do not concede to you that Princeton/Newport is an example of a bad prosecution. But even if it were, one swallow does not make a summer in Capistrano, and one bad RICO doesn't justify the repeal of the statute.

Let's take a look at the other half of the Princeton/Newport story. Gordon is good, but only with half truths. Do you know what a half truth is? It is a half lie. The other half of what was in the Newport case was the manipulation of stock. They drove down the price of stock. They deprived people of the ability to sell it at a fair market price. That's not tax evasion; that is stealing from the people who weren't able to sell it in a fair market. The Princeton/Newport people were appropriately indicted, tried, and convicted.

He suggests to you let the 23,000 people in the Keating matter sue under traditional law. Give them actual damages. What are actual damages? Are they actually actual damages? No, they don't include the transaction costs—counsel's fees and other things. They don't include the opportunity cost—what the people could have done with that \$200 million. They could have put it somewhere else. Calling "actual" damages "actual" damages is a fiction out of the 19th century; they are not just. Triple damages move in the right direction.

<sup>29</sup> T. WOLFE, *THE BONFIRE OF THE VANITIES* 615-16 (paperback ed. 1988) (emphasis in original).



Look at the old system, the old common law of misrepresentation: the burden of proof is clear and convincing. Go look at RICO: the burden of proof is preponderance, which is fair. No thumb on the scales for either side. RICO is fair. The old system had its thumb on the side of the capitalist, the guy who was taking the money, and not the guy who was investing the money.

He says I am making a class argument. I am not making a class argument. I believe in the American way, which is that everybody gets an equal opportunity. A chance for success. And not a chance for success based on money or power or access to it, which is precisely the corrupt system he is defending.

I concede that I want to change it, but to make it live up to the American ideal.

He suggests that RICO is a monster and that I am somehow its Dr. Frankenstein.

Let me suggest to you that RICO is not a monster. It is the slingshot the Davids of this world can use to have a fair fight with the Goliaths of white collar crime and organized crime.

He suggests that he is for King's liberty; well, so am I. But the establishment of the King's liberty presupposes the establishment of the King's peace.

I want equal justice under law—as well as liberty.

## II. Discussion

PROFESSOR COFFEE: I will take questions in a minute, but I just want to add a third and subversive possibility to this debate. We have heard two positions: RICO is a monster; RICO is a savior. There is a third possibility: that the abolition of RICO, if it occurred, wouldn't change, fundamentally or dramatically, American criminal justice or the prosecution of white collar crime. The problems that Gordon Crovitz says are there would persist because of the underlying predicate felonies, which are elastic and elusive in their definitions. As a result, even without RICO, prosecutors could do the same thing. E. F. Hutton was indicted on 1000 counts of mail fraud. I think that was a classic scam, and they were clearly guilty, but 1000 counts of mail fraud remind you that prosecutors have other ways to leverage up indictments. You can proliferate counts mainly because you can find mailings or phone calls everywhere. There are other ways you can get the penalties up if you are so motivated as a prosecutor and if you are not easily embarrassed by doing that. So there may be other techniques that would substitute for the supposedly in terrorem penalties that RICO imposes. Does that mean there is no problem with RICO? I'm not saying that. I think there could be a problem.

RICO probably today can be used in the majority of fraud cases. I think Paul Coffey said something like that yesterday. I will give him a chance as the first speaker to defend any misstatements that I am making. Even if it wasn't his statement yesterday, I would assert that RICO probably can be used in the majority of fraud cases, and possibly in the major-

ity of white collar cases. That could mean that we have a nuclear deterrent available for cases of low level or marginal culpability. That we could use the double-barrelled elephant gun to shoot a mouse, or a rabbit, or maybe rats is a better term here. There could be a problem in this disproportion. Is that critique true? I think it would depend a lot on what the internal procedures in the Justice Department are. I think we know very little, really, about that. The way in which the guidelines work is very hard to evaluate from a distance. Indeed, the guidelines tend to be pretty vague and have large exceptions, and we don't really know much about the way which they are implemented. I am prepared to believe that Paul Coffey is fair and just. In fact, I believe anyone with that name by definition is fair. But I don't know that we have the visibility and accountability that we would like.

Today, defense counsel believe that RICO charges are primarily used to secure plea bargaining advantages. Prosecutors will throw RICO in, and with that 20 year threat, with that forfeiture of the entire enterprise, and with those other fines, then we know defendants won't go to trial in marginal cases. And maybe, as Young & Rubicam did yesterday, they will plead guilty to an overseas questionable payment, where maybe there was a factual defense had they gone to trial. That's the basic problem that inheres in all plea bargaining. Can you leverage up so that one side faces the death penalty if they go to trial for a \$2 traffic ticket? At that point they are quite ready to settle that \$2 traffic ticket. That's the way I think some of these issues should be debated. I will mention one other problem, before I give Paul a chance to respond.

I want to remind you that RICO does not expand the scope of the criminal law one iota. Rather, it enhances the penalties applicable to the very elastic predicate felonies. Vagueness may be the critical defect, which RICO then aggravates. Most notably, the new mail fraud statute criminalizes anyone who denies another the tangible right to honest services. That comes pretty close to saying "anyone who acts unfairly . . . ." Let me raise this jurisprudential question for you. Think about it: would it be appropriate, just, sensible to have a federal statute that says "anyone who engages knowingly in an immoral act is guilty of a crime." Remember I said "knowingly"—I've eliminated the fair notice problem. I find that such a statute would be very dangerous for the reason that it creates tremendous power in the courts to make the law on ex post basis. Also, it gives prosecutors the power of selective prosecution. That is, we all know that the majority of our neighbors and friends, not us, but everyone else, occasionally engages knowingly in immoral acts. We know that the prosecutors cannot prosecute all of those cases, but the ability to pick and choose transfers great social power to the prosecutor. I am raising this problem, because in the white collar crime area RICO tends to be connected with the mail fraud statute more than with anything else. And unlike Gordon I tend to think that the problem resides less in RICO than in the open-ended character of some of the underlying predicate felonies.

You have heard a different position, a position that maybe some of these problems, to the extent they are there, would remain without RICO. Ultimately, even in the absence of RICO, federal prosecutors still have the ability to use conspiracy charges and to proliferate counts. If there is a sensible, intermediate solution, it might lie in greater accountability, visibility, and stronger guidelines and a more open, visible office to implement guidelines. Not only over the indictment, but over other issues, such as the ability to secure forfeiture of the enterprise. I think it would be appropriate here if I gave a chance to Paul Coffey to respond to me and my assertions and then I will take questions from the audience. Just raise your hands and I will recognize you.

MR. COFFEY: First of all, I know that I am not wearing a suit. It's Saturday at Notre Dame, though. Gordon, the first thing I want to mention was that the tip off from the audience you are addressing should have come when you mentioned G.K. Chesterton who said of the Irish many years ago: "For the great Gaels of Ireland / Are the men that God made mad, / For all their wars are merry / And all their songs are sad."<sup>30</sup> They just see things in a different light, and coming here to Notre Dame arguing against a strong, aggressive law-enforcement approach to crime, probably is a little bit like going into an ancient coliseum, and cheering for the lions when everybody in the stands is next in line to go down into the field.

My view of America, without getting too high a platform, is that most people think that the laws should apply equally. And I have a funny story. In 1971, I had just completed a trial of a loan shark in Boston, and he had been convicted. I was standing out in the hallway, with an FBI agent, and we were congratulating each other. This guy walks up, and says, "Hey, kid you did a good job. I hear good things, and if you ever want a job just look us up." He shook my hand. I said, "Who are you?" He said, "I am just a local businessman." The FBI agent started to laugh, and I said, "What are you laughing at?" He said, "Do you know who that was?" I said "No." He said, "That was Jerry Angiulo." The same guy talking about RICO on the tape transcript that Gordon read. One interesting thing about the Angiulo crowd: one of the principal activities that it was engaged in, when generating money from its loan-sharking and gambling, was laundering money through the First Bank of Boston. You probably remember cases against the First Bank of Boston three or four years ago. The mob was making so much money and was so brazen about it, that the soldiers in the family were stuffing the bills in these green trash bags, garbage trash bags, and walking them through the lobby of the First Bank of Boston, and giving them to cashiers. Millions and millions of dollars, without exaggeration, were being laundered through these banks in a very short periods of time—months. It was that laundering of money, money that Angiulo was then putting into his legitimate businesses, that accounts for the recent changes in money laundering statutes designed to address that type criminal activity. Now it seems to

---

30 G. K. CHESTERTON, *THE BALLAD OF THE WHITE HORSE* 26 (1924).

me that if a mobster can unlawfully operate the affairs of the bank, the laws ought to apply equally to the banker who is allowing him to do it. Now, it is a matter of proof in all of these cases whether we can show that, the defendants, be they Princeton/Newport, Drexel, or what have you, are guilty of the crimes. But charges in the indictments specifically say that they willfully and knowingly engaged in very significant, fundamentally criminal acts; that is what the indictments say. So if this is true it is kind of hard to argue that the crimes do not apply to bankers.

And another thing accountability: someone mentioned accountability. I will tell you one thing about accountability. Every time an article appears in the paper, like the "Ham Sandwich" article, or "Captain Ahab" articles, I usually get a call from the assistant attorney general, when the New York Times runs these articles, and he says "What the hell is going on?" The fact of the matter is, all the RICOs that go through the Organized Crime Section, for better or worse, come across my desk, so that if something does go wrong, if it turns out that the charges and evidence did not substantiate using this powerful weapon against very high profile defendants, there is someone who has to account for the review and authorization of those cases. So for better or worse, I think the rap against Rudy Giuliani and Bruce Baird yesterday and some of the other prosecutors is somewhat misdirected. If we are bringing good RICOs or bad RICOs, the answer lies in the Organized Crime Section because it is our job to make sure we are bringing good cases we have handled.

The last thing I want to say, did any of you folks see *Dangerous Liaisons*? There is a scene in it where Glenn Close is talking to, I forget the name of the fellow, and they are discussing someone. He says about the other person "You know that guy is very intelligent." But Glenn responds, "He's stupid." "You think he's stupid, that man's a genius, he's an intellect." But, she says, "Yes, he's a genius, but he is stupid in a way that only very intelligent people can be stupid." And that, in fact, is a very subtle, astute observation. The more lawyers, and other intelligent people who are trained to think in cosmic terms, address a problem, the easier it is, at least in my opinion, for us to lose focus of what we are trying to accomplish, which in this case is the creation and preservation of a very important government program against organized crime. Abolition of the RICO statute would gut that program; it would be stupid.

We should not to get carried away with our own importance. Sometimes we do get carried away bringing the wrong cases in the search of the Great White-Collar Defendant. The point is that we are trying to fight the problem. And this tool is very important in addressing that problem. Businessmen in this day and age who cheat are a big problem, a very big problem. Tom Wolfe asked the question "Shouldn't we feel bad about going after the Great White [Collar] Defendant?" I would like to ask the question in a slightly different way: "Shouldn't we feel bad if we are not going after the Great White-Collar Defendant?" Isn't there something terribly wrong with government if we are only going after the disenfranchised. Some defendants are easy marks. Jerry Angiulo, by the way, is an easy mark. His crowd is so egregiously involved in crime, catching

them is a matter of time. But the really intelligent people, people who Glenn Close was talking about, they are a lot harder to catch. Sometimes to effectively remove their criminal impact on society, we have to use tools that may seem at first blush to be real heavy-handed. The fact is that these tools are about all we have to get their attention. All I can tell you is that when RICOs come across my desk for authorization, we are very acutely aware, I perhaps more than anyone, of what the fallout will be if it is brought for the wrong reason. We are convinced that these cases need to be brought against one and all and we are going to continue to do that.

AUDIENCE: I would like to examine metaphors. Mr. Crovitz wants to suggest that Milken is an innocent "babe in the woods" and that RICO is a Frankenstein monster that is scaring Drexel clean. In the recent indictment, just so everyone in the room knows, besides the racketeering counts there were fifty-five counts of mail and wire fraud, eleven counts of fraud in the sales securities, twenty counts of fraud in the purchase and sale of securities, three counts of fraud in connection with a tender offer, six counts of filing false statements with the SEC, and one count of assisting in false tax preparations. Without the racketeering indictment, if he were convicted of these charges, he would serve 480 years in prison and pay at least \$24 million in fines without going into some of the forfeitures to work it out. Do you really think that the Frankenstein monster is scaring Milken, or do you think that maybe he is not so innocent, that all these other charges can significantly scare Mr. Milken into doing some effective plea bargaining?

MR. CROVITZ: If he is going to face 480 years without RICO, why did the government include RICO? The government included RICO because it makes the trial a lot easier than a securities trial, or a tax trial, or another trial where the entire discussion in the course of the trial to the jury is the substantive underlying predicate acts. Instead you walk into the courtroom and Drexel is described as a continuing racketeering enterprise, Milken referred to as a racketeer. People know what those words mean. They, for very good reasons, believe the government would not say something that is not true or contrary to the usual usage of words. The defendants are then a lot easier to convict. The Princeton/Newport case is a classic example of how the government can use RICO to bring a case which is really a tax case where there is very little discussion of the tax issues involved.

AUDIENCE: He was convicted of parking, of multiple incidences, maybe as many as thirteen.

MR. CROVITZ: These were tax parking.

PROFESSOR BLAKEY: Yesterday you admitted that it was more than tax parking, it was also manipulation.

MR. CROVITZ: There was one of them that was indicted on manipulation, there were some that were only indicted on the tax parking, and I am talking here about the tax parking.

**PROFESSOR BLAKEY:** And not talking about the manipulation?

**MR. CROVITZ:** No. If somebody manipulates in the stock market, please, Paul bring a case against them. I can't stand manipulations in the market.

**AUDIENCE:** If you do it 200 times, is it still not a pattern? Or if you do it fifty-five times like in Milken, do you still want to try each one, and not try a pattern?

**PROFESSOR COFFEE:** Actually, I can make something out of your question. The government did have a reason to bring RICO. They would like to reduce the national debt for last year by \$650 million.

**AUDIENCE:** They are facing \$11 billion in forfeitures actually.

**PROFESSOR COFFEE:** The bond that I think they were negotiating was in that sort of range. That does supply additional reasons.

**MR. CROVITZ:** E. F. Hutton came up a minute ago. E. F. Hutton faced 1000 mail fraud counts. E. F. Hutton is still in business. They were crooked.

**PROFESSOR COFFEE:** They went down the tubes and became Shearson Lehman/E.F. Hutton very quickly thereafter.

**MR. CROVITZ:** They are still in business. Princeton/Newport went out of business before the trial, and Drexel had very good reason, based on Princeton/Newport, to believe that it too would be out of business before trial. Now Paul Coffey, to his credit, I want to emphasize this, and the Department of Justice, after the Princeton/Newport case, issued two amendments to the manual on when to bring RICO cases, and one of them said don't bring tax charges as RICO charges, bring them as tax charges. The other one restricted the amount and the method of pre-trial forfeitures against legitimate businesses. I think that is a clear recognition, despite of what you have heard today, that there was a serious problem with the Princeton/Newport case. And if we don't have more Princeton/Newport cases, if there is a Milken trial and the trial is on securities counts, or tax counts, and not on some big racketeering and mail fraud and wire fraud counts, then more power to you, I hope that we end up learning something from the trial.

**MR. COFFEY:** Gordon, do you think that we should have used RICO in the Chicago pit cases, assuming the evidence alleged in the indictment? I am interested to hear your view on that.

**MR. CROVITZ:** I have a question about some of these pit cases. You try to imagine a situation in life where you conduct business without the telephone, or without sending a letter. About the only example I can think of is two guys standing next to each other in a pit, and one guy says, "Hey, if you can sell this to me at this price, I will buy this and I will sell this to you and you buy that and we both rob the customer and we make money." That doesn't look like a RICO count to me, it looks like fraud. It ought to be brought as fraud, but it doesn't look to one like a RICO count.

MR. COFFEY: What if the defendant is doing it for a year, and in the course of a year he may have done this to hundreds of customers. In each case, he said either literally or words to the effect, "To hell with him [the customer], I want to make my money." And if we assume, just for the purpose of the argument, that was done in a fraudulent manner, do you think we ever get to the point, I could make it two years or three years, would we ever get to the point where you say, "Well, all right, maybe RICO becomes fair," or is it your position that RICO simply has no place in securities prosecution?

MR. CROVITZ: My position on the pit case is this. The difference between white collar criminals and mobsters is white collar criminals do not assume that going to jail is just part of their job. A lot of the mobsters do. However, there is no equality between mobsters and white collar criminals in terms of public perception. There is a lack of such equality, without regard to how the crime was committed. The National Law Journal took a poll last year, and asked people, "If a bank is robbed of \$5000, what do you think the punishment should be?" under two different examples. The first example it gave was the bank was robbed by a gunman, who came in and held up the bank and got \$5000. And the average number of years people thought he ought to serve was about twenty. A lot more than he would really serve, but that's what most people thought—about twenty years. The second example is an accountant who siphons off \$5000. The average period of prison sentence people thought that he ought to get was about five years, but a lot of people thought he shouldn't have to go to jail at all. Now I may be more a hawk on whether he ought to go to jail at all than most Americans are, but I think that poll indicates the truth, which is that we have throughout our history viewed violent crime very differently from economic crime. And I think that we cloud the issue, we fail to devote resources to fighting drugs, violent crime, for clearing up ghettos where people live under twenty-four hour fear, and instead go off on what are sometimes true larks by prosecutors. True larks at a time when there has never been so much violent crime in this country. Never have there been so many people who fear to go out of their homes. It just seems to me that the whole RICO debate is based on this notion that there is somehow equality, and that has led to a terrible misallocation of resources.

I want Wall Street to be prosecuted for crimes. Wall Street is very important to me, and it has to be run by clear rules, where everybody knows the rules, and nobody cuts corners. I am all for that. What I am saying though is we have got laws that will take care of that. Don't cloud it up with RICO. Don't make martyrs of people by RICOing them, rather than taking them down an old-fashioned way. If you want something like RICO, and if you think you can't make cases against Mafia families without something like RICO, let's go back and take another look at it, and have the debate that we had in the late 60's, before RICO, which was all about the mob family and how we helped prosecute them and bring down the mob. And we have to change the conspiracy laws, change the forfeiture laws. Let's talk about that. I just think that RICO has become a

terrible leviathan on the criminal side, and also on the civil side. In order to clear the air here, we ought to go back to first principles and decide how we really want to allocate prosecutorial resources.

**PROFESSOR BLAKEY:** Gordon, let me make two comments on part of what you have said. One of them is about Princeton/Newport. More people here ought to realize that this was a small partnership in which a high degree of skill by the partners was required. The truth of the matter is that as soon as those people were indicted for felonies, and it looked like they were going to go to jail, that partnership bit the dust. As soon as the principal guy was going to go to jail—was going to lose his brokers license—the business was no longer a viable partnership.

If it had been a large corporation, it could have lost a major figure. It was not; it was a small partnership. And that would have been the case, whether he was indicted for RICO, or for securities fraud, or for tax fraud. That partnership went down on that ground independent of the RICO forfeiture, at least in my judgment, and the people I talk to, and incidently, I know the prosecutors and the defense counsel in that case, and they will tell you that, at least privately.

Let me raise for you the second point. William White, a very prominent sociologist, did a study of juvenile kids in the ghetto. He asked them for a number of things. What was the impact on them of various factors in their life? And one of the things that contributed to their attitude toward society—their failure to adopt society's work-earn-save philosophy—was the perception that there was a double standard. The poor had one set of standards and the rich had another, and the rich people got away. They did it and got away. The poor people got the wrong end of the stick.

I suggest to you that what's important sometimes about prosecuting a Jimmy Hoffa—putting him in jail—is not entirely that the Teamsters Union get a little cleaner, because in fact it turned out not to be a lot cleaner. But what people saw, in some sense, was that Jimmy Hoffa was not above the law, and that is precisely the same thing with a Mike Milken.

It is precisely the same thing with an Anguilo.

It is not simply putting that person in jail. It is showing that the King's writ runs not only on Mulberry Street, but on Wall Street.

I agree with you that we ought to allocate resources. The states are not doing white collar crime; they are doing overwhelmingly street crime. If the Feds pull out of white collar crime and organized crime, it will not be prosecuted at all. And the Feds do not have resources to do it. The SEC has a budget of about \$135 million. The Commodities Future Trading Corporation has a budget of about \$40 million. Mike Milken's salary last year was \$550 million. The Southern District of New York has a budget of \$22 million.

Unless we are able to energize, not only public resources but also private resources, in an effort to control this kind of conduct, it won't happen. The empirical studies done by economists of the antitrust statute, which contains a similar model of public enforcement (both civil and



criminal) and private enforcement of triple damages, correlates the price of bread to the level of enforcement, and it was not criminal enforcement, it was triple damages that kept the price of bread down. If we have effective enforcement of the antitrust laws, we won't have the price of bread fixed.

Lack of freedom in the marketplace is one thing; lack of integrity in the marketplace is another. The little investor is out of the marketplace. Ten or fifteen years ago sixty percent of the stock in this country was held by households; now it's about half of that. Sixty percent of the trades in the market today are trades by large institutional investors, not the little guy.

Formerly, the little guy would buy a company and believe in the company; it was his company; he would stick to it, and he would hold it even though its profits temporarily went down. Now we have the institutional investor with short term memory—in and out. We have a very different market than we once did. I am not denying that the money of the little investor does not go into the mutual funds. His money is probably better off in the mutual fund, just to get professional investment. I am just saying that it is a very different market today. It is mainly for only institutional investors, being run by managers, as opposed to companies being owned by aggregates of small people, who care about the country and the company.

MR. CROVITZ: Can I make a point of fact on Princeton/Newport because it is such an interesting case. It was not the indictment that led investors to flee Princeton/Newport. The investors in Princeton/Newport were not penny stock brokers or wildcatters or arbitrageurs. The investors in Princeton/Newport, the two largest ones, were the Harvard University endowment, not a radical investor, and McKinsey and Co.'s own pension plan. Both of them left because they feared the possible effect of forfeiture on their own funds in Princeton/Newport. They stuck with the company during the posting of a bond, they even stuck with them to the end of the year when they had to decide whether they were going to renew. There was no indication by the government about how much of their money, if any, could be forfeited. They said they could not afford the risk. The company went out of business just like that.

MR. COFFEY: They were afraid of our superseding indictment. You are right in what they said. You say that the original forfeiture did not effect PNP's ability to continue. PNP claimed that the prosecutors said they were going to supersede and ask for additional forfeiture. They claim that the prosecutor said "I won't be able to tell you until January." They say that they had to decide whether to commit to the entire year by December.

PROFESSOR COFFEE: The partnership agreement expired on December 31; the limited partners had to recommit. So they say they got out then.

PROFESSOR BLAKEY: What's the alternative? Not indict them because they might go out of business?

MR. CROVITZ: The alternative is, if you think they have violated the tax law, bring a tax case.

MR. COFFEY: But we thought they violated the insider trading and stock manipulation.

MR. CROVITZ: Well, there's no conviction on insider trading.

MR. COFFEY: Gordon, even the defendants in that case—I think you know this, but if you don't, I don't think there is any reason why I can't tell you. When they came in on a preindictment conference in Washington, I met with them. They objected strenuously to any indictment wherein the entire pattern of racketeering would be tax parking. After listening to them, I decided and told the prosecution and the defense attorneys that no RICO would be authorized against any defendant in Princeton/Newport unless each such defendant was charged with one additional, generically different activity. So each of the five defendants was charged with tax parking and either the one or the other of the predicates: insider trading and stock manipulation. Now as you know at trial Judge Carter didn't like the theory of one of those predicates. The jury didn't like the theory on some of the others, and when all was said and done, only one of the five defendants was convicted of what we were calling in the case "tax plus": tax plus some other type of activity. But that's something over which we had no control. We don't agree with Judge Carter's decision. We don't think he applied the law correctly on whether there were other victims in the tax parking other than Uncle Sam; for example, the other investors, the investment community in general. The point is that, when we authorized the case, we listened to the defense attorneys, we thought they made a good point, we accommodated their point, and we changed the prosecutive theory to make sure that we were not bringing a pure tax parking case. And then afterwards when the judge made his decision, the defenses attorneys raged from pillar to post that we had brought a pure tax case.

PROFESSOR COFFEE: Couldn't you have reconsidered the RICO rationale?

MR. COFFEY: Well, they asked us to, and it wasn't an easy call to make. But at that point, because we felt the judge was wrong, because we felt that what remained in the case included one of the additional tax plus charges, it still was an appropriate RICO. Now if this case came in today, Princeton/Newport, if it came in on the basis of the jury's convictions, that is, a prosecutive theory came in and was just tax parking, we would not authorize it. But I think today's session, as I understand it, is looking ahead as opposed to looking back. So in this particular context the point ought to be: in the future, is the government going to be using RICO for tax parking cases? The answer is no. Are we going to be using RICO in very thin securities cases? The answer is no because the securities statutes themselves have been recently buttressed with more jail time and more penalties to take the weight off our need to use RICO. Consequently, I expect the Southern District will not perceive the need to bring these cases.

AUDIENCE [to Mr. Crovitz]: It seems to me that your argument for a future racketeering statute would exclude a mobster who wasn't involved in something violent; say they were involved in drugs and prostitution and financially and weren't involved in violent crime. Is that an unfair characterization?

MR. CROVITZ: I think, are there fifty-two predicate offenses?

MR. COFFEY: Yes, fifty-two. Plus fraud and some generic references to include securities.

MR. CROVITZ: I mean there is loan-sharking, there is gambling, prostitution maybe, drugs certainly.

PROFESSOR BLAKEY: Let me list 4 categories: violence—that includes murder, robbery and kidnapping; the provision of illegal goods and services—that's drugs, prostitution, and gambling; corruption involving the government or unions, that includes extortion and fraud; and finally commercial fraud, whether it is mail fraud or wire fraud or securities fraud.

MR. CROVITZ: My view is that we ought to go back to the debate we had in the 60's where prosecutors believe they can't convict these mob families—and there is some new evidence now that proves the Sicilian Mafia was really untouched by the very good victories of the 80's.

MR. COFFEY: Unfortunately that is correct.

MR. CROVITZ: We have a continuing problem. I certainly recognize that. If prosecutors believe they need extra powers to get those people, which they very well may, I think we ought to give it to them. What I object to is the vagueness: we generally know what murder is, we know what prostitution is, we know what drugs are; we don't know what mail fraud is, what wire fraud is, or what securities fraud is.

PROFESSOR BLAKEY: Make no mistake: there are marginal cases in homicide, where you don't know if it's homicide or not. Bernard Goetz is an example. Was that self-defense or homicide? One grand jury said no; they reindicted; they retried it, and it was an extremely controversial thing. It always will be. We don't know when day becomes night in any statute at the margin.

Let me carry it a little bit further. What you do when you talk about the maximum penalty in a minimum liability situation and treat it as if it were a RICO-specific question is really deceptive.

I can take robbery, which you will grant is a traditional common law crime, and I can show you a kid who is nine or ten, with a stick, who takes a bicycle from another kid. That's an armed robbery. And at the other end of the scale we can take a John Dillinger. The same statute applies to John Dillinger and to the child.

And there is no way, using language, which includes logical universals, that you won't encompass a wide range of activity within any concept. And anytime you do, there will always be marginal cases at the edge of the concept. The truth of the matter is that there are vast numbers of RICO that are absolutely clear and that nobody has any quarrel with, you

see them and you recognize them. If you're not familiar with them, then the thing to do is to go read the materials.

For us to concentrate on Princeton/Newport is to make the debate turn on one unrepresentative illustration.

Is that an illustration of an aberration, or is that an illustration of an characteristic of the matter?

The truth of the matter is that the securities fraud cases are about 1% of RICO. Organized crime is 37%. The white collar crime other than securities, is 44%. Let's get a range of these cases.

MR. CROVITZ: Let's talk about the 90% of civil RICO cases that have nothing to do with any racket except some tennis rackets. And that's your bill.

PROFESSOR BLAKEY: No, that's your definition of racket. I think a guy who steals with a machine gun, from the point of view of the guy who loses the money—there is no difference whether it was stolen with a pen or stolen with a pistol. The widow and the orphan still don't have the money. Tell the people who bought the bonds from Keating that what they should be worried about is marijuana, rather than their life savings. Charles Keating, in setting up a Lincoln Savings and sucking the money out of it, as the testimony in trial yesterday indicated—fifteen transactions—\$155 million—generated property by giving away my money. Money that you recognize, and I agree with you, we insure. Is that not organized crime? In fact, it doesn't even have the justification that organized crime does. Fat Tony Salerno grew up poor. Fat Tony Salerno didn't have the opportunities in life that a Charles Keating did. Fat Tony Salerno had no education. What's Charles Keating's excuse? Well-educated, a Harvard lawyer, who manipulates the system and walks away. There is a sense in which he is more responsible, not less, because of his background.

MR. CROVITZ: That's exactly the argument I think that has led to the true allegations of a double standard in law enforcement that I think has a lot a merit. The true argument about double standards is not that the state and federal prosecutors go after the poor. The allegation from a lot of ghetto neighbors is that the white power structure, as they put it, doesn't enforce the laws in their neighborhoods. Some even allege that there is an conspiracy to import drugs and to allow drug sales, maybe even import AIDS. Some of these wild conspiracy theories *are* wild. Some of them have a grain of truth based on the philosophy you've just offered which is that there are some people you just shouldn't prosecute for crimes, and there are others who, even if laws aren't vague, we ought to throw the whole federal government at.

PROFESSOR BLAKEY: I'm saying that Keating should be prosecuted too.

MR. CROVITZ: What Keating should be prosecuted for is classic misrepresentation, telling little old ladies that these were government guaranteed bonds when they weren't. There is no simpler kind of case.

PROFESSOR BLAKEY: But Gordon, there is a difference between rape and gang rape. Let him go down for rape. If he engages in gang rape, let him go down for gang rape.

MR. COFFEY: Bob, you know what you've just done? Monday morning there is going to be an editorial in the Wall Street Journal entitled "Gang Rape RICO." (Laughter)

MR. CROVITZ: Paul, if you would like to write it, I will put your name on it.

PROFESSOR BLAKEY: We have an agreement that none of this will be held against us in other forms.

PROFESSOR COFFEE [to audience]: Any other participants?

AUDIENCE: Professor Blakey, personally I would rather someone take that front company and use a piece of paper to take \$5000 out of my bank account, than someone took their .45 and put it up against my head and took \$5000 out of my pocket.

PROFESSOR BLAKEY: Why do you have to choose? Why can't we prosecute them both?

AUDIENCE: I would like to prosecute both of them, but I believe that there is a difference. I personally would rather one happen than the other. I think, based on that, that Mr. Crovitz's distinction between those two is valid.

PROFESSOR BLAKEY: I grant the distinction that violence is worse.

AUDIENCE [To Professor Blakey]: Look at the mail fraud statutes—you teach us how to look at them. Then you show us the cases, you show us that those words are difficult to understand, even when the finest jurists in this country, or the federal bench, look at them, they have a difficult time understanding consistently what they are. RICO is a magnifier lens. Is it a good idea to take that magnifier and apply it in those areas? Or would it be better to limit our magnifier to the places where we have maybe 500 years of traditional common law to understand the thing rather than fifteen?

PROFESSOR BLAKEY: The easy answer is this. When I was in the Department in the early 60's, we prosecuted mob figures occasionally. I can count on one hand the people we got. We simply didn't have much impact on them. We didn't know how to organize ourselves; we didn't have access to the necessary investigative means, we didn't have a way to try them; we didn't have adequate sentence for them. And, in fact, people sat down after the experience of the Kennedy Administration and figured out what was wrong. And when we figured out what was wrong in the mob cases, we figured out what was wrong in all cases involving organizations. You are right: the mob was the occasion for RICO, but it didn't define the scope of the statute. What we learned in the mob cases we also learned applied to all organized crime-type cases. That doesn't mean just the mafioso. It also applies to white collar crime and other kinds of

organized crime. And the world is different today. He [Paul Coffey] can come here and say he took out the family in LA, he took out the family in Chicago, he took out the family in 9 other major cities.

We were counting on one hand individual prosecutions. When we thought individually, we caught only individuals, and, even then, we were not terribly successful. When we began to think about groups and patterns of behavior, it changed the way investigations went down, trials went down, and sanctions went down. And the world today is a better world, not worse. More people are accountable today for what they do. Going back to the 60's, they weren't accountable. Period.

MR. COFFEY: Gordon, what do you think about Ferdinand Marcos and General Noriega. Should we use RICO against them?

MR. CROVITZ: No.

MR. COFFEY: Why not?

MR. CROVITZ: Let's take the easier case first: the fellow sweating it out in Miami. He ran drugs. If the US government wants to go around the world indicting and prosecuting foreign heads of state who run drugs, that is fine with me. In fact, I am for it. I think we can get Noriega. I think that would be a nifty way to get to Fidel Castro, who was been in a lot of meetings with Noriega, who remains unindicted. If you are going to bring cases against foreign heads of state, let's have equal protection and get some of the other ones as well as Noriega. I don't think you need RICO to do it. Drug cases are drug cases.

MR. COFFEY: But there is more than drug charges. For example, in the Ferdinand Marcos indictment there are allegations that he ripped off his people through extortions and embezzlement of US funds, and the like. Not only don't the drug statutes fit that, and in Noriega there are allegations of non-drug activities as well, but if you try to use some other individual statutes, such as mail or wire fraud, the judge never could hold the case together.

MR. CROVITZ: I'll tell you what I am afraid of. I'm afraid that if you use the racketeering label against people whom the jury may think are kind of nasty and hateful characters, but they know they aren't racketeers, whatever that means in people's minds, I am afraid you risk not getting a conviction in what ought to be relatively straightforward cases based on narrower charges. We will see, and I wish you all the luck in pursuing those cases. But I do worry that one of the problems with RICO is that you end up letting off people who could have been convicted on a lesser, more clear charge without this.

MR. COFFEY: Doesn't that suggest that if a person reaches a certain recognizable position in society, such as a head of state, or a banker, that no one could be called a racketeer because that term is defined by how it was perceived in the 1920s, so now it is no longer fair to broaden that perception against these other people?

MR. CROVITZ: You are not really saying that the US government thinks that bankers and Noriega and Marcos are all three similar. I mean

Noriega and Marcos both—well, with Noriega clearly—the allegations charge an awful lot of violence, including murder. Juries understand that. It seems to me that leaves a chance of winning that case. I don't know why you have to enlarge those.

MR. COFFEY: The answer is we have to, because RICO is the only tool available to us that creates, in federal court, a statutory vehicle for combining all of these different crimes, at different times and different locations in one case.

MR. CROVITZ: If we want to use the Justice Department as a tool of foreign policy, then Justice should abide by a set of guidelines for prosecutions. To indict a foreign head of state, prosecutors should be required to get the approval of the State Department, the Defense Department, and the President himself. Then I think we ought to amend the Foreign Corrupt Practices Act to include some acts by foreign heads of state. If you want to do that, that's fine. If you want to define it more broadly than we would define it for US citizens, that's okay with me too. But I think to go after those guys you shouldn't put at risk some of the people who have been victimized by RICO here.

AUDIENCE: If Noriega extorts, and murders, and runs drugs, isn't he just like a mob family? Isn't he a racketeer?

MR. CROVITZ: If you were going to have a status crime, if we were going to sit down and try to draft what the Supreme Court would now say is an unconstitutional status crime, I certainly would not think we would limit it to people with Italian names. How you would draft it is no mean feat. That's why the court would hold it unconstitutional. If we want to try, we could probably come up with a description of what we really mean by organized crime. And I don't think that organized crime in such a definition is very likely to include tax fraud.

PROFESSOR COFFEE: Paul, can I go back to your question for a minute, because, I think Gordon let something go by because I don't think he is principally a proceduralist. You made the justification that one of the important advantages of RICO that we haven't been talking about this morning is that it allows events at widely separated times, among people who don't know each other, who belong to different groups and have little conspiracies, to be grouped into one giant RICO conspiracy. That could present the following problem in my opinion. Consider for the moment that there may be defendants who either have a meritorious defense or that no one knows till the jury speaks whether they are guilty or innocent. Also in the same case we have not only money laundering, but we have other aspects of this Mafia family that have engaged in loan-sharking, prostitution, hit-man murder, and extortion. Now we have a trial in which there sixty-five defendants. Many of them wearing dark shirts with white ties. There are one or two white collar defendants over here who may have been involved in money laundering the proceeds. Hence, there are some complicated defenses that go to their *mens rea*, whether they really knew whether this money was coming in legally or not. It is very useful to the prosecution to be able to

stick marginal or peripheral defendants right there in the middle of the rest of the Mafia family. It's useful, but are there fairness issues in that?

PROFESSOR BLAKEY: They will probably get off by innocence by association.

MR. COFFEY: No, I don't think so. (Laughter).

. . . .

PROFESSOR COFFEE: There is a difference with RICO because it allows you to take people who are in one conspiracy to commit money laundering, and another conspiracy to commit murder, and say both of these conspiracies were part of an enterprise being run through a pattern of racketeering.

MR. COFFEY: In one sense, it all depends on the precise way the question is articulated. RICO critics say how can you take five defendants from one conspiracy, put them in the same trial as five defendants in another conspiracy and call it all one conspiracy? Take the example of this organization: You [referring to Professor Coffee] are a banker, and we agree that you will launder money from my drug trade. A few months pass. By that time you would be getting some money from me. You invest it, put it in a business. You then talk to Bob, he's involved with, maybe, hijacking. If the evidence is sufficient to show at trial that we all knew the general outline of the mob group, it is fair game to have all defendants in the same charges.

That's aside from the *Casamento* problem, where the case is too big to try. But it's now one conspiracy. I remember the first RICO trial I had, I had this type of situation. We were saying that the defendants were loan sharks and gamblers and the hijackers and stuff like that. The public generally responds to the mafia as one department store. And sometimes the people in the shoe department don't know what is happening up in the credit union. The credit union doesn't know how well they are doing down in ladies underwear. It is all part of one department store. They have a common economic goal, they have a common agreement, it is foreseeable the department store will have various aspects to it. If the department store is operating unlawfully, and then the persons are the right targets.

PROFESSOR COFFEE: I hear you; but notice, you changed your facts. You made a case out of Meyer Lansky making obscene amounts of money. I gave you a slightly different one. It may be the Gambino family. They got a lawyer or an investment banker who approaches an honest bank vice president to inquire about processing large amounts of money. The vice president may or may not be guilty; there are factual issues that you could raise at trial. The problem is that this defendant will be submerged. The jury, on the sixty-first day of the trial, after hearing about eight hit men, and five counts of interstate prostitution and pornography, finally begins to hear his case. Now he is submerged in what some people would call a circus trial.

MR. COFFEY: It might be a circus, but that's the judge's fault.



**PROFESSOR COFFEE:** It wouldn't happen if we had one conspiracy. This is the area where I think conspiracy and RICO do present different procedural settings in the courtroom because instead of having a single conspiracy to commit interstate violence, we've got multiple conspiracies with little real connection. A corrupt Mafia family will engage in anything illegal that looks like it will be profitable. But it brings together all kinds of people who are in legitimate enterprises but may or may not have succumbed to the overture to launder some money for the family, or otherwise engage in the peripheral side of these activities.

....

**MR. COFFEY:** I think we are perfectly entitled, when we find activity that is unlawful under the common law, or under any some sense of the general public, I think it is perfectly fair and appropriate for a prosecutor to go to the book, which we do thousands of times a year, and look for statutes that technically apply to that activity.

**PROFESSOR COFFEE:** If Clark Clifford—who has probably the best known lobbyist over the last twenty years and has been in and out of most Democratic Administrations—sends a bill for legal services to his client, but it really is a bill for lobbying services because he talked to several senators to explain to them why they shouldn't like a piece of legislation, can this be called mail fraud? Assume that he sends a bill to his client "\$50,000 for legal services." Under your theory, he could be indicted. It's the same as misrepresentation, because if you're saying that it's fair for the law to make that fraud, all that protects Clark Clifford is that prosecutors don't dislike him.

**MR. CROVITZ:** Can I give you another example? What happens if somebody leaves a part of government, say a former congressman, and becomes a lawyer, who has access to the floor of the House, and takes advantage of that access. He talks to his former colleagues about legislation that maybe they might want to pass, he sends a bill to his clients who will benefit from that legislation, he marks that as a legal bill and not a lobbying bill, you know this somebody who has held a public office, who has access to Congress, that seems to me to be—under your view of the law—that is a crime that occurs dozens and dozens of times every week.

**MR. COFFEY:** You don't view that as a crime?

**PROFESSOR BLAKEY:** I am not so sure that legitimate lobbying is not legal. But what he was purporting to do was not just lobbying, he was purportedly illegally lobbying.

**MR. COFFEY:** I don't consider the Keating case to be lobbying, I consider the focus to be abuse of the public trust. In your hypothetical, I would consider that to be a crime, but if the ex-congressman said to his client, "I think I got a real good chance next term of getting back in this House because they are going to redistrict, and you pay me money now, I will strike a deal with another Congressman to join a bill that I'm going to introduce when I back into the House," I think that's a crime.

MR. CROVITZ: If you want to see a public reaction to a case outside the unique situation in Keating, then bring one of those cases. Then you can see the reaction: it's going to be one of horror, if you bring a case like that.

MR. COFFEY: Oh boy, we always get reactions of horror in Congress when we we're looking into Congressional corruption. (Laughter.)

MR. CROVITZ: This may be one time where even those of us who think the Congress is a terribly corrupt institution would say that we've gone too far.

MR. COFFEY: A lot of people thought we shouldn't have brought the Abscam cases, as you know.

MR. CROVITZ: We supported you.

MR. COFFEY: That's what's wonderful about the Journal Board. It's so supportive of law enforcement 99% of the time, I can't for the life of me figure how we are missing the boat involving white collar criminals.

MR. CROVITZ: That's why we have to write so often this subject, trying to help you out here.

MR. COFFEY: You single out the white collar defendants as having some type of special rules, the law of the jungle. But when we move into public officials, or mobsters, or something like that, there's no apparent disapproval on your part when we charge these people with the same crimes.

MR. CROVITZ: No, that is actually not our position. Our position on RICO as it now stands is that it ought be abolished. It ought not to be used against even the people which we consider it applies to because of the abuses that have occurred.

MR. COFFEY: Civil RICO abuses?

MR. CROVITZ: And criminal—both. Civil obviously. And that's because, as the guidelines written in 1981 predicted, if you allow imaginative prosecutions under RICO, if you brought cases far afield from the language of the guidelines and the original purpose of RICO, which was organized crime, you are going to get a lot of bad publicity because you run the risk, that I think has occurred, of sending a lot innocent people to jail without having done anything. You and I share an interest in law enforcement, and I would think that you are putting it somewhat at risk.

PROFESSOR COFFEE: We've gone about seven minutes over the scheduled time, and this probably could go on all day, it may for years yet. But I want to say that not since St. George met the dragon have I seen a more interesting exchange of views. I will leave everybody to form their own opinion about who is St. George and who is dragon. (Laughter and applause.)