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RICO AND ITS PROGENY: GOOD OR BAD LAW?

The following is a transcript of a debate which took place at the Thomas J. White Center on Law & Government at the University of Notre Dame on November 14, 1985. The participants in the debate were the Honorable Abner J. Mikva, U.S. Court of Appeals for the District of Columbia Circuit and G. Robert Blakey, O'Neill Professor of Law, University of Notre Dame.

Abner J. Mikva

I am pleased to be back on the campus of Notre Dame. It has been a long time. I am especially pleased to share a platform with my old friend and former colleague, Professor Blakey. He certainly is one of the fathers, if not the father of RICO.1 He was present at the creation. He has readily admitted his responsibility and has watched with pride as kid RICO has grown up to be one of the law's most notorious bullies.

I would like to explain RICO to you, as I see it, before I tell you why I think Blakey's offspring ought to be put in the closet for good. When I was practicing labor law, we used to tell a story about a strike that had gone on for many, many months, and finally, the union and the management agreed on a settlement; but under the terms of the union's constitution, every member of the bargaining committee had to physically sign the agreement. They went through the signing ceremony—all the management people signed it; all the union people signed it, until they got to old Gus, who refused to sign it. They begged him, they pled with him, they explained the strike would go on, and still he would not sign it. They got the president of the international union in Washington on the phone and he talked to old Gus, and Gus still would not sign it. Finally, in desperation, they went to the president of the company and told him the problem, and he

said "You send Gus in here and I'll talk to him." Gus walked into the president's office and the president threw the contract at Gus and said, "Gus, either you sign that contract or you're fired." Gus took out his pen and signed the agreement. The president of the company looked at him and said, "Now will you tell me why in hell you wouldn't sign it up to now?" Gus shrugged his shoulders and said, "Nobody ever explained it to me that well before."

Let me see if I can explain RICO as I see it; RICO: Racketeer Influenced Corrupt Organizations. Who could oppose a bill designed to get at such nefarious activities? Why is a federal judge, sworn to uphold the law and the Constitution of the United States, contending that a law aimed at racketeer influenced corrupt organizations ought to be scrapped?

Well, I must confess, first of all, that I appear here wearing more than the normal amount of sackcloth and ashes. It is not that I voted for the Organized Crime Act of 1970 of which RICO is a part. While I was present at the creation, along with Professor Blakey, I did not vote for the bill. I am afraid my transgression was much greater. I made the mistake of warning Papa Blakey and my former Congressional colleagues what a bad boy RICO was going to grow up to be. I helped create a legislative history that has since been used by various litigants to try to prove that the Act can be stretched to cover any kind of lawsuit. I confess that I used a substantial amount of hyperbole in trying to build opposition to the entire Act when it came up for floor consideration. I stand amazed, however, at how modest my hyperbolic horrible examples were compared to what really has happened in the real world when lawyers have gotten hold of it.

The use of the civil RICO provision as a weapon in various sorts of commercial disputes is, to my mind, the most incredible expansion of what was once a little cottage industry into a most important tool of civil litigation. First of all, even my warnings in 1970 about the future did not suggest the sheer volume of RICO claims that would be filed. During the first ten or eleven years after the Act was passed in 1970, there were not too many private RICO claims filed. It was used in a few criminal cases, and occasionally you would find it in a civil dispute. Since 1981 or 1982, the number of such claims has risen beyond measure and I use the words "beyond measure" advisedly and literally.

Most—or at least many civil RICO claims—never go to trial. Indeed, they are not even meant for real litigation purposes. They serve a very awful purpose, a very distressing
purpose, just in being put in the lawsuit in the first place. Their addition to a civil complaint has a profound impact on the defendant. No defendant—even Mr. American Express, the Card-Robinson—wants to be known as a racketeer, wants a finding in a civil suit that he has been engaged in racketeer influenced activities. And so what started out as a small cottage industry for federal prosecutors has become a commonplace weapon in the civil litigator’s arsenal.

Just a few weeks ago, I received an advertisement from one of the legal publishers urging me to become a subscriber to the *Civil RICO Report*; they told me what terrible things could happen to me if I did not keep up with all the new uses of RICO—what could happen to me as a lawyer, and what could happen to my clients, if I did not advise them of it. Think of it: a whole loose-leaf service just developed from a throw-away section of the Organized Crime Act. In looking through one of the American Bar Association manuals, I found that the Corporation Law Section has a separate subcommittee on civil RICO.

In preparing for my appearance here today, I went through some of the cases in which a civil RICO claim has been filed. And the range of cases boggle the mind. These are not cases against Mafia figures. These have nothing to do with some poor merchant who has been squeezed by the mafiosi in a loan transaction. RICO makes its appearance in everything from divorce suits to religious disputes, to suits against one of the national candidates for President, to a major political party, and to just about every kind of garden variety of contractual and securities dispute that you could imagine between businessmen, to corporate raids, to defenses against corporate raids, to state efforts to collect state sales taxes from local businessmen.

If you find it hard to relate that potpourri to organized crime or racketeering, you are not alone. Every judge, almost without exception, including the five Justices of the Supreme Court who upheld the interpretation of civil RICO to cover all of these things, has wistfully begged and urged the Congress to reexamine what it has wrought.

A distinguished circuit judge in this circuit, Judge Bauer, was forced to uphold my home state of Illinois’ use of civil RICO against a gasoline dealer who under-reported his sales taxes that were due the state of Illinois. They threw a civil RICO charge at him and Judge Bauer had to uphold it, but he said in his opinion he hoped that his ruling would appear to Congress as the “distress flag” that it is and urged Con-
gress to reexamine the use of civil RICO.

One of the few issues, as I said, on which both the majority and the minority agree in the *Sedima*² case was that civil RICO was being used in ways not contemplated by Congress as a weapon against legitimate businessmen in ordinary commercial disputes. The civil RICO count today has become boilerplate in commercial lawsuits. Its presence in a complaint frequently forces defendants to settle and pay out for frivolous disputes under pain of having to defend against being labeled a racketeer. And because of this intimidation factor, it is impossible to even accurately measure the full impact of civil RICO. We do know that the oppressive use of it in a complaint has created a very disastrous effect in the civil bar.

Some judges, including four Justices of the Supreme Court of the United States, would have tempered the language of civil RICO so as to preclude the incredible results that are being achieved under it. I have to say in all candor that had I been one of those judges, I would not have agreed with the four. I think that while the Congress may not have contemplated the present use of civil RICO, the words are so loose—so many loose canons were set forth in the country when that provision passed the Congress of the United States—that a judge performing the duty of interpreting the laws as Congress wrote them has no choice but to acknowledge that its use by present civil litigation experts is within the confines of the law. So I would say that Congress has to change the law, that it is not appropriate for a court to try to narrow it by some kind of artificial means.

There are several ways to change RICO that are currently pending before the Congress. I would hope that, at the very least, Congress would give special attention to a bill proposed by Congressman Boucher, a distinguished Virginia congressman. Unlike some of the other sponsors that have bills before the Congress, and unlike some of the opponents of the original Organized Crime Act of 1970, Congressman Boucher proposes to use scalpels rather than meat-axes. Some of Congressman Boucher's predecessors promised that the Organized Crime Act of 1970 would cure everything from organized crime to hoof and mouth disease. Some of his other predecessors, like your orator, insisted that the entire bill be scrapped because it would reach everything from Saturday night poker games to prosecutorial excesses against innocent people.

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Well, the Organized Crime Act of 1970 has not wiped out organized crime—you may have noticed that. But neither has it led to all the prosecutorial excesses that I envisioned. In fact, the guidelines used by the Department of Justice before it proceeds under the criminal RICO provisions of the Act have been a model of self-restraint. And while I continue to think the language is too broad in criminal as well as in civil RICO, I recognize that we have not had the kind of problems with criminal RICO that we have with civil RICO.

Since these criminal provisions, and other provisions of the Act, have proved helpful if not lethal in the ongoing war against organized crime, I think that there is no reason to change them at this point. But however one might feel about those other provisions, it is clear that the civil RICO provision, as it was written and as it is being used, goes beyond anything that Congress had in mind. In 1970, for example, even I would not have suggested that this section of the Act would become a real weapon in resolving divorce disputes or religious controversies. That point is beyond dispute; therefore, we need to address this cancer that is chewing up civil litigation.

Let me tell you how it works. Racketeering activity is defined in the RICO statute—in the organized crime statute—and it includes a variety of activities. It includes some really serious crimes of violence—murder, kidnapping, arson, robbery. It also includes a lot of white collar crimes—gambling, bribery, extortion. It includes narcotics crimes and counterfeiting. But then it goes on to include a couple of items in the definition of racketeering activities that are, in and of themselves, troublesome sections of the federal criminal law. It includes crimes relating to mail fraud, crimes relating to wire fraud, and crimes relating to obstruction of justice. This is the problem that civil RICO creates, to compound the problems that those laws might have on their own two feet: section 1964, the RICO statute itself, in part (C) says that any person injured in his business or property by reason of a violation of section 1962 may sue therefore in any appropriate United States district court and shall recover three-fold the damages he sustains and the cost of his suit including a reasonable attorney's fee.

Now, let's be very specific. You are plaintiff's lawyer, in almost any type of civil action. Let's take a divorce action. There is one that I think we would all agree is not normally the basis for going into the criminal code of the United States. You, as a lawyer for Winnie Wife, allege that Henry
Husband on two separate occasions—you have to have two—called his broker in New York on the telephone and sold stocks that were jointly owned by the couple, and he stashed the proceeds in his own bank account. Now, because he used an interstate wire to achieve his nefarious results, you add a RICO count to the end of the divorce complaint or in a separate action, and you seek to have him, and maybe his broker and his bank as well, branded as Racketeer Influenced Corrupt Organizations. Does that sound silly? Well, the fact of the matter is that is exactly one of the divorce suits that was brought, where a RICO charge was alleged in which the plaintiff sought three times the value of the securities that had been transferred and the attorney’s fee. It sounds so extreme that even I would not have offered that as an example of the terrible things that could have happened when I opposed the bill. But it can happen, and it will happen.

Well, you can ask, what business does the federal criminal code have in the abuse of a marriage by one spouse over the other. You can ask why it gets involved in a lot of other actions to which it has been a party. Now that it has been used that often in divorce cases and other places, it is going to be used even more. And my concern is that there is almost no limit to the kind of civil complaint that the civil RICO can be used and abused, from corporate takeovers to garden variety contractual disputes.

When I was complaining about the state of the law, a lawyer friend of mine—he is a good lawyer, he is not some ambulance chaser—said, “you know, I wouldn’t dream of filing a complaint involving securities violations or almost any other kind of corporate mis-activity that did not include a RICO count—a civil RICO count.” I was a little bit astounded when he made that statement. I said, “I can’t believe that. You’re a responsible lawyer. Why would you do it? Why do you do it?” He said, “Well, I would think that a client would have a pretty good malpractice suit against me if I eschewed the use of RICO, given how popular and how widespread it is and how successful it has been. And I think for me to avoid that very juicy remedy of three-fold damages and attorney’s fees is not the kind of risk that a careful lawyer takes.”

Again, let me just refer for a minute to the legislative history. It is pretty clear that these results were not intended by Congress; but then the legislative history of civil RICO is itself not the best example of how the legislative process ought to work. On this, there is no dispute. When the bill
passed the Senate, there was not a civil RICO provision in the bill. It came over to the House. The House committee was under some duress to do something because anybody who was not for this bill or something like it was for organized crime. I was one of the thirty-six people who ultimately ended up voting against the bill, and every campaign thereafter when I ran for Congress, someone would get up in my meetings and say, "Why are you for organized crime?" And I would have to explain that I was not really for organized crime, even though I had voted against the bill. But the civil RICO provision was inserted in the House with very little debate, and then it went over to the Senate where there was no debate, and the result is that you really have almost the naked words of the statute which, as I described earlier, seem to cover the waterfront.

If I had known then what I know now about the legislative process and legislative history—this was my first term in Congress I say as my plea in abatement—I would not have gone through all those hyperbolic examples. Instead, I would have gone to Manny Celler, the Chairman of the House Judiciary Committee and the floor manager of the bill—and I would have said, "Manny, I've got thirty-six votes in my pocket who are ready to really set off a fire fight against this bill, but we will vote for it, or at least be quiet about it, if you will agree to some dialogue that we can have on the floor." And he would have said, "Anything, anything you want, Ab. You write it. I will say it." And I could have written the dialogue in which I would have said, "Now we certainly don't want this to apply to divorce cases." And he would have said, "You are absolutely right." And I would have said, "We certainly do not want to apply this to religious controversies." And he would have said, "You are absolutely right." And I could have gotten any kind of legislative history I wanted.

I remember a story that happened while I was in Congress about how the legislative process works. Mo Udall had been trying to put through a strip mining bill for many, many years. There was a big fight about it because the miners were afraid it was going to cost jobs, and the environmentalists wanted a tougher bill, and the states were concerned that they were giving up all their state sovereignty. He passed it one time, and the Senate refused to pass it. He passed it a second time, and President Ford vetoed it. Finally, he had a Democratic president and support in both Houses, and he gingerly put together this coalition of miners and state officials and others to support the bill. It got out on the floor.
He had an assurance from the White House that they would sign the bill if it came to them.

It got out on the floor and Mo was managing the bill; one of the congressmen from West Virginia got up and said, "Now will the gentleman from Arizona assure me that this makes clear that the states remain sovereign and are in control of their own destinies as far as strip mining is concerned?" And Mo Udall said, "The gentlemen from West Virginia is absolutely correct. This bill protects state sovereignty and is very careful to see to it that states' rights are not impinged in any manner, shape or form." A little later in the debate, one of the environmentalist congressmen got up and said, "Now will the gentleman from Arizona assure me that this bill once and for all sets federal standards and makes it clear that we are going to have federal determination of what are good strip mining practices?" And Mo Udall said, "The gentleman from New York is absolutely correct. This bill once and for all sets federal standards that can be enforced." And he came back from the cloakroom for a drink of water, and we laughed and we said, "Hey Mo, they both can't be right." And he said, "The gentleman is absolutely correct."

Well, I could have gotten that kind of dialogue, I'm sure, from Manny Celler, and maybe I could have avoided some of the problems. But I did not know then what I know now, and we have ended up with a lot of problems that are not going to go away.

Let me just summarize briefly in the minute or so that I want to take. The worst part of the offense that we have foisted off on American law from this loose language is that we have federalized state tort laws. We have federalized state criminal laws. And we have done this to an incredible degree.

I spent ten years in the state legislature of Illinois (sometimes called the last vestige of democracy in the raw, until you go to the Indiana legislature when you are not sure that Illinois deserves that title). I spent an equal amount of time in the Congress of the United States. I came away from those two sets of somewhat different experiences convinced that there are many things we must do as a nation. We obviously cannot handle matters of defense on a state by state basis, even though the state of Nebraska insists on having its own navy. I do not think we can handle national defense on that basis. I do not think we can handle matters of foreign policy. And I think that there are matters of protection of civil rights and state excesses, for instance, that need to be done
on a national basis. But the last thing we need to do is to turn every garden variety contract dispute into a federal case.

The late Justice Felix Frankfurter used to say that the states ought to serve as social laboratories, where they could experiment in new ways to solve old problems. I've always thought that made a lot of sense: that the genius of our federal system has been when we have left the states free to find their own ways to solve problems that basically have a local or state concern. I came out of ten years in the state legislature, aware of all the frailties of that form of government, and yet very much "a states righter," believing that when a problem has a local tie, you are much better off settling that problem on a local level. And unless we want to get rid of the state courts completely, we have to stop federalizing things like national tort laws.

Whether Frankfurter was right or not, I know that the legitimacy of law and law-making has an important ingredient of localism. The problem can be solved best at the most local level at which it can be solved. I do not think that federal judges and the United States Congress are going to shed any light on the problems of divorce, or the failure of a local seller of real estate or linoleum to deliver the goods to his customer on time. I do not think that the federal courts or the Congress are going to be the best places to solve that problem. I am not sure the states will do it or that the local courts will do it either. But at least there will be somebody for the local people to kick and yell at when it does not come out right. Ladies and gentlemen, civil RICO was bad legislating; it has turned out to be bad law. We ought to get rid of it.

Professor Blakey

Will somebody tell me what I am doing here? I am a law professor. That is a federal judge. I am debating a federal judge? When I have opinions, I put them in law review articles. When he has opinions, he hands them down.

This brings to mind a scene out of The Godfather. You remember it. Brando had just died. Al Pacino had just become the Godfather. The plot to kill Pacino had been uncovered. Abe Vigoda had been captured and was going to be taken out and killed. He turns to Robert Duval and says, "Tell Michael that I liked him. There was nothing personal about it. It was just business." I'm trying to figure out here whether I'm Abe Vigoda or Robert Duval. But Judge, I hope you'll understand that I always liked you. There is nothing
personal about this.

Let’s do a couple of things. Let’s begin by reviewing the history of what really happened. People who talk about RICO are a lot like the actors in the classic Japanese movie *Roshamon*. Those of you who saw it will recall it dealt with a rape of an individual by a bandit. Then the story is told from the perspective of the rapist, the bandit, the woman, an independent witness, and a third party. Each person sees something very different. The perspective that I give you is that of the person who was told what to do and did it.

Let’s go down the history: The Organized Crime Control Act was introduced in the Senate, and at that particular point in time, the statute did not have in it a provision for triple damages and private civil suits. A separate bill contained those provisions. It was referred to the American Bar Association, where it was approved. A recommendation was made that it not be enacted as part of the Sherman Act, but passed as independent legislation. That bill had the triple damage provisions in it from the beginning; it was not just a throw away provision at the end, as Judge Mikva just indicated. Both bills were processed in the Senate. The American Bar Association appeared and testified in behalf of the triple damage provisions. The President of the United States endorsed the triple damage provisions, while it was pending in the Senate. A combined bill was then reported out in the Senate.

I would make two points about the Senate debate. One deals with Judge Mikva’s notion that somehow this statute was always processed solely as an Organized Crime Control Act. That is simply not true. A conscious decision was made by the Senators that this bill would be systemic reform, not limited to organized crime. That point was specifically raised by Senator Hart and Senator Kennedy in the Senate, and it was responded to by Senator McClellan and the others. The bill was always touted as systemic reform.

Let me put this in a slightly different context for you. Title Two of the Organized Crime Control Act deals with immunity. Its provisions were used in the Watergate hearings by Senator Ervin to immunize John Dean in his testimony against the White House. Nobody objected that Title Two of the Organized Crime Control Act secured John Dean’s testimony in a congressional hearing. Some people suggested that there was crime in the White House, but nobody suggested it was organized. It is only a Johnny-come-lately who somehow now objects to the Organized Crime Control Act in Title IX.
being used for people whose names don't end in vowels. And I might add that I did not hear Congressman Mikva object that it was an abuse of the statute when the Organized Crime Control Act was being used to secure John Dean's testimony.

The statute did not—and this is the second point—did not have in it as it passed the Senate a triple damage clause. Nevertheless, at that time, drafters of the legislation were operating under the dispensation of the Supreme Court's teaching in *Borak,* not *Cort v. Ash.* And it was appropriate to assume that there was an implied cause of action in it. Indeed, that was the assumption made by the people processing the legislation. It passed the Senate, and it went to the House.

The American Bar Association appeared before the House Committee—the Committee on which Congressman Mikva sat—and testified that they wanted the triple damage clause put back in. That is one part of the testimony. The other part of the testimony in the House hearings is by the Association of the Bar of New York City. They said, "This statute is too broad." They specifically said that the bill would make racketeering cases out of all sorts of securities matters. And that this was inappropriate. Congress had a choice at that point, either to go with the Association of the Bar of New York City or to go with the American Bar Association. It chose to go with the American Bar Association.

The gentleman to my left was on the Committee, and he dissented at that time. He said the bill would have a substantial impact on the dockets of the federal courts. He later took the floor of the House and he said the bill would be used in ordinary commercial disputes. He also said that the bill could be used in civil cases without a criminal conviction. He debated it over a two day period. He raised the organized crime objection on the House floor, and he was responded to by Congressman Poff. Congressman Poff said, "I'm sure that the gentleman from Illinois would be the first to object if this bill had been limited in some way to people of a certain ethnic background. This bill is systemic reform. It applies across the board to everyone."

Congress then passed the bill over the objections of Congressman Mikva and the small band of people who represented his perspective at that time. It did not go directly to the President of the United States.

Congressman Mikva has been around for a while. He

knows what has to happen to a bill amended in the House. It has to go back to the Senate. When it got back to the Senate, far from being a bill passed without debate, as he told you, the bill was specifically debated. Senator McClellan took the floor and commented on the House-passed amendments. He applauded the addition of the triple damage clause. Senator Dole said, “This bill should be passed.” And he cited Title IX, and particularly the private remedies in it, as a reason why it should be passed.

Now, Congressman Mikva also knows how it works in the Senate. The bills that pass the House are circulated to the people in the Senate. People are asked, “Do you want to vote on anything in this bill?” If the Senators do not have the votes—and they did not, as Congressman Mikva did not have in the House—they say, “No, let it go to the President.” So, it went to the President, and the President signed it.

Now you tell me, when the issues are specifically raised in the legislative history, contrary to what the good Judge says, when the language is unequivocal, and he concedes this, how it is somehow an abuse to use the statute in the way in which it was advertised?

You have heard from two people here. You have heard from Congressman Mikva, who now acknowledges, as Judge Mikva, that he was wrong in 1970 on his estimates of the possible abuse of this statute on the criminal side. He has now repudiated his former position, and he is now presenting it to you in another form, as if he had never presented it to you before, his estimates of the abuse of this statute on the civil side. Let me see whether his facts today are any better than his memory of yesterday: they are not.

Judge Mikva suggests that the number of cases being processed in the court are without number. Well, that is simply not true. In fact, the Justice Department has done a study of the civil RICO cases, and that study indicates that in fifteen years there have been less than 500 civil RICO cases filed.

Now, he will say, “But they have all been filed recently.” All right Judge, I will give you 500 a year—a year—indeed, just as a margin of error, I will give you that factor multiplied by ten. Let’s make it 5,000 RICO cases a year—that would be approximately two percent of the federal docket—approximately two percent of the 250,000 cases filed each year. That is hardly a floodgate.

Let’s take his second point. Is this litigation in some sense new and therefore threatening, by its volume and its
character, to inundate the federal courts? Answer, no. The same Department of Justice study indicated that sixty-five percent of those civil RICO cases would have been in the federal courts on another basis of jurisdiction—either diversity or an independent federal claim.

So, we are not talking about either wholly new cases, and we are not talking about a volume that threatens to inundate the federal courts at any time soon. But let's assume that these cases are both new and of a large proportion. Does that mean that simply the last comer should find himself excluded?

Or, if we are concerned about the federal docket, don't we examine the full menu of what is in the federal courts and decide which ought to have priority? Certainly, it ought not be merely the last in time. Let's ask what federal interest lies, for example, in having car accident diversity cases tried in federal courts. Take that class of cases out and you will have room for 5,000 RICO cases.

I do this only with trepidation. I hear complaints about the volume of federal litigation from my friends on my right. I normally don't hear it from my friends on the left.

I suggest to you in a large number—not necessarily all cases—that complaints about docket clogging is a code word that in fact is a complaint about the underlying nature of the claim. Let me give you the subject matter of the top four out of five cases in the federal courts: prisoner petitions, social security, civil rights and labor. Is it because some people do not like the underlying plea for human dignity associated with prisoner petitions, social security, civil rights, and labor that they are complaining about the docket clogging indirectly when they are not willing to complain about it directly?

And that brings me to my next point. Look, we can talk about what RICO meant in 1970 to the people who processed it. That is a historical question that the historians can write articles about in learned journals till time runs out. But for lawyers, that issue is now settled. Five people on the Supreme Court—and that's still enough—said that statute means what it says. As such, the legal question is over.

We are not now dealing with what that statute means as a matter of its legislative history or its text. The issue before us now is should we repeal it, in whole or in part, and for the answer to that, we need to turn to current data—the current situation.

Let me see if I can trace for you why I believe that RICO plays an important role in federal law, comparable to pris-
oner petitions, social security, civil rights or labor.

Note that the complaint here is not over RICO's application in any area other than fraud. And the complaint is not over its application to anybody other than what Congressman Mikva—now Judge Mikva—suggests are legitimate businesses. Let's drop a footnote. How do you know the business is legitimate until the person has had his day in court to test the question? Less than ten RICO cases have gone to trial. All of this is a complaint based on the face of the complaints.

I am an old-fashioned person. I believe that everybody is entitled to his day in court. A well pled complaint ought to be tried. And if it turns out that there are a substantial number of not only well pled, but supported RICO complaints, that is a very different thing than simply to accept the name of corporation, which somehow makes it beyond suit.

I do not think wardens are beyond suit. I do not think cops are beyond suit. I do not think doctors are beyond suit. I do not even think lawyers are beyond suit. I think in our society nobody is above the law, including legitimate businesses.

Let's take the example of the legitimate businesses cited in the *Sedima* opinion as ones that ought to be above suit. Thank God for this one. You all know what it is. "Outrageous" is what one circuit judge called a civil suit against E.F. Hutton. Hutton now, of course, has pled guilty to 2,000 counts of mail fraud.

If we are going to go down the lists of legitimate businesses, let's take the General Electric Company, for example, who's cheating us on the Minuteman Missile; or Rockwell International; or General Dynamics.

I do not think any business is legitimate simply because it develops a favorable image for itself through advertising. The time to find out whether they are legitimate is in the case, and the place to find that out is in a full and fair trial.

But let's talk about the problem. Current estimates suggest that the economic crime problem, the fraud problem, in this country is as high as $200 billion. Two hundred billion dollars. It approaches our national deficit. That makes it as high or as close to our drug problem. Let's drop a footnote there. Putting heroin to one side, hey look, the drug problem is largely voluntary. I have a choice as to whether I use cocaine or marijuana.

Do I have a choice on the issue of fraud? Judge Mikva would say, "Let the states handle it." Let the states handle it under a nineteenth-century fraud jurisprudence that was
written from the perspective of the entrepreneur capitalists—not the modern consumer. It was written at a time in which we did not have major labor unions, in which we did not have major corporations. We did not have major insurance companies. And I can go down the list. We live today in a society where we are necessarily, not optionally, dependent upon the faithfulness of fiduciaries—our lawyers, our doctors, our brokers, our insurance agents. If he is going to offer me nineteenth-century fraud law as an adequate remedy

RICO is not different from either the antitrust or securities statutes. It takes the messages of both and generalizes them across our society. If his arguments for the defederalization of RICO are appropriate, they apply with equal force to the antitrust and the securities laws. And I have not heard him make that argument in a principled fashion.

Let me bring it home to you. Current estimates in this country right now are that insurance fraud costs this country about $11 billion. Now everybody says, “Well who cares? The insurance company pays for it.” If you believe that, then I suggest that you not purchase any bridges in Brooklyn. In fact, an insurance company has to collect approximately $1.25 for every $1.00 it pays out. That means all of us are paying approximately $13.75 billion in extra insurance premiums.

And who do the costs of fraud come from? Who are those people who are the victims of fraud in our society? The old, the young, those on welfare, and the weak are the people who are dependent in our society, and they are the ones who need precisely the kind of protection that RICO would offer them.

Who are the groups appearing, along with Judge Mikva, before the House Judiciary Committee? Who has he associated himself with in this situation? The National Association of Manufacturers, the banks, the insurance companies, right down the list. Who has testified against his position? The consumer groups. The Gray Panthers. The people largely without power in this society. I think sometimes you can judge a man’s position by the company he keeps.

Now Congressman Mikva—now Judge Mikva—suggests to you that his amendment—the criminal conviction amendment—is not going to harm this bill. Well, now, what he ought to do is read the opinion of the United States Supreme Court in Sedima, in particular he ought to read footnote num-
ber nine, in which Justice White proceeds to analyze the so-called criminal conviction limitation. And I note that not one judge in dissent undertook to defend the criminal conviction limitation.

What impact would it have on criminal cases? Well, first of all, it would be a perverse incentive in plea bargaining. You'd plea bargain out to anything, but a RICO count, to avoid the triple damage suit, and you would have the government dealing with civil responsibility, not just criminal responsibility.

It would undermine the prosecutor's ability to obtain a conviction, because every complaining witness in a RICO case would be open to the following question: Isn't it true that your ability to sue in this case depends upon a criminal conviction in this prosecution? Answer: Yes. It would, therefore, undermine the credibility of the complaining witness.

It would put incredible pressures on prosecutors who were trying to decide which cases to bring. Political pressure would be put on prosecutors to bring cases so that people could follow up with civil litigation.

It would also be unjust in application. Every time the government made a major criminal case by immunizing one party to testify against the other, they would not only immunize that person from criminal responsibility, but civil responsibility. They would be picking and choosing not only who goes to jail but who pays triple damages.

From the perspective of defendants, is that a fair measure? Is it fair that their civil responsibility would depend on the exercise of prosecutive discretion?

What about decisions in the criminal justice process that did not go down on the merits? We are all lawyers here. Everybody knows what the suppression sanction is, the exclusionary rule. Do criminal trials really determine guilt or innocence, or do they determine legal guilt and legal innocence?

If Judge Mikva really wants to use prosecutive discretion as a means to limit the ability of private parties to bring civil suits, he ought not to base it on a conviction; he ought to base it on indictments. He is using this wrong surrogate.

But let's examine what other claims for relief in Anglo-American jurisprudence are so limited. Antitrust is not. Securities is not.

He complains about the racketeer label. What about calling a person a "killer," which is precisely what we do in a wrongful death action. Do we surround wrongful death actions with specialized protections? Higher burdens of proof?
Prosecutor approval? Criminal conviction limitations? No. Why has he, therefore, picked this cause of action alone to treat in this unique way? That's the question he has to answer. I have no full answer for it. I can not find any justification for it.

Let me end with what I said when I began. I really meant it when I said I liked Judge Mikva. I worked for a conservative southern Senator, while he was a liberal northern Congressman. Those issues that he and I came into conflict over were principally in the criminal justice area. But on other issues—that man fought against an unjust war in Vietnam. That man spoke for the oppressed in this country—the old, the poor, and the black. On those issues, Congressman Mikva and I were one.

I am sure that if we talked long enough I could bring him to see the error in his ways on this issue, too. Come home Judge Mikva to your people.

Crossfire Period

Mikva: Well, I don't know if I am addressing Al Pacino or Roger Ebert or Jesse James. But let me see whomever this mysterious person is.

Have all of you at least been exposed to the doctrine of implied remedies? Do you know what it is? It is the notion that sometimes Congress intends for a federal law with criminal sanctions to be available to a private "attorney general," to a private litigant, to bring suits and sometimes not.

Many parts of the Securities Act have been held to have implied remedies in them. Others have not. The Supreme Court and other courts have struggled with this problem for at least fifty years. It probably preceded the Securities Act, but certainly since the Securities Act, every statute that has any kind of a criminal penalty to it, the courts have struggled with the problem of whether Congress intended for that statute to have an implied remedy. Some justices of the Supreme Court, Justice Rehnquist for instance, think the whole doctrine is pernicious. Others think that it is a good idea. Congress struggles with what the courts will do, and you get a great deal of backing and forthing about whether a statute does have an implied remedy or does not. Obviously, Congress can always say specifically this shall be a remedy for the private individual as well as for public prosecutors.

My question is, Professor Blakey, as a professor of law, put aside your movie critic hat and your actor's hat. Do you
really think that Congress, back in 1970, knew that they were wiping out fifty years of implied remedy dogma and doctrine by that one little piece—the civil RICO act—which automatically created implied remedies for every securities act, every contract claim, every tort claim? Do you really think that Congressman Poff knew he was doing that when he pushed so hard at your little creation?

Blakey: Notice carefully what he said. He said, "Was Congress creating an implied remedy?" And of course they were not. They were creating an express remedy. There is no implied remedy under the individual criminal provisions. There is now an express remedy when you can show in a civil court the elements of the criminal offense.

Did Congress intend that? Well, I don't know. Congressman Mikva told his fellow congressmen what was going on. And into the teeth of what he said at the time, they passed it. And the President signed it. What better evidence of intent do you have than what people say? And not what people subsequently resurrect and reconstruct about it.

I think Congress knew full well what they were doing in 1970. They created an express cause of action for the area of fraud. The findings of the statute, in the front, decry fraud as a problem. The provisions of the statute are not implied, they are express. Securities fraud, mail fraud, wire fraud, travel fraud are on the face of the statute. The cause of action is expressed, and if there was any doubt, there is a provision in RICO that calls for liberal construction. In the legislative history the issue was raised. What else could they have done but have understood what they did? I think they did. RICO is not difficult to read. It is hard to accept in some people's hearts, which are also hard.

Judge, you cited for our friends here, gathered together to learn, a single instance of what you thought was abuse. The filing of the case in the divorce action. The use of RICO in a divorce context. Will you tell everybody here what happened in that case?

Mikva: Yes, she did not get the divorce.

Blakey: No, what happened to her RICO complaint?

Mikva: She did not get the divorce and therefore she could not get the RICO claim. He was not a racketeer after all.

Blakey: No, what actually happened in the case is the judge dismissed it.

Mikva: Because she did not get the divorce. He was not a racketeer. It turned out he only beat her a little bit. That does not make him a racketeer. So she did not get the RICO
claim.

**Blakey:** No, in point of fact, if my memory serves me, in this particular case, it was dismissed, and the lawyer that brought it had filed against him a petition for Rule 11 sanctions.

Now, Judge Mikva, do you think we ought to repeal every statute, including, for example, the securities or the antitrust statutes, merely because it has some frivolous cases brought under it?

**Mikva:** No. And it is not the frivolous cases that worry me, though even there I would recall for your somewhat selective memory, that I offered an amendment on the floor of the House to provide some sanctions for frivolous cases and you and your minions opposed it. But I won’t get into that. As I say, your memory is a little selective. That’s understandable. You are older than you were when we last discussed this matter. People age differently.

Anyway, I am not talking about the frivolous cases. I am talking about cases that are real, that involve big bucks, where RICO has been used as an instrument of oppression.

He mentioned the Gray Panthers. My good friend Congressman Wyden was representing the Gray Panthers in opposing the amendment to this Bill. Let me tell you who he brought with him as his witness. He brought with him a six-foot-ten basketball star with the Portland Trailblazers, who complained that he had been bilked out of over a million dollars by some investment advisor who identified himself as being with some important New York firm. The New York firm claimed they never heard of the guy. But Mr. Wyden’s friend, the six-foot-ten basketball player who lost a million dollars—he was the tallest Gray Panther I ever saw, and the richest one too—wants to sue the New York broker as well as this local guy (who I assume by this time is judgment-proof) for his having been bilked out of a million dollars. Now, I am all for him suing the New York stockbroker if he can show there was some connection between his bilking and that New York house. But if in fact the bilker was a perfect stranger, is this something you really want to throw a Racketeer Influenced Corrupt Organization practice charge at? Do you really want to even have to make that company in New York defend itself that it is not a racketeer? Is that really the way we want to practice law?

Those are not frivolous cases, and there are more than 5,000 of them. There have been more than 5,000 filed this year. If he is talking about the ones that came to judgment, it is true that as of the beginning of the year, there were only
about 300 that went to judgment. But as I said early in my remarks, the problem is not only with judgments. Judges strain as much as they can to try to avoid the incredible impact of this section. The problem is the oppressive impact that this RICO count has just by being filed as part of a lawsuit.

You know, again I hate to come back to Professor Blakey's selective memory, but I went back and looked at the purposes of the statute, too. And right in the Senate report, big as life, it says this: "It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools and the evidence-gathering process, by establishing new penal provisions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." And my whole debate that he referred to in the House was the fact that they never defined organized crime in the bill. And Congressman Poff got up and said, "well, we don't know how to define it," so we didn't. That's the whole business of ethnic references. He suggested "Do you want us to do it by identifying people whose names end in a vowel?" Well, my name ends in a vowel and I obviously did not want him to identify people by people whose names end in a vowel.

The fact of the matter is, that bill was sold to the Congress of the United States as an attack on organized crime. Then Attorney General John Mitchell beat his breast (that was before he went to jail) about how this was the great triumph of law over organized crime. If it had that kind of an impact on organized crime, if civil RICO had been used to the extent that it was promised to be used in terms of organized crime, maybe it would be worth some of the excesses and some of the frivolous claims, but the fact of the matter is that it has been abused and overused. Bob Blakey is absolutely right—the language is clearly capable of being construed to mean what the court has been saying it means, and I acknowledged that freely at the beginning. That is why I opposed it then. I wish I had not, as I say. I wish I had gone through some mumbo jumbo, but clearly the language encompasses it—which is why it is not a court problem.

It is a Congressional problem. It is a policy problem. It is a matter of bad public policy that was put in by the Congress and has to be taken out by the Congress. And until it is, we have to face the fact that Congress—sneakily through the back door—wiped out all kinds of state laws, state doctrines, and state sovereignty in order to slip in this little provision.
They said on the surface, that it was for organized crime, but in fact they really meant it to apply to every kind of commercial dispute there is.

Now you know, the National Association of Manufacturers is in bad shape if they have to always rely on me to bring their chestnuts out of the fire. But sometimes, even the National Association of Manufacturers is right. And sometimes, even an insurance company is right. And sometimes, even a bank is right. And when you look at the entire list of commercial enterprises in this country that have said that this is an oppressive disaster as long as it stays on the books, it seems to me that unless you are totally opposed to the capitalist system—I did not think you were, Professor Blakey—at least the last Blakey I knew was not—then it seems to me that you ought to recognize that this bill was not a good piece of legislation in the first place, has become abused out of all recognition in the second place, and ought to be gotten rid of. Mr. Chairman, I yield you the floor.

Blakey: Let me comment, at least initially, on the false allegation that RICO has distorted the actual litigation process. I have sat on a RICO Cases Committee for the American Bar Association. The RICO Cases Committee has on it members of all segments of the American Bar Association—business, labor and other groups. It was our conclusion that, far from being an effective settlement weapon, the effect of the use of a RICO count in a complaint was to cause a "truly legitimate business" to dig in its heels, and not to settle cases that otherwise would have been settled, if only for the nuisance thing. That is one answer.

Let's take the next answer. What is the effect of a triple damage count in a complaint, where there is some merit to the suit? Let's talk about the normal balance of power in litigation between insurance companies and policy holders—banks and depositors and others. The truth of the matter is, the person who can hire the most expensive lawyer and can defend that case with a blizzard of white paper can buy off legitimate claims—and this is not simply my own position here, this is the position of the Seventh Circuit in Haroco, Inc. v. American National Bank & Trust Co., affirmed on other grounds by the United States Supreme Court. The truth is that the addition of a triple damage claim in these situations gives the defendant the incentive to settle this at close to ac-

5. 747 F.2d 384 (7th Cir. 1984), aff'd on other grounds, 105 S. Ct. 3291 (1985).
tual damages. What it does is to even out an imbalance that is already built in the system.

This is not only true under RICO, it's true under the antitrust laws. The basic studies of the antitrust laws indicate that they settle—they tend to settle out—at close to actual damages. That sounds to me like moving things in the right direction. That sounds to me like it's moving things towards basic justice.

Congressman Mikva—now Judge Mikva—suggests that this was a mistake in 1970. I think it was not a mistake in 1970. I think people understood what they were doing. And I think when we look at contemporary events, that this statute can be seen as the culmination of a series of statutes in the late nineteenth and early twentieth centuries, in which this country has reversed the nineteenth-century jurisprudence. We did it in antitrust at a national level. We did it with the food and drug statutes. We did it with the meat packing statutes. We did it with the labor statutes. We did it in the securities statutes.

Let's talk about the securities statutes for a minute. Why do we have two securities statutes—one in '33 and one in '34? Because the brokers and the other financial racketeers—and that is what they were called in the legislative history—told the country that they could not get out of the Depression because the '33 act that simply held them responsible for fraud was impeding economic recovery. And they made a major effort to reach out and castrate the '33 act. And there is some argument that much of what they did in '34 came close to it. Roosevelt resisted it at that time, because he thought integrity in the securities market was an important thing.

If we are to be misled by the business community that somehow suggests that RICO is anti-business on the current record, with less than ten verdicts handed down, we will be buying an essentially Chicken Little argument that the sky is going to fall. If you do not want a RICO problem, as a legitimate business, do not engage in crime. RICO does not make unlawful and subject to a civil suit anything that was not previously made unlawful by federal or state criminal statutes.

What they really mean is that traditional white collar crime has not been prosecuted in this country. And that corporations and people like you and I with basically white collars have been able to talk our way out of the criminal process. What Congressman Mikva—Judge Mikva—basically wants when he wants to preserve the criminal side of
RICO—he wants a blue collar criminal statute, and not a white collar civil statute.

Well, you know, if our market is free because of the antitrust laws, it is not because of the exercise of prosecutive discretion by the Department of Justice. Less than fifteen percent of the antitrust cases are brought by the Department of Justice. Eighty-five percent or more are brought by private parties. Look at the statistics in antitrust. Look at the statistics in securities. Last year the antitrust division brought 75 criminal cases; private parties brought over 1300 antitrust cases. Last year, the Securities and Exchange Commission brought 26 criminal prosecutions. Private people brought over 3,000 cases under the securities acts.

That is the kind of statistics that the business community serving at its own special interest would like to see true under RICO. If it is garden variety fraud, then I suggest it's time we begin weeding it.