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LEAVING NO STONE UNTURNED: USING RICO AS A REMEDY FOR POLICE MISCONDUCT

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I. INTRODUCTION

> Rodney King was about police abuse, O.J. was about police incompetence, and Rampart is about police corruption.[1]
>
> It's not a bad apple. The barrel itself is rotten.[2]

A little over a decade ago, the videotaped beating of Rodney King merely confirmed what many Los Angeles residents had long since determined—the Los Angeles Police Department (LAPD) was a corrupt, racist, and even brutal police force.[3] For the rest of the country, however, there was a search for some way to explain something that, until then, people could all too easily ignore—for the millions of Americans who had never been on the wrong side of *the thin blue*

1. *10 Years After King Beating, LA Police Still Struggle with Tarnished Reputation*, ST. LOUIS POST-DISPATCH, Mar. 3, 2001, at 5 (quoting Professor Laurie Levenson).

2. *The Simpson Legacy*, L.A. TIMES, Oct. 8, 1995, at S3 (quoting Michael Zinzun, Director of the Coalition Against Police Abuse, commenting on the problem of police misconduct in the LAPD), *available at* 1995 WL 9833684.

3. *See* Sheryl Stolberg, *The Times Poll 31% of Angelenos Say Gates Should Quit Now*, L.A. TIMES, Mar. 22, 1991, at A1 (reporting that when Los Angeles residents were polled shortly after the King beating, twenty-nine percent said that LAPD policies were to blame for the incident, sixty-five percent said that racism among the LAPD's officers was at least *fairly common*, and another sixty-eight percent said that brutality in the LAPD was *common*), *available at* 1991 WL 2306537.

line, police misconduct was someone else's problem.[4] Now, however, people could hardly flip through the channels fast enough to avoid the image of four white police officers repeatedly clubbing an unarmed black man.[5] And then, of course, there were the riots. For a short time, national attention was focused on the issue of police misconduct. It became, in a sense, everyone's problem.

Initially, the outlook for reform was positive. The Christopher Commission, which was created to explore the scope of abuse in the LAPD, determined that the King beating was by no means an anomaly.[6] As such, the Commission made several specific recommendations aimed at systemic reform.[7] Not all of the recommendations, though, were implemented.[8] And as the public's interest in police misconduct waned, the LAPD grew complacent.[9] It seemed misconduct was once again merely a marginal problem. Even the King beating was, to some, little more than a case of a few cops who went too far—apart from these few bad apples, the LAPD was otherwise a good police force.[10] That, however, was before the Rampart Scandal.

In August 1998, the arrest of police officer Rafael Perez began the unraveling of what has since been termed the worst scandal in the history of the LAPD.[11] Perez was accused of using his position as a member of the LAPD's Rampart Division CRASH[12] unit to obtain and

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4. *See* GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1991, at 77-78 (1992) (reporting that a majority of Americans did not believe police brutality occurred where they live).

5. The racial element of the King beating was, of course, one of its more disturbing aspects. Its parallel to some of the more egregious instances of racial injustice in American history was virtually impossible to ignore. *See* Mary Maxwell Thomas, *The African American Male: Communication Gap Converts Justice into "Just Us" System*, 13 HARV. BLACKLETTER L.J. 1, 7 (1997).

6. *See* INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 25-74 (1991); *see also* Erwin Chemerinsky, *The Rampart Scandal: Policing the Criminal Justice System: An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 561 (2001).

7. *See* Chemerinsky, *supra* note 6, at 562.

8. *See id.*

9. Edward Lazarus, *The L.A.P.D. Scandal: A Testament to the Failure of Police Reform*, FindLaw (Oct. 5, 2000), *at* http://writ.corporate.findlaw.com/lazarus/20001005.html (last visited Aug. 23, 2003).

10. *See, e.g.*, *Forum Addresses Police Brutality*, S.F. CHRON., Oct. 15, 1991, at A15 (reporting the view among some participants at a forum sponsored by the California League of Cities that the issue of misconduct was overblown by the media), *available at* 1991 WL 4214249.

11. Chemerinsky, *supra* note 6, at 549.

12. The acronym CRASH stands for "Community Resources Against Street Hoodlums." L.A. BOARD OF POLICE COMMISSIONERS, REPORT OF THE RAMPART INDEPENDENT REVIEW PANEL 1 (2000), *available at* http://www.lacity.org/oig/rirprpt.pdf (last visited Aug. 23, 2003).

sell illegal narcotics.[13] Conceding these charges, Perez struck a deal with prosecutors in which he agreed to disclose his knowledge of misconduct by other Rampart officers.[14] His testimony revealed a pervasive pattern of corruption in the LAPD's Rampart Division.[15] As many as seventy officers were implicated in misconduct ranging from murder to drinking on the job.[16] Over one hundred sentences were overturned as a consequence of Perez's testimony, including that of Javier Ovando, who was shot, framed, and testified against by Perez and his partner.[17] At Perez's sentencing hearing, he apologized for his mistakes, confessing to his own weaknesses, but also pointing to a culture in his former department where the "lines between right and wrong became fuzzy and indistinct. . . . and the ends seemed to justify the means."[18]

If Perez's allegations were true, Rampart misconduct was much more than a case of a good cop gone bad or the doings of a rotten apple in an otherwise pristine barrel.[19] Rather, as Perez suggested, misconduct so far-reaching and severe must surely have its root in a larger culture of corruption.[20] After all, this was the LAPD—the same police force who nearly beat Rodney King to death, the same police force whose chief remarked in a similar case that the victim was *lucky*[21] to have escaped, and the same police force who defended killing African-Americans through the use of a special chokehold because their necks were different from *normal people*.[22] The bad apple

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13. *Frontline: LAPD Blues* (PBS television broadcast, May 15, 2001) (transcript), *at* http://www.pbs.org/wgbh/pages/frontline/shows/lapd/etc/script.html (last visited Aug. 23, 2003) [hereinafter *LAPD Blues*]; *see also The Rampart Scandal: Genesis of a Scandal*, L.A. TIMES, Apr. 25, 2000, at A18, *available at* 2000 WL 2234602.

14. *See LAPD Blues*, *supra* note 13.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Frontline: LAPD Blues, Rampart Scandal, Rafael Perez's Statement to the Court* (excerpt) (PBS television broadcast, May 15, 2001), *at* http://www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal/statement.html (last visited Aug. 23, 2003).

19. For discussion of this phenomenon, see Susan Bandes, *Tracing the Pattern of No Pattern: Stories of Police Brutality*, 34 LOY. L.A. L. REV. 665 *passim* (2001); see also Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1481-82 (1993) (discussing whether just a few bad apples (police officers) are behind the abuse, or whether it is the entire department).

20. Even the term *scandal*, some suggest, fails to capture the real story of corruption in police departments like the LAPD—rather than a variation from the norm, they contend that misconduct in the LAPD *is* the norm. *See* Bandes, *supra* note 19, at 672-73.

21. Hoffman, *supra* note 19, at 1510.

22. David Shaw, *Media Failed to Examine Alleged LAPD Abuses; Press: Eulia Love Case Brought a Tougher Look. But Complaints About Patterns of Use of Force Weren't Explored*, L.A. TIMES, May 26, 1992, at A1, *available at* 1992 WL 2909305. Other examples of LAPD brutality include the Dalton Avenue Raid in 1988, and the killing of Eulia Love, an elderly black woman, because she refused to turn off her gas. *Id.*

theory could only explain so much.[23] Consequently, in the wake of the Rampart Scandal, there appeared to emerge, as one commentator put it, "a rare window of opportunity to institute reform at the LAPD."[24]

On the other hand, some of the same factors that kept reform at bay following the Rodney King beating would have to be overcome for systemic change to be effected.[25] Most significantly, Javier Ovando and other Rampart victims, like King, were minorities.[26] Thus, their prospects for extra-judicial remedies were relatively slight.[27] And, while theory might have suggested that any breakdown in democracy would simply be compensated through judicial relief,[28] in reality, the courthouse has steadily closed its doors on victims of police misconduct.[29]

Most notably, the courts have restricted the use of 42 U.S.C. § 1983,[30] the principal remedy for victims in police misconduct claims.[31] On its face, § 1983 appears to be a powerful remedy for redressing the misconduct of police departments and their officers. Prudential restrictions, statutes of limitations, heightened pleading standards, and qualified immunity often function, however, to guard municipal actors (or the municipalities themselves) from liability.[32]

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23. For further discussion, or rather, critique, of the bad apple theory of police misconduct, see Bandes, *supra* note 19.

24. Charles Rappleye & John Seeley, *Righting the Ship*, L.A. WKLY., Sept. 15, 2000, at 15 (quoting Erwin Chemerinsky).

25. In the ten years since Rodney King's beating, promises of reform have become a staple of political rhetoric in Los Angeles. *See* John Corrigan, *Legacy of a Beating; the Proving Ground; After Rodney King and Four Cops Made History in Lake View Terrace, the LAPD's Foothill Division Was Ordered to Reinvent Itself. Today, Change—Inertia—Are Evident.*, L.A. TIMES MAG., Mar. 4, 2001, at 20. Thus far, however, a decade's worth of rhetoric has done little, if anything, to stem the tide of police misconduct. *Id.*

26. This is especially true, as later noted, when minorities are defined not only as African-Americans or Hispanics but as *suspected and convicted criminals* or, similarly, gang members. *See* Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923, 928 (2001). For discussion of the disproportionate impact of police misconduct on racial and economic minorities, see, for example, Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1305 (1999) ("One of the salient characteristics of police brutality is that it is largely practiced on poor and minority groups . . . .").

27. *See* Hoffman, *supra* note 19, at 1462-71.

28. *Id.* at 1504.

29. *Id.*

30. 42 U.S.C. § 1983 (2000).

31. For discussion on the progress of institutional reforms, see Erwin Chemerinsky, Commentary, *To Prevent a Repeat of Rampart, Fix More Than the LAPD*, L.A. TIMES, Apr. 25, 2003, pt. 2, at 15. This Comment also addresses the prospect of law enforcement, as opposed to civil redress, as a means to effect reform. *See infra* Part III.A. Consistent with what this Comment posits, these efforts have met marginal success thus far. *See* Charles Rappleye, *Dismissing Rampart*, L.A. WKLY., Dec. 6, 2002, at 23; Harrison Sheppard, *LAPD Yet to Comply with Consent Decree*, DAILY NEWS L.A., Feb. 1, 2003, at N5.

32. *See* Lee v. Gates, No. CV0103085DTCTX, 2001 WL 1098070 (C.D. Cal. Sept. 10, 2001) (unpublished order).

In many cases, then, the most that police misconduct victims might hope for is some degree of compensation[33] for their injuries.[34] For the most part, those aspects of the system that facilitate the misconduct remain intact.

It was out of this context that victims of the Rampart Scandal turned to the Racketeer Influenced and Corrupt Organizations Act (RICO).[35] Initially, some legal commentators put forth ambitious claims regarding both the motivations behind as well as the potential of using RICO in police misconduct suits.[36] The focal point was RICO's provision for treble damages, which some predicted would result in huge windfalls for misconduct victims and their lawyers and potentially crippling liability for municipalities.[37] Under RICO, however, only injuries to *business or property* are compensable.[38] Thus, one does not arrive at treble damages simply by tripling the damages awarded in non-RICO suits.[39] For instance, if a plaintiff's only injuries are pain and suffering, treble damages mean nothing—three times zero is, after all, zero. And, since many victims of police misconduct are socioeconomic minorities,[40] who rarely own businesses or property of significant value, it is unlikely that RICO's treble damages provision would lead to the huge recoveries that are common in other RICO suits. Even assuming that income or lost opportunity for income are property under RICO, actual damages are still unlikely to

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33. For discussion of the *myth* of actual damages and the greater ability of treble damages to make victims whole, see G. Robert Blakey, *Of Characterization and Other Matters: Thoughts About Multiple Damages*, LAW & CONTEMP. PROBS., Summer 1997, at 97, 112 [hereinafter *Thoughts About Multiple Damages*] (calling actual damages "a misnomer of undeniable dimensions"); see also G. Robert Blakey et al., *What's Next?: The Future of RICO*, 65 NOTRE DAME L. REV. 1073, 1087 (1990) [hereinafter *The Future of RICO*] (referring to actual damages as "a fiction out of the 19th century").

34. For an example of a case where many of the limitations on § 1983 actions converge to deny plaintiffs recovery, see *Gates*, 2001 WL 1098070.

35. 18 U.S.C. §§ 1961-1968 (2000).

36. *See, e.g.*, Steven P. Ragland, *Using the Master's Tools: Fighting Persistent Police Misconduct with Civil RICO*, 51 AM. U. L. REV. 139, 145 n.55 (2001) (quoting Professor Chemerinsky as remarking that the use of RICO in police misconduct actions is "a novel theory, and it could tremendously expand the scope of the liability the city could be facing").

37. *Id.*; *but see* B. J. Palermo, *RICO Viewed as Cop Suit Sidelight*, NAT'L L.J., Sept. 25, 2000, at A4 (noting that the attorney for plaintiffs in RICO actions against LAPD officers had conceded that the potential of "treble damages has been exaggerated" and also quoting the "architect of the RICO law," Professor Blakey, as saying that a "false impression has been created that the police department is a defendant and [that the plaintiff] will score big time" in these claims against LAPD officers (alteration in original)).

38. *See* 18 U.S.C. § 1964(c) (2000).

39. *See id.*

40. *See* Bandes, *supra* note 26, at 1305 ("One of the salient characteristics of police brutality is that it is largely practiced on poor and minority groups . . . .").

be extensive for plaintiffs who, in many cases, were low-wage workers or unemployed when they suffered their injuries.[41]

Additionally, it has been argued that RICO has the potential to fill what is presently a remedial vacuum for many misconduct victims.[42] That is, where victims cannot rely on § 1983 or some other cause of action, they might still redress their injuries by availing themselves of RICO.[43] This, too, however, is doubtful. Rather, RICO appears to suffer from many of the same procedural vulnerabilities as § 1983, making it an unlikely candidate to fill major gaps in civil rights law.

Yet none of this is to suggest that RICO has no place in efforts to combat police misconduct. Instead, RICO's principal value may lie in its potential to make a powerful statement about the nature of police misconduct. Under RICO, plaintiffs would have to prove that police departments like the LAPD conduct activities that are normally associated with mobsters. This might in turn bear practical consequences in the fight against police misconduct, not the least of which is conveying, particularly to the general public, that the LAPD is, in kind, no different than the mob. In other words, RICO could, at least symbolically, dispel the *bad apple* theory of police misconduct. Additionally, other potential advantages under RICO (relative to § 1983) include the prospect of broad discovery requests, a relaxed statute of limitations, and its avoidance of *Heck v. Humphrey's*[44] bar on collateral suits. While these advantages would not wholly compensate for the inadequacies of § 1983, they would at least provide misconduct victims and their lawyers additional tools in an otherwise poorly-stocked toolbox.[45] Presently, though, the viability of RICO applied as such has been placed in serious doubt.

Even by the LAPD's own account,[46] proving the racketeering aspect of claims against Rampart officers would probably not, in most cases, be a high hurdle to overcome. In fact, the major obstacle for plaintiffs in these actions has, thus far, not been a problem in linking the LAPD to a pattern of racketeering activity. Rather, the difficulty has been in satisfying RICO's injury to *business or property* require-

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41. *See generally id.* (explaining that minorities and low-income earners are more often subjected to police brutality).

42. *See* Ragland, *supra* note 36, at 172-75.

43. *See id.*

44. 512 U.S. 477, 487 (1994) (holding that a court will only proceed in a § 1983 action if its decision would not render another criminal judgment against the plaintiff invalid).

45. See Steven Ragland's clever use of metaphor, in referring to RICO as a tool (the *Master's Tool*) for police misconduct plaintiffs. *See* Ragland, *supra* note 36, at 139 n.1.

46. Despite perhaps underestimating the scope and nature of the Rampart Scandal, the LAPD's Board of Inquiry Report, however inadequate, probably still contains enough findings of misconduct to support a pattern of racketeering. *See* Chemerinsky, *supra* note 6, at 553-59.

ment.[47] In *Guerrero v. Gates*, a federal judge ruled that the plaintiff's allegations of "lost employment, employment opportunities, wages, and other compensation" constituted cognizable injuries under RICO.[48] However, another judge in the same district recently held in *Walker v. Gates* that such injuries are not redressable under RICO, reasoning instead that the plaintiff's alleged injuries were personal in nature rather than injuries to *business or property* as required by § 1964(c).[49] Thus, at least in the Central District of California, it is presently unclear whether a plaintiff in a police misconduct action has standing to allege a RICO violation when his only injuries are lost income or opportunities for income.

Under Ninth Circuit precedent, *Walker* appears to be the proper decision.[50] However, in interpreting RICO according to its original purpose and relevant Supreme Court precedent, this Comment contends that the *Walker* court's construction of RICO's injury to *business or property* requirement is an insufficient basis for dismissing claims that are truer to RICO's basic purpose—to give citizens a mechanism to fight back against enterprises who they might otherwise be helpless in resisting[51]—than many of its more established applications. That is, the activity of the LAPD, unlike that of many other entities targeted under RICO, is precisely in the nature of what the original enactors of RICO sought to prevent.[52]

This Comment thus argues first that while RICO's value in police misconduct actions may not be quite what some commentators initially predicted it is nonetheless *worth fighting for*.[53] It then contends that the better view, in reconciling *Guerrero* and *Walker*, is one in which strained interpretations of the Act's injury to *business or property* requirement (a la *Walker*) do not preclude its use in police misconduct actions—though, for now, it appears that the better resolution of *Walker* and *Guerrero* is probably not the most likely resolution.

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47. 18 U.S.C. § 1964(c) (2000).

48. 110 F. Supp. 2d 1287, 1293 (C.D. Cal. 2000).

49. No. CV 01-10904GAF(PJWX), 2002 WL 1065618, at *7-10 (C.D. Cal. May 28, 2002) (unpublished order).

50. *See* Oscar v. Univ. Students Co-op Ass'n, 965 F.2d 783, 785 (9th Cir. 1992) (concluding that personal injuries are not recoverable under RICO).

51. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922, 922.

52. *See id.*

53. Near the end of the second movie in Tolkien's *Lord of the Rings* trilogy, Sam remarks to Frodo that "[f]olk . . . had lots of chances of turning back only they didn't. Because they were holding on to something." Frodo then asks the obviously begged question, "What are we holding on to, Sam?" To which, Sam replies, "There's some good in this world . . . . And it's worth fighting for." LORD OF THE RINGS: THE TWO TOWERS (New Line Cinema 2002) (transcript), *available at* http://www.council-of-elrond.com/tttrans.html (last visited Aug. 23, 2003). In more than one respect, the above dialogue may be (or at least should be) a fitting encapsulation of the civil-rights lawyer's credo.

Part II of this Comment briefly chronicles the evolution of civil RICO in order to assess the appropriateness of its application in police misconduct actions. Part III evaluates traditional remedies for police misconduct. Part IV suggests possible reasons for using RICO in police misconduct actions relative to the shortcomings of traditional remedies. Part V discusses the requirements for pleading a RICO claim. Part VI assesses the viability of RICO in police misconduct actions by evaluating the conflict between the *Guerrero* and *Walker* decisions. Finally, Part VII briefly concludes this Comment.

II. *IT'S ALIVE*!: THE EVOLUTION OF CIVIL RICO AND WHETHER ITS APPLICATION TO THE LAPD IS A LOGICAL NEXT STEP

> Jimmy Hoffa was not above the law, and that is precisely the same thing with a Mike Milken . . . . [T]he King's writ runs not only on Mulberry Street, but [also] on Wall Street.[54]

When President Richard Nixon signed RICO into law in 1970, he declared its use as a major tool in the war against organized crime.[55] This sentiment was shared by others instrumental in enacting RICO, whose principal concern was the destructive impact by groups like *La Cosa Nostra* on American economic life.[56] While RICO was written to carefully avoid any specific reference to organized crime, it is unlikely that Congress or the President anticipated that RICO would be anywhere near as comprehensive in its application as it is today.[57] Certainly, few people, if any, expected that thirty years after RICO's enactment, it would be used against the very people—law enforcement officials—who are responsible for carrying out RICO's original design: fighting *gangsters* and other criminal elements.[58] Perhaps even more ironically, it is, in some cases, alleged criminals or *gangsters* who are utilizing RICO. While it may be somewhat counterintuitive, this latest stage in RICO jurisprudence (that is, its application to police misconduct) is merely a logical next step in its evolution.

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54. *The Future of RICO*, *supra* note 33, at 1095 (quoting Professor Blakey).

55. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON 846-47 (1970) [hereinafter NIXON'S REMARKS].

56. *See* S. REP. NO. 91-617, at 76 (1969).

57. *See, e.g.*, Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994); H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989); Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); Am. Nat'l Bank & Trust Co. of Chicago v. Haroco, Inc., 473 U.S. 606 (1985).

58. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922, 922.

A. The Evolution of a Monster[59]

The Senate bill responsible for creating a private right of action under RICO was clear in its targets: *La Cosa Nostra*, the Mafia, the mob, gangsters, and the underworld.[60] Nevertheless, Congress stopped short of making an explicit reference to organized crime in the text of RICO.[61] The main concern of RICO's drafters was that a clear reference to organized crime could raise the specter of constitutional scrutiny—a specific mention of *La Cosa Nostra*, for instance, might be interpreted as either creating a status crime or, worse yet, as targeting a particular ethnic group.[62] Erring on the side of caution (or so it was perceived), Congress then passed RICO to provide for the liability of *any person* violating its provisions.[63] This most general of references has led to very literal interpretations by the courts, and consequently, an application of RICO that extends well beyond members of organized crime.[64]

In *Sedima, S.P.R.L. v. Imrex Co.*, Justice White, in writing for the majority, remarked that civil RICO was "evolving into something quite different from the original conception of its enactors."[65] Despite this candid recognition, the Court held that RICO's use outside the context of organized crime was *inherent* because RICO refers to "'any person'—not just mobsters."[66] *Sedima*, then, essentially affirmed the trend in RICO litigation whereby, of the 270 known RICO cases decided prior to that point, forty percent involved securities fraud, thirty-seven percent involved common law commercial fraud, and only nine percent actually involved suits against professional criminals.[67] Despite the urgings of many to retreat to a narrower applica-

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59. *See* Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1037 (1990) (discussing a luncheon address about RICO given by Judge David B. Sentelle of the United States Court of Appeals for the District of Columbia Circuit in which he referred to RICO as the "[m]onster [t]hat [a]te [j]urisprudence").

60. *See* Douglas E. Abrams, *Crime Legislation and the Public Interest: Lessons from Civil RICO*, 50 SMU L. REV. 33, 38-50 (1996).

61. 18 U.S.C. § 1964(c) (2000).

62. *See* G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?*," 43 VAND. L. REV. 851, 860-67 (1990).

63. *Id.*

64. With RICO's provision for threefold damages, few plaintiffs' lawyers have hesitated to capitalize on the Court's implicit invitation to apply the Act outside the context of organized crime. *See* Abrams, *supra* note 60, at 52 (discussing RICO's legislative history). Accordingly, one judge has asked: "'Would any self-respecting plaintiffs' lawyer omit a RICO charge these days?'" *Id.* (quoting Papagiannis v. Pontikis, 108 F.R.D. 177, 179 n.1 (N.D. Ill. 1985)).

65. 473 U.S. 479, 500 (1985).

66. *Id.* at 495.

67. *Id.* at 498 n.16.

tion,[68] later cases followed the lead of *Sedima* in interpreting the scope of civil RICO very broadly.[69]

B. In the Monster's Sights: The LAPD As a Logical Next Step in RICO's Evolution?

As discussed later in this Comment, applying RICO to police misconduct faces certain potentially fatal difficulties.[70] These difficulties are not, however, traced to either the status of defendant officers or their departments. On the contrary, there is nothing in civil RICO jurisprudence that indicates its application should stop short of police officers. In fact, not only do cases against the police square with the low threshold set by *Sedima* and its progeny, but, additionally, the conduct of corrupt police forces appears to be more along the lines of what Congress intended to prohibit than many of RICO's other applications outside of organized crime.

In *Sedima*, the Court found *any person* to be an unambiguous reference.[71] As such, no one is *per se* excluded from RICO's coverage. There does not, therefore, seem to be any justification for categorically excluding police officers. In fact, liability for the type of blue-collar, violent crime (for example, murder, attempted murder) engaged in by police officers seems to be more consistent with RICO's original design than many of its established applications.[72] For instance, much of the criticism aimed at the expansion of RICO has been focused on its use in redressing white-collar crime.[73] Critics charge that RICO was never intended as a tool to harass innocent businessmen.[74] While police departments, like white-collar entities, are legitimate enterprises, the form of racketeering that takes place through an entity like the LAPD appears to much more closely resemble the conduct of an *archetypal mobster*. The acts allegedly committed by Rampart officers—murder, attempted murder, rob-

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68. *See, e.g.*, Chief Justice William H. Rehnquist, Reforming Diversity Jurisdiction and Civil RICO, Address at the Eleventh Seminar on the Administration of Justice (April 7, 1989), *in* 21 ST. MARY'S L.J. 5, 11-13 (1989). While congressional action has been urged and sometimes explored, resulting legislation has done little to restrict RICO. *See, e.g.*, Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 107, 109 Stat. 737, 758 (codified at 15 U.S.C. §§ 77Z-1 to 77Z-3 (2000)).

69. *See, e.g.*, Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994); H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989); Agency Holding Corp. of Chicago v. Malley-Duff & Assocs., 483 U.S. 143 (1987); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); Am. Nat'l Bank & Trust Co. v. Haroco, Inc., 473 U.S. 606 (1985).

70. *See infra* Part V.

71. 473 U.S. at 495.

72. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, §1, 84 Stat. 922.

73. *See, e.g.*, *Wounding the RICO Beast*, WASH. TIMES, Nov. 27, 1989, at F2 (discussing how labor unions, corporations, and other non-mobsters have been adversely affected by RICO).

74. H.R. REP. NO. 91-1549, at 187 (1970).

bery, and narcotics dealing, to name a few—are precisely the types of offenses that RICO was intended to address.[75] Moreover, both the frequency of crimes committed by the LAPD and the systematic way in which the crimes appear to have been carried out seem to clearly distinguish cases against its officers from cases brought against many white-collar offenders. So, not only do suits against police officers under RICO appear to square with the *any person* standard adopted by the *Sedima* Court, but the conduct of departments like the LAPD are in some ways representative of the very behavior that RICO was designed to address. For now, then, it is worth noting that applying RICO to police misconduct, particularly of the kind engaged in by Rampart officers, appears to be a logical next step in the evolution of civil RICO.

III. WHAT'S WRONG WITH THE TOOLBOX?: EVALUATING TRADITIONAL REMEDIES FOR POLICE MISCONDUCT

Much of the difficulty in remedying police misconduct stems from its disproportionate impact on socioeconomic and racial minorities. So long as police misconduct is a minority issue, the prospects of long-term political or institutional reform are meager. As a result, victims of police misconduct have instead relied heavily on the courts for redressing their injuries and for more systemic remedies. In recent years, however, legal redress of this kind has been severely limited. It is presumably for this reason, at least in part, that victims have turned to RICO to compliment their existing modes of redress.

A. Political Redress

Theoretically, the most effective means of addressing police misconduct is, perhaps, to hold elected officials accountable for the conduct of their police departments. If citizens are dissatisfied with the conduct of their police, they can demand that their representatives implement reforms or suffer the consequences on election day. This assumes, however, a favorable distribution of political power that, in reality, rarely exists.

Police misconduct is largely a problem that is borne by socioeconomic and racial minorities, who lack the political and economic resources to demand political change.[76] Moreover, even assuming an effective coalition of racial and economic minorities, this does not necessarily mean that police misconduct will be adequately addressed. It has been suggested that lower-income, racial minorities might actually be the least interested in protecting civil liberties when doing so

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75. *See* NIXON'S REMARKS, *supra* note 55, at 846 (noting RICO's objective of combating "drug traffic in this country").

76. *See* Hoffman, *supra* note 19, at 1470.

potentially interferes with effective law enforcement.[77] After all, they are the ones who must pay the price when sensitivity to civil liberties compromises effective law enforcement.[78] So long as this is the prevailing perception—that misconduct is not a minority problem but rather something that only criminals need to worry about—reform, at least insofar as it focuses on greater respect for civil liberties, has little chance for support even among minorities.[79]

Political majorities, on the other hand, are generally unlikely to identify with the interests of any minority group unless there is some corresponding self-interest at stake. The riots that followed the beating of Rodney King and the economic losses that resulted are a good illustration of how serious matters must become before a political majority takes an otherwise minority issue seriously. Although the Rampart Scandal was serious, it did not pose an economic threat to the political majority like the riots did and thus did not hold the same potential to effect reform. This is not to say that a conscientious majority will not sometimes act on the basis of purer motives. However, this depends on a number of variables that are too uncertain to provide consistent protection to real or potential misconduct victims. Moreover, even when high-profile events act on the more altruistic sensibilities of the politically relevant, their responses tend to be short-lived. That the LAPD remains one of the most corrupt police forces in the world ten years after Rodney King's beating is a testament to the whimsical quality of majoritarian responses to minority issues. As long as police misconduct remains predominately a minority issue, then political action will fail to yield an adequately consistent solution.

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77. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 115 (1999) (Thomas, J., dissenting). As Justice Thomas stated:

> [T]he people who will suffer from [the majority's] lofty pronouncements are people . . . who have seen their neighborhoods literally destroyed by gangs and violence and drugs. They are good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens. As one resident described: "There is only about maybe one or two percent of the people in the city causing these problems maybe, but it's keeping 98 percent of us in our houses and off the streets and afraid to shop." By focusing exclusively on the imagined "rights" of the two percent, the Court . . . has denied our most vulnerable citizens the very thing that . . . elevates above all else—the "'freedom of movement.'" And that is a shame.

Id. (citations omitted).

78. *Id.*

79. Here, I refer to minorities in the ordinary sense. However, criminals are another less-politically-relevant minority. *See* Dorf & Issacharoff, *supra* note 26, at 928.

B. Federal Enforcement

Under 18 U.S.C. § 241, the federal government has authority to criminally prosecute anyone who, with at least one other individual, "conspire[s] to injure, oppress, threaten, or intimidate any person" in order to deprive that person of her constitutional rights.[80] Likewise, § 242 provides for the criminal prosecution of anyone who under color of law willfully deprives another of her constitutional rights.[81]

The effectiveness of these provisions is severely limited.[82] First, in order to prove a violation of either provision, the government must establish not only that the defendant conspired to deprive or actually deprived someone of her constitutional rights, but additionally, it must prove that the defendant specifically intended to do so.[83] Thus, even if the government can prove beyond question that an officer deprived an individual of her constitutional rights, there is absolutely no culpability that follows unless it can also be established that the harm was specifically intended.[84] This has had the obvious effect of making civil rights violations extremely difficult to prove and almost certainly has led to a greater reluctance on the government's part to prosecute cases in the first place. Second, regardless of the difficulties involved in winning a § 241 or § 242 prosecution, everything initially depends on the government's willingness to prosecute. Much, then, hinges on the administration's commitment to civil rights, its willingness to interfere with local or state matters, and the funding made available to prosecute cases. Depending on the administration or other relevant political circumstances, these considerations will often weigh in favor of governmental restraint.

In 1994, Congress passed the Violent Crime Control and Enforcement Act of 1993,[85] which included 42 U.S.C. § 14141, a provision which empowers the Justice Department to "obtain appropriate equitable and declaratory relief" against a governmental authority engaged in a pattern or practice that deprives persons of their constitutional rights.[86] The enactment of this provision is so recent that it is difficult to predict its potential impact in remedying police miscon-

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80. 18 U.S.C. § 241 (2000).

81. *Id.* § 242.

82. For further discussion of federal enforcement under §§ 241-42, see Hoffman, *supra* note 19, at 1488-91.

83. *See* United States v. Guest, 383 U.S. 745 (1966); Screws v. United States, 325 U.S. 91 (1945).

84. As always, proving intent is much more difficult than establishing what actually took place. Even when, in reality, intent was present, proving it to a jury is no simple feat.

85. One commentator has proposed that amending 42 U.S.C. § 14141 to include a private right of action would allow for more consistent protection of civil rights against police misconduct. Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 *passim* (2000).

86. 42 U.S.C. § 14141 (2000).

duct. However, like 18 U.S.C. §§ 241 and 242, its effect will only be as extensive as the government's zeal in enforcing it. Thus, it is unlikely that it will result in a consistent safeguarding of rights.

C. Private Right of Action: 42 U.S.C. § 1983

Where other actions rely on political or administrative decisionmakers, § 1983 empowers the victims of police misconduct themselves to redress the harms committed by corrupt police departments and their officers.[87] Despite its flaws, it has, therefore, been the most effective tool in redressing police misconduct.[88]

Section 1983 provides for liability of "[e]very person who, under color of . . . [state law] subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution."[89] Persons under § 1983 may include state employees or municipalities.[90] Thus, police officers, chiefs, departments, and even their policymaking superiors are theoretically subject to liability under § 1983. Prudential limitations imposed by the courts[91] have, however, severely restricted the actual scope of § 1983 and thereby rendered many victims without adequate means to compensate their injuries. Perhaps more importantly though, § 1983 has also been effectively disabled as a basis for fundamental reform of corrupt departments like the LAPD. Additionally, stringent statutes of limitations, jury tendencies, and other restrictions further decrease the chances of success on a § 1983 claim and diminish the likelihood that claims will ever be brought in the first place.[92]

1. Barriers to Municipal Liability and Qualified Immunity

While § 1983 technically allows for suits against municipalities, the threshold for liability is so high that entities like the LAPD enjoy something close to effective immunity. The principal limitation at issue is a complete foreclosure on respondeat superior liability.[93] Thus, a plaintiff cannot, as a matter of course, sue a police department on the basis of violations committed by its officers. Instead, under *Monell v. Department of Social Services*,[94] a plaintiff must prove that the alleged constitutional deprivation was approved either through official decisionmaking channels or implicitly through a governmental

87. 42 U.S.C. § 1983 (2000).
88. Hoffman, *supra* note 19, at 1504.
89. 42 U.S.C. § 1983 (2000).
90. *See* Hoffman, *supra* note 19, at 1504.
91. *Id.* at 1511.
92. *Id.*
93. *Id.* at 1505.
94. 436 U.S. 658 (1978).

custom.[95] This latter standard appears to leave room for plaintiffs to sue when they suffer constitutional harm resulting from an officer's lack of training or supervision, or otherwise stated, the department's implicit approval of officer misconduct. Assuming that this was the end of the analysis, the potential for pressuring departments into providing adequate training and supervision would be tremendous. However, policymakers, in failing to address this issue, must be proven to have acted with *deliberate indifference*[96] to the risk of "the *particular* injury suffered by the plaintiff[s]."[97] In effect, then, it is very difficult to impose liability on municipalities for failure to proactively prevent constitutional injuries.

Actions against individual police officers suffer from similar difficulties. Here, an officer's qualified immunity defense is the principal obstacle. To overcome the defense, a plaintiff must prove that the officer violated clearly established law in causing the plaintiff's constitutional injury.[98] While in many instances the law violated will indeed have been clearly established, this does not necessarily translate into a favorable verdict for the plaintiff. As Judge Newman stated before a subcommittee on civil and constitutional rights:

> To most jurors hearing a jury instruction on the defense of qualified immunity, it simply sounds as if the officer should not be found liable if he thought he was behaving lawfully, and many jurors will give him the benefit of the doubt on that issue, even if they think his conduct was improper.[99]

Moreover, even when plaintiffs are successful in actions against individual officers, it is worth noting that damages are almost invariably paid by the municipality.[100] While this, on the one hand, relieves pressure on individual officers, the willingness of municipalities to indemnify their officers is seldom correlated with a desire to effectively prevent violations from occurring again. Often, where an individual bad apple is to blame, the politically expedient thing to do is to avoid controversy by settling claims without addressing the systemic nature of the problem.[101]

2. Barriers to Injunctive Relief: City of Los Angeles v. Lyons

In terms of effecting institutional reform, the critical limitation on § 1983 actions is what, in many cases, functions essentially as a ban

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95. *See id.* at 690-91.
96. City of Canton v. Harris, 489 U.S. 378, 392 (1989).
97. Bd. of the County Comm'rs. v. Brown, 520 U.S. 397, 412 (1997).
98. Anderson v. Creighton, 483 U.S. 635, 639 (1987).
99. *Federal Response to Police Misconduct: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 34 (1992).
100. *See* Hoffman, *supra* note 19, at 1507-08.
101. *See id.*

on injunctive relief. In *City of Los Angeles v. Lyons*, the Supreme Court held that, unless a plaintiff can establish "a real and immediate threat" that the harm alleged will occur in the future, injunctive relief is not available.[102] In *Lyons*, the plaintiff requested an injunction to stop the LAPD from using a particular chokehold in response to non-deadly force.[103] While the plaintiff alleged that, without being provoked, the officers administered the chokehold on him until he passed out[104] and that in a span of seven years this same chokehold caused the deaths of fifteen people,[105] the Court held that the plaintiff was without standing to request that the LAPD be enjoined from using the chokehold in response to non-deadly force.[106] Even if it were certain that the LAPD would again apply the chokehold to *someone*, the Court would not grant the injunction unless the plaintiff could establish that *he* would again be choked.[107] Thus, in the words of Justice Marshall, even "if the police adopt . . . a policy of shooting 1 out of 10 suspects, the federal courts will be powerless to enjoin its continuation."[108] Plaintiffs, therefore, have essentially no means to proactively ensure, under § 1983, that their constitutional rights will not be infringed by state actors.

3. Statute of Limitations

An additional obstacle in many § 1983 claims is its statute of limitations. The Supreme Court has held that although federal law governs the characterization of a § 1983 claim for statute of limitations purposes, state law governs the length of the limitations period and its tolling and application.[109] In some states, including California, plaintiffs only have one year from the time of their injury to initiate a cause of action.[110] In addition to the obvious problem that the claims of many plaintiffs become time-barred and thus are never heard, a strict statute of limitations has the added effect of shortening the time period in which other plaintiffs can gather the necessary resources to effectively litigate their claims.

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102. 461 U.S. 95, 110 (1983).
103. *Id.* at 98.
104. *Id.* at 97.
105. *Id.* at 100.
106. *Id.* at 105.
107. *Id.* at 102-06.
108. *Id.* at 137 (Marshall, J., dissenting) (interpreting the majority's view).
109. Wilson v. Garcia, 471 U.S. 261, 268-75 (1985), *superceded by statute as stated in* Grace v. Thomason Nissan, 76 F. Supp. 2d 1083, 1090 (D. Or. 1999).
110. *See* Del Percio v. Thornsley, 877 F.2d 785, 786 (9th Cir. 1989).

4. Heck v. Humphrey

In *Heck*, the Supreme Court held that a § 1983 claim which implicitly challenges a plaintiff's previous criminal conviction is barred until the conviction is "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus."[111] This holding has obvious implications in police misconduct actions: barring success on some prior prescribed action, victims of police misconduct are prevented from suing to redress their injuries. Thus, for instance, police misconduct victims who are framed or are convicted on the basis of a police officer's false testimony could not sue under § 1983 until they first proved their innocence in a separate action.[112] Accordingly, *Heck* has been the downfall of many § 1983 claims[113] and has likely kept many more from ever being brought.

5. Jury Tendencies

Benefit of the doubt determinations by jurors are not restricted to the context of qualified immunity. Besides favoring police officers, jurors are also responsive to the credibility issues posed by most police misconduct plaintiffs.[114] Typically, plaintiffs in § 1983 actions are individuals who either were allegedly engaged in criminal activity at the time when their injuries occurred or at least have criminal backgrounds.[115] Even when jurors find in favor of plaintiffs, these considerations bear on the amount of damages they award.[116] Such tendencies, coupled with other difficulties in proving § 1983 claims, result in yet another major problem—many legitimate claims are probably never litigated because they fail to survive the cost-benefit analysis that lawyers employ when determining whether to invest in a case.[117]

While § 1983 remains the best cause of action available in police misconduct actions, it is hardly a panacea for victims. Rather, it provides neither reliable redress for injuries nor a means to effectively address systemic misconduct. In cities like Los Angeles, where police misconduct is common and political attempts at reform have been largely unsuccessful, the ineffectiveness of § 1983 means that many

111. 512 U.S. 477, 487 (1994).

112. *See, e.g.*, Guerrero v. Gates, 110 F. Supp. 2d 1287, 1290-91 (C.D. Cal. 2000).

113. *See generally* Paul D. Vink, *The Emergence of Divergence: The Federal Court's Struggle to Apply* Heck v. Humphrey *to § 1983 Claims for Illegal Searches*, 35 IND. L. REV. 1085 (2002) (explaining the split of opinion among the federal circuit courts regarding *Heck*'s application to claims arising from illegal searches or seizures).

114. *See* Hoffman, *supra* note 19, at 1511.

115. *Id.*

116. *Id.*

117. *See id.*

citizens are left to live under a constant threat of abuse by corrupt departments and their officers.

IV. WHY RICO?

> This makes it possible that we can demonstrate what I have always claimed: The LAPD is a criminal enterprise.[118]

In what is, in many respects, presently a remedial vacuum for police misconduct victims, RICO may, to some degree, partially compensate for the inadequacies of more traditional remedies like § 1983. Perhaps more importantly, though, there are other potential advantages that inhere in applying civil RICO in police misconduct actions.

A. Damages

Discussion of RICO's advantages typically begins with reference to its provision for treble damages.[119] In police misconduct actions, specifically, the prospect of large recoveries has two possible advantages. The most immediate advantage is obvious enough—a windfall for plaintiffs and their lawyers. The second possible advantage relates to § 1983's virtual prohibition on injunctive relief. Assuming treble damages would mean a massive increase in liability exposure, continued indemnification of officer misconduct without reduction in the frequency of offenses would soon spell financial ruin for municipalities.[120] Under this scenario, municipalities would be faced with the choice of either reforming their police departments or enduring the political consequences of draining public coffers.[121] If the mere threat of RICO induced cities to choose the former, its impact would be analogous to injunctive relief. All this, however, assumes that actual damages are significant enough that the RICO multiplier will result in extensive liability. If it were as simple as tripling § 1983 damages, this would most assuredly be the result. This, however, is not exactly the equation under RICO.

Because, under RICO, only injuries to *business or property* are compensable, pain and suffering and other conventional compensatory damages are not recoverable.[122] Thus, under RICO, unlike

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118. Henry Weinstein, *Judge OKs Use of Racketeering Law in Rampart Suits; LAPD Can Be Sued As a Criminal Enterprise, He Rules. The Decision Could Triple the City's Financial Liability for Mistreatment of Citizens, Experts Say*, L.A. TIMES, Aug. 29, 2000, at A1 (quoting Stephen Yagman, co-counsel for the plaintiffs in *Walker*, *Guerrero*, and other suits on behalf of Rampart victims).

119. *See, e.g.*, Ragland, *supra* note 36, at 172, 174-76.

120. *Id.* at 175-76.

121. *See id.*

122. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985) (excluding recovery for personal injuries).

§ 1983, a plaintiff who suffers wrongful imprisonment would only be entitled to whatever injury to *business or property* was suffered as a result of her arrest.[123] Even assuming for now that lost income or lost opportunity for income are compensable, the average RICO claim in a police misconduct action would probably stand to gain plaintiffs little in the way of damages. Unless a plaintiff's wages are exceptionally high or a plaintiff's low wages were deprived over a very long period of time, the amount of lost income or lost opportunity for income would tend to be very little—if not from the plaintiff's perspective, then at least from the perspective of his lawyer and the defendant. That the amount is tripled would be of some solace to the plaintiff and his lawyer but would still not constitute the huge recoveries imagined by some when RICO was first tested in the police misconduct context.

Under RICO, any chance at substantial recoveries in police misconduct suits would probably have to come by consolidating claims into class actions. Even coupled with attorney's fees (also provided for under civil RICO),[124] however, class actions would probably still not result in the crippling liability (and huge recoveries) that some observers initially anticipated. Much, of course, depends on the size of the class and how willing the courts will be to recognize class members' injuries as cognizable under RICO. If classes are limited to individuals who are directly impacted by police misconduct (for example, those who are kidnapped and murdered), then the classes will probably not be large enough to allow for large aggregate recoveries.[125]

On the other hand, if courts were willing to view, for instance, the lost business income that store owners and other business persons suffer due to police misconduct (for example, killing and falsely arresting potential customers or clients), potential class sizes would become much larger and so, too, would the potential for large recoveries. Depending on how remote the courts would allow an injury to be, one can imagine how virtually everyone within a city where police misconduct is pervasive might be impacted economically in small measure (for example, the extra cost that someone pays in gasoline to avoid an area where police officers facilitate narcotics dealing). As this Comment later discusses, however, proximate cause analysis clearly limits recoveries for indirect or remote injuries.[126] Thus, barring exceptional facts, damages awards under RICO in police mis-

123. *Id.* This assumes for now that damages to *business or property* derived from false arrest are recoverable under RICO. *See infra* Part V.B.

124. 18 U.S.C. § 1964(c) (2000).

125. The prospects for large classes among tobacco litigants (thousands of smokers) are, for instance, much better.

126. *See infra* Part V.D.1.

conduct actions would tend to be relatively meager. The most that plaintiffs might hope for, then, is that treble damages under RICO, in concert with § 1983 damages, will compensate their injuries more adequately than actual damages ordinarily would.[127]

B. Pleading Requirements

Like § 1983, civil RICO does not depend on administrative or political discretion.[128] It, therefore, provides an immediate advantage that other remedies, including the criminal provisions of RICO, do not have—that is, injured parties may commence claims on their own behalf.[129] While, on its face, RICO does not appear to suffer from the same fatal pleading requirements that plague § 1983, its capacity to compensate for the weaknesses of § 1983 are mainly limited to its more relaxed statute of limitations.

1. Specific Intent

While RICO itself does not contain an intent element, many of RICO's predicate offenses do. So, for instance, assuming again that deprivation of income constitutes an injury to *business or property* under RICO, a plaintiff, who is kidnapped by a police officer, would not have to prove that the officer intended to violate RICO, yet he would have to prove that the officer intended to kidnap him. It is unlikely, then, that RICO would compensate for the pleading difficulties posed, for instance, by a qualified immunity defense in a § 1983 claim.[130]

If the law violated is not clearly established and the qualified immunity defense is available in a § 1983 action, it is unlikely that the violation would be a predicate offense under RICO. For example, a police officer who arrests someone for using profanity may not have violated clearly established law in doing so, but the arrest would probably not constitute a predicate offense under RICO either. If the officer was considered to have acted in good faith and is thus immune from § 1983 liability, it is difficult to see how his act would then satisfy the intent element of a RICO predicate offense. Thus, while the qualified immunity defense does not apply to RICO, this fact probably does little to compensate for the difficulties in overcoming the defense in a § 1983 claim.

If there is any advantage to not facing a qualified immunity defense in a RICO action, it is perhaps taking away an excuse for juries to absolve officers of liability. Even when clearly established law has

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127. *See Thoughts About Multiple Damages*, *supra* note 33, at 112-17.
128. *See* 18 U.S.C. § 1964(c).
129. *Id.*
130. *See supra* Part III.C.1.

been violated, juries nevertheless will sometimes rely on the qualified immunity defense to find in favor of defendant officers. The absence of this defense in the RICO context might leave juries without such a convenient excuse. However, a jury convinced that an officer was simply doing the best he could do under the circumstances, regardless of legal or factual determinations, may find for that officer whether or not it has an immunity defense upon which to rely.[131]

2. Statute of Limitations

The clearest advantage to a RICO claim in a police misconduct action is its uniformly relaxed statute of limitations. While § 1983 statutes of limitations sometimes expire within as little as one year from the time of the plaintiff's injury, a four-year statute of limitations applies to all civil RICO claims.[132] This allows plaintiffs a much better chance both to plead their claims as well as to muster the necessary resources to do so effectively.

3. Heck v. Humphrey

There is presently a split among district courts in the Ninth Circuit over whether *Heck* applies to RICO suits. In *Garcia v. Scribner*, the court held, without analysis, that *Heck* applies to RICO suits in the same manner as it applies to § 1983 suits.[133] However, in *Hunter v. Gates*, another case out of the Central District of California, the court refused to follow *Garcia* and held that RICO was not governed by *Heck*.[134] Thus, at least in the district where *Guerrero*[135] and *Walker*[136] were decided, *Heck* does not necessarily prevent a RICO plaintiff from collaterally attacking a previous criminal conviction.

C. Discovery

To prove a pattern of racketeering activity under RICO, at least two predicate offenses over a ten-year period must have been committed in maintaining or conducting (or conspiring to maintain or conduct) the affairs of an enterprise.[137] This provides a built-in justi-

131. *See supra* Part III.C.5.
132. Agency Holding Corp. v. Malley-Duff Assocs., Inc., 483 U.S. 143, 156 (1987).
133. No. C 97-0742 CRB, 1998 U.S. Dist. LEXIS 10508, at *8-9 (N.D. Cal. July 10, 1998).
134. No. CV99-12811, 2001 WL 837697, at *2-3 (C.D. Cal. Apr. 16, 2001).
135. Guerrero v. Gates, 110 F. Supp. 2d 1287, 1293 (C.D. Cal. 2000).
136. Walker v. Gates, No. CV 01-10904GAF(PJWX), 2002 WL 1065618, at *9 n.13 (C.D. Cal. May 28, 2002).
137. 18 U.S.C. § 1961(5) (2000).

fication for plaintiffs' lawyers to make broad discovery requests.[138] Apart from its obvious value in proving misconduct, information that would come through discovery spanning a ten-year period[139] might significantly enhance the leverage of plaintiffs in settlement negotiations.[140] The information that could be generated through such a broad discovery request would not only bear on the defendant's chances at trial but might also produce information that would lead to additional litigation. Once information becomes a part of the public record, the police department and its officers would expose themselves to suits both by other injured parties as well as the government. As cities attempt to avoid these risks, plaintiffs might begin to see increases in the frequency and size of their settlement awards.[141]

D. Exposing the LAPD for What It Is

The most important advantage of using civil RICO in police misconduct actions may be its potential to dispel the *bad apple* theory of police misconduct. To prove a RICO violation, it must be shown that the defendant conducted (or conspired to conduct) an enterprise through a pattern of racketeering activity.[142] This means overcoming the perception that an officer bears all the responsibility for his misconduct, independent of a larger, systemic pattern. While judgments would, technically, be rendered against individual police officers, the message of a favorable RICO verdict would also be an indictment of the departments that were used to facilitate their criminal conduct. It would, in effect, be a recognition of systemic police misconduct.

Additionally, by associating entities like the LAPD with a statute that was originally intended for groups like *La Cosa Nostra*, a jury might even convey the more ambitious message that the LAPD is, in kind, no different than an organized crime unit. As one civil rights attorney has said, "The most important thing is exposing the LAPD for what it is, . . . the mob."[143]

Negative characterizations of a police department should not necessarily be seen, however, as limited to mere abstract or moral victories. It is possible that *exposing the LAPD for what it is* would mean greater success in pleading other claims. For example, juries hearing

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138. See Palermo, *supra* note 37, for comments by Thomas C. Hokinson, Chief Assistant Attorney of Los Angeles, regarding the advantage of using RICO in police misconduct suits.

139. *Id.*

140. *See Thoughts About Multiple Damages*, *supra* note 33, at 119 (noting that one former federal judge, Susan Getzendanner, stated that "in her tenure on the bench she never saw a [RICO] settlement she considered unjust").

141. *See id.*

142. 18 U.S.C. § 1962(b)-(d) (2000).

143. Palermo, *supra* note 37 (quoting Stephen Yagman).

evidence on a pattern of illegal behavior might be less likely to carry favorable biases for police officers into deliberations on § 1983 claims. Additionally, a public that believes its police department is using its tax dollars to function as an organized crime unit might also be more inclined to press for more federal prosecutions. This would, in turn, create a greater comfort level on the part of the government to intrude on what is, otherwise, often considered a local matter. Likewise, placing the LAPD on par with the mob might be further incentive for political officials to undertake serious efforts to reform the department.

E. Conclusion: The Potential Significance of RICO for Victims of Police Misconduct

RICO is by no means a substitute for § 1983. In fact, with the exception of its more relaxed statute of limitations and its presumed avoidance of *Heck*, it does very little to compensate for the deficiencies of § 1983. This does not mean, however, that the RICO experiment is not worth seeing through. It is important to keep in mind that § 1983 and RICO are not mutually exclusive. The trend so far has been to plead RICO as a compliment to, not as a substitute for, § 1983 claims.[144] Assuming the viability of RICO liability in police misconduct actions, this trend will probably continue.[145]

RICO may not be the answer for police misconduct victims, but in the imperfect world of civil rights litigation, even the slightest advantages are worth sustaining. RICO's potential as a discovery tool and the opportunities that it would provide to make a bold statement about the nature of police misconduct do not directly respond to the deficiencies of § 1983. Nevertheless, these advantages alone are enough to justify using RICO as a compliment to § 1983. The practical consequences that this would bear is anyone's guess. However, it is at least conceivable that exposing a department like the LAPD for what it really is will have some influence on a legal culture that presently neglects the rights of police misconduct victims.

V. ELEMENTS OF A RICO CLAIM

> RICO is for me (and many, if not most, of my . . . colleagues) an agonizingly difficult and confusing area of the law.[146]

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144. *See, e.g.*, Walker v. Gates, No. CV 01-10904GAF(PJWX), 2002 WL 1065618 (C.D. Cal. May 28, 2002); Lee v. Gates, No. CV0103085DTCTX, 2001 WL 1098070 (C.D. Cal. Sept. 10, 2001); Guerrero v. Gates, 110 F. Supp. 2d 1287 (C.D. Cal. 2000).

145. Plaintiffs and their lawyers stand to lose little by doing this—if one claim falters, the other may survive, or the combination of both may result in a larger recovery.

146. Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187, 196-97 (9th Cir. 1987) (Burns, J., concurring).

RICO's civil action provision, § 1964(c), states that "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue . . . and shall recover threefold the damages he sustains."[147] Violations under § 1962 include investing income derived from a pattern of racketeering activity in an enterprise, acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity, conducting the affairs of an enterprise through a pattern of racketeering activity, or conspiring to do any of these through a pattern of racketeering activity.[148] Thus, to establish standing under § 1964(c), a plaintiff must plead the following elements: (1) the existence of an enterprise; (2) a predicate violation of § 1962; (3) a pattern of racketeering activity; and (4) an injury to his business or property.[149] This Part discusses these elements in greater depth, focusing particularly on the critical inquiry posed to the *Guerrero* and *Walker* courts regarding RICO's injury to *business or property* requirement.

A. Enterprise: Who or What Is a RICO Enterprise?

An enterprise under RICO is defined broadly to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[150] As discussed in Part II, RICO's avoidance of any specific reference to organized crime has resulted in application to virtually every type of enterprise, illegitimate as well as legitimate. In particular, a majority of circuits, including the Ninth Circuit, have held that government entities (for example, police departments) satisfy the enterprise requirement under RICO.[151] There are, however, additional criteria for pleading this element.

1. Distinctness of Enterprise

While virtually any entity may constitute an enterprise under RICO, a limitation imposed by some courts, including the Ninth Circuit, requires that the defendant and the enterprise be distinct.[152]

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147. 18 U.S.C. § 1964(c) (2000).
148. *Id.* § 1962.
149. *See id.* § 1964.
150. *Id.* § 1961(4).
151. *See* United States v. Freeman, 6 F.3d 586, 597 (9th Cir. 1993) (following seven other circuits that held that government entities could constitute enterprises under RICO); *see also* United States v. Ruiz, 905 F.2d 499 (1st Cir. 1990) (finding a police department to constitute a RICO enterprise).
152. *See, e.g.*, Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984) (explaining that under RICO an enterprise must be "'different from, not the same as or part of, the person whose behavior the act was designed to prohibit'" (quoting United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), *overruled by* Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990))); *see also* River City Markets, Inc. v. Fleming Foods W., Inc.,

Thus, the LAPD, for instance, could not serve as both the enterprise and the defendant in a RICO suit. Rather, as in both *Walker* and *Guerrero*, the defendants are individual officers, not the LAPD—the latter is instead the enterprise that the officers allegedly used to facilitate their misconduct.[153]

2. Affecting Interstate Commerce

Additionally, under § 1962(a), RICO only applies to enterprises "which [are] engaged in, or the activities of which affect, interstate or foreign commerce."[154] For the Rampart Division, the relevant inquiry is whether it is an enterprise that affects interstate commerce. Clearly, at least in some small measure, a police department (or division) affects interstate commerce. If nothing else, its ability to police affects matters like tourism or the growth of businesses within its jurisdiction, both of which have an impact on interstate commerce. After the Supreme Court's decision in *United States v. Lopez*, however, proving that an enterprise has *some* impact on interstate commerce may not be enough to end the analysis.[155]

In holding the Gun-Free School Zones Act (GFSZA) unconstitutional, the Supreme Court in *Lopez* determined that only economic activities that *substantially* affect interstate commerce are subject to legitimate regulation by Congress under the Commerce Clause.[156] While it is clear that, after *Lopez*, statutes like RICO will be judged by a stricter standard of scrutiny: just how much and whether RICO will withstand constitutional analysis is not entirely clear. In one breath, the *Lopez* Court recognized that, although a single activity *trivial by itself* may not substantially affect interstate commerce, that alone is not "'enough to remove [it] from the scope of federal regulation where, . . . taken together with that of many others . . . is far from trivial.'"[157] The Court also noted, however, that "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'"[158] It is no secret, of course, that al-

960 F.2d 1458, 1461 (9th Cir. 1992) ("*Rae* simply embodies the maxim that an individual cannot associate or conspire with himself.").

153. *See infra* Part V.A.3.

154. 18 U.S.C. § 1962(a) (2000).

155. *See* 514 U.S. 549, 558-59 (1995), *superceded by statute as stated in* United States v. Danks, 221 F.3d 1037, 1038-39 (8th Cir 1999).

156. *Id.* at 559, 567.

157. *Id.* at 556 (quoting Wickard v. Filburn, 317 U.S. 111, 127-28 (1942)).

158. *Id.* at 561 n.3 (quoting United States v. Enmons, 410 U.S. 396, 411-12 (1973)), in part (quoting United States v. Bass, 404 U.S. 336, 349 (1971) (internal quotes omitted).

tering this *sensitive* balance is something to which the present Court has been particularly hostile.[159]

In striking the GFSZA, the Court determined that: "The possession of a gun in a local school zone is in *no sense* an economic activity that might, through repetition elsewhere, substantially affect *any* sort of interstate commerce."[160] Whether we take from this analysis that the GFSZA failed primarily because the possession of a gun is not an economic activity or because it did not substantially affect interstate commerce, it is easy to imagine that, under this strict analysis, many statutes, previously considered legitimate, will soon face serious constitutional challenges under *Lopez*.[161]

In gauging the implications of *Lopez* for RICO, one question that emerges is what precisely must affect commerce? Is it the enterprise, the racketeering activity that is facilitated through the enterprise, or the predicate offense responsible for the plaintiff's injury? By way of analogy to *Lopez*, it appears that the relevant nexus to interstate commerce under RICO is probably the activity regulated, rather than the enterprise. Assuming this, it is questionable whether some RICO violations, particularly those that have traditionally been matters of state concern (for example, murder and kidnapping), can be legitimately regulated under the Commerce Clause.

Thus far, the Supreme Court has managed to avoid the implications of *Lopez* for RICO, leaving the lower courts to sort through its many mysteries. There is very little indication, however, that lower courts are willing to apply *Lopez* in any way which would fundamentally affect RICO.[162] In *United States v. Juvenile Male*, the Ninth Circuit held that "unlike the Gun-Free School Zones Act, 'which was aimed at purely local, noneconomic activities,'" RICO is instead "'concerned solely with *inter* state, rather than *intra* state, activities,'" and therefore is not subject to "'*Lopez*'s "substantially affects" test.'"[163] Rather, the court stated, "'[w]here [a] crime . . . directly affects interstate commerce,'" a plaintiff, to establish federal jurisdiction, need "only to prove that the crime had a 'de minimis effect' on

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159. *See generally* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002) (examining the Rehnquist Court's federalism doctrines).

160. *Lopez*, 514 U.S. at 567 (emphasis added).

161. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act); United States v. Juvenile Male, 118 F.3d 1344 (9th Cir. 1997) (rejecting challenge to constitutionality of RICO under *Lopez*); United States v. Atcheson, 94 F.3d 1237 (9th Cir. 1996) (concluding that *Lopez* did not overrule the *de minimus* standard in determining whether statutes affect interstate commerce).

162. *See, e.g.*, *Juvenile Male*, 118 F.3d at 1346-50; United States v. Beasley, 72 F.3d 1518, 1526 (11th Cir. 1996); United States v. Maloney, 71 F.3d 645, 663 (7th Cir. 1995).

163. *See* 118 F.3d at 1348 (analogizing RICO to the Hobbs Act, which was the focus of the quotations from *Atcheson*, 94 F.3d at 1242).

interstate commerce."[164] Citing to *Lopez*, the court reasoned that because "RICO . . . regulates activities which, in the aggregate, have a substantial effect on interstate commerce[,] . . . the 'de minimis character of individual instances arising under [the] statute is of no consequence.'"[165]

Juvenile Male would appear to allow for a finding that, while the misconduct of one department's officers might not substantially affect interstate commerce, police misconduct in the aggregate certainly does; therefore, the police-department activity is legitimately regulated under RICO. In many ways, however, regulating police misconduct resembles the GFSZA. For instance, a police department, like a school, is a local entity. And many acts of police misconduct (for example, murder, kidnapping, and attempted murder) are like gun possession, essentially noneconomic activities.[166] Regardless, then, of how much a local entity like the LAPD affects interstate commerce through its noneconomic activities, it seems very likely that, if police misconduct actions brought under RICO do not falter on other grounds, they will soon be attacked under *Lopez*.

3. The Relationship of the Enterprise to the Prohibited Activities

While the enterprise itself is not actually sued,[167] RICO plaintiffs must establish that the enterprise facilitated the defendant's racketeering activity and that the enterprise felt the effects of the racketeering activity.[168] So in cases like *Guerrero* and *Walker*, for example, plaintiffs had the burden of proving that the defendant officers' acts were facilitated by their positions within the LAPD and that their racketeering activity impacted the operation of the LAPD.[169]

If plaintiffs' claims are true, the racketeering activity of defendant officers appears to have been facilitated by their positions in the LAPD. After all, an ordinary citizen could not have planted narcotics, arrested, and wrongfully detained plaintiffs. Rather, defendants could have only done so in their capacities as officers of the LAPD. Additionally, it is equally difficult to imagine that the defendants' actions would not have had an impact on the LAPD's operation. Assuming the best of all possible scenarios, the defendants' conduct would have at least impacted the morale of other officers, the reputation of

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164. *Id.* (quoting *Atcheson*, 94 F.3d at 1242-43).

165. *Id.* (alteration in original) (quoting *Lopez*, 514 U.S. at 558).

166. Additionally, murder and attempted murder are also crimes that have traditionally been addressed by state governments; thus, the federalization of these crimes may also be seen as a threat to the *sensitive relation* between states and the federal government.

167. *See* Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir. 1996) (determining that a municipality cannot form the requisite intent for a RICO predicate offense).

168. *See* United States v. Blackwood, 768 F.2d 131, 138 (7th Cir. 1985).

169. *See id.*

the department, and hence the department's ability to perform its essential functions. Accordingly, pleading RICO's enterprise element has not been the principal difficulty for police misconduct plaintiffs.

B. Predicate Offense

To be liable under RICO, a defendant must have committed any one of a number of predicate offenses listed in § 1961.[170] Examples of predicate offenses include murder, robbery, kidnapping, bribery, extortion, mail and wire fraud, and Hobbs Act extortion violations.[171] In *Slade v. Gates*, another case alleging violations of RICO by Rampart officers, the court held that assault, false arrest, and evidence planting were not predicate offenses under RICO because they were not specifically delineated in § 1961(1).[172] This restriction has the effect of barring redress under RICO for many of the most common instances of police misconduct.[173]

Assuming that lost income or opportunity for income is compensable under RICO (which the *Slade* court did not),[174] the exclusion of false arrest, is particularly problematic. While the court in *Slade* found the plaintiff's allegations of attempted murder, extortion, and drug dealing satisfactory,[175] these offenses do not provide for a clear causal link to lost employment. For instance, an officer who attempts to murder someone in the process of carrying out a false arrest commits a RICO predicate offense. This, however, is immaterial so long as it is the false arrest, rather than the attempted murder, that causes the victim's lost employment. In order to establish liability, a plaintiff must instead allege a predicate offense that has a clear causal relationship to his injury. While certain predicate offenses (for example, witness tampering) might occasionally suffice, in the many instances where false arrest is the sole cause of an individual's lost employment, victims would be without recourse under RICO.

1. Pleading a Factual Basis for Claims

While "RICO predicate acts need not be pled with particularity," they "must be sufficiently pled to give [d]efendants notice of the factual basis of the claim."[176] The court in *Slade* found that the plaintiff failed "to allege any facts to support [his] claim[s] of extortion, at-

170. 18 U.S.C. § 1961(1) (2000).
171. *Id.*
172. No. 01-8244-RMT(Ex), 2002 U.S. Dist. LEXIS 20402, at *17-20 (C.D. Cal. Oct. 11, 2002).
173. *See, e.g.*, *id.*
174. *Id.*
175. *Id.*
176. *Id.* at *18.

tempted murder or drug dealing."[177] Conclusory allegations, the court held, are not enough to sufficiently plead a predicate act under RICO.[178] Plaintiffs in RICO actions must be careful, then, not only to plead predicate acts that are specifically listed in § 1961, but also to support them with a factual basis.[179]

2. Predicate Offense Requirement for Conspiracies?

It is worth briefly mentioning that, prior to the Supreme Court's decision in *Beck v. Prupis*,[180] a split existed among circuits over whether a plaintiff, who is "'injured . . . by reason of' a 'conspir[acy] to violate'" RICO, has to prove that her injury was caused by an enumerated RICO predicate offense.[181] *Beck* resolved this conflict by holding that, in order to sufficiently plead a RICO conspiracy, a plaintiff must indeed allege that her injuries were the result of a specifically enumerated RICO predicate offense.[182]

C. Pattern of Racketeering Activity

To be liable under RICO, a defendant must infiltrate an enterprise or conspire to do so through "a pattern of racketeering activity."[183] A pattern of activity under RICO is defined as "at least two acts" (the same acts that satisfy the predicate offense element) "occurr[ing] within [a span of] ten years."[184] "[T]wo isolated acts of racketeering activity," however, "do not constitute a pattern."[185] Rather, "[t]he infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern."[186]

1. Relationship Between Acts

A RICO pattern must be held together by some "common scheme, plan, or motive" so as not to merely constitute "'a series of disconnected acts.'"[187] So, for instance, if a police officer in one division of the LAPD steals narcotics out of an evidence room and nine years

177. *Id.* at *19.
178. *Id.*
179. *Id.* at *18.
180. 529 U.S. 494 (2000).
181. *See id.* at 500 (alterations in original) (quoting 18 U.S.C. §§ 1962(d), 1964(c) (2000)).
182. *Id.* at 507.
183. 18 U.S.C. § 1962(b)-(d) (2000).
184. *Id.* § 1961(5).
185. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985).
186. *Id.* (quoting S. REP. NO. 91-617, at 158 (1969)).
187. United States v. Brooklier, 685 F.2d 1208, 1222 (9th Cir. 1982).

later an officer in another division bribes a witness to give false testimony, these offenses, absent other facts, almost certainly would not constitute a pattern of racketeering activity under RICO. Likewise, repetitive acts perpetrated against a single individual also would not constitute a pattern under RICO. Thus, if an officer robs an individual and then murders that same individual, these two acts would fail to satisfy RICO's pattern requirement.[188]

It appears, however, that the alleged misconduct of the Rampart Division satisfies the relatedness prong of RICO's pattern requirement. In a span of ten years, the Rampart Division is alleged to have committed hundreds of criminal acts, including murder, attempted murder, and robbery,[189] all of which are acts listed in § 1961(1).[190] Putting aside more cynical theories for a moment, the common motive or scheme shared by officers committing these acts might have at least been the suppression of Los Angeles' criminal element, albeit through the systematic deprivation of civil liberties. Less noble motives would, of course, include pecuniary gain or racism. In any case, with such a pervasive pattern of misconduct present, it is hard to imagine that plaintiffs could not piece together some common motive or scheme that directed the criminal activities of Rampart officers.

2. Continuity

To establish the continuity prong of RICO's pattern requirement, a plaintiff must prove that the pattern of racketeering is part of an ongoing scheme that "poses a risk of continuing illegal activity."[191] While it might be difficult, generally, to establish bright lines separating mere sporadic activity[192] versus that which poses a threat of continuing activity,[193] cases against Rampart officers do not appear to present any such difficulties. As already noted, the Rampart division may have engaged in hundreds of illegal acts over the last ten years.[194] There is little to suggest, moreover, that this behavior will cease anytime soon.[195] If ever there were a threat of continuing illegal activity to be discovered, it would most likely be found in a corrupt division within a department like the LAPD.[196]

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188. Satellite Fin. Planning Corp. v. First Nat'l Bank, 646 F. Supp. 118, 120 (D. Del 1986).
189. *LAPD Blues*, *supra* note 13.
190. 18 U.S.C. § 1961(1) (2000).
191. Medallion Television Enters. v. SelecTV of Cal., 833 F.2d 1360, 1363 n.2 (9th Cir. 1987).
192. *Id.* at 1362.
193. *Id.* at 1363.
194. *LAPD Blues*, *supra* note 13.
195. *See supra* Part I.
196. *See supra* Parts I, III.

D. Cognizable Injury

So far, the major obstacle to police misconduct victims bringing suit under RICO has been satisfying its injury to *business or property* requirement under § 1964(c).[197] The courts have held that this limitation at least precludes recovery for injuries that are purely personal in nature[198] and that are not proximately caused by a RICO predicate offense.[199] Beyond this, however, it is unclear what exactly constitutes a cognizable injury under RICO. This lack of clarity was made especially apparent by conflicting decisions in *Guerrero*[200] and *Walker*,[201] both of which were cases brought by victims of Rampart misconduct.

In *Guerrero*, the court held that loss of income and lost opportunity for income are cognizable injuries under RICO.[202] Yet, less than two years later, the same district found in *Walker* that such injuries are personal in nature and, therefore, are non-compensable.[203] This Section discusses the established requirements of pleading an injury under RICO as well as the split in authority that led to divergent conclusions of law in *Walker* and *Guerrero*.

1. Proximate Causation

As set forth in *Sedima*, a plaintiff must, at minimum, suffer an injury by reason of racketeering activity in order to establish standing under RICO.[204] Additionally, after *Holmes v. Securities Investor Protection Corp.*, plaintiffs also have to prove that their injuries are directly caused by an act prohibited under RICO.[205] The Court in *Holmes* was careful to note, however, that:

> "[T]he infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case." Thus, our use of the term "direct" should

197. 18 U.S.C. § 1964(c) (2000).

198. *See, e.g.*, Oscar v. Univ. Students Co-op Ass'n, 965 F.2d 783, 785 (9th Cir. 1992); Genty v. Resolution Trust Corp., 937 F.2d 899, 918 (3d Cir. 1991); Fleischauer v. Feltner, 879 F.2d 1290, 1299-1300 (6th Cir. 1989); *see also* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 509 (1985) (Marshall, J., dissenting); *cf.* Reiter v. Sonotone Corp., 422 U.S. 330, 339 (1979) (finding personal injuries non-recoverable under a statute after which RICO was modeled).

199. *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268-70 (1992) (establishing a proximate causation standard).

200. Guerrero v. Gates, 110 F. Supp. 2d 1287 (C.D. Cal. 2000).

201. Walker v. Gates, No. CV 01-1094GAF(PJWX), 2002 WL 1065618 (C.D. Cal. May 28, 2002) (unpublished order).

202. 110 F. Supp. 2d at 1292.

203. *Walker*, 2002 WL 1065618, at *7.

204. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495-97 (1985).

205. 503 U.S. 285, 272 (1992).

> merely be understood as a reference to the proximate-cause enquiry [sic] that is informed by [policy] concerns . . . .[206]

To sort through whether an injury is sufficiently direct, courts have adopted a three-factor test, which considers the following factors:

> (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.[207]

Consistent with common law proximate-cause analysis, this test simply attempts to balance competing policy concerns.[208] The first factor concerns the goal of enforcing RICO's substantive provisions through private suits. This is then balanced with the last two factors, which are concerned with the administrative aspects of apportioning damages under RICO.

Generally, an injury that is the result of "harm flowing merely from the misfortunes visited upon a third person" will not confer standing under RICO.[209] So, for instance, a store owner who is injured in his business because a police officer murdered one of his customers seemingly would not have standing because his injury *flows from the misfortune* of his deceased customer. But, what if, as this Comment later discusses, the deceased customer cannot bring suit because his injury is not cognizable under RICO?[210] The first factor under the courts' balancing test appears to suggest that the store owner might have standing on grounds that the deceased customer cannot vindicate RICO. This reasoning, however, has been handily rejected by the Ninth Circuit so long as the directly injured parties have some other means of vindicating the law.[211] For example, then, a court would likely reject the store owner's claim on grounds that

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206. *Id.* at n.20 (citations omitted) (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536 (1983) in part).

207. Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc. (Oregon Laborers), 185 F.3d 957, 963 (9th Cir. 1999) (basing its test on the standard set forth in *Holmes*).

208. *See Holmes*, 503 U.S. at 274.

209. *Id.* at 268-69.

210. *See infra* Part V.D.2.

211. *Oregon Laborers*, 185 F.3d at 964 (rejecting plaintiff's assertion that third parties could bring claim on behalf of directly injured parties when the latter could not vindicate themselves under RICO but had other claims available to them).

the decedent's family could sue under § 1983.[212] Administrative difficulties, moreover, would probably keep most courts from hearing claims based on such remote injuries (for example, calculating the store owner's injury). It is likely, then, that if victims of police misconduct cannot directly address their injuries under RICO, proximate cause will likewise prevent anyone else from doing so. As Justice Scalia remarked in *Holmes*: "Life is too short to pursue every human act to its most remote consequences; 'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith."[213]

2. Personal Injury Exclusion

Under RICO, a plaintiff may recover damages for injuries to *business or property*.[214] This phrase has been found to have restrictive significance,[215] namely in barring recoveries for personal injuries.[216] Clearly, then, the emotional distress that results from a RICO predicate offense would, for instance, not be compensable. Beyond this, however, it is not completely clear what constitutes a cognizable injury under RICO. The principal conflict among circuit courts is between the Ninth Circuit's decision in *Oscar v. University Students Co-operative Association*[217] and that of the Fifth Circuit in *Khurana v. Innovative Health Care Systems, Inc.*[218] In addition to *Khurana*, there are also several district court decisions that conflict with *Oscar*.[219]

(a) Oscar v. University Students Cooperative Association

In *Oscar*, the Ninth Circuit held that an injury under RICO "requires proof of concrete financial loss, and not mere 'injury to a valuable intangible property interest.'"[220] Thus, the plaintiff in *Oscar* did

212. If, however, § 1983 were not available for one of the reasons discussed earlier in this Comment, use of RICO by the store owner would seemingly become more compelling under *Oregon Laborers*.

213. *Holmes*, 503 U.S. at 287 (Scalia, J., concurring).

214. 18 U.S.C. § 1964(c) (2000).

215. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) (interpreting the phrase in the Clayton Act, 15 U.S.C. § 15(a), upon which RICO was modeled).

216. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 509 (1985) (Marshall, J., dissenting).

217. 965 F.2d 783 (9th Cir. 1992).

218. 130 F.3d 143 (5th Cir. 1997), *vacated as moot*, Teel v. Khurana, 525 U.S. 979 (1998).

219. *See, e.g.*, Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 74 F. Supp. 2d 221, 236-37 (E.D.N.Y. 1999); Jerry Kubecka, Inc. v. Avellino, 898 F. Supp. 963, 968 (E.D.N.Y. 1995); Meyer v. First Nat'l Bank & Trust Co., 698 F. Supp. 798, 803 (D.N.D. 1987); Hunt v. Weatherbee, 626 F. Supp. 1097, 1100-01 (D. Mass. 1986); von Bulow v. von Bulow, 634 F. Supp. 1284, 1309 (S.D.N.Y. 1986).

220. 965 F.2d at 785 (quoting Berg v. First State Ins. Co., 915 F.2d 460, 464 (9th Cir. 1990)).

not have standing to sue under RICO because her alleged injury, diminished use and enjoyment[221] of her apartment, did not constitute a *concrete financial loss*.[222] According to the court, where a plaintiff's complaint is based on nothing more than personal discomfort and annoyance, it is essentially a non-compensable personal injury, regardless of how the alleged injury might relate to the use of a valuable property interest.[223] The court reasoned that, even if the plaintiff's house had burned down, her injury would still not be compensable so long as her financial loss was covered by insurance.[224] The severity of an injury is thus irrelevant to confer standing under RICO unless a plaintiff can claim a *concrete financial loss*.

Finally, the *Oscar* court also set forth the curious proposition that, while "'the economic aspects of [a fundamentally personal injury], could as a theoretical matter, be viewed as injuries to "business or property," . . . engaging in such metaphysical speculation is a task best left to philosophers, not the federal judiciary.'"[225] Thus, it appears that *Oscar* also stands for a blanket prohibition on any damages that flow from personal injuries, even if a plaintiff can show that her injuries resulted in *concrete financial losses*.

(b) Khurana v. Innovative Health Care Systems, Inc.

The Fifth Circuit is presently the only circuit whose interpretation of RICO's injury to *business or property* requirement has clearly conflicted with *Oscar*.[226] In *Khurana*, the Fifth Circuit held that both damage to professional reputation and lost business opportunities (in the form of lost employment opportunities) were cognizable injuries under RICO.[227] The court in *Khurana* came to this conclusion without analysis of whether either falls within the definition of *business or property*.[228] It appears, though, that the court considered both the plaintiff's lost employment opportunities and the damage to his professional reputation as injuries to business interests and, on that ba-

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221. *Id.* at 787.
222. *Id.* at 785.
223. *Id.* at 787.
224. *Id.* at n.5.
225. *Id.* at 788 (quoting Doe v. Roe, 958 F.2d 763, 770 (7th Cir. 1992)).
226. It appears that the First Circuit would have adopted the *Khurana* approach in *Libertad v. Welch*, 53 F.3d 428, 437 n.4 (1st Cir. 1995). Evidence of plaintiff's injury was, however, insufficient. *Welch*, 53 F.3d 428, 437 n.4.
227. Khurana v. Innovative Health Care Sys., Inc., 130 F.3d 143, 150-53 (5th Cir. 1997), *vacated as moot*, Teel v. Khurana, 525 U.S. 979 (1998). Because the *Khurana* decision was vacated, there is technically no conflict between the Fifth and Ninth Circuits regarding RICO's injury to *business or property requirement*. However, *Khurana* merits discussion for a number of reasons. First, the *Guerrero* court relied on its reasoning. Secondly, its reasoning provides an alternative to *Oscar*. And finally, it may very well reflect the willingness of the Fifth Circuit to depart from *Oscar*.
228. *See id.*

sis, held that he had requisite standing under RICO.[229] It is not clear whether the court would have also held that any *concrete financial loss* flowing from the plaintiff's injuries, even if purely personal in nature, would have been sufficient—this presumably was not a determination that the *Khurana* court was obliged to make.

(c) District Court Decisions in Conflict with Oscar

In holding that lost opportunity for income and lost income are cognizable injuries under RICO, *Guerrero* relied not only on *Khurana* but also on a handful of lower court decisions from other circuits.[230] In the latest such case, *National Asbestos Workers Medical Fund v. Philip Morris, Inc.*,[231] the court was faced with the question of whether pecuniary losses associated with personal injuries were cognizable under RICO. In finding that they were, the court determined that: "[T]he exclusion of an entire class of pecuniary losses . . . would contravene the comprehensive Congressional scheme [behind RICO], contradict [its] most natural reading[,] . . . and result in underenforcement [sic] of [its] policies."[232] In explicitly refusing to follow *Oscar* and other like-minded decisions, the court contended that such decisions "are reminiscent of earlier attempts to engraft artificial limitations upon the standing provisions of RICO."[233] The court reasoned that RICO should instead be read consistently with its "plain language and legislative history call[ing] for a freer and more expansive interpretation."[234]

VI. PUTTING *WALKER* AND *GUERRERO* INTO PERSPECTIVE: INTERPRETING RICO'S INJURY TO "BUSINESS OR PROPERTY" REQUIREMENT

> Though the Earth, and all inferior Creatures be common to all Men, . . . every Man has a *Property* in his own *Person* . . . . The *La-*

229. *See id.*

230. 110 F. Supp. 2d at 1293 (citing Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 74 F. Supp. 2d 221, 233 (E.D.N.Y. 1999); Jerry Kubecka, Inc. v. Avellino, 898 F. Supp. 963, 968 (E.D.N.Y. 1995); Meyer v. First Nat'l Bank & Trust Co., 698 F. Supp. 798, 803 (D.N.D. 1987); Hunt v. Weatherbee, 626 F. Supp. 1097, 1100-01 (D. Mass. 1986); von Bulow v. von Bulow, 634 F. Supp. 1284, 1309 (S.D.N.Y. 1986)).

231. 74 F. Supp. 2d 221 (E.D.N.Y. 1999).

232. *Id.* at 236.

233. *Id.* at 237.

234. *Id.* Other lower court decisions relied upon by *Guerrero* rest upon much the same reasoning as *National Asbestos*, except that *Hunt v. Weatherbee*, 626 F. Supp. 1097, 1101 (D. Mass. 1986), based its conclusion that lost employment is an injury to *business or property* on cases construing the Clayton Act, a federal statute upon which after which RICO was modeled. *See* 15 U.S.C. § 15(a) (2000) (stating "any person who shall be injured in his *business or property* by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee") (emphasis added).

> *bour* of his Body and the *Work* of his Hands, we may say, are properly his.[235]

There are two basic points of agreement between the *Guerrero* and *Walker* courts—both recognize that neither personal injuries nor intangible losses are recoverable under RICO. Their disagreement instead exists in determining whether lost employment—or, alternatively, tangible losses flowing from personal injuries constitute cognizable injuries under RICO. This Part explores this conflict in light of relevant precedent and suggests a resolution that comports with Congress's objectives in enacting civil RICO.

A. Putting Guerrero *and* Walker *into Perspective*

Less than two years after *Guerrero* held that lost income or lost opportunity for income constituted an injury under RICO,[236] a judge in the same district came to precisely the opposite conclusion in *Walker*.[237] The split between these two courts hinged on a most fundamental question: What is property (under RICO)?

1. Guerrero

In *Guerrero*, the court, in denying defendants' motion to dismiss, held that the plaintiff's alleged injury in the form of lost employment was cognizable under RICO.[238] The basis for its decision, though, was not entirely clear. On the one hand, the court, relying on *Khurana*, noted that "[l]oss of employment [and] business opportunities . . . have . . . been held to constitute cognizable injuries . . . for purposes of RICO."[239] This suggests that the key determination is whether plaintiff's underlying injury (for example, lost employment) is one to *business or property*.

However, in rejecting defendants' argument that plaintiff's injury was "nothing more than pecuniary losses stemming from personal injuries,"[240] the court also noted what it perceived was a trend among the courts that "favor[s] . . . allowing RICO claims for the pecuniary losses associated with personal injuries caused by racketeering."[241] Thus, the critical question left unanswered by *Guerrero* was whether the plaintiff's financial loss was independently significant as an injury to *business or property* or whether the loss was compensable

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235. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 305-06 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

236. Guerrero v. Gates, 110 F. Supp. 2d 1287, 1293 (C.D. Cal. 2000).

237. Walker v. Gates, No. CV 01-01904GAF(PJWX), 2002 WL 1065618, at *8-9 (C.D. Cal. May 28, 2002) (unpublished order).

238. 110 F. Supp. 2d at 1293.

239. *Id.*

240. *Id.*

241. *Id.*

only because it flowed from an underlying injury (for example, lost employment) that is itself cognizable under RICO.

Under the first possibility, the derivation of the loss is immaterial.[242] If it derived from a personal injury, this alone would not exclude its compensability. If, for instance, plaintiff's alleged injury was an expenditure for treatment of a psychological injury, the fact that the underlying injury was personal would be of no consequence—the money he spent on treatment could still be recovered. Under this analysis, determining whether lost employment is a personal injury or instead an injury to *business or property* has no bearing so long as *concrete financial loss* can be claimed.

On the other hand, the alternative interpretation of *Guerrero* would allow for recovery of tangible financial loss only if it derived from an injury to *business or property*. For instance, if plaintiff's house was burned down, the threshold inquiry would be whether losing his house was an injury to *business or property*. Only after answering this question in the affirmative would the financial consequences of his injury become relevant. On the other hand, a purely personal injury like psychological harm would not be compensable no matter how extensive its financial consequences.

2. Walker

Less than two years after *Guerrero* was decided, the court in *Walker* squarely rejected its reasoning.[243] First, the *Walker* court held that "'economic losses which derive . . . from a fundamentally personal injury' are not compensable under RICO."[244] In relying primarily on cases cited to in *Oscar*,[245] the court specifically precluded recovery for lost wages and employment that resulted from plaintiff's false arrest because these, the court held, are fundamentally personal injuries.[246] The court reasoned that just because the plaintiff suffered "secondary financial losses . . . from his personal injuries [that] does not transform his losses into injuries to business or property."[247]

The court stated, moreover, that "[e]ven if the Court were to focus solely on the nature of the damages plaintiff sustained, rather than

242. It may, however, bear on proximate cause analysis. *See supra* Part V.D.1.

243. Walker v. Gates, No. CV 01-10904GAF(PJWX), 2002 WL 1065618, at *8-9 (C.D. Cal. May 28, 2002) (unpublished order).

244. *Id.* at *8 (quoting Oscar v. Univ. Students Co-op Ass'n, 965 F.2d 783, 788 (9th Cir. 1992)).

245. 965 F.2d at 786-88 (citing, for example, Grogan v. Platt, 835 F.2d 844, 846-47 (11th Cir. 1988), *cert. denied*, 488 U.S. 981 (1988), and Doe v. Roe, 958 F.2d 763, 770 (7th Cir. 1992)).

246. *Walker*, 2002 WL 1065618, at *9.

247. *Id.*

on the nature of the injury inflicted, plaintiff's losses still would not qualify as compensable injuries."[248] This was based on the court's position that neither employment nor lost opportunity for employment fits within the definition of property.[249] The court instead determined that only those things that can be owned or possessed are property.[250] A later decision, which held consistent with *Walker*, may have clarified the court's position by requiring that a plaintiff must at least allege some *out-of-pocket expenditure*.[251]

3. *Evaluating* Walker *and* Guerrero *in Light of Relevant Precedent*

Relevant analysis in resolving the conflict between *Guerrero* and *Walker* largely hinges on the significance of *Oscar*. This begs the preliminary consideration, however, of whether *Oscar* itself was correct in light of prior Supreme Court precedent.

(a) Supreme Court Precedent

The Supreme Court has never directly addressed the question of whether lost employment or lost opportunities for employment are *business or property* under RICO, nor has it addressed whether the pecuniary losses associated with a personal injury are compensable. In *Reiter v. Sonotone Corp.*, however, the Court interpreted *business or property* in the Clayton Act to have restrictive significance.[252] Consistent with this construction, Justice Marshall, in his *Sedima* dissent, interpreted RICO's clause to exclude recovery for personal injuries.[253] The other express limitation was adopted in *Holmes*, holding that an injury under RICO must be the proximate cause of a defendant's racketeering offense.[254]

In terms of the first limitation, there is nothing in any Supreme Court decision that can be directly cited to as support for an extension of Justice Marshall's dissent in *Sedima* to exclude recovery for

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248. *Id.* at *10.
249. *Id.*
250. *Id.*
251. Slade v. Gates, No. 01-8244-RMT(Ex), 2002 U.S. Dist. LEXIS 20402, at *15 (C.D. Cal. Oct. 11, 2002).
252. 442 U.S. 330, 339 (1979).
253. 473 U.S. 479, 509 (1985) (J. Marshall, dissenting). Marshall's interpretation on this specific point was not inconsistent with the majority's opinion. Moreover, given the intuitive appeal of his position, it seems unlikely that the Court would have disagreed with Marshall had the issue of recovery for personal injuries been before it. *See Reiter*, 442 U.S. at 330, 339 ("Congress must have intended to exclude some class of injuries by the phrase 'business or property.'"). As earlier noted, there is at least general agreement among the lower courts on this issue. *See, e.g.*, Oscar v. Univ. Students Co-op Ass'n, 965 F.2d 783, 785 (9th Cir. 1992); Genty v. Resolution Trust Corp., 937 F.2d 899, 918 (3d Cir. 1991); Fleischauer v. Feltner, 879 F.2d 1290, 1299-1300 (6th Cir. 1989).
254. 503 U.S. 258, 268-70 (1992).

business or property injuries (for example, wages) that derive from personal injuries. The floodgate concerns alluded to in *Holmes* suggest the need for such a limitation,[255] yet it is unclear why *Holmes* itself, in adopting a proximate causation requirement, should not be seen as addressing this concern.

Additionally, there is some tension between *Oscar* and the Supreme Court's decision in *Radovich v. National Football League*.[256] In *Radovich*, the Court held that the plaintiff had standing to pursue his claim under the Clayton Act where his alleged injury was lost opportunities for employment.[257] It is not clear whether the Court considered plaintiff's lost opportunities as an injury to *business or property* or whether, instead, the plaintiff's claim of pecuniary loss was sufficient. Under either interpretation, *Oscar* appears to depart from *Radovich*.

If *Radovich* stands for a recognition of pecuniary loss as one to *business or property*, regardless of its derivation, *Oscar* clearly departs from this position.[258] On the other hand, while it did not expressly adopt a position with respect to the status of lost employment, it might nevertheless be argued that *Oscar* is also in tension with *Radovich's* alternative interpretation (that lost employment constitutes an injury to *business or property*). *Oscar* did, after all, adopt the reasoning and results of cases from other circuits that categorically rejected lost employment as an injury to *business or property*.[259] While *Oscar* did not expressly adopt the particular position of these circuits, its unqualified reliance on their reasoning suggests that it would have adopted their position if given the opportunity. This, in fact, was precisely the presumption that the *Walker* court made in expressly rejecting *Radovich*.[260]

While the *Radovich* Court did not analyze the Clayton Act's injury requirement, the mere fact that plaintiff's injury was *not an issue* for the court casts some doubt on the determinations made in *Oscar*.[261] And while decisions interpreting the Clayton Act are not directly binding on courts construing RICO, the similar language and objectives of the two acts provides a sound basis for using the interpretations of one to guide the other. In fact, this is exactly what the Ninth Circuit did in *Oscar* when it cited to *Reiter* as support for its *restric-*

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255. *See id.*
256. 352 U.S. 445 (1957).
257. *Id.* at 448, 454.
258. *See Oscar*, 965 F.2d at 783 *passim*.
259. *Id.* at 786-88 (citing, for example, Grogan v. Platt, 835 F.2d 844, 846-47 (11th Cir. 1988), and Doe v. Roe, 958 F.2d 763, 770 (7th Cir. 1992)).
260. Walker v. Gates, No. CV 01-10904GAF(PJWX), 2002 WL 1065618, at *9 n.13 (C.D. Cal. May 28, 2002) (unpublished order).
261. *See Radovich*, 352 U.S. at 448-54.

tive interpretation of RICO's injury requirement.[262] Presumably then, the Ninth Circuit must, at some point, find a means of reconciling its reliance on cases like *Reiter* and its implicit rejection of *Radovich*.

(b) Walker *and* Guerrero *in Light of* Oscar

Assuming that *Oscar* is entirely consistent with relevant Supreme Court precedent, the question is whether its reasoning is more closely followed in *Guerrero* or *Walker*. Here, the analysis is fairly straightforward; both courts recognized that *Oscar* required plaintiffs to plead tangible financial loss.[263] Beyond this, however, the two decisions clearly diverged, with *Walker* more closely adhering to *Oscar*.

For its part, the *Walker* court focused its reliance on *Oscar* on cases adopting the approach that economic losses derived from personal injuries are non-compensable.[264] While *Oscar* did not explicitly adopt this approach, it came very close when it said that determining whether the economic consequences of personal injuries are "injuries to '*business or property*'" is a matter "best left to philosophers, not the federal judiciary."[265] Further, in holding that the plaintiff could not recover for an injury, in part, because it was "'like that claimed by [a] plaintiff in a personal injury action,'"[266] the implication of *Oscar* appeared to be, as the *Walker* court plainly asserted, that "'economic losses which derive . . . from a fundamentally personal injury' are not compensable under RICO."[267] So, in its holding that losses flowing from false arrest are not compensable under RICO, *Walker* appears to square with *Oscar*.

On the other hand, the court in *Guerrero* did little to justify what appeared to be a departure from *Oscar*. Without analysis, the court rejected the defendants' reliance on *Oscar* and instead cited to decisions in other circuits.[268] Because *Oscar* appears to stop short of plainly rejecting recovery for economic losses derived from personal injuries, *Guerrero* was perhaps not in express conflict with *Oscar*. However, unlike the *Walker* court, the court in *Guerrero* showed little interest in following the reasoning in *Oscar*.

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262. *See Oscar*, 965 F.2d at 786. The plaintiff in *Walker* cited to *Radovich*, but because *Radovich* was implicitly rejected by *Oscar*, the court did not find it controlling. *Walker*, 2002 WL 1065618, at *9 n.13.

263. *See Walker*, 2002 WL 1065618, at *10; Guerrero v. Gates, 110 F. Supp. 2d 1287, 1293 n.1 (C.D. Cal. 2000).

264. Walker, 2002 WL 1065618, at *8-10 (discussing *Oscar's* reliance on *Grogan v. Platt*, 835 F.2d 844, 846-47 (11th Cir. 1988), and *Doe v. Roe*, 958 F.2d 763, 770 (7th Cir. 1992)).

265. 965 F.2d at 788 (quoting *Doe*, 958 F.2d at 770) (internal quotes omitted).

266. *Id.* at 787 (quoting Ingram v. City of Gridley, 224 P.2d 798, 803 (Cal. Ct. App. 1950)).

267. *Walker*, 2002 WL 1065618, at *8 (quoting *Oscar*, 965 F.2d at 788).

268. *Guerrero*, 110 F. Supp. 2d at 1293.

Regarding the significance of lost employment, *Oscar* was silent. However, *Oscar's* requirement of *tangible financial loss* suggests the result that *Walker* reached—that lost employment or lost employment opportunities are not compensable. The financial losses in lost employment are, after all, hypothetical.[269] In that sense, then, lost employment does not yield tangible losses in, for instance, the way that extortion clearly would.[270]

In *Slade*, this position may have been clarified somewhat—the court held that plaintiffs must plead some *out-of-pocket expenditure*.[271] Because this cannot be satisfied through wages and employment opportunities never realized, neither would be cognizable under RICO. Curiously, *Guerrero* cautioned that only tangible losses could be recovered but, at the same time, held that lost employment or lost opportunities for employment were cognizable injuries even though both classes of injury are only tangible in a purely hypothetical sense.[272] The court did not attempt to resolve this difficulty.

B. Interpreting Section 1964(c)'s Injury Requirement in Light of RICO's Plain Language and Legislative Purpose

In the absence of controlling Supreme Court precedent, interpretations of RICO's injury to *business or property* restriction ought to be consistent with its plain meaning and Congress's intent in enacting RICO. This is a formula that the Supreme Court has closely adhered to in interpreting other provisions of RICO, resulting in the rejection of several efforts to limit standing under RICO.[273]

Section 1964(c) states that "[a]ny person injured in his business or property" as the result of a RICO predicate offense may sue to recover their losses.[274] In *Guerrero* and *Walker*, there were two possible theories for satisfying this requirement: lost employment or lost wages. Unlike interpretation of other parts of RICO, such as its application to *any person*, determining the meaning of *property* is not so easily susceptible to common understanding. Centuries of legal and metaphysical speculation have failed to produce a definitive view,[275] so it is not at all surprising, then, that courts and legal scholars differ over its definition within the context of RICO.

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269. Even if a plaintiff earned steady income, his loss is still hypothetical in the sense that he never actually earned the wages he claims he lost.

270. In extortion, the victim had the money at one point but lost it in paying off the defendant racketeer—this is, in no sense, hypothetical.

271. Slade v. Gates, No. 01-8244-RMT(Ex), 2002 U.S. Dist. LEXIS 20402, at *15 (C.D. Cal. Oct. 11, 2002).

272. *Guerrero*, 110 F. Supp. 2d at 1293 n.1.

273. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496-500 (1985).

274. 18 U.S.C. § 1964(c) (2000).

275. *See, e.g.*, LOCKE, *supra* note 235.

Determining who has gotten the better of whom in a metaphysical tug-of-war is beyond the scope of this Comment—the key determination here is not so much *what is property* for every circumstance, but rather what it should be under RICO. One way out of this interpretive dilemma is to rely, as the *Walker* court did, on state law for guidance.[276] But, while this may be effective in sparing judges from inquiries better left to philosophers, it is unclear why state statutes or state court decisions should have a bearing on interpretation of a statute dealing with problems of national concern. An arguably better and certainly less arbitrary approach is instead to interpret RICO's injury requirement in a way that gives civil RICO the effect that Congress intended. Quite simply then, the critical question is whether Congress intended to remedy the type of injuries that the plaintiffs in *Guerrero* and *Walker* suffered.

1. Applying RICO to the LAPD in Light of Its Fundamental Objectives

In enacting RICO, Congress essentially had three purposes in mind. First, it wanted to curb the destructive impact of organized crime on the American economy.[277] Secondly, it sought to prevent infiltration of legitimate enterprises by criminal actors.[278] And third, with regard to civil RICO in particular, it wanted to give racketeering victims some means of compensating their injuries.[279]

(a) Protecting American Economic Life

As to Congress's first concern, the Supreme Court has been very clear—RICO is not limited to organized crime.[280] Thus, Congress's purpose might instead be viewed more broadly, as curbing the influence of systematic racketeering activity on the American economy—no matter who engages in it.[281] As discussed earlier, the allegations of misconduct in the Rampart CRASH unit clearly satisfy the type of racketeering pattern that Congress had in mind in enacting RICO.[282]

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276. Walker v. Gates, No. CV 01-10904GAF(PJWX), 2002 WL 1065618, at *10 (C.D. Cal. May 28, 2002) (unpublished order) ("Under California law, the loss of employment generally is not considered an injury to property.").

277. *See* NIXON'S REMARKS, *supra* note 55, at 846-47.

278. S. REP. NO. 91-617, at 76 (1969) (stating the purpose of RICO as "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce").

279. *Organized Crime Control: Hearing on S. 30 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong. 520 (1970). Rep. Steiger submitted an amendment which "would add a private civil damage remedy . . . similar to the private damage remedy found in the anti-trust laws" so that victims of racketeering be given some "access to a legal remedy." *Id.*

280. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985).

281. *See id.*

282. *See supra* Part I.

The only question left, then, is: Whether the activity of an entity like the LAPD has the potential to negatively impact American economic life in ways that RICO was designed to address? Surely, both in what it has done (for example, narcotics dealing) and what it has failed to do (for example, not arresting narcotics dealers), the LAPD's misconduct has surely had some impact on economic life in Los Angeles. While Los Angeles economic life is not American economic life, the aggregate impact of similar offenses committed by officers in other cities undoubtedly has a substantial negative impact on American economic life. The analysis is no different than if we were to consider the impact of one small, isolated mobster versus that of the entire mob generally. If courts are willing to apply RICO to the mobster, then there is little substance to the contention that injuries suffered from police misconduct are not what RICO was designed to redress. Both the mobster and the police department are engaged in activities that, when aggregated with the same offenses committed by all mobsters and police departments, adversely affect the national economy.

(b) Preventing the Infiltration of Legitimate Enterprises

In terms of preventing the criminal infiltration of legitimate enterprises, the LAPD is perhaps an ideal object of RICO coverage. After all, it is hard to imagine there ever being more of a stake in preserving the legitimacy of an enterprise than when it concerns the very institutions entrusted to protect citizens from criminals.

(c) Redressing Private Injuries

Finally, there is the issue of redressing private injuries caused by racketeering. If plaintiffs' allegations are true that defendants' racketeering activity was clearly the cause of their injuries. These injuries, then, are, generally speaking, precisely what RICO was designed to compensate: private injuries resulting from prohibited racketeering activity. However, as discussed earlier and as with any litigation, there must be some restrictions on the injuries for which parties may recover.[283] For now, though, it is worth noting that, as a general matter, the principal objectives of RICO are satisfied as applied to police misconduct like that at issue in *Guerrero* and *Walker*.

2. Interpreting RICO's Limitations in Light of Its Fundamental Objectives

There are two principal limitations on recoveries under RICO. One such limitation is built into the statute—only injuries to *business or property* are compensable. Thus, plaintiffs could not, for in-

283. *See supra* Parts IV-V.

stance, recover for their pain and suffering. Additionally, there is the standard limitation of proximate causation. The injuries alleged in *Guerrero* and *Walker*, however, do not fall within either of these two basic limitations.

(a) Injury to Business or Property

Plaintiffs in *Guerrero* and *Walker* claimed financial losses due to lost employment.[284] This type of loss does not constitute a personal injury, but instead is, in the strictest sense, an injury to property. As the Supreme Court noted in *Reiter*: "[T]he word 'property' has a naturally broad and inclusive meaning. In its dictionary definitions and in common usage 'property' comprehends anything of material value owned or possessed. Money, of course, is a form of property."[285] Thus, the *business or property* limitation, absent some additional restriction, is not enough to preclude plaintiffs' recovery under RICO.

Of course, it can be stated that the plaintiffs' loss was not tangible because their claims of lost wages were, in a sense, hypothetical. Why this is necessarily relevant, however, is not at all clear, particularly if the courts' objective is to effect the intent of RICO. First, permitting claims like those in *Guerrero* and *Walker* to proceed would surely have at least some deterrent effect on the economically destructive racketeering activity of police departments. To instead require an allegation of some *out-of-pocket expenditure* ignores this purpose. This would, for instance, allow plaintiffs to collect if they proved that defendant officers stole fifty dollars from their wallets but deny recovery for potentially thousands of dollars or more in lost income. Surely, the latter type of loss has a greater impact on *American economic life*. It makes no sense, then, to categorically preclude the latter from civil RICO while including the former.

For similar reasons, an *out-of-pocket expenditures* requirement is also inconsistent with the aim of protecting legitimate enterprises from criminal infiltration. To impose arbitrary limitations on recoveries under RICO limits the liability for offending parties and thus removes a disincentive to infiltrate legitimate entities like the LAPD. Finally, denying compensation for the loss of one's livelihood, simply because it does not constitute an *out-of-pocket expenditure*, is clearly inconsistent with RICO's objective of giving private parties some means of compensating their injuries. As already discussed, the impact of lost income on racketeering victims is potentially much more severe than that suffered through out-of-pocket expenditures.

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284. Walker v. Gates, No. CV 01-10904GAF(PJWX), 2002 WL 1065618, *8 (C.D. Cal. May 28, 2002) (unpublished order); Guerrero v. Gates, 110 F. Supp. 2d 1287, 1292 (C.D. Cal. 2000).

285. Reiter v. Sonotone Corp., 442 U.S. 330, 338 (1979) (citations omitted).

Even if money is property, however, *Walker* held that tangible losses flowing from a fundamentally personal injury are not compensable.[286] It is unclear, though, why the underlying source of the injury should matter any more than whether there is an out-of-pocket loss suffered. Even under Justice Marshall's dissent in *Sedima,* only personal injuries are excluded from RICO coverage; it stated nothing regarding property losses that flow from personal injuries.[287] To illustrate the strained logic of *Walker*, consider the following example: A pizza shop owner owes his bookie money. The bookie tries to make good, but the shop owner never has enough to pay him. So, the bookie, using his connections as part of a major organized crime syndicate, decides to put a hit out on the shop owner (something he has done many times in his ten-year career as a bookie). The hitman walks into the pizza shop, fires at the shop owner but barely grazes his head. Thinking the shop owner is dead, the hitman walks away. The trauma to the shop owner's head causes him to pass out. When he finally wakes up, his shop is in flames because the pizza ovens had been on too long. He rushes out of the shop in time to save his life, but his uninsured shop is gone forever.

Presumably, under *Walker*, the shop owner would recover nothing under RICO. His underlying injury was fundamentally personal: a graze to the head. The loss of his shop was the consequence of this injury, so he could recover nothing under the standard of no recovery for tangible losses flowing from personal injuries. This is despite the fact that, in the example, there was clearly a RICO offense, a pattern of racketeering activity, and certainly an injury to property. Such a result simply does not comport with RICO's policy objectives.

On the other hand, there is the difficulty that arises when personal and economic injuries are intertwined.[288] This is only a problem, however, if the two categories of injuries cannot be segregated to honor the restrictive significance of RICO's injury to *business or property* requirement. In the example above and, more importantly, in *Guerrero* and *Walker*, no such difficulty arises. In each case, claims can clearly be limited to purely economic injuries. Because in many cases this is easily achieved, it makes little sense to categorically preclude recovery for any injury derivative of an underlying personal injury.

Instead, by limiting the analysis to whether an injury to *business or property* has resulted from a prohibited RICO predicate offense (regardless of whether it also resulted in a non-cognizable personal

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286. *Walker*, 2002 WL 1065618, at *8.

287. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 509 (1985) (Marshall, J. dissenting).

288. *See* Grogan v. Platt, 835 F.2d 844, 847 (11th Cir. 1988).

injury), courts would both effect RICO's intent as well as avoid speculative philosophical inquiry. For instance, courts would not have to determine whether employment is property—rather, their judgment would focus entirely on whether there was some causal nexus between plaintiffs' loss of money (or some other property) and their allegation of a RICO predicate offense.

Surely, though, there must be some limits on RICO recoveries. If ten years from now, plaintiffs in *Guerrero* and *Walker* were to claim lost wages for the period since they were first imprisoned because the damage to their psyches prevented them from effectively interviewing for jobs, this would raise a number of legitimate concerns. This problem, though, is precisely what the court in *Holmes* addressed when it adopted a proximate causation standard for civil RICO.[289]

(b) Containing RICO as an Administrative Matter—Proximate Causation

If it is simply a matter of containing the expansion of RICO as an administrative matter, it is unclear why proximate causation does not adequately perform this function. As earlier noted, proximate causation has essentially two components: policy objectives and administrative concerns.[290] The first is clearly not at issue—allowing plaintiffs to proceed on their claims would directly effect RICO's goal of deterring the corrupt and economically destructive impact of systematic racketeering activity like that which has been engaged in by the Rampart CRASH unit. The second component is not an obstacle either. Plaintiffs are clearly the most direct victims of their own false imprisonment. Calculation of their losses would, moreover, merely be a matter of determining their lost wages over the period they were incarcerated—not the type of calculation to which the courts are unaccustomed. In weeding out those who suffer indirect, incalculable injuries, there is simply no legitimate justification for not leaving in those who, like the plaintiffs in *Walker* and *Guerrero*, are directly injured in ways that are conducive to precise calculation.

VII. CONCLUSION: WHITHER RICO?

> Reaching into his bag and taking out a stone . . . .[291]

In defending RICO's application outside the context of organized crime, one of its original drafters has remarked: "RICO is not a monster. It is [instead] the slingshot the Davids of this world can use to

289. *See* 503 U.S. 258, 268-70 (1992).
290. *See supra* Part V.D.1.
291. 1 *Samuel* 17:49 (New International Version).

have a fair fight with the Goliaths . . . ."[292] The Supreme Court has been clear—the application of RICO is not limited to organized crime. In being applied to almost every type of enterprise, however, a fairly common thread does emerge among RICO's targets. They tend to be institutions so large and pervasive in their influence that their power to negatively impact the lives of private citizens is enormous. The function of RICO, then, is simply to balance the scales—whether the targeted entity is the mob or a police department is unimportant.

Rather, few contexts provide a more compelling justification for leveling the playing field than in the area of police misconduct. There is perhaps no greater imbalance in power than one where a political minority is at the mercy of an institution entrusted with authority to deprive them of their liberties. Arguably, this is an imbalance much greater than the one that Richard Nixon and members of Congress had in mind thirty years ago. Even at the height of its powers, the mob never enjoyed the one thing that makes police departments so potentially dangerous: a presumption of legitimacy. Moreover, unlike police misconduct, organized crime was (and is) clearly a concern of the politically and economically relevant. Fundamentally, then, RICO is, if anything, more suited to redressing the misconduct of police departments than the brand of activity that originally preoccupied its enactors.

After all, where are the *Davids of this world* but in cities like Los Angeles where civil liberties and economic well-being are threatened by the very institutions entrusted to protect them. If ever RICO was to be used in a way that is consistent with its scale-balancing function, it is in the hands of minorities against Goliath-like enterprises such as the LAPD. After *Walker*, however, little room has been left for such an application. For the time being, then, it appears that the *Davids of this world* must continue in search of a stone worthy of their adversary.

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292. *The Future of RICO*, *supra* note 33, at 1088.