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Obscenity Predicates, RICO, and the First Amendment

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COMMENTS

OBSCENITY PREDICATES, RICO, AND THE FIRST AMENDMENT

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I. INTRODUCTION

Organized crime has long wielded a powerful influence over legitimate American business. Historically, organized crime in the United States involved blatantly unlawful conduct such as syndicated gambling, loan sharking, and trafficking in narcotics. More recently, however, organized crime has found its roots in otherwise lawful activity. In this way, organized crime may successfully enmesh itself in legitimate business and thus camouflage its true activity and source of revenue. A hardware store funded by loan sharking proceeds or a pizza parlor used as a place for prostitution exemplifies the situations in which lawful and unlawful activity are inexorably intertwined in an attempt to legitimize the unlawful side of the business and thereby immunize it from civil or criminal prosecution.

Congress has struggled for over four decades with its goal of eradicating organized crime in America.¹ This attempt to wipe out organized crime stems from the adverse effects corrupt organizations have on legitimate competing enterprises.² Recognizing that organized crime is often associated with otherwise lawful activity,

1. Since the early 1950's, Congress has investigated the influence of organized crime on legitimate American business. See *infra* notes 6, 7, 9 and accompanying text.

2. See *infra* note 6 and accompanying text.

Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO).³

By assembling a list of crimes and linking them as "predicate acts"⁴ in a continuing criminal enterprise, Congress enabled a prosecutor to destroy an otherwise lawful enterprise when the enterprise commits two predicate acts within a ten-year period. The following diagram illustrates the manner in which RICO renders an enterprise a criminal enterprise:

TWO PREDICATE ACTS WITHIN TEN YEARS + ENTER-
PRISE (LAWFUL OR UNLAWFUL) = CRIMINAL ENTER-
PRISE (RICO VIOLATION)

As the equation demonstrates, the commission of at least two predicate acts within a ten-year period renders the operation of the enterprise unlawful. It is the use or the operation of the enterprise to commit the predicate acts that is prohibited. Upon a finding that at least two predicate acts are committed, the operation of the enterprise constitutes criminal activity.

In the context of the hypothetical hardware store funded by loan sharking proceeds, the illicit funding of the store constitutes the requisite predicate acts, rendering the operation of the hardware store unlawful under RICO substantive provisions. In the case of the pizza parlor used as a place for prostitution, the commission of at least two acts of prostitution constitutes the requisite predicate acts. As with the hardware store, the operation of the pizza parlor constitutes criminal activity under RICO substantive provisions.

The paradigmatic situation arises in the application of RICO substantive provisions to the case of a bookstore engaged in the sale of both obscene and nonobscene material. As the above diagram illustrates, under the statute, the commission of at least two predicate acts within a ten-year period renders the operation of the enterprise unlawful. In the context of a bookstore, the sale of at least two obscene materials within a ten-year period constitutes the requisite predicate acts in an alleged RICO violation. Upon a finding that obscene materials have been sold on the premises at least twice, the use or the operation of the bookstore constitutes criminal activity. Under RICO substantive provisions, not only the sale of obscene materials (the predicate offense) but the sale of

3. Pub. L. No. 91-452, 84 Stat. 922, 941 (1970)(codified as amended at 18 U.S.C. §§ 1961-1968 (1988)).

4. For a discussion of predicate acts, see *infra* notes 17, 18 and accompanying text.

nonobscene materials becomes unlawful.

The application of RICO substantive provisions to a bookstore engaged in the sale of both obscene and nonobscene materials raises First Amendment considerations. Obscene materials are not protected by the First Amendment. Materials not deemed to be legally obscene, however, are entitled to the same protection as other forms of expression.⁵ The application of RICO substantive provisions to a bookstore in which both obscene and nonobscene materials are sold differs from that of a hardware store funded by loan sharking proceeds or a pizza parlor which is used as a place for prostitution in the activity prohibited under the statute.

In the context of a hardware store, the conduct prohibited is the operation of the hardware store and the incident sale of materials. Operating the hardware store involves nonexpressive activity, beyond the scope of the First Amendment. The same is true of the pizza parlor. That is, the conduct that is rendered criminal, the operation of the pizza parlor, does not constitute the type of activity protected under the First Amendment. A fundamental difference, however, arises in the context of the hypothetical bookstore. The prohibited conduct under the statute in this case is the sale of presumptively protected material and therefore requires an analysis under the appropriate First Amendment standard of review.

The application of RICO substantive provisions to a bookstore engaged in the sale of both obscene and nonobscene material raises the question whether Congress can render this enterprise a criminal enterprise. In contrast to the hardware store funded by loan sharking proceeds or the pizza parlor used as a place for prostitution, the sale of presumptively protected reading or viewing material invokes First Amendment scrutiny. This Article will examine the constitutionality of the prohibited conduct under RICO substantive provisions in the context of the hypothetical bookstore engaged in the sale of obscene and nonobscene material.

II. RACKETEERING INFLUENCED & CORRUPT ORGANIZATIONS ACT

A. *Historical Perspective*

In the early 1950's, Congress began investigating organized criminal activity, such as syndicated gambling, loan sharking, and narcotics trafficking,⁶ and the influence that activity had on the

5. See *infra* text accompanying notes 34-37.

6. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922 (Congressional Statement of Findings and Purpose)(codified at 18 U.S.C. § 1961 (1988)),

nation's economic system and its interference with legitimate business.⁷ Because of these investigations, Congress enacted the Organized Crime Control Act (OCCA) of 1970.⁸ Recognizing that traditional law enforcement methods failed to eradicate organized crime's infiltration of legitimate American business,⁹ Congress subsequently enacted the Racketeer Influenced and Corrupt Organizations Act as Title IX of OCCA.¹⁰

B. Purpose

The purpose of RICO is to destroy organized crime "by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."¹¹ It is designed to provide new legal tools of unprecedented scope for an

Section 1 of the Act provides:

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic process; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens

7. See The President's Comm'n on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967); The President's Comm'n Law Enforcement and the Administration of Justice, *Task Force Report on Organized Crime* (1967). See generally, John L. Koenig, Comment, *What Have They Done to Civil RICO: The Supreme Court Takes the Racketeering Requirement Out of Racketeering*, 35 AM. U. L. REV. 821, 822 (1986). See SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, THIRD INTERIM REPORT, S. REP. NO. 307, 82d Cong., 1st Sess. 1-5 (1951) (imploping Congress to adopt measures to counter organized crime); SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, SECOND INTERIM REPORT, S. REP. NO. 141, 82d Cong., 1st Sess. 1 (1951) (finding that organized crime operates through interstate commerce and influences local authorities in many states). Presidential commissions and congressional committees further reported on the influence of organized crime in the United States.

8. Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (Congressional Statement of Findings and Purpose) (codified at 18 U.S.C. § 1961 (1988)).

9. See, e.g., H.R. Doc. No. 105, 1st Cong., 1st Sess. (1969) (President of the United States stating in a message to Congress that two decades of federal effort against organized crime had not succeeded in eradicating any of the "families" that controlled the criminal syndicates).

10. Pub. L. No. 91-452, 84 Stat. 922, 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (1988)).

11. Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

assault upon organized crime and its economic roots.¹² Ironically, Congress could not adequately define organized crime in the statute.¹³ As a result, RICO makes the person's conduct the subject of its prohibitions. As opposed to criminalizing membership in criminal organizations, RICO defines the conduct commonly associated with organized crime and makes such conduct a violation.¹⁴

RICO substantive provisions, for example, make it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."¹⁵ RICO thus prohibits investing in, controlling, or conducting any enterprise through a pattern of racketeering activity or through money derived from a pattern of racketeering activity.¹⁶

The federal statute defines a pattern of racketeering activity as the commission of at least two "acts of racketeering activity" within a ten-year period.¹⁷ These acts, referred to as "predicate acts," are any crime listed in section 1961 and defined as "racketeering activity."¹⁸

C. *Conduct Prohibited by RICO Section 1962 of the Federal Act*

Specifically, RICO prohibits four activities:¹⁹ (1) using or investing, directly or indirectly, of any income derived from a pat-

12. *Id.* at 923.

13. 116 CONG. REC. 18,912, 18,913 (1970)(statement of Sen. McClellan); see *id.* at 35,204 (statement of Rep. Poff)(organized crime impossible to define). Legislative history indicates that the failure of Congress to define organized crime stemmed from its desire to eradicate organized and systemic criminal activity, not occasional acts of criminal conduct. *Id.* at 32,205.

14. See 18 U.S.C. § 1962 (a)-(c)(1988).

15. 18 U.S.C. § 1962(c)(1988).

16. 18 U.S.C. § 1962 (a)-(c)(1988).

17. 18 U.S.C. § 1961(5)(1988). Legislative history indicates that Congress intended "pattern" to mean connected and periodic, not separate and erratic. S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969)(stating that "[o]ne isolated 'racketeering activity' was thought insufficient to trigger the remedies under the proposed chapter" and that "the target of [the legislation] is thus not sporadic activity"). The United States Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex*, 473 U.S. 479 (1985), however, held that the government need only allege two violations of prohibited predicate acts; it need not be satisfied by two prior convictions of predicate acts. *Id.* at 488-89.

18. Prohibited "racketeering activities" include murder, kidnaping, gambling, arson, robbery, bribery extortion, and dealing in narcotic or other dangerous drugs. 18 U.S.C. § 1961(1)(A) (1988).

19. See 18 U.S.C. §§ 1962(a)-(d)(1988).

tern of racketeering activity through collection of unlawful debt to acquire any interest in, or to establish or operate any enterprise engaged in interstate or foreign commerce;²⁰ (2) acquiring or maintaining, directly or indirectly, of any interest in or control of any enterprise engaged in interstate or foreign commerce through a pattern of racketeering activity, or through collection of an unlawful debt;²¹ (3) conducting or participating in the affairs of any enterprise engaged in interstate or foreign commerce through a pattern of racketeering activity or through collection of unlawful debt;²² and (4) conspiring to violate any of the aforementioned provisions.²³

D. RICO Substantive Provisions Under Section 1962

Under the statute, the use of an enterprise to commit at least two predicate acts can render the "operation" of the "enterprise" unlawful.²⁴ It is the use of the enterprise to commit the racketeering act that is prohibited.²⁵ Upon a finding that the enterprise committed at least two predicate acts, RICO substantive provisions render the enterprise a criminal enterprise and the operation of the enterprise, because it is determined to be criminal, criminal activity.²⁶ Otherwise lawful acts of the enterprise, whether they are predominant or merely incidental to the business, become part of the enterprise and also constitute criminal activity.²⁷ In the context of a hardware store funded by loan sharking proceeds, for example, the operation of the hardware store, whether or not it is the predominant activity of the enterprise, constitutes criminal activity.

Similarly, in the case of a bookstore engaged in the sale of both obscene and nonobscene material, whether the primary function of the store is the sale of nonobscene material is irrelevant under the statute. The sale of two or more pieces of obscene material on the premises within a ten-year period nevertheless renders the operation of the bookstore criminal activity.

20. See *Id.* at § 1962(a).

21. *Id.* at § 1962(b).

22. *Id.* at § 1962(c).

23. *Id.* at § 1962(d).

24. See *supra* text accompanying notes 15, 19-23.

25. See 18 U.S.C. § 1962(c)(1988). See *supra* text accompanying notes 15-19.

26. See *supra* text accompanying note 15.

27. See *supra* text accompanying note 16.

E. RICO Punishment Power Under Section 1963

RICO provides both criminal penalties²⁸ and civil remedies²⁹ for violation of its substantive provisions. One of the most important of the remedies and penalties available to prosecutors is the forfeiture of assets acquired through a pattern of racketeering activity.³⁰ Thus, as part of the criminal penalties, RICO forfeiture provisions allow for the separation of the defendant from the criminal enterprise and the permanent closure of that enterprise.

F. Expansion of Predicate Acts to Include Obscenity Violations

Initially, the federal statute did not contain the predicate offense of obscenity violations. In an attempt to combat the dissemination of obscene books and materials,³¹ Congress amended the

28. Section 1963(a) provides: "Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both . . ." 18 U.S.C. § 1963(a) (Supp. 1990).

29. Civil remedies include awarding treble damages to persons with business or property injuries that arise out of a RICO violation. 18 U.S.C. § 1964(c)(1988).

30. 18 U.S.C. § 1963 (a)(1988 & Supp. 1990). Section 1963 (d) provides district courts with jurisdiction to enter restraining orders pursuant to Section 1963(a) actions. Section 1963(e) authorizes the Attorney General to seize property forfeited under this section. It requires forfeiture of:

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any —

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of Section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of Section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds. 18 U.S.C. § 1963(a)(1)-(3)(1988 & Supp. 1990). *See also United States v. Kravitz*, 738 F.2d 102, 104-05 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985)(holding forfeiture mandatory under 18 U.S.C. § 1963(a) after finding that appellant's property was used to promote racketeering).

31. Pub. L. No. 98-473, § 1020, 98 Stat. 1837, 2143 (1984)(codified at 18 U.S.C. § 1961(1)(1990))(obscenity crimes added to definition of racketeering activity after research indicated that organized crime syndicates were involved in pornography trade).

statute to include as a predicate offense, "any act . . . involving . . . dealing in obscene matter . . . which is chargeable under State law and punishable by imprisonment for more than one year" ³² Congress based this expansion on the arguable connection between pornography and organized crime. ³³

"Obscenity is not a synonym for pornography." ³⁴ Pornography refers generally to sexually explicit material and should be distinguished from obscenity, which is a legal term of art that refers to materials not protected by the First Amendment because they fall within the guidelines established by the Supreme Court's decision in *Miller v. California*. ³⁵ Legally obscene materials, therefore, may be regulated or banned by state and federal government. ³⁶ Unlike obscenity, however, sexually explicit materials are entitled to the same protection as other forms of expression. ³⁷

Perhaps ironically, however, obscene materials are often sold by an enterprise engaged in the sale of presumptively protected First Amendment materials. ³⁸ The use of RICO substantive provi-

32. 18 U.S.C. § 1961(1)(A)(1990). In 1984, Congress extended the list of predicate acts under RICO to include violations of both federal obscenity code and generic state provisions prohibiting "dealing in obscene matter." 18 U.S.C. § 1961(1)(A) (1990).

33. 18 U.S.C. § 1961(1)(1988 & Supp. 1990). In proposing the inclusion of state and federal obscenity violations as predicate offenses under the federal RICO statute, Senator Helms stated:

We are experiencing an explosion in the volume and availability of pornography in our society. Today it is almost impossible to open mail, turn on the television, or walk in the downtown areas of our cities, or even in some suburban areas, without being accosted by pornographic materials. The sheer volume and pervasiveness of pornography of our society tends to make adults less sensitive to the traditional value of chaste conduct and leads children to abandon the moral values their parents have tried so hard to instill in them.

130 CONG. REC. 5433 (daily ed. Jan. 30, 1984)(statement of Sen. Helms).

34. ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 9 (1981). Obscenity is a legal term of art that refers to indecency and filth. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 595. For the Supreme Court's current definition of obscenity, see *infra* text accompanying notes 76-79. Pornography, on the other hand, refers generally to sexually explicit adult material that depicts women as prostitutes and focuses on the role of women in providing sexual pleasure to men. Sunstein, *supra*, at 595.

35. 413 U.S. 15, 23-24 (1973).

36. See John J. O'Donnell, *RICO Forfeiture and Obscenity: Prior Restraint or Subsequent Punishment?*, 56 FORDHAM L. REV. 1101 (1988)(citing *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 57 (1973)).

37. See *Roth v. United States*, 354 U.S. 476, 487 (1957)(free speech and press clauses of the First Amendment protect sexually explicit materials but exclude materials deemed to be legally obscene).

38. This constitutional quagmire may in fact further the government's interests. In 1988, for example, the Justice Department stated that it planned to seek more racketeering indictments in order to close down major distributors of pornography. See Philip Shenon, *Justice Dept. Plans Anti-Racketeering Drive Against Pornography*, N.Y. TIMES, Jan. 12, 1988, at A16. See also O'Donnell, *supra* note 36, at 1101-02.

sions to combat obscenity implicates constitutional considerations of freedom of speech and the press under the First Amendment. RICO substantive provisions must therefore be examined for their operation and effect on nonobscene materials.

G. Application of RICO Substantive Provisions Using Obscenity Predicates to an Enterprise Selling Presumptively Protected First Amendment Material

Congress' expansion of predicate offenses to include the dissemination of obscene material as applied to an enterprise engaged in the sale of both obscene and nonobscene material raises serious constitutional issues. RICO substantive provisions render an enterprise selling obscene materials a criminal enterprise,³⁹ and the continued operation of that enterprise when obscene materials have been sold at least twice on the premises, constitutes criminal activity.⁴⁰

In the context of a bookstore, therefore, RICO substantive provisions using obscenity predicates render the bookstore itself a criminal enterprise over and above such criminal prosecutions as may arise from the actual sale of obscene materials. Consequently, the operation of the bookstore constitutes criminal activity; the sale of obscene material and nonobscene material both constitute part of the criminal enterprise. The owner or operator of the enterprise is ultimately punished under the statute not only for the commission of the predicate offense — dissemination of obscene material — but for the operation of an enterprise which is engaged in the sale of material protected by the First Amendment.

This result leads to the question of whether Congress can constitutionally render an enterprise engaged in the sale of presumptively protected reading or viewing material a criminal enterprise. If Congress cannot enact laws that result in the prohibition of an enterprise selling nonobscene material, the expansion of the predicate offenses to include dealing in obscene matter as applied to an otherwise lawful enterprise selling constitutionally protected material poses grave constitutional consequences.

It is the prohibited operation of an enterprise selling nonobscene material under RICO substantive provisions that triggers First Amendment scrutiny. This Comment examines the application of RICO substantive provisions to an enterprise selling both

39. See *supra* text accompanying notes 15-23.

40. See *supra* text accompanying notes 24-27.

obscene and nonobscene material. It concludes that this application under the statute violates the First Amendment.

III. SPEECH PROTECTED AND UNPROTECTED UNDER THE FIRST AMENDMENT

A. *Constitutional Standard*

The First Amendment prohibits the enactment or application of any law "abridging the freedom of speech."⁴¹ The social importance of the protection given speech and the press is long recognized. "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress and by the States."⁴²

While the First Amendment protects sexually explicit materials but excludes materials found to be legally obscene,⁴³ the boundary between materials that are legally obscene and those that are sexually explicit but protected by the Constitution remains uncertain. Despite the difficulty in defining obscenity, the federal government has utilized several methods in an attempt to eradicate obscenity. These methods include criminal laws punishing the sale and distribution of obscene materials, civil injunctive proceedings,⁴⁴ nuisance abatement laws,⁴⁵ and zoning laws.⁴⁶ Since Congress' expansion of the predicate offenses to include obscenity violations, the far-reaching remedies under RICO punishment provisions have made it the preferred method of both state⁴⁷ and

41. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I. First amendment protection of freedom of expression is applicable to the states through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

42. Madison's Report on the Virginia Resolutions, 4 Elliot's Debates 571 (1941).

43. See *supra* text accompanying notes 34-37.

44. See, e.g., *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 54-55 (1973).

45. See, e.g., Note, *Enjoining Obscenity as a Public Nuisance and The Prior Restraint Doctrine*, 84 COLUM. L. REV. 1616, 1617-20 (1984).

46. For an extensive discussion of the First Amendment issue raised by the use of zoning regulations to regulate adult establishments, see generally *Recent Developments, The Conflict Between the First Amendment and Ordinances Regulating Adult Establishments*, 30 WASH. U.J. URB. & CONTEMP. L. 315, 328-29 (1986) (Zoning laws must strictly adhere to requirements that protect First Amendment right.).

47. Federal RICO attempts to prevent organized crime in enterprises dealing with interstate and international business. State RICO focuses on intrastate organized crime. Most state statutes are nevertheless technically modeled after federal RICO. See, e.g., 18 U.S.C. §§ 1961-1968 (1988). See also *Alvers v. State of Indiana*, 489 N.E.2d 83, 87 (Ind. Ct. App. 1986).

federal legislatures to eliminate obscenity.⁴⁸

B. Overview of First Amendment Jurisprudence

First Amendment jurisprudence indicates that issues involving presumptively protected materials must be decided under carefully defined parameters with the highest regard for the constitutional consequences on protected speech.⁴⁹ In *Near v. Minnesota*,⁵⁰ for instance, a newspaper owner challenged the constitutionality of a Minnesota statute⁵¹ that authorized injunction in restraint of publication of a malicious, scandalous and defamatory newspaper, magazine, or other periodical.⁵²

Under the statute, the publisher was permitted to show in defense that the matter published was true and published "with good motives and for justifiable ends."⁵³ The Supreme Court held the statute, "so far as it authorized the [injunction] proceedings . . . to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment," regardless of the question of the truth of the charges contained in the particular periodical.⁵⁴

The *Near* Court noted that one of the purposes of the statute was not punishment in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal."⁵⁵ It is the continued publication of scandalous and defamatory matter, the Court concluded, that constitutes the business and the declared nuisance.⁵⁶

48. Legislative history reveals that Congress intended RICO to be the preferred weapon of prosecutors to undermine criminal enterprises. See 116 CONG. REC. 591 (1970)(statement of Sen. McClellan)(stating that RICO focuses on organizations because individual prosecutions are inadequate methods of combatting organized crime); 115 CONG. REC. 9567 (1969)(statement of Sen. McClellan)("Constant references have been made to the frustration resulting when the only consequence of conviction is that organized crime and its infiltrated organizations are run by a new leader and the organizations which are the real threat are not affected.").

49. See *Near v. Minnesota*, 283 U.S. 697 (1931). But see *United States v. O'Brien*, 391 U.S. 367 (1968)(holding that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms).

50. 283 U.S. 697 (1931).

51. MINN. STAT., ch. 285 § 1(b)(1925).

52. *Near*, 283 U.S. at 702.

53. *Id.*

54. *Id.* at 722-23.

55. *Id.* at 711.

56. *Id.*

The Court rejected the State's attempt to justify the statute as dealing not with publication per se, but with the business of publishing defamation. "Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint."⁵⁷ The *Near* Court found that the suppression was accomplished under the statute by enjoining the publication and that restraint was the object of the statute.⁵⁸

The Court held that the operation and effect of the statute in substance was that unless the owner or publisher was able and disposed to bring competent evidence to satisfy the judge that the charges were true and published with good motives and for justifiable ends, his newspaper or periodical was suppressed and further publication was made punishable as a contempt. This, the Court held, was the essence of censorship.⁵⁹

While the Court recognized that the freedom of speech and press clause is not absolute,⁶⁰ it emphasized that limitations to First Amendment protection have been acknowledged only in exceptional cases.⁶¹ The Court stressed the possible deleterious consequences of upholding the statute in *Near*:

If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, . . . and required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship.⁶²

Similarly, the application of RICO section 1962 to a bookstore prohibits the operation of the bookstore and consequently the sale of First Amendment material when two obscene materials are sold

57. *Id.* at 720.

58. *Id.* at 712.

59. *Id.* at 713.

60. *Id.* at 716.

61. In *Near*, the Court acknowledged limitations to the protections of the First Amendment in exceptional cases: "When a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Near*, 283 U.S. at 716 (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

62. *Id.* at 721.

on the premises within a ten year period. Bookstore owners, like newspapers, are distributors of protected speech. By rendering the enterprise engaged in the sale of two or more obscene materials criminal, the otherwise lawful activity of selling books becomes unlawful.

Applying the Court's rationale in *Near*,⁶³ it is the use and operation of the bookstore to sell obscene materials that constitutes the prohibited activity. The effect of the substantive offense is to prohibit the bookstore owner or operator's First Amendment right in selling nonobscene materials.

The effects of the RICO substantive provision are far broader than the effect of the Minnesota statute at issue in *Near*. Unlike the statutory violations in *Near*, RICO violations render the bookstore a criminal enterprise, regardless of a showing that the obscene materials are no longer sold on the premises, or how few obscene materials were sold. Congress' expansion of predicate acts to include "dealing in obscene matter" becomes the legislative "machinery" alluded to by the *Near* Court, prohibiting the operation of the bookstore when two obscene materials are sold on the premises.

The *Near* Court reasoned that "[i]f, however, the publisher has a constitutional right to publish, without prior restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it."⁶⁴ Similarly, contrary to the application of RICO substantive provisions to a bookstore owner or operator, if such an owner or operator has a right to sell nonobscene material, he may not "lose [this] right by exercising it."⁶⁵ An examination of First Amendment jurisprudence concerning the question whether a bookstore in fact has such a right follows.

The Supreme Court established modern precedent for the permissible scope of government regulation of sexually explicit materials in *Roth v. United States*.⁶⁶ In *Roth*, the Court considered whether a federal obscenity statute⁶⁷ that prohibits the mailing of

63. For a recent application of the Court's rationale in *Near*, see *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986). See also *infra* text accompanying notes 159-161.

64. *Near*, 283 U.S. at 720.

65. *Id.*

66. 354 U.S. 476, 484 (1957) (Court first addressed the constitutionality of a criminal obscenity statute).

67. 18 U.S.C. § 1461 (1991). The statute provided, in pertinent part: "Every obscene,

obscene material violates the First Amendment. The dispositive question, the Court concluded, was "whether obscenity is utterance within the area of protected speech and press."⁶⁸ Under carefully defined parameters, the Court held that obscenity is not protected by the First Amendment. The Court recognized, however, the importance in safeguarding First Amendment protection for nonobscene materials:

The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interests.⁶⁹

Under *Roth*, the standard for judging obscenity adequate to withstand the charge of constitutional infirmity, is whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interests.⁷⁰ The standard set out in *Roth* stemmed from the notion that "all ideas having even the *slightest* redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guarantees, unless excludable because they encroach upon the limited area of more important interests."⁷¹

The Supreme Court revised the *Roth* test in *Memoirs v. Massachusetts*⁷² to include three elements. First, the dominant theme of the material taken as a whole appeals to a prurient interest in sex.⁷³ Second, "the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters."⁷⁴ Lastly, "the material is utterly without redeeming social value."⁷⁵

Since *Roth*, the Supreme Court has held that there is a pre-

lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier." *Id.*

68. *Roth*, 354 U.S. at 481.

69. *Id.* at 488.

70. *Id.* at 489.

71. *Id.* at 484 (emphasis added).

72. 383 U.S. 413 (1966).

73. *Id.* at 418.

74. *Id.*

75. *Id.*

sumption that sexually explicit material, however unappealing it may be, is protected by the First Amendment.⁷⁶ Sixteen years after the decision in *Roth*, the Supreme Court in *Miller v. California*⁷⁷ again redefined the constitutional boundaries on government regulation of sexually explicit materials. "[S]tatutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such [government] regulation to works which depict or describe sexual conduct [and which meet the following three-part test]."⁷⁸ The Supreme Court rejected the definition of obscenity as expressed in *Memoirs* and delineated instead the following three-part test:

- (a) Whether the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁷⁹

Miller remains the prevailing constitutional standard when assessing whether material is obscene.

C. *The effect of RICO Substantive Provisions Using Obscenity Predicates on Protected Speech*

The Supreme Court's decisions from *Roth* to *Miller* exclude obscenity from First Amendment scrutiny and establish an arguably ascertainable standard by which to judge a work obscene. First Amendment jurisprudence establishes, however, that valid laws regulating obscenity may not ignore constitutional safeguards designed to prohibit the suppression of presumptively protected speech.

Historically, restrictions on speech have been examined for prior restraint violations. A prior restraint in speech suppresses an act or an expression before it enters the market place.⁸⁰ There are two types of prior restraints: 1) a court injunction that prevents a

76. See *Roaden v. Kentucky*, 413 U.S. 496 (1973).

77. 413 U.S. 15 (1973).

78. *Miller*, 413 U.S. at 23-24.

79. *Id.* at 24-25.

80. See Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1980).

person from engaging in certain types of communication,⁸¹ and 2) restraints that require a license before one may engage in a particular form of expression.⁸²

The Supreme Court has repeatedly held that rigorous procedural safeguards must be employed before expressive materials can be seized as "obscene."⁸³ The Court first examined the application of "prior restraint" on sexually explicit materials in *Marcus v. Search Warrant*,⁸⁴ wherein the Court invalidated confiscation of expressive materials seized pursuant to a valid search warrant but without an adversarial hearing on the question of obscenity.

In *Marcus*, under proceedings pursuant to certain Missouri statutes,⁸⁵ a city police officer filed a sworn complaint that each of the appellants, a wholesale distributor of magazines, newspapers, and books, and the operators of five retail newsstands, kept "obscene" publications for sale.⁸⁶ In an ex parte proceeding, without granting appellants a hearing or even seizing any of the publications in question, the trial judge issued search warrants authorizing the officers to search appellants' premises and "seize" all "obscene" material.⁸⁷

The officers seized all copies of any publications which in their judgment were obscene. Appellants moved to quash the search warrants for return of the seized publications and for suppression of their use in evidence, on the ground that their seizure violated the protection of free speech and press clause guaranteed by the Fourteenth Amendment.⁸⁸ The trial court denied appellants' motions. The trial court found that 100 of the seized publications were obscene and ordered their destruction. The court also found that 180 were not obscene and ordered their return. The state supreme court sustained the validity of these orders.⁸⁹

The United States Supreme Court held that the search and seizure procedures lacked sufficient safeguards to protect nonobscene materials and reversed the judgment.⁹⁰ "A state is not free to adopt whatever procedures it pleases for dealing with obscenity without regard to the possible consequences for constitutionally

81. See *Near v. Minnesota*, 283 U.S. 697, 702-03 (1931).

82. See *Freedman v. Maryland*, 380 U.S. 51, 52 n.1 (1965).

83. *Fort Wayne Books v. Indiana*, 489 U.S. 46, 62 (1989).

84. 367 U.S. 717 (1961).

85. Mo. REV. STAT. § 542.380 et. seq. (1955)(repealed 1974).

86. *Marcus v. Search Warrant*, 367 U.S. 717, 721-22 (1961).

87. *Id.* at 722.

88. *Id.* at 723.

89. *Id.* at 721.

90. *Id.* at 731.

protected speech.”⁹¹

Similar to *Marcus*, the Supreme Court in *A Quantity of Books v. Kansas*,⁹² invalidated the confiscation of books and films when copies of selected books were seized without a prior adversarial hearing on their obscenity.⁹³ In these cases and those immediately following, the Court established that pretrial seizures of expressive materials could only be undertaken pursuant to procedures “designed to focus searchingly on the question of obscenity.”⁹⁴ This may be accomplished by utilizing the least restrictive methods which would infringe upon protected speech. The forfeiture of obscene materials, for instance, and fines imposed on the owner or operator of the bookstore, would ensure First Amendment protection of presumptively protected speech.

The Court later refined that approach. Most importantly, in *Heller v. New York*,⁹⁵ the Court noted that “seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding.”⁹⁶

Thus, while a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, the publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversarial hearing.⁹⁷ The Supreme Court in *Freedman v. Maryland*⁹⁸ delineated the minimum due process owed to individuals

91. *Id.* at 730-31. The *Marcus* Court noted the state’s limited power to suppress obscenity given the constitutional protections for free expression:

We therefore held that a State may not impose absolute criminal liability on a bookseller for the possession of obscene material, even if it may dispense with the element of *scienter* in dealing with such evils as impure food and drugs. . . . There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller.

Id. (quoting *Smith v. California*, 361 U.S. 147, 152-153 (1959)).

92. 378 U.S. 205 (1964).

93. *Id.* at 208.

94. *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961).

95. 413 U.S. 483 (1973).

96. *Id.* at 492 (emphasis in the original).

97. *New York v. P.J. Video, Inc.*, 475 U.S. 868, 874-876 (1986).

98. 380 U.S. 51 (1965). In *Freedman*, the defendant was convicted of exhibiting a motion picture without submitting it to the Maryland State Board of Censors for prior approval. The defendant appealed, challenging the constitutionality of the Maryland motion picture censorship statute. *Id.* at 52. Md. ANN. CODE, art. 66A, § 2, (1957) provides, in pertinent part: “It shall be unlawful to sell, lease, lend, exhibit or use any motion picture

deprived of expressive materials prior to a judgment:

First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted . . . Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination.⁹⁹

While the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances), it is otherwise when materials presumptively protected are involved.¹⁰⁰ The Supreme Court therefore has recognized that certain activities of commercial distribution are presumptively protected under the doctrine of prior restraint. Notwithstanding this recognition, however, the Court has held that the First Amendment does not preclude closure of a bookstore when it engages in criminal conduct not protected by the First Amendment.

In *Arcara v. Cloud Books, Inc.*,¹⁰¹ the defendants operated an adult bookstore that sold sexually explicit publications and had booths available for viewing sexually explicit movies.¹⁰² In addition to the sale of sexually explicit materials, illicit solicitation of prostitution occurred on the premises.¹⁰³ A New York statute authorized the closure of a building found to be a public health nuisance if the building was used as a place for prostitution and lewdness.¹⁰⁴ The statute did not provide for the seizure of the contents of the building.¹⁰⁵ The defendants argued that closing the bookstore interfered with their First Amendment rights to sell nonobscene books on the premises.¹⁰⁶

film or view in the State of Maryland unless the said film or view has been submitted by the exchange owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors.”

Freedman, 380 U.S. at 52 n.1. The defendant argued that the statute was an invalid prior restraint because the censorship board could ban a film without a prompt judicial review. The Court concluded that the Maryland procedural scheme did not satisfy these criteria.

99. 380 U.S. at 59-60.

100. *Lo-Ji Sales v. New York*, 442 US 319, 326 n. 5 (1979).

101. 478 U.S. 697 (1986).

102. *Id.* at 698.

103. *Id.* at 698-99.

104. *Id.* at 699-700 (citing N.Y. PUB. HEALTH LAW §§ 2320, 2329 (McKinney 1985)).

105. *Id.*

106. *Id.* at 700.

The Supreme Court upheld the statute, finding that the factual situation in *Arcara* did not trigger application of the First Amendment.¹⁰⁷ The *Arcara* court reasoned that the sexual activity that occurred on the bookstore premises involved nonexpressive activity, beyond the scope of First Amendment protection. The Court held that the First Amendment did not bar closure of the bookstore, because the sale of books in an establishment that was used for prostitution does not confer First Amendment coverage to defeat a valid statute which is aimed at terminating illegal uses of premises.¹⁰⁸

In a concurring opinion, Justice O'Connor noted the difference between a bookstore where prostitution occurred and a bookstore selling obscene books: "If . . . a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books . . . the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review."¹⁰⁹

The First Amendment standard of review should not be applied, Justice O'Connor reasoned, where, as here, the government is regulating neither speech nor an incidental nonexpressive effect of speech. The hypothetical hardware store funded by loan sharking proceeds, and the pizza parlor used as a place for prostitution, fall within Justice O'Connor's rationale: the activities involved constitute neither speech nor an incidental nonexpressive effect of speech. Justice O'Connor illustrates, however, how the analysis differs in the context of a bookstore engaged in the sale of both obscene and nonobscene material. This case, Justice O'Connor explains, would require First Amendment analysis.

The prophecy of Justice O'Connor's words in *Arcara* come to fruition when RICO substantive provisions using obscenity predicates are applied to a bookstore engaged in selling presumptively protected material. Unlike the solicitation of prostitution, the sale of books "implicate First Amendment concerns and requires analysis under the appropriate First Amendment standard of review."¹¹⁰ First Amendment jurisprudence indicates that a sanction against an adult bookstore that suppresses protected speech, as well as unprotected obscenity, acts as a prior restraint and violates the book-

107. *Id.* at 707.

108. *Id.*

109. *Id.* at 708 (O'Connor, J., concurring). Justice Stevens joined in the concurring opinion.

110. *Id.*

store owner's First Amendment rights.¹¹¹

More recently, the Supreme Court upheld the constitutionality of a federal criminal statute that prohibited the sale of both obscene and nonobscene, although "sexually explicit" or indecent telephone messages. In *Sable Communications of California v. FCC*,¹¹² the Court upheld the criminal prohibition against obscene messages but struck down the ban on nonobscene messages.¹¹³ The Court observed: "Sexual expression which is indecent but not obscene is protected by the First Amendment; and the [government] do[es] not submit that the sale of such materials to adults could be criminalized solely because they are indecent."¹¹⁴

While the Supreme Court has held that the standards governing regulation of allegedly obscene books and materials should not differ from those applied with respect to narcotics, gambling, and other contraband, the Court has emphasized that an order issued in the area of First Amendment rights must be framed in the narrowest terms that will accomplish the pin-pointed objective permitted by the constitutional mandate. These terms must also meet the essential needs of the public order.¹¹⁵ This Comment suggests that in order to pass constitutional scrutiny, the objective is best accomplished through narrowly-drawn procedures that do not interfere with the continued sale of presumptively protected materials.¹¹⁶

D. Analysis of RICO's Effect on Protected Speech

The prohibited activity under RICO substantive provisions must be examined against the backdrop of the foregoing First Amendment jurisprudence. A conviction for a violation of section 1962(a) requires proof that the accused (1) conducted (2) an enterprise (3) affecting interstate commerce (4) through a pattern (5) of

111. See *supra* text accompanying notes 59-62.

112. 492 U.S. 115 (1989).

113. *Id.* at 117.

114. *Id.* at 126.

115. *Id.* The *Sable* Court emphasized that while the government may regulate the content of constitutionally protected speech in order to promote a compelling interest, it must choose the least restrictive means to further the articulated interest. See also *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 183 (1968) (Court struck down a ten day restraining order, issued ex parte and without notice to petitioners, against a rally organized by a white supremacist group).

116. See, e.g., *State v. Feld*, 745 P.2d 146, 153-154 (Ariz. Ct. App. 1987) ("While the court could constrain a defendant from moving inventory in its entirety, it could not interfere with continued exhibitions or sales").

racketeering activity.¹¹⁷

In the context of Justice O'Connor's metaphorical bookstore in *Arcara*,¹¹⁸ the activity prohibited by section 1962 is the use of the bookstore to sell obscene materials. Under the federal statute, therefore, the sale of two or more obscene materials by a bookstore's owners or operators constitutes the requisite predicate acts on which the criminal racketeering activity is based.

Under section 1962(c), a determination that the materials sold are obscene renders the bookstore a criminal enterprise. The dissemination of presumptively protected materials constitutes part of the criminal enterprise and thereby renders the sale of presumptively protected material criminal activity. The federal statute, therefore, represents an expansion of the government regulation of obscene materials to government regulation of both obscene and nonobscene materials when sold by the same enterprise. Congress has the power to criminally prohibit the dissemination of obscenity under the Constitution.¹¹⁹ The conduct criminally prohibited by RICO substantive provisions, however, is the operation of a business selling obscene materials when that business sells at least two materials deemed obscene. When that enterprise is a bookstore, selling both obscene and nonobscene materials, "a conviction for that operation violates the First Amendment."¹²⁰ As Justice Stevens aptly noted in *Fort Wayne Books*:

For there is a difference of constitutional dimension between an enterprise that is engaged in the business of selling and exhibiting books, magazines, and videotapes and one that is engaged in another commercial activity, lawful or unlawful. A bookstore receiving revenue from sales of obscene books is not the same as a hardware store or a pizza parlor funded by loan-sharking proceeds. The presumptive First Amendment protection accorded the former does not apply either to the predicate offense or to the business use in the latter.¹²¹

The section that follows is a necessary excursion from the First Amendment discussion, focusing on the scope of government regulation of speech and judicial reaction to this expansion.

117. *United States v. Kopituk*, 690 F.2d 1289, 1323 (11th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

118. *See supra* text accompanying note 105.

119. *Roth v. United States*, 354 U.S. 476, 484 (1957). *See also supra* text accompanying notes 25-26.

120. *See Alexander's Petition for Rehearing*, at 14.

121. 489 U.S. 46, 84-85 (1989) (Stevens, J., concurring in part, dissenting in part).

IV. THE EXPANDED GOVERNMENT REGULATION OF EXPRESSIVE MATERIALS UNDER SECTION 1962 AND THE SUPREME COURT'S SCRUTINY OF THE EXPANDED GOVERNMENT REGULATION

In *Fort Wayne Books, Inc. v. Indiana*,¹²² the Supreme Court reviewed two decisions of the Indiana courts involving the application of that state's RICO and Civil Remedies for Racketeering Activity (CRRA) Acts to cases involving bookstores selling allegedly obscene materials.¹²³ The complaint recited thirty-nine criminal convictions for selling obscene publications from the three stores.¹²⁴ Petitioner, Fort Wayne Books, Inc., and two other corporations, each operated an "adult bookstore" in Fort Wayne, Indiana.

On March 19, 1984, the State of Indiana and a local prosecutor filed a civil action against three corporations and certain of their employees.¹²⁵ The complaint alleged that defendants had engaged in a pattern of racketeering activity by repeatedly violating the state laws barring the distribution of obscene books and films, thereby violating the state's RICO law.¹²⁶ A 1984 amendment to the state RICO law added obscenity violations to the list of predicate offenses to constitute "racketeering activity" under Indiana law.¹²⁷

Fort Wayne Books was charged with six substantive obscenity violations and two RICO offenses. Challenging the two RICO offenses, Fort Wayne Books raised no objection to the obscenity indictments.¹²⁸ Rather, Fort Wayne Books advanced two arguments

122. 489 U.S. 46 (1989). *Fort Wayne Books* was actually a consolidation of two cases on the intermediate and state supreme court levels: 4447 Corp. v. Goldsmith, 504 N.E.2d 559 (Ind. 1987), which originated in the Marion Circuit Court, and *Fort Wayne Books, Inc. v. State*, which originated in the Allen County Court. 4447 Corporation v. Goldsmith did not join *Fort Wayne Books* in seeking Supreme Court review of the Indiana Supreme Court decision; the Supreme Court's decision focuses exclusively on the facts of the *Fort Wayne Books* case.

123. *Id.* at 50.

124. *Id.* at 51.

125. *Id.* at 50-51.

126. *Id.* at 51. The "racketeering activities" forbidden by the Indiana RICO law are a "pattern" of multiple violations of certain substantive crimes, of which distributing obscenity is one. IND. CODE § 35-49-3-1 (1988). *Fort Wayne Books*, 489 U.S. at 57.

127. *See* IND. CODE § 35-45-6-1 (1988).

128. *Fort Wayne Books* made no claim that the Constitution bars a criminal prosecution for distributing obscene material. 489 U.S. at 54. Indeed, the *Fort Wayne Books* Court noted that the constitutionality of criminal sanctions against those who distribute obscene materials has been well established by prior cases. *Id.* at 54. *citing*, *Pinkus v. United States*, 436 U.S. 293, 303-304 (1978); *Spawn v. California*, 431 U.S. 595, 597-599 (1977); *Miller v. California*, 413 U.S. 15, 23-26 (1973); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957).

attacking the facial validity of the Indiana RICO statute's use of obscenity violations as predicate acts for a RICO conviction. First, Fort Wayne Books argued that the Indiana RICO law, as applied to an "enterprise" that has allegedly distributed obscene materials, is unconstitutionally vague;¹²⁹ and, second, that the potential punishments available under the RICO law are so severe that the statute lacks "a necessary sensitivity to First Amendment rights."¹³⁰

The Supreme Court explicitly declined, despite petitioners' request, to rule on the question of the constitutionality of the post-judgment forfeiture authorized by the Indiana RICO/CRRA statutes.¹³¹ The Court noted that since neither appealed case involved such a forfeiture, "[t]hese claims could only be reviewed when (or if) such remedies are enforced."¹³² The Court held that the pretrial seizure of petitioner's bookstore and its contents was improper because there was no determination that the seized items were "obscene" or that a RICO violation had occurred.¹³³

While the constitutionality of post-judgment remedies as applied to the predicate offense of obscenity was not decided in *Fort Wayne Books*, it was presented and decided in *United States v. Pryba*.¹³⁴ The Prybas owned and operated nine video rental stores and three bookstores in Northern Virginia. Following a jury trial, the Prybas were convicted of various offenses relating to the sale of obscene videotapes and obscene magazines.¹³⁵ The Prybas ap-

129. Petitioner argued that the "inherent vagueness" of the standard established by *Miller v. California*, 413 U.S. 15 (1973), is at the root of his objection to any RICO prosecution based on predicate acts of obscenity. See Brief for Petitioner in No. 87-614, at 24-33.

130. See Brief for Petitioner in No. 870614, at 23.

131. *Fort Wayne Books*, 489 U.S. at 60.

132. *Id.* Justice Stevens, in a separate opinion joined by Justice Brennan and Justice Marshall, dissented from the Court's opinion in the *Sappenfield* case and concurred in part and dissented in part from the Court's *Fort Wayne Books* decision. Justice Stevens argued that the questions relating to the severity of the post-judgment forfeiture remedies were ripe for review. "The significance of making obscenity a predicate offense comparable to murder, kidnapping, extortion, or arson cannot be evaluated fairly if the CRRA portion of the RICO/CRRA scheme is ignored." *Id.* at 77 (Stevens, J., concurring).

133. *Id.* at 63. The Court stated that mere probable cause to believe that a violation had transpired is inadequate to remove books or films from circulation. *Id.* at 66. "Where the claimed RICO violation is a pattern of racketeering that can be established only by rebutting the presumption that expressive materials are protected by the First Amendment, that presumption is not rebutted until the claimed justification for seizing such materials is properly established in an adversary proceeding." *Id.* at 67.

134. 900 F.2d 748 (4th Cir.), cert. denied, 111 S. Ct 305 (1990).

135. Dennis E. Pryba and Barbara A. Pryba, husband and wife, were each convicted of one count of violating 18 U.S.C. § 1962(a) (participating in a pattern of racketeering activity); one count of violating 18 U.S.C. § 1962(c) (employed by a criminal enterprise engaged in racketeering activities); one count of violating 18 U.S.C. § 1962(d) (conspiracy to violate § 1962(a)); seven counts of violating 18 U.S.C. § 1465 (transportation of obscene materials in

pealed their conviction and raised constitutional challenges to the forfeiture provisions of the federal RICO statute.¹³⁶ The heart of the government's case consisted of the introduction of the tapes and magazines that were alleged to be obscene.¹³⁷ At trial, the jury found six of the nine magazines and four video tapes that had been rented or purchased to be obscene.

The United States Court of Appeals for the Fourth Circuit held that the forfeiture provision of the federal RICO statute was constitutional.¹³⁸ The court reasoned that the provision did not act as a prior restraint on free speech because the defendants had an opportunity to litigate the issue of whether the speech was obscene prior to the forfeiture. The court, deciding that the materials were obscene, seized the materials as a subsequent punishment for the defendant's criminal conduct. The Supreme Court denied certiorari.¹³⁹

Constitutional attacks on the application of obscenity predicates to enterprises engaging in the sale of both obscene and non-obscene presumptively protected material have focused on the penalties imposed for criminal conduct under the federal RICO statute. Appellate courts have relied upon *Fort Wayne Books* and *Pryba* to summarily dismiss these challenges. By contrast, this Comment argues that it is the substantive offense under section 1962 of the statute, and not the penalties imposed under section 1963, that pose constitutional problems. This argument was recently presented to the United States Court of Appeals for the Eighth Circuit in *United States v. Alexander*.¹⁴⁰

V. UNITED STATES V. ALEXANDER

A. Factual History

In *United States v. Alexander*, the petitioner, Ferris J. Alex-

interstate commerce for sale and distribution). Jennifer G. Williams was acquitted on Count I, violation of § 1962(a), but convicted of all of the remaining counts. Educational Books, Inc. was convicted of one count of violating 18 U.S.C. § 1962(a) and one count of violating 18 U.S.C. § 1962(d). All defendants appealed their judgments. *Pryba*, 900 F.2d at 750.

136. The Prybas also raised issues concerning the use of the prior state obscenity convictions of Educational Books, Inc. to prove predicate acts of racketeering, and various rulings the trial court made in the admission of evidence and in the voir dire examination of prospective jurors. *Pryba*, 900 F.2d at 750.

137. The indictments were brought following an obscenity investigation during which investigators opened memberships with video retail centers and rented or purchased sexually explicit video tapes and magazines. *Id.* at 750.

138. *Id.* at 755-56.

139. 111 S.Ct. 305 (1990).

140. 943 F.2d 825 (8th Cir. 1991).

ander, Sr., was convicted on twenty-four counts of a forty-one count indictment, including the sale of obscene magazines and videos, and operating an enterprise selling obscene materials in violation of 18 U.S.C. § 1962.¹⁴¹ Alexander was in the adult entertainment business for more than thirty years, selling magazines, showing movies, and selling and renting video cassettes.¹⁴² Alexander's business, which the government charged was a RICO "enterprise," consisted of thirteen rental stores and one wholesale distributorship, selling millions of dollars of these materials each year.¹⁴³ Of all this material, the jury found four magazines and three videotapes sold by his business to be obscene.¹⁴⁴ The sale of these seven obscene materials constituted the predicate acts on which Alexander's RICO convictions were based.¹⁴⁵

The court sentenced Alexander to six years imprisonment for the RICO violations, imposed a fine of 100,000 dollars, and ordered Alexander to pay the costs of his prosecution, incarceration, and supervised release.¹⁴⁶ The court also ordered forfeiture of Alexander's interest in his thirteen retail stores and one wholesale distributorship, and forfeiture of 8.9 million dollars in proceeds generated by those businesses during the years 1985 through 1988.¹⁴⁷

Alexander appealed his conviction and sentence to the United States Court of Appeals for the Eighth Circuit, challenging the constitutional validity, both facially and as applied, of the statutes on which his obscenity-related convictions and penalties were based. The three-judge panel rejected Alexander's constitutional arguments and the appeal of his conviction for the other counts of his indictment. Alexander petitioned the court for rehearing en banc of the one issue he claimed was erroneously decided in part IV of the court's opinion, wherein the court rejected Alexander's argument that the First Amendment prohibits criminal prosecution and conviction for the operation of a business selling both ob-

141. *Id.* at 826-27. Alexander sought: 1) a declaratory judgment that the application of the RICO statute to obscenity offenses violated his First Amendment rights, and 2) a permanent injunction prohibiting the application of the RICO statute to obscenity offenses. The district court granted the Attorney General's motion to dismiss and motion for summary judgment. *Alexander v. Thornburgh*, 713 F. Supp. 1278 (D. Minn.), *appeal dismissed*, 881 F. 2d 1081 (8th Cir. 1989).

142. *Alexander*, 943 F.2d at 827.

143. *Id.*

144. *Id.* at 829.

145. *Id.*

146. *Id.*

147. *Id.*

scene and nonobscene expressive materials.¹⁴⁸ Without further explanation, the court stated: "Alexander was not prosecuted for selling nonobscene material"¹⁴⁹ Recently, the United States Supreme Court granted petitioner Alexander's request for a writ of certiorari.¹⁵⁰ On January 12, 1993, the Court heard oral arguments.¹⁵¹ The Court certified two questions: first, whether the forfeiture provision under section 1963 constitutes a prior restraint or otherwise violates the First Amendment, and second, whether the forfeiture provision is so disproportionate to the offense as to constitute a violation of the Eighth Amendment.¹⁵² It has been suggested that during oral argument the court concentrated on the question of First Amendment considerations rather than the Eighth Amendment.¹⁵³ Although the question that was certified considered the constitutionality of section 1963 under the First Amendment rather than section 1962, there is no analytical distinction between the two. The government's actions are content based, thus invalidating the seizure of constitutionally protected materials.

B. Eighth Circuit's Opinion

Alexander's First Amendment arguments cannot be understood without first understanding the conduct criminally prohibited by RICO substantive provisions under section 1962(c), the punishment for that conduct under section 1963, and the prohibitions of the First Amendment.

The court's opinion suggests that Alexander's section 1962(c) offense consisted of merely selling obscene materials.¹⁵⁴ While the sale of obscene materials were the predicate offenses charged, the substantive 1962(c) offense was operating a business which sold seven obscene magazines and videotapes. Because the business, or "enterprise" Alexander was accused of operating, also sold millions of dollars of expressive materials not proved obscene, Alexander

148. See Alexander's Petition for Rehearing, at 2.

149. *Alexander*, 943 F.2d at 834.

150. *Alexander*, 112 S. Ct. 3024 (1992).

151. Tony Mauro, *Court Ponders Case of Prosecutorial Zeal*, Jan. 18, 1993, *LEGAL TIMES* at 8.

152. *Id.*

153. *Id.*

154. The court stated: "We summarily reject Alexander's arguments. The district courts did not err in rejecting Alexander's invitation to overturn *Miller*." *Id.* at 832. While the court aptly relies on *Pryba* in support of its contention that "forfeiture provided by 18 U.S.C. § 1467 does not violate the First Amendment" *Id.* at 833, this does not end the inquiry.

argued that he was, in effect, "convicted for selling both obscene and nonobscene expressive materials."¹⁵⁵

On appeal, the government did not dispute this description of the conduct criminally prohibited by RICO section 1962(c), and the court did not otherwise refer to the prohibited conduct.¹⁵⁶ The court's opinion, however, strongly suggests that it confused the substantive offense prohibited by RICO section 1962(c) with the punishment imposed by the forfeiture provisions of section 1963.

RICO section 1963 mandates forfeiture of all assets used or invested in a RICO enterprise.¹⁵⁷ The forfeiture provisions are penalties for violating RICO section 1962. These penalties cannot be imposed unless and until a defendant has been convicted of a section 1962 violation.¹⁵⁸ The court in *Alexander* characterized this constitutional attack on his conviction for violating section 1962 as an attack on RICO's forfeiture provisions. "Alexander argues that the application of the forfeiture provision of section 1962 unconstitutionally criminalizes non-obscene expressive material."¹⁵⁹

The *Alexander* court misconstrued the provisions of the RICO statute. Section 1962 contains no forfeiture provision; the forfeiture provisions are contained in section 1963. "[T]he First Amendment, regardless of the punishment imposed, limits prosecution for the sale of sexually explicit expressive materials to the sale of obscene materials only under the Supreme Court's holding in *Miller*."¹⁶⁰

The Eighth Circuit's reference to the "forfeiture provision of section 1962," was later applied to Alexander's constitutional argument: "Alexander asserts that *Sable Communication v. Federal Communications Commission*, . . . further supports his argument that the application of the RICO forfeiture provision unconstitutionally criminalized the sale of expressive material."¹⁶¹

The FCC statute in *Sable* contained no forfeiture provisions. The court's opinion implies that committing the predicate act constitutes the RICO offense and the prohibition against operating the business was merely punishment for the offense, and not the RICO

155. See Alexander's Petition for Rehearing, at 5.

156. The court did not describe the conduct prohibited by RICO section 1962(c) except to summarize the statutory language in a footnote. See Alexander's Petition for Rehearing, at 5.

157. Section 1963(a)(3).

158. See Alexander's Petition for Rehearing, at 7.

159. *Alexander*, 943 F.2d at 832.

160. See Alexander's Petition for Rehearing, at 7 (emphasis in original).

161. *Alexander* at 833-34. For a discussion of the *Sable* decision, see *supra* text accompanying notes 112-16.

offense itself. Separation of the RICO offense set out in section 1962 (operating the business) from the RICO punishment power set out in section 1963 (forfeiture provision) is fundamental to an understanding of the First Amendment concerns presented by section 1962(c).¹⁶² Adhering to this principle, the court's application of the holding in *Pryba* seems misplaced. The criminal defendants in *Pryba* challenged section 1962 only on grounds of vagueness, and attacked the RICO forfeiture provision, facially and as applied, on grounds of overbreadth and prior restraint.¹⁶³

The court's rejection of the Supreme Court's holding in *Sable*, apparently failing to separate the substantive crime under section 1962 from the penalties imposed under section 1963, suggests a belief that had the separate bans on obscene and nonobscene phone messages been combined to ban purveyors who sold both obscene and nonobscene messages, the Court would have upheld the statute.¹⁶⁴ The Supreme Court has stated that business purveying sexually explicit speech has First Amendment protection.¹⁶⁵

The Sixth Circuit Court of Appeals has considered the question of whether a city ordinance allowing revocation of the license of any bookseller or movie house possessing or exhibiting both obscene and nonobscene materials violated the First Amendment. In *Paducah v. Investment Entertainment, Inc.*,¹⁶⁶ the court invalidated such an ordinance on First Amendment grounds, holding that the ordinance's license revocation procedure was invalid because it could result in closing a place of business even though not all the materials were obscene. The revocation procedure, the court concluded, constituted a prior restraint of both protected and unprotected speech.¹⁶⁷

The *Paducah* court held that the procedural safeguards concerning the obscene materials were adequate because the license revocation procedures were not triggered until after a procedural determination that the material sold was obscene. The license revocation order, however, violated the First Amendment because the license revocation also restrained nonobscene materials without

162. See Alexander's Reply Brief, at 10.

163. *United States v. Pryba*, 900 F.2d 748 (4th Cir.), cert. denied, 111 S. Ct. 305 (1990). See also *supra* text accompanying notes 133-37.

164. See Alexander's Petition for Rehearing, at 9.

165. See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990).

166. 791 F.2d 463 (6th Cir.), cert. denied, 479 U.S. 915 (1986).

167. 791 F.2d at 465. The appellate court cited approvingly an example given by the district court: "Under the ordinance a movie theater could be closed for repeatedly showing an obscene film on weekends even though the theater showed 'The Ten Commandments,' 'Snow White,' and 'Gone With the Wind' on week days." *Id.*

proof that they were obscene.¹⁶⁸ The Eighth Circuit did not address Alexander's constitutional challenge to RICO section 1962(c) using obscenity predicates. Whether this section withstands First Amendment scrutiny, therefore, remains unanswered.

VI. CONCLUSION

Alexander's constitutional challenge to RICO section 1962(c) violations using obscenity predicates is an attack on the statute as applied to an "enterprise" engaged in the sale of presumptively protected materials. The Alexander argument echoes the constitutional problems alluded to in Justice O'Connor's concurring opinion in *Arcara*.¹⁶⁹ Justice O'Connor's metaphorical bookstore, Alexander argues, differs from a hardware store funded by loan sharking proceeds, or a pizza parlor used as a place for prostitution. Like the solicitation of prostitution, the activity in the above hypothetical manifests absolutely no element of protected expression.¹⁷⁰

The significance of the *Alexander* decision, therefore, emerges against the backdrop of O'Connor's metaphorical bookstore. RICO Section 1962(c), by rendering a bookstore that has sold at least two obscene materials a criminal enterprise, prohibits the future sale of presumptively protected materials. According to O'Connor, the case of a bookstore selling obscene material "clearly implicates First Amendment concerns and requires an analysis under the appropriate First Amendment standard of review."¹⁷¹

In Alexander's Petition for Rehearing, he stated: "Alexander makes no argument that the sale of obscene materials has First Amendment protection. The corollary, however, is that the sale of non-obscene material is protected even when sold at the same store at which obscene material is sold."¹⁷² The gravity of the constitutional question presented in part IV of the *Alexander* opinion is best illustrated by Justice Brennan's dissent in *Maryland v. Macon*:¹⁷³

[T]he same official use of the power to search and seize [expressive material] sanctioned today in its application against the

168. *Id.* at 470.

169. 478 U.S. 697 (1986). See also *supra* text accompanying notes 108-110.

170. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (O'Connor, J., concurring). See *supra* text accompanying notes 108-110.

171. See *supra* text accompanying notes 105.

172. Alexander's Petition for Rehearing, at 10.

173. 472 U.S. 463 (1985) (Brennan, J., dissenting).

sexual nonconformist can be instantly turned against the political nonconformist These 'stealthy encroachments' upon our liberties sanctioned in the State's present effort to combat vice may become potent weapons in a future effort to shackle political dissenters and stifle their voices.¹⁷⁴

If *Alexander* is appealed to the Supreme Court, a proper analysis of RICO section 1962(c) using obscenity predicates may ensure the continued protections of the freedom of speech and press guarantees under the First Amendment. If the Supreme Court fails to untangle the substantive RICO offense under section 1962(c) from the penalties imposed under section 1963, however, the government's "effort to combat vice"¹⁷⁵ may reduce these voices of freedom to distant echoes of a lost era.

Amanda M. McGovern¹⁷⁶

174. *Id.* at 477.

175. *Id.* See also *supra* text accompanying note 144.

176. J.D., 1992, University of Miami School of Law.