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A REPLY TO MICHAEL GOLDSMITH

*Gerard E. Lynch**

I am grateful for Professor Michael Goldsmith's response¹ to my discussion of RICO.² It is always gratifying to find that one's writings have stimulated thought and debate.

Professor Goldsmith's criticisms of my discussion come in three parts. First, he claims that I have misread the history of RICO's adoption. Second, he objects to my criticisms of its scope. Third, he argues that the statute as now drafted serves prosecutorial purposes that would not be captured by the proposals I make for its replacement. Professor Goldsmith's arguments are not persuasive.

I.

First, then, RICO's history. I argued that the dramatic reworking of criminal law effected by RICO was the somewhat haphazard result of a legislative process in which no member of Congress ever showed any indication of foreseeing or desiring the results actually accomplished. Despite his claim that the "legislative history . . . actually *glitters* with resolve to strike at enterprise criminality in all its forms,"³ Professor Goldsmith cites no evidence that any member of Congress anticipated the broad uses of RICO that have evolved.

Professor Goldsmith's historical evidence comes in two forms.⁴ First, he reiterates the familiar claim of uncritical admirers of RICO that general statements in the legislative history that the Organized Crime Control Act⁵ *as a whole* was intended to strike hammer blows against organized crime warrant the conclusion that those who made them specifically intended one particular title of the Act to authorize previously unimagined prosecutions.⁶ But rhetorical assertions that criminal organizations engage in bad acts of all sorts, that the weapons provided by the Act (which include a plethora of significant procedural and substantive innovations⁷) permit a direct attack on such organiza-

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1. Goldsmith, RICO and Enterprise Criminality: A Response to Gerard E. Lynch, 88 Colum. L. Rev. 774 (1988).

2. Lynch, RICO: The Crime of Being a Criminal, (pts. 1-4), 87 Colum. L. Rev. 661, 920 (1987).

3. Goldsmith, *supra* note 1, at text following note 18 (emphasis added).

4. I put to one side his novel use of interpretations of RICO attributed to mobsters themselves. *Id.* at note 36—interpretations even less authoritative than the claims of RICO's congressional sponsors that RICO was "carefully drafted." *Id.* at note 50 and accompanying text.

5. 18 U.S.C. §§ 1961-68 (1982 & Supp. III 1985).

6. Goldsmith, *supra* note 1, at notes 29-33, 74-77, and accompanying text.

7. For a partial catalog, see Lynch, *supra* note 2, at 667 n.25.

tions, and that the ultimate goal is their destruction, is a staple of congressional debate about anticrime measures.⁸ Such familiar generalizations hardly suggest that Congress realized it was criminalizing membership in criminal organizations, vastly increasing federal jurisdiction over local political corruption, dramatically increasing the penalties for white collar offenses, and radically altering the nature of criminal trials.⁹

Second, Professor Goldsmith cites proposals by Professor Cressey, Senator McClellan and others to criminalize membership in the Mafia as precursors of RICO.¹⁰ The existence of such proposals, which were more or less abandoned in favor of the rather different approach taken by RICO, hardly shows that RICO was intended to cover the same ground.¹¹

Professor Goldsmith's true concern is evidenced by his vigorous defense of broad judicial interpretation of RICO as resting on the "plain meaning" of RICO's language.¹² But this response attacks a legal and jurisprudential assertion I did not make. My article makes no claims about the "correct" interpretation of statutory language,¹³ and I nowhere suggest that the legislative history of RICO should control its language.¹⁴ I advance no theory about how courts should interpret

8. See Bradley, *Racketeering and the Federalization of Crime*, 22 Am. Crim. L. Rev. 213 (1984) (discussing history of federal enactments promising to curtail organized crime).

9. This point is made, and the sort of evidence relied on by Professor Goldsmith specifically rejected, in my original discussion. See Lynch, *supra* note 2, at 679-80 nn.93-97 and accompanying text.

Professor Goldsmith also argues that because RICO serves certain prosecutorial purposes so well, it *must have been* specifically intended to do so by its drafters. Goldsmith, *supra* note 1, at notes 85-87 and accompanying text. Given the protean nature of RICO, the years it took for prosecutors to recognize its potential, and the absence of any statements by its supporters that RICO was intended to operate in this fashion, I see no reason to infer, with Professor Goldsmith, that Senator McClellan "surely" had a conscious desigu encompassing all that has come to pass in the name of RICO. Perhaps the persuasiveness of the inference depends on how willing one is to attribute significant legal developments to historical accident rather than conscious design.

10. Goldsmith, *supra* note 1, at notes 60-71 and accompanying text.

11. Professor Goldsmith based his claim that RICO was intended to incorporate such proposals on Senator McClellan's statement that the Organized Crime Control Act (as a whole) incorporates "many" prior anti-organized crime proposals "that were found . . . constitutional." Goldsmith, *supra* note 1, at note 71. The citation proves little, and its relevance is further undercut by Professor Goldsmith's own suggestion that these particular proposals were abandoned because of constitutional doubts. Goldsmith, *supra* note 1, at note 72 and accompanying text.

12. Goldsmith, *supra* note 1, at notes 35-40 and accompanying text.

13. The purposes of my analysis of RICO's legislative history are set out at the beginning of my article. Lynch, *supra* note 2, at 664-66.

14. On the contrary, I explain how the language of RICO leads to the conclusion adopted in *United States v. Turkette*, 452 U.S. 576 (1981), Lynch, *supra* note 2, at 694; explicitly disavow any argument that *Russello v. United States*, 464 U.S. 16 (1983), is "wrong," Lynch, *supra* note 2, at 710 n.217; and conclude that the whole question of

criminal statutes.¹⁵

My article asks a historical, not a jurisprudential, question: is there any evidence that Congress understood the radical changes in federal jurisdiction, sentencing policy, criminal procedure, and the very nature of substantive crime—sweeping far beyond the infiltration of legitimate institutions by organized crime, and, for that matter, organized crime itself—that have been worked by the literal (and thus liberal) reading of RICO? The claim that such revolutionary consequences were specifically intended, yet were not debated in terms (and, as Professor Goldsmith agrees, were largely ignored for years by the prosecutors who benefited from them)¹⁶ seems implausible. Whatever the merits of jurisprudential claims about the relative weight to be accorded in interpreting a statute to the plain meaning of statutory language and to evidence of actual legislative intent, the *historical* claim that the broad sweep of statutory language is the best evidence of what the legislators actually intended is surely incorrect. I have written about the historical process by which RICO has evolved; that inquiry is not much advanced by arguments about the very different question of what legal force courts should give to its language.

II.

Professor Goldsmith's responses to my discussion of the scope and uses of RICO seem to demand that one declare for or against RICO as a whole, as written and interpreted, and to classify me an enemy of the statute. This again misconceives my purpose. My project has been to catalog the ways in which RICO is in tension with the traditional goals and principles of our criminal law tradition, and then to track carefully the various uses to which prosecutors have put the statute to determine whether those tensions are a necessary price for the benefits obtained. Far from savaging the policies behind the innovative prosecutions the statute has permitted, I pointed out that most of the uses to which RICO has actually been put reveal gaps in the criminal code that need plugging. Indeed, I defended the most controversial aspects of the "illicit enterprise" concept, and proposed a statute specifically designed to fill the role RICO has come to play in this area.¹⁷

Professor Goldsmith does not address my specific analysis of the ways in which RICO extends federal jurisdiction, expands prosecutorial

interpretation has been mooted by the evident enthusiasm for RICO as evolved that was shown by Congress in 1984. *Id.*

15. For that matter, neither does Professor Goldsmith, beyond citing the Supreme Court's somewhat simplistic enthusiasm for "plain meaning."

16. Goldsmith, *supra* note 1, at notes 145-46 and accompanying text.

17. See Lynch, *supra* note 2, at 955-71. This defense of RICO may prove to be the most controversial part of the article. One thoughtful and experienced attorney who has practiced on both sides of the white collar criminal bar, was moved by contemplation of my position to invoke the shades of Torquemada and Joe McCarthy. See Rakoff, *Invitation to a Lynching*, N.Y.L.J., Jan. 14, 1988, at 1, col. 1.

discretion, muddles together all sorts of different offenses into a single category with a single draconian (and in significant part, mandatory) penalty, and distorts traditional procedural rules and concepts of criminal acts. The only specific argument he makes that I have overstated the reach of RICO is the claim that the Supreme Court's decision in *Sedima*,¹⁸ with its vague footnote suggestion that a "pattern" of racketeering requires "continuity plus relationship,"¹⁹ solves the problem.²⁰ So far, the *Sedima* footnote has found its main use as a tool for lower courts to divest themselves of the civil RICO suits that Professor Goldsmith finds so valuable.²¹ Professor Goldsmith makes no attempt to describe how *Sedima* applies any concrete limitation to criminal cases that have been brought or could be brought under RICO, and cites no case (and I am aware of none) in which criminal charges have foundered on the treacherous footnote. Even expansively interpreted, the *Sedima* footnote merely limits the use of RICO against what Professor Goldsmith calls "'isolated'" offenders²² and "'single episode' situations."²³ Given the courts' history of broad application of criminal RICO, Professor Goldsmith's conviction that a single footnote in a Supreme Court opinion will truly tame this side of RICO is scant assurance.²⁴

18. *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

19. *Id.* at 496 n.14.

20. Goldsmith, *supra* note 1, at notes 134-37 and accompanying text.

21. For cases relying on footnote 14 to dismiss civil RICO actions, see *Conduct v. Conduct*, 815 F.2d 579 (10th Cir. 1987); *Roeder v. Alpha Indus.*, 814 F.2d 22 (1st Cir. 1987); *Marks v. Forster*, 811 F.2d 1108 (7th Cir. 1987); *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). But see *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986) (sustaining civil RICO claims against *Sedima* objection). Each circuit seems to be developing its own version of exactly what *Sedima* requires beyond two predicate acts; it remains true that the meaning of "pattern" after *Sedima* "has yet to be clearly established in the law." *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291, 298 (1st Cir. 1986). In criminal cases, however, courts still seem more generous in finding RICO patterns. See, e.g., *United States v. Garver*, 809 F.2d 1291, 1300 (7th Cir. 1987) (proof of four counts of mail fraud sufficient to establish pattern; *Sedima* and circuit's civil RICO cases not cited); *United States v. Ianniello*, 808 F.2d 184, 189-91 (2d Cir. 1986) (*Sedima* footnote dismissed as dictum; enterprise element itself provides continuity and relationship). The Second Circuit has recently agreed to reconsider en banc whether a RICO conviction can be based on a "pattern" consisting of the murder of three victims on the same occasion. *United States v. Indelicato*, No. 87-1075 (2d Cir. Apr. 1, 1988). Perhaps the court will vindicate Professor Goldsmith's prediction.

22. Goldsmith, *supra* note 1, at text accompanying note 132 (quoting 116 Cong. Rec. 18,940 (1970) (statement of Sen. McClellan)).

23. *Id.* at text accompanying note 140 (quoting Lynch, *supra* note 2, at 714 n. 230 (quoting U.S. Attorneys' Manual § 9-110.340 (Mar. 9, 1984))).

24. Professor Goldsmith also believes that the "enterprise" element significantly limits the reach of RICO, disputing my suggestion that quite loosely affiliated criminal groups have been treated as enterprises. The degree of structure in a criminal group is, to a large extent, in the eye of the beholder—which is precisely the problem with the enterprise concept. Professor Goldsmith finds substantial "structure and continuity" among the defendants in *United States v. Turkette*, 452 U.S. 576 (1981), and regards the defendants in *United States v. Elliott*, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S.

As for my laborious examination of the prosecutive uses of RICO, Professor Goldsmith makes the valid point that a detailed review of reported decisions does not provide as full a picture as an in-depth study of each case, with interviews of the participants, review of the record, and use of social scientific techniques.²⁵ Of course, no one has yet undertaken such a study, and Professor Goldsmith suggests no reason to expect it might yield results different from mine. Indeed, the only specific example he offers of a case in which RICO might have been used in a way not discussed in my study is a case in which RICO was *not* used, and in which Professor Goldsmith suggests RICO could have solved the procedural problems assigned by the Justice Department as a reason for accepting a plea bargain.²⁶ Since the procedural problems are not specified, the appropriateness of applying RICO penalties to the facts is not assessed, the reasons why the Justice Department preferred a plea bargain to a RICO prosecution are unknown, and the claim that the actual disposition of the case was unsatisfactory is left implicit, the implications of the example are unclear.

Professor Goldsmith's intense commitment to the defense of RICO as it is leads him to confuse essentially historical arguments about what was intended—which in my view are important mostly insofar as they tell us something about the way legal doctrine develops—with policy arguments about what sorts of legal definitions of crimes lend themselves to fair and effective enforcement. For example, contrary to Professor Goldsmith's claim,²⁷ my doubts about sections 1962(a) and (b) have little to do with my reading of the intention of the framers of RICO, and everything to do with the fact that, for reasons that have been pointed out since the debates over RICO's adoption,²⁸ these sections have not been and cannot be useful law enforcement tools.²⁹

Finally, Professor Goldsmith doubts my conclusions because I do not consider the value of private civil RICO actions. My article concerns the value, cost and implications of imposing criminal punishment according to the provisions of RICO. That question is totally in-

953 (1978), as "analogous to a 'large business conglomerate,'" noting in support that the Justice Department and the appellate courts so described them. Goldsmith, *supra* note 1, at note 123. Based on the evidence underlying these descriptions, laid out in full in the court's opinions, and discussed in some detail in my article, see Lynch, *supra* note 2, at 704-06 (*Turkette*); *id.* at 949-53 (*Elliott*), I find the opposite conclusion more compelling.

25. Goldsmith, *supra* note 1, at text following note 144. The point is so valid I made it myself. Lynch, *supra* note 2, at 725 n.266.

26. Goldsmith, *supra* note 1, at notes 107-08 and accompanying text.

27. *Id.* at notes 155-57 and accompanying text.

28. See Lynch, *supra* note 2, at 691 n.139 (citing contemporaneous criticisms of § 1962(a)).

29. Theoretical arguments about the weaknesses of these sections are discussed at length in *Id.* at 685-92; empirical evidence of the infrequency of their use is presented in *id.* at 726-29.

dependent of whether RICO civil actions have served a valuable purpose.³⁰ The latter question is the subject of a vast literature. I merely note here that I find it difficult to share Professor Goldsmith's belief that the countless civil RICO actions that have been filed over the last fifteen years have had a valuable effect in deterring or punishing crime; most of these cases appear to me to have involved ordinary civil disputes.³¹ I do agree with Professor Goldsmith, however, that we are only beginning to enter the era of effective *governmental* use of civil RICO. Whether that era will turn out to be one of fair and effective law enforcement, or whether it will lead to Justice Department short-circuiting of normal regulatory mechanisms in such areas as labor law and securities law, remains to be seen.³²

30. If we were to conclude that it is valuable to provide a federal forum for civil actions by those who have been injured by criminal acts, either generally or in the circumstances defined by RICO, there is no reason why such a private right of action could not be granted without creating a new federal crime. The (hotly disputed) costs and benefits of civil RICO are not really relevant to the merits of the crimes defined in § 1962.

31. I am perplexed by Professor Goldsmith's claim that studying the civil cases would show the true value of RICO's potential *criminal* applications, and that to study only prosecutions "assesses the [Justice] Department's strategy rather than the statute." Goldsmith, *supra* note 1, at text preceding note 145. I would not think that the RICO cases filed by civil plaintiffs should be taken as a barometer of what the Justice Department ought to be prosecuting, nor that the restraint shown by prosecutors (relative to civil plaintiffs) in invoking RICO constitutes a failure of their nerve, wisdom or resources measured against the potential of the RICO statute, rather than a wise understanding of the situations in which an apparently infinitely elastic statute serves legitimate law enforcement purposes.

32. I take this opportunity also to point out one expansion of federal criminal law by RICO that I had overlooked. In my earlier article, I implied that the loansharking provisions of RICO largely replicate those contained in other federal statutes. Lynch, *supra* note 2, at 981 & n.219. Bruce Baird, Chief of Securities Fraud Prosecutions for the United States Attorney for the Southern District of New York, points out that this is not so. The other federal loansharking statutes apply only to *extortionate* extensions or collections of credit, and thus require some use or threat of violence. See 18 U.S.C. §§ 891-894 (1982). RICO, however, prohibits acquiring an interest in an enterprise by or conducting an enterprise through collection of *unlawful* debt, defined much more broadly in terms of unenforceable gambling debts or usurious loans. *Id.* §§ 1961(6), 1962(b), 1962(c). (Although there is apparently no requirement of a pattern of such violations, a RICO violation that can be made out by a single collection of unlawful debt includes a requirement that the specific unlawful debt transaction be incurred in connection with a "business" of gambling or making loans at a rate in excess of twice the enforceable rate, so that something similar to the pattern requirement in effect is restored.) RICO thus federalizes a substantial quantity of loan-sharking activity not covered by §§ 891-894. This branch of RICO has been less frequently used than the "pattern of racketeering" branch. But see *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986) (RICO prosecution largely based on collection of unlawful debt). As with the political corruption cases, see Lynch, *supra* note 2, at 744-48, the merits or drawbacks of extending federal criminal jurisdiction so broadly over loan-sharking are entirely separable from the RICO superstructure; RICO's "enterprise" element adds nothing that is not already covered by the limitation of "unlawful debt" to debts incurred in connection with a "business" of loan-sharking.