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RICO's Forfeiture Provision: A First Amendment Restraint on Adult Bookstores

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RICO's Forfeiture Provision: A First Amendment Restraint on Adult Bookstores

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I. INTRODUCTION

Federal and state governments attempt to control the distribution of obscene¹ materials through a variety of methods, including zoning² and moral nuisance abatement laws.³ Recently, both federal and state legislatures have resorted to the Racketeer Influenced and Corrupt Organizations Act (RICO)⁴ to accomplish this goal. The

1. "Obscenity is not a synonym for pornography." A. DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 9 (1981). Obscenity is a legal term of art that refers to indecency and filth. 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 69-73. 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. See A. DWORKIN, *supra*, at 200-01. Pornography is entitled to some protection from government control. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 329-31 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). One commentator has characterized pornography as "low value" speech entitled to less first amendment protection than other forms of speech. Sunstein, *supra*, at 591, 602-08.

2. See *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 46 (A Washington zoning ordinance prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single-family or multiple-family dwelling, church, park or school.), *reh'g denied*, 475 U.S. 1132 (1986); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 62-64 (1981) (A New Jersey zoning ordinance did not allow live entertainment, whether nude dancing or some other form of live presentation.); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 52-55 (plurality opinion) (Zoning ordinances adopted by the city of Detroit prohibited an adult theater to be located within 1,000 feet of any two other "regulated uses," or within 500 feet of a residential area.), *reh'g denied*, 429 U.S. 873 (1976); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 206-07 (1975) (A Florida ordinance made it a public nuisance and a punishable offense for a drive-in movie theater to exhibit motion pictures containing nudity, if the screen was visible from a public street or place.). For a thorough discussion of the first amendment issues raised when governmental bodies use zoning 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 rights.).

3. See *infra* notes 91-133 and accompanying text.

4. 18 U.S.C. § 1961(1)(A) (West Supp. 1988); ARIZ. REV. STAT. ANN. § 13-

Act provides harsh remedies against purveyors of obscene materials.⁵

The Supreme Court of the United States has held that the first amendment to the Constitution⁶ does not protect obscenity.⁷ Therefore, an injunction or forfeiture of obscene books and films is constitutional.⁸ A prosecutor acting under RICO may seize obscene books and films, as well as nonobscene protected materials, and seek permanent injunctions banning their future distribution.⁹ Thus, RICO's

2301(D)(4)(u) (Supp. 1987); CAL. PENAL CODE § 186.2(a)(19) (West 1988); COLO. REV. STAT. § 18-17-103(5)(b)(VI) (1986); CONN. GEN. STAT. § 53-394(a)(11) (West 1985); FLA. STAT. § 895.02(1)(a)(27) (1987); GA. CODE ANN. § 16-14-3(3)(A)(xii) (1988); IDAHO CODE § 18-7803(a)(8) (1987); IND. CODE ANN. § 35-45-6-1 (Sec. 1) (West 1986); N.J. STAT. ANN. § 2C:41-1(1)(e) (West 1982); N.C. GEN. STAT. § 75D-3(c)(2) (1987); N.D. CENT. CODE § 12.1-06.1-01(2)(d)(17) (1985); OHIO REV. CODE ANN. § 2923.31(I)(2)(b) (Anderson 1987); OKLA. STAT. ANN. tit. 22, § 1402(10)(v) (West Supp. 1989); OR. REV. STAT. § 166.715(6)(a) (T) (1987); UTAH CODE ANN. § 76-10-1602(4)(fff) (Supp. 1988). See *infra* notes 14-29 and accompanying text.

5. See, e.g., 18 U.S.C. §§ 1963-1964 (1982); ARIZ. REV. STAT. ANN. § 13-2314 (1978); CAL. PENAL CODE § 186.3 (West 1988); COLO. REV. STAT. §§ 18-17-105, 18-17-106 (1986); CONN. GEN. STAT. § 53-397 (West 1985); FLA. STAT. §§ 895.04-.05 (1987); GA. CODE ANN. §§ 16-14-6, 16-14-7 (1988); IDAHO CODE §§ 18-7804(g) & (h), 18-7805 (1987); IND. CODE ANN. § 34-4-30.5-3 (West 1986); N.J. STAT. ANN. §§ 2C:41-3, 2C:41-4 (West 1982); N.C. GEN. STAT. §§ 75D-5, 75D-8, 75D-10 (1987); N.D. CENT. CODE §§ 12.1-06.1-04, 12.1-06.1-05 (1985); OHIO REV. CODE ANN. §§ 2923.32-.35 (Anderson 1987); OKLA. STAT. ANN. tit. 22, §§ 1404, 1409 (West Supp. 1989); OR. REV. STAT. § 166.725 (1987); UTAH CODE ANN. § 76-10-1603.5 (Supp. 1988).

Generally, there are two types of forfeiture statutes under federal law: a civil forfeiture statute and a criminal forfeiture statute. S. REP. NO. 225, 98th Cong., 2d Sess. 3182, 3376-77 (1984). The government commences civil forfeiture of crime-related property by seizing the asset in an *in rem* proceeding. *Id.* at 3376. The asset's value determines whether a judicial or an administrative proceeding occurs. *Id.* Because the forfeiture is an *in rem* proceeding, the case may be brought in the district where the property is located. *Id.*

Criminal forfeiture, on the other hand, is an *in personam* proceeding against a criminal defendant. *Id.* The forfeiture is a sanction against the convicted defendant. *Id.* A defendant must, however, be found guilty of engaging in a pattern of racketeering activity before a judgment of forfeiture is entered against him. *Id.* Once a forfeiture judgment is entered against the convicted defendant, the government may seize the asset. *Id.* at 3376-77. This does not, however, prevent the government from obtaining a restraining order against the defendant's assets to prevent the defendant from transferring his assets prior to his conviction. *Id.* at 3377. Unlike civil forfeiture, the assets remain in the custody of the defendant until he is convicted for the underlying racketeering offenses. *Id.* at 3378. Therefore, the government may seize the assets only when the defendant has been convicted and a forfeiture judgment has been entered against him. *Id.*

6. The first amendment provides in relevant 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).

7. *Miller v. California*, 413 U.S. 15, 23, *reh'g denied*, 414 U.S. 881 (1973); *Roth v. United States*, 354 U.S. 476, 485, *reh'g denied*, 355 U.S. 852 (1957). See *infra* note 70 and accompanying text.

8. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

9. See, e.g., *United States v. Pryba*, 674 F. Supp. 1504, 1508 (E.D. Va. 1987) (An *ex parte* restraining order enjoined the defendants from selling or disposing any property that a

remedies go beyond specific injunctions¹⁰ and authorize the forfeiture of a business' entire assets when a pattern of "racketeering activity"¹¹ is proven. This raises troubling questions regarding the application of RICO to obscenity. When the government seizes materials that later are adjudged nonobscene, it suppresses future conduct and violates the "doctrine of prior restraint"—a longstanding constitutional doctrine that prohibits restrictions on expression.¹²

This Comment focuses on the conflict between federal and state

prosecutor may forfeit under RICO.); 4447 Corp. v. Goldsmith, 479 N.E.2d 578, 582-83 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559, 560 (Ind. 1987), *rev'd sub nom.* Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916 (1989) (Sheriffs in two counties padlocked several adult bookstores charged with violating RICO and seized their contents.). For specific federal and state RICO provisions allowing a prosecutor to seize the assets of a defendant who has engaged in a racketeering activity, see *supra* note 5.

10. A specific injunction is an injunction against the future distribution of a *particular* obscene material. See, e.g., Kingsley Books, Inc. v. Brown, 354 U.S. 436, 437 (1957) (a criminal statute authorizing an injunction order against a particular obscene book). Courts have generally upheld the constitutionality of these injunctions. *Id.* at 444-45.

11. Under federal and most state RICO statutes, a "pattern of racketeering activity" requires two acts or incidents of racketeering activity. 18 U.S.C. § 1961(5) (1982); CAL. PENAL CODE § 186.2(b) (West 1988); COLO. REV. STAT. § 18-17-103(3) (1986); CONN. GEN. STAT. § 53.394(e) (West 1985); FLA. STAT. § 895.02(4) (1987); GA. CODE ANN. § 16-14-3(2) (1988); IDAHO CODE § 18-7803(d) (1987); IND. CODE ANN. § 35-45-6-1 (Sec. 1) (West 1986); MISS. CODE ANN. § 97-43-3(d) (Supp. 1988); NEV. REV. STAT. § 207.390 (1983); N.J. STAT. ANN. § 2C:41-1(d)(1) (West 1982); N.M. STAT. ANN. § 30-42-3(D) (Supp. 1988); N.Y. PENAL LAW § 460.10(4) (McKinney Supp. 1988); N.C. GEN. STAT. § 75D-3(b) (1987); OHIO REV. CODE ANN. § 2923.31(E) (Anderson 1987); OKLA. STAT. ANN. tit. 22, § 1402(5) (West Supp. 1989); OR. REV. STAT. § 166.715(4) (1987); TENN. CODE ANN. § 39-1-1003(6) (Supp. 1988).

Federal RICO provides examples of what constitutes a "racketeering activity," but fails to give a general definition. Nevertheless, several states have defined racketeering activity. Indiana's definition of "racketeering activity" is typical and provides: "'Racketeering activity' means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation," of any of a number of enumerated predicate offenses. IND. CODE ANN. § 35-45-6-1 (Sec. 1) (West 1986). See ARIZ. REV. STAT. ANN. § 13-2301(D)(4) (1978); COLO. REV. STAT. § 18-17-103(5) (1986); CONN. GEN. STAT. § 53.394(a) (West 1985); FLA. STAT. § 895.02(1) (1987); GA. CODE ANN. § 16-14-3(3)(A) (1988); HAW. REV. STAT. § 842-1 (1985); IDAHO CODE § 18-7803(a) (1987); MISS. CODE ANN. § 97-43-3(a) (Supp. 1988); NEV. REV. STAT. § 207.390 (1983); N.C. GEN. STAT. § 75D-3(c)(1) (1987); N.D. CENT. CODE § 12.1-06.1-01(2)(d) (1985); OHIO REV. CODE ANN. §§ 2923.31(I) (Anderson 1987); OKLA. STAT. ANN. tit. 22, § 1402(10) (West Supp. 1989); OR. REV. STAT. § 166.715(6) (1987); TENN. CODE ANN. § 39-1-1003(9) (Supp. 1988).

12. The doctrine of prior restraint seeks to prevent the advance punishment of acts of expression. Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 11 (1981). The doctrine, therefore, presumes that any governmental action that prevents an expression from occurring is unconstitutional. *Id.* See *infra* notes 84-85 and accompanying text.

There are generally two types of prior restraints. First, there is a governmental order or a court injunction that prevents a person from engaging in certain types of communications. See, e.g., *Near*, 283 U.S. at 701-02. The second type of prior restraint requires a license or permit before one may engage in a particular type of expression. See, e.g., *Freedman v. Maryland*, 380 U.S. 51, 52 & n.1 (1965). For a discussion of the doctrine of prior restraint, see Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent*

regulation of obscene materials under RICO and the prior restraint doctrine.¹³ It discusses the constitutionality of RICO's forfeiture provision as it applies to the predicate offense of obscenity. Section II of this Comment reviews the background of RICO and obscenity law. In addition, the Section examines the forfeiture provision of RICO as it applies to adult bookstores and discusses the inconsistent treatment of the constitutionality of this remedy by the courts. Section III analyzes the doctrine of prior restraint and describes the two-prong test that courts use to determine the constitutionality of a statute that implicates the first amendment. Further, this Section analyzes the doctrine of prior restraint in the context of nuisance law. Finally, Section IV applies the doctrine of prior restraint to RICO's forfeiture provision and concludes that the forfeiture provision is a prior restraint on the dissemination of nonobscene protected materials, unless there is an extraordinary and compelling government interest to uphold it as constitutional.

II. AN OVERVIEW OF TWO DOCTRINES: RICO AND OBSCENITY

A. *The Legislative History and Statutory Language of RICO*

Congress enacted RICO,¹⁴ Title IX of the Organized Crime

Punishment, and the Costs of the Prior Restraint Doctrine, 67 CORNELL L. REV. 245 (1982); Blasi, *supra*.

13. Federal RICO seeks to prevent organized crime in enterprises dealing with interstate and international business, while state RICO focuses on intrastate organized crime. Nevertheless, most state statutes are technically patterned after federal RICO. *Baines v. Superior Court*, 142 Ariz. 145, 148, 688 P.2d 1037, 1040 (Ct. App. 1984); *Alvers v. State of Indiana*, 489 N.E.2d 83, 87 (Ind. Ct. App. 1986). *See, e.g.*, 18 U.S.C. §§ 1961-1968 (1982 & West Supp. 1988); ARIZ. REV. STAT. ANN. §§ 13-2301 to 13-2317 (West 1978 & Supp. 1988); CAL. PENAL CODE §§ 186 TO 186.8 (WEST 1988); COLO. REV. STAT. §§ 18-17-101 to 18-17-109 (1986); CONN. GEN. STAT. §§ 53-393 to 53-403 (West 1985); FLA. STAT. §§ 895.01 to 895.09 (1987); GA. CODE ANN. §§ 16-14-1 to 16-14-15 (1988); HAW. REV. STAT. §§ 842-1 to 842-12 (1985); IDAHO CODE §§ 18-7801 to 18-7805 (1987); ILL. ANN. STAT. ch. 56 1/2, paras. 1651-1660 (Smith-Hurd 1982) (restricted to narcotics racketeering); IND. CODE ANN. § 35-45-6 (West 1986); LA. REV. STAT. ANN. §§ 1351-1356 (West Supp. 1988) (restricted to narcotics racketeering); MISS. CODE ANN. §§ 97-43-1 to 97-43-11 (Supp. 1988); NEV. REV. STAT. §§ 207.350-.520 (1983); N.J. STAT. ANN. §§ 2C:41-1 to 2C:41-6.2 (West 1982); N.M. STAT. ANN. §§ 30-42-1 to 30-42-6 (Supp. 1988); N.C. GEN. STAT. §§ 75D-1 to 75D-14 (1987); N.D. CENT. CODE §§ 12.1-06.1-01 to 12.1-06.1-08 (1985); OHIO REV. CODE ANN. §§ 2923.31 to 2923.36 (Anderson 1987); OKLA. STAT ANN. tit. 22 §§ 1401 to 1419 (West Supp. 1989); OR. REV. STAT. §§ 166.715-.735 (1987); R.I. GEN. LAWS §§ 7-15-1 to 7-15-11 (1985); TENN. CODE ANN. §§ 39-1-1001 to 39-1-1010 (Supp. 1988); UTAH CODE ANN. §§ 76-10-1601 to 76-10-1609 (Supp. 1988); WASH. REV. CODE ANN. §§ 9A.82.001-.904 (1988) (referred to as "Criminal Profiteering Act"); WIS. STAT. ANN. §§ 946.80-.87 (West Supp. 1987).

Federal and state RICO are related in yet another way. Prior state RICO convictions for dealing in obscene materials are admissible to prove acts of racketeering under federal RICO. *Pryba*, 680 F. Supp. at 792.

14. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 941

Control Act of 1970,¹⁵ in an effort to combat organized crime's corruption of American business.¹⁶ The legislative history of RICO indicates that Congress intended to provide prosecutors with new weapons of unprecedented scope in the fight against organized crime.¹⁷ The prosecutor's arsenal consists of new statutory offenses,¹⁸ evidence-gathering techniques,¹⁹ and a forfeiture provision.²⁰ Congress enacted the forfeiture provision to punish the racketeer and per-

(1970) (codified at 18 U.S.C. §§ 1961-1968 (1982)), *amended by* the Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, §§ 302, 901, 1020, 2301, 98 Stat. 1837, 2040-44, 2135, 2143, 2192 (1984). President Reagan appointed an advisory committee to further the goal of eradicating organized crime. Exec. Order No. 12,435, 48 Fed. Reg. 34,723 (1983), *as amended by* Exec. Order No. 12,507, 50 Fed. Reg. 11,835 (1985).

For a general discussion of RICO, see Third Annual Survey of White Collar Crime, *Racketeer Influenced and Corrupt Organizations (RICO)*, 22 AM. CRIM. L. REV. 401 (1985).

15. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended in scattered sections of 18 U.S.C.).

16. During the last ten years organized crime in the United States has increased. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS Table 27 (1987). The number of arrests for specific offenses in 1978 totalled 7.6 million. *Id.* Specific totals were: murder-14,456; gambling-44,672; arson-13,649; robbery-108,239; drug abuse violations-477,213; and sex offenses, including prostitution and commercialized vice-127,509. *Id.* By 1987, the Crime Index had risen by almost 25 percent to 9.5 million persons arrested for crime related offenses. *Id.* Specific totals were: murder-15,064; robbery-114,439; drug abuse violations-737,094; and sex offenses, including prostitution and commercialized vice-169,987. *Id.*

17. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923 (1970) ("It is the purpose of [RICO] to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."); *Id.* at § 904(a), 84 Stat. 947 (The provisions of RICO shall be liberally construed to achieve its purposes.).

18. 18 U.S.C. § 1962 (1982). The relevant section provides:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Id.

19. 18 U.S.C. § 1968 (1982). The Attorney General may serve a civil investigative demand upon a person or enterprise who may possess any material relevant to a racketeering investigation. 18 U.S.C. § 1968(a) (1982).

20. 18 U.S.C. § 1963 (1982). The relevant section provides:

Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established[,] operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

18 U.S.C. § 1963(a) (1982). For the respective states' forfeiture provisions, see *supra* note 5.

manently separate him from the business he corrupted.²¹

Under federal and state RICO, any person who, through the commission of two or more acts, directly or indirectly invests, acquires, maintains, or participates in an enterprise that constitutes a pattern of racketeering activity is subject to criminal prosecution.²² In an effort to prevent the distribution of obscene books and films, Congress expanded RICO's definition of "racketeering activity" to include "dealing in obscene matter."²³ The expansion of RICO's forfeiture provision to include obscene materials poses a threat to an individual's constitutional rights under the first amendment.²⁴

RICO's remedies are among the most powerful weapons in the

21. Taylor, *Forfeiture under 18 U.S.C. § 1963 — RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379, 383-84 (1980).

22. See, e.g., 18 U.S.C. § 1962 (1982); ARIZ. REV. STAT. ANN. § 13-2312 (1978); COLO. REV. STAT. § 18-17-104 (1986); CONN. GEN. STAT. § 53-395 (West 1985); FLA. STAT. § 895.03 (1987); GA. CODE ANN. 16-14-4 (1988); HAW. REV. STAT. § 842-2 (1985); IDAHO CODE § 18-7804 (1987); ILL. ANN. STAT. ch. 56 ½, para. 1654 (Smith-Hurd 1982) (restricted to narcotics racketeering); IND. CODE ANN. § 35-45-6-2 (West 1986); LA. REV. STAT. ANN. § 1353 (West 1988) (restricted to narcotics racketeering); MISS. CODE ANN. § 97-43-5 (Supp. 1988); NEV. REV. STAT. § 207.400 (1983); N.J. STAT. ANN. § 2C:41-2 (West 1982); N.M. STAT. ANN. § 30-42-4 (Supp. 1988); N.Y. PENAL LAW § 460.20 (McKinney Supp. 1988); N.C. GEN. STAT. § 75D-4 (1987); N.D. CENT. CODE § 12.1-06.1-03 (1985); OHIO REV. CODE ANN. § 2923.32 (Anderson 1987); OKLA. STAT. ANN. tit. 22, § 1403 (West Supp. 1989); OR. REV. STAT. § 166.720 (1987); R.I. GEN. LAWS § 7-15-3 (1985); TENN. CODE ANN. § 39-1-1004 (Supp. 1988); UTAH CODE ANN. § 76-10-1603 (Supp. 1988); WASH. REV. CODE ANN. § 9A.82.060 (1988); WIS. STAT. ANN. § 946.83 (West Supp. 1987).

23. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 1020(1), 98 Stat. 2143 (1984) (codified at 18 U.S.C. § 1961(1)(A) (West Supp. 1988)). Before 1984, examples of racketeering activities included any act involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs. 18 U.S.C. § 1961(1) (1982). Several states, however, included obscenity as a predicate offense of RICO before this amendment to federal RICO. See, e.g., ARIZ. REV. STAT. ANN. § 13-2301(D)(4)(u) (Supp. 1987); COLO. REV. STAT. § 18-17-103(5)(b)(VI) (1986); CONN. GEN. STAT. § 53-394(a)(11) (West 1985); FLA. STAT. § 895.02(1)(a)(27) (1987); GA. CODE ANN. § 16-14-3(3)(A)(xii) (1988); IDAHO CODE § 18-7803(a)(8) (1987); IND. CODE ANN. § 35-45-6-1 (Sec. 1) (West 1986); N.J. STAT. ANN. § 2C:41-1(1)(e) (West 1982); N.D. CENT. CODE § 12.1-06.1-01(2)(d)(17) (1985); OR. REV. STAT. 166.715(6)(a)(T) (1987).

24. See *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987); *Western Business Systems, Inc. v. Slaton*, 492 F. Supp. 513 (N.D. Ga. 1980); *State v. Feld*, 155 Ariz. 88, 745 P.2d 146 (Ct. App. 1987), cert. denied, 108 S. Ct. 1270 (1988); *4447 Corp. v. Goldsmith*, 479 N.E.2d 578 (Ind. Ct. App. 1985), vacated, 504 N.E.2d 559 (Ind. 1987), rev'd sub nom. *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989). See *infra* notes 40-62 and accompanying text.

The forfeiture provision of RICO has raised constitutional issues other than the first amendment. See *United States v. Busher*, 817 F.2d 1409, 1415-16 (9th Cir. 1987) (noting that the forfeiture order may be grossly disproportionate and, therefore, violate the eighth amendment's prohibition against excessive fines and cruel and unusual punishment); *Pryba*, 674 F. Supp. at 1511-12, 1516-17 (holding that the forfeiture provision of RICO is neither vague or overbroad, nor does it constitute excessive fines or cruel and unusual punishment and does not violate due process); *United States v. Thevis*, 474 F. Supp. 134, 141 (N.D. Ga. 1979) (The forfeiture provision of RICO is not unconstitutionally vague or overbroad.). See also

prosecutor's arsenal. The government uses the forfeiture provision to attack the economic base of the racketeer,²⁵ and to separate him from the source of his economic gain.²⁶ Before a court can issue an ex parte seizure order that closes the premises and forfeits the assets of the business, a prosecutor must show that an individual is engaged in racketeering activity.²⁷ An individual violates RICO when he distributes obscene materials.²⁸ Once the individual is convicted for having engaged in racketeering activity, a prosecutor then uses the forfeiture provision to seize property that was used in the course of the individual's illegal conduct.²⁹ In *Russello v. United States*,³⁰ the Supreme

Taylor, *supra* note 21, at 382-83 (Generally, RICO's forfeiture provision does not inflict cruel and unusual punishment.).

Numerous constitutional challenges have been raised to RICO's statutory provisions. *See Feld*, 155 Ariz. at 93, 745 P.2d at 151 (conducting an enterprise illegally through obscenity is not an unconstitutionally vague offense); *State v. Sappenfield*, 505 N.E.2d 504 (Ind. Ct. App. 1987) *aff'd sub nom.* *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916, 924-25 (1989) (RICO is not unconstitutionally vague as to the predicate offense of obscenity.).

25. See 18 U.S.C. § 1963(a) (1982). For the text to 18 U.S.C. § 1963(a), see *supra* note 20. Before the forfeiture provision was adopted, fine and imprisonment were the only two sanctions imposed against an individual who engaged in racketeering activities. *Organized Crime Control Hearings, 1970: Hearings on S. 30 Before the Subcomm. No. Five of the House Committee on the Judiciary*, 91st Cong., 2d Sess. 106, 107 (1970) (statements of Sen. McClellan). Incarcerating or fining a defendant, however, had no effect on his ability to run the business. By temporarily transferring the assets to a friend or family member, the racketeer could continue to run the business from prison until his release. *Id.*

26. See Taylor, *supra* note 21, at 383-84.

27. *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916, 929 (1989) (An ex parte seizure order cannot be issued on mere probable cause that RICO violation has occurred.). See *infra* note 55 and accompanying text.

28. 18 U.S.C. § 1961(1)(A) (West Supp. 1988); ARIZ. REV. STAT. ANN. § 13-2301(D)(4) (u) (Supp. 1987); CAL. PENAL CODE § 186.2(a)(19) (West 1988); COLO. REV. STAT. § 18-17-103(5)(b)(VI) (1986); CONN. GEN. STAT. § 53-394(a)(11) (West 1985); FLA. STAT. § 895.02(1)(a)(27) (1987); GA. CODE ANN. § 16-14-3(3)(A)(xii) (1988); IDAHO CODE § 18-7803(a)(8) (1987); IND. CODE ANN. § 35-45-6-1 (Sec. 1) (West 1986); N.J. STAT. ANN. § 2C:41-1(1)(e) (West 1982); N.C. GEN. STAT. § 75D-3(c)(2) (1987); N.D. CENT. CODE § 12.1-06.1-01(2)(d) (17) (1985); OHIO REV. CODE ANN. § 2923.31(I)(2)(b) (Anderson 1987); OKLA. STAT. ANN. tit. 22, § 1402(10)(v) (West Supp. 1989); OR. REV. STAT. § 166.715(6)(a)(T) (1987); UTAH CODE ANN. § 76-10-1602(4)(ff) (Supp. 1988).

29. 18 U.S.C. §§ 1963-1964 (1982); ARIZ. REV. STAT. ANN. § 13-2314 (1978); CAL. PENAL CODE § 186.3 (West 1988); COLO. REV. STAT. §§ 18-17-105, 18-17-106 (1986); CONN. GEN. STAT. § 53-397 (West 1985); FLA. STAT. §§ 895.04-.05 (1987); GA. CODE ANN. §§ 16-14-6, 16-14-7 (1988); IDAHO CODE §§ 18-7804(g) & (h), 18-7805 (1987); IND. CODE ANN. § 34-4-30.5-3 (West 1986); N.J. STAT. ANN. §§ 2C:41-3, 2C:41-4 (West 1982); N.C. GEN. STAT. §§ 75D-5, 75D-8, 75D-10 (1987); N.D. CENT. CODE §§ 12.1-06.1-04, 12.1-06.1-05 (1985); OHIO REV. CODE ANN. §§ 2923.32-.35 (Anderson 1987); OKLA. STAT. ANN. tit. 22, §§ 1404, 1409 (West Supp. 1989); OR. REV. STAT. § 166.725 (1987); UTAH CODE ANN. § 76-10-1603.5 (Supp. 1988). Prosecutors may also seek revocation of a store's license and charter through RICO's civil remedies. *See, e.g.,* COLO. REV. STAT. § 18-17-106(d) (1986); FLA. STAT. § 895.05(d) (1987); GA. CODE ANN. § 16-14-6(a)(4) (1988); IDAHO CODE § 18-7805(d)(5) (1987); N.J. STAT. ANN. § 2C:41-4(a)(5) (West 1982). First amendment concerns do not arise in these situations because there is no seizure of a business' assets.

Court defined the type of property subject to forfeiture.³¹ Russello, a member of a group of individuals associated for the purpose of committing arson with the intent to defraud insurance companies, was convicted for engaging in racketeering activity.³² The Court held that forfeitable interests include not only the property used while the defendant engaged in racketeering activity, but also include all profits and proceeds derived from such activity.³³

A problem arises with the execution of the forfeiture provision because many adult bookstores and theaters contain materials that are not considered obscene, and therefore, are protected by the first amendment.³⁴ "One obscene book on the premises of a book store [sic] does not make an entire store obscene."³⁵ An injunction that closes a bookstore or theater and allows the forfeiture of all the assets halts the future sale of other materials that may not be obscene. Thus, the forfeiture provision may infringe upon the bookstore owner's first amendment right to free speech with respect to these nonobscene materials.³⁶

Like the federal government, a number of states have used their RICO laws to combat the distribution of obscene material, by closing adult bookstores and theaters, and demand forfeiture of the business' assets.³⁷ State courts addressing this issue have reached different results on the constitutionality of the forfeiture provision. Some

30. 464 U.S. 16 (1983). For a discussion of *Russello v. United States*, see Note, *The Forfeiture of Profits under the Racketeer Influenced and Corrupt Organization Act: Enabling Courts to Realize RICO's Potential*, 33 AM. U.L. REV. 747 (1984); Note, *RICO—Criminal Forfeiture of Proceeds of Racketeering Activity under RICO*, 75 J. CRIM. L. & CRIMINOLOGY 893 (1984).

31. *Russello*, 464 U.S. at 21-22.

32. *Id.* at 19.

33. *Id.* at 28-29.

34. See *Miller v. California*, 413 U.S. 15, 23, *reh'g denied*, 414 U.S. 881 (1973); *Roth v. United States*, 354 U.S. 476, 485, *reh'g denied*, 355 U.S. 852 (1957).

35. *Sanders v. State*, 231 Ga. 608, 613, 203 S.E.2d 153, 157 (1974).

36. See *Miller*, 413 U.S. at 23; *Roth*, 354 U.S. at 485.

37. Federal RICO was not used in this manner until August 1987. *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987). In *Pryba*, the defendants operated a number of retail video stores and were indicted on several counts of alleged RICO violations, three of which involved obscenity violations, with accompanying criminal forfeiture provisions. *Id.* at 1507-08. The court issued an ex parte restraining order to prevent the defendants from disposing of certain assets that might be forfeitable under RICO's forfeiture provisions. *Id.* at 1508. The defendants claimed that RICO's forfeiture provision acted as a prior restraint on free speech. *Id.*

The United States District Court for the Eastern District of Virginia held that the forfeiture provision of federal RICO was constitutional. *Id.* at 1516. It 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 forfeiture. *Id.* at 1512. The court, having decided that the materials were obscene, seized the materials as a subsequent punishment for the defendants' criminal conduct. *Id.* at 1512-13.

courts have dismissed prior restraint claims and upheld as constitutional RICO's forfeiture provision, characterizing it as an in rem penalty for past illegal conduct.³⁸ Other courts, however, have held that it is unconstitutional, reasoning that it acts as a prior restraint on protected speech and materials.³⁹ These state decisions may serve as a guide in determining the constitutionality of the forfeiture provision under federal RICO.

In *Western Business Systems, Inc. v. Slaton*,⁴⁰ the United States District Court for the Northern District of Georgia upheld Georgia's RICO forfeiture provision as it applied to the predicate offense of obscenity.⁴¹ In *Western Business Systems*, purveyors of sexually explicit materials moved for a preliminary injunction to prevent the future application of Georgia's RICO Act.⁴² The court denied the preliminary injunction and held that the Act did not infringe upon the defendant's first amendment right to freedom of speech.⁴³ In dicta, the court further stated that Georgia's RICO law provides for the forfeiture of property "of whatever nature and no matter how inoffensive, if it is acquired with racketeering proceeds."⁴⁴ The seizure, therefore, is unrelated to the contents.⁴⁵ Moreover, the court reasoned that property is forfeited not because of any likelihood that it may be obscene, but because it is property realized or gained from crime.⁴⁶

The Supreme Court of Indiana declared its RICO statute constitutional in *4447 Corp. v. Goldsmith*.⁴⁷ In *4447 Corp.*, the state alleged

38. See *Western Business Systems, Inc. v. Slaton*, 492 F. Supp. 513 (N.D. Ga. 1980); *4447 Corp. v. Goldsmith*, 479 N.E.2d 578 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559, 564-65 (Ind. 1987), *rev'd sub nom.* *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989). See *infra* notes 40-55 and accompanying text.

39. *State v. Feld*, 155 Ariz. 88, 745 P.2d 146 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988). See *infra* notes 59-62 and accompanying text.

40. 492 F. Supp. 513 (N.D. Ga. 1980).

41. *Id.* at 515.

42. *Id.* at 513. Ordinarily, in a RICO action, the prosecutor seeks to prevent the defendant from disposing of certain assets. *4447 Corp.*, 479 N.E.2d at 581-83. In *Western Business Systems*, however, the bookstore owners initiated the action to prevent enforcement of the RICO statute. *Western Business Systems*, 492 F. Supp. at 513.

Several RICO statutes provide a private right of action or right to restitution with treble damages for those individuals injured by racketeering activity. See, e.g., *Feld*, 155 Ariz. at 97, 745 P.2d at 155 (construing the Arizona RICO statute, ARIZ. REV. STAT. ANN. § 13-2314(D)(4) (1978)).

43. *Western Business Systems*, 492 F. Supp. at 515.

44. *Id.* at 514.

45. *Id.*

46. *Id.*

47. 504 N.E.2d 559, 566 (Ind. 1987), *rev'd sub nom.* *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989). The defendants moved to vacate the injunctive orders providing for seizure of adult bookstore contents and their closing. *4447 Corp. v. Goldsmith*, 479 N.E.2d

that several bookstores were part of an illegal enterprise that contained sexually oriented books, magazines, films, and videos for sale or exhibition.⁴⁸ Invoking Indiana's Civil Remedies for Racketeering Activity (CRRA) statute, the state sought civil injunctive relief to bar further racketeering violations based on the predicate offense of obscenity.⁴⁹ Simultaneously, the prosecutor filed a "Verified Petition for Seizure of Property Subject to Forfeiture."⁵⁰ Two Indiana county courts issued ex parte seizure orders based on the state's allegations.⁵¹ In one of the counties, two bookstores were permitted to continue operating, while only an unopened bookstore was sealed.⁵² In the other county, however, all of the bookstores were sealed and the contents seized.⁵³ The owners alleged that the ex parte seizure orders were an unconstitutional prior restraint on their first amendment rights.⁵⁴ The Supreme Court of Indiana held that the RICO/CRRA

578, 580 (Ind. Ct. App. 1985). The circuit court denied the motion. *Id.* The Indiana Court of Appeals reversed and held that the injunctive remedies, seizure, and forfeiture sanctions of state RICO constituted unconstitutional prior restraints when applied to the predicate offense of obscenity. *Id.* at 585.

48. 4447 Corp., 504 N.E.2d at 561-62.

49. *Id.*

50. *Id.* Attached to the pretrial seizure petition was a probable cause affidavit sworn by a police officer, alleging that a violation of RICO had occurred. *Id.*

51. 4447 Corp., 479 N.E.2d at 582-83. Both circuit court cases involved the constitutionality of RICO's forfeiture provision and were consolidated on appeal. *Id.* at 580. In the trial court case prosecuted in Marion County, the defendants had never been convicted of violating the state's obscenity statute. *Id.* at 580-83. In the Ft. Wayne case, however, the prosecutor cited thirty-nine previous obscenity convictions constituting a pattern of racketeering activity. *Id.* at 583. This distinction may raise a question as to whether the state has a cause of action against the defendants in Marion County without the predicate violation of obscenity. See *J.N.S., Inc. v. State*, 712 F.2d 303, 305-06 (7th Cir. 1983) (Distributors of sexually explicit materials had twice been charged but had not been convicted of obscenity violations; the distributors had not suffered sufficient actual or threatened injury to present a "case or controversy" under Article III of the Constitution.). But see *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916, 926 (1989) (There is no constitutional basis that alleged predicate acts used in a RICO/obscenity prosecution must be "affirmed convictions"); *United States v. Malatesta*, 583 F.2d 748, 757 (5th Cir. 1978) (Under federal RICO, conviction of the underlying offense is not required.), *reh'g en banc*, 590 F.2d 1379 (1979), *cert. denied*, 444 U.S. 846 (1979). Federal and several state RICO statutes do not mention the word "conviction." See, e.g., 18 U.S.C. § 1963 (1982); HAW. REV. STAT. § 842-3 (1985); IDAHO CODE § 18-7804 (1987); LA. REV. STAT. ANN. § 1353 (West Supp. 1988); N.J. STAT. ANN. § 2C:41-3(a) (West 1982); N.C. GEN. STAT. § 75D-4(b) (1987); R.I. GEN. LAWS § 7-15-3 (1985); UTAH CODE ANN. § 76-10-1603.5 (Supp. 1988). Instead, the statutes speak only of committing a "violation" of any of the enumerated offenses. *Id.* But see COLO. REV. STAT. § 18-17-105 (1986); FLA. STAT. § 895.04 (1987); GA. CODE ANN. § 16-14-5(a) (1988); MISS. CODE ANN. § 97-43-7 (Supp. 1988); NEV. REV. STAT. § 207.410 (1983); N.Y. PENAL LAW § 460.30 (McKinney Supp. 1988); TENN. CODE ANN. § 39-1-1005 (Supp. 1988); WIS. STAT. ANN. § 946.84 (West Supp. 1987).

52. 4447 Corp., 479 N.E.2d at 582.

53. *Id.* at 583.

54. *Id.*

statute and the pretrial seizure order was constitutional.⁵⁵ In discussing the RICO/CRRA statute, the court adopted the dicta in *Western Business Systems, Inc. v. Slaton*⁵⁶ and held that if the elements of a pattern of racketeering activity are shown, then the assets are subject to forfeiture.⁵⁷ The court further held that the Indiana RICO statute met the standards of procedural due process because a forfeiture hearing was held within a reasonable time after the petition for seizure was filed.⁵⁸

55. *447 Corp.*, 504 N.E.2d at 565-67. As this issue went to press, the Supreme Court held that a pretrial seizure order removing books and films from a bookstore based on mere probable cause to believe that the books and films were obscene is unconstitutional. *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916, 928-29 (1989). Mere probable cause to believe that there are valid grounds to seize a bookstore's assets is insufficient to remove the sale of presumptively protected books and films. *Id.* at 929. When the first amendment is involved, there is an exception to the general rule that all contraband, instrumentalities, and evidence of a crime may be seized on probable cause that a violation has occurred. *Id.* at 927 (citing *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 n.5 (1979)). The Court stated that the risk of prior restraint concerning materials protected by the first amendment motivated this rule. *Id.* at 928. See *Heller v. New York*, 413 U.S. 483, 492 (1973) (Although a single copy of a film may be seized for evidentiary matters based on probable cause, seizing films to destroy them or to prevent their distribution or exhibition is a very different matter.); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 637 (1968) (per curiam) (A warrant authorizing the seizure of materials presumptively protected by the first amendment may not be based solely on the allegations of a police officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts.); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 208 (1964) (Seizing and destroying books on the belief that the books are obscene is unconstitutional because it does not adequately safeguard against the suppression of nonobscene books.). *But see Western Business Systems, Inc. v. Slaton*, 492 F. Supp. 513, 514 (N.D. Ga. 1980) (A court may issue an ex parte seizure order upon a showing of probable cause that an individual has violated RICO and that his property is subject to forfeiture.).

In determining that the pretrial order was unconstitutional, the Supreme Court expressly stated that it was not deciding the constitutionality of post-trial forfeiture or of any civil post-trial sanction authorized by RICO. *Fort Wayne Books*, 109 S. Ct. at 928-29, 928 n.11. This Comment discusses the constitutionality of the post-trial forfeiture of federal and state RICO.

56. 492 F. Supp. 513, 514 (N.D. Ga. 1980). See *supra* notes 40-46 and accompanying text.

57. *4447 Corp.*, 504 N.E.2d at 565.

58. *Id.* at 567. RICO's forfeiture provision raises another constitutional issue regarding the suppression of obscene materials. It is well settled that speech may be suppressed pursuant to certain constitutionally required procedures. *Freedman v. Maryland*, 380 U.S. 51 (1965). In *Freedman*, the state of Maryland had a statute that required all films to be previewed by the Maryland State Board of Censors. *Id.* at 52 & n.1. After being convicted for violation of this statute, a film exhibitor challenged the constitutionality of this statute alleging that it acted as an unconstitutional prior restraint on free speech. *Id.* at 52-54. The Maryland Court of Appeals affirmed the exhibitor's conviction. 233 Md. 498, 505, 197 A.2d 232, 235-36 (Ct. App. 1964). The Supreme Court of the United States reversed and provided three safeguards to ensure that obscene materials would be constitutionally enjoined: First, the censor must bear the burden of proof that the film is unprotected by the first amendment; second, an adversarial, prompt, and final adjudication on the issue of obscenity must be assured by statute or by a judicial determination; and third, any prior restraint before judicial review must be strictly limited in duration. *Id.* at 58-61. See *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (reaffirms the *Freedman* principles).

Other state courts have held RICO's forfeiture provision unconstitutional, however. In *State v. Feld*,⁵⁹ the state indicted two individual defendants and a corporate defendant for showing obscene films.⁶⁰ The Court of Appeals of Arizona held that the RICO forfeiture provision was unconstitutional because it permitted the sale and forfeiture of a firm's assets when only a portion of the assets were found to be obscene.⁶¹ The court reasoned that because the sanction restricted future, presumptively protected speech, rather than punished the past distribution of unprotected speech, it was an unconstitutional prior restraint.⁶²

B. *The Law of Obscenity*

The courts historically have sought to protect an individual's first amendment rights.⁶³ The Supreme Court, however, does not treat this right to first amendment protection as absolute.⁶⁴ Speech may be abridged without violating the first amendment if the time, place, or manner of the speech makes the suppression reasonable.⁶⁵ In *Chaplinsky v. New Hampshire*,⁶⁶ for example, the Supreme Court

Under federal RICO, the ex parte seizure order provides for forfeiture only after the defendant has been convicted of racketeering activity and the property was used in, or derived from, the criminal activity. 18 U.S.C. § 1963(c) (1982). On the other hand, several state RICO forfeiture provisions authorize the government or law enforcement agent to seize the property *before* such property has been adjudicated obscene. See, e.g., IND. CODE ANN. § 34-4-30.5-3 (West 1986). The issue arises whether the ex parte order and seizure absent any proceeding are constitutional, or whether an adversarial proceeding is required to determine the obscenity of each item *prior* to the seizure of such materials. See *Sanders v. State*, 231 Ga. 608, 612-13, 203 S.E.2d 153, 156 (1974) (Under nuisance law, a temporary restraint against obscene materials is authorized only *after* an adversary hearing that makes a prompt determination of whether or not an item is obscene.).

59. 155 Ariz. 88, 745 P.2d 146 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988).

60. *Id.* at 90, 745 P.2d at 148.

61. *Id.* at 97, 745 P.2d at 155. The court did not, however, declare the entire RICO scheme unconstitutional, but held that only the forfeiture provision of RICO was unconstitutional. *Id.* at 98, 745 P.2d at 156. The court reasoned that where a statute is in part both constitutional and unconstitutional, and if the sections are severable, then those sections found to be constitutional will be upheld and those found to be unconstitutional will be rejected. *Id.*

62. *Id.*

63. See *Roth v. United States*, 354 U.S. 476, 484, *reh'g denied*, 355 U.S. 852 (1957).

64. *Id.* at 483. On the theory of the first amendment, one commentator has stated:

[The] absolutist position [regarding first amendment rights], whereby any law which for any reason and in any degree punishes or restricts speech is said to be unconstitutional, has never been accepted by the Supreme Court, and, in fact, has been denied by the Court in a long series of opinions, both those which upheld the free speech claim, and those which denied it.

M. NIMMER, NIMMER ON FREEDOM OF SPEECH 2-3 (1984).

65. M. NIMMER, *supra* note 64, at 2-4.

66. 315 U.S. 568 (1942).

stated that certain limited classes of speech like the "lewd and obscene" are not protected by the first amendment.⁶⁷ The Court reasoned that this kind of speech does not warrant protection because it has only slight social value, as compared to the social interests of order and morality.⁶⁸ Confirming *Chaplinsky's* dicta, the Court in *Roth v. United States*⁶⁹ held that "obscenity is not within the area of constitutionally protected speech or press."⁷⁰ Thus, an individual does not have a first amendment right to distribute materials defined as "obscene."

Several attempts have been made to define "obscenity."⁷¹ In the landmark case of *Miller v. California*,⁷² the Supreme Court set forth the current standard of obscenity with a three-part test.⁷³ Under the *Miller* standard, a work is subject to state regulation, if under prevailing community standards and taken as a whole by an average person, it: first, appeals to the prurient interest; second, depicts or describes in a patently offensive manner certain sexual conduct defined by state law; and third, lacks serious artistic, literary, scientific, or political value.⁷⁴ The Court stated that sex and nudity could not be depicted without limit by films or pictures sold in public places.⁷⁵ Furthermore, the Court stated that the primary concern is that the material in question be judged by the "average person," and not by a sensitive

67. *Id.* at 571-72. Other types of unprotected speech also include "the profane, the libelous, and the insulting or 'fighting words.'" *Id.* at 572.

68. *Id.*

69. 354 U.S. 476, *reh'g denied*, 355 U.S. 852 (1957).

70. *Id.* at 485. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973) (Obscene material is speech that is not entitled to first amendment protection.); *Miller v. California*, 413 U.S. 15, 23 (Obscene material is not protected by the first amendment.), *reh'g denied*, 414 U.S. 881 (1973).

71. The early standard adopted by many American courts was delineated in the English case of *The Queen v. Hicklin*, 3 Q.B. 360 (1868). The *Hicklin* standard measured the work by its effect on persons specially susceptible to immoral influences. *Id.* at 371. In 1957, the Supreme Court rejected the *Hicklin* standard and held that the test for obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Roth*, 354 U.S. at 489. The Court defined "prurient" as having "a tendency to excite lustful thoughts." *Id.* at 486. The standard was later changed to include three elements: First, "the dominant theme of the material taken as a whole appeals to a prurient interest in sex;" second, "the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters;" and third, "the material is utterly without redeeming social value." *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966).

72. 413 U.S. 15, *reh'g denied*, 414 U.S. 881 (1973).

73. *Id.* at 24. But see *State v. Henry*, 78 Or. App. 392, 405, 717 P.2d 189, 196-97 (Ct. App. 1986) (en banc) (holding that an obscenity statute patterned after the *Miller* standard was unconstitutionally vague).

74. *Miller*, 413 U.S. at 24.

75. *Id.* at 25-26.

person.⁷⁶

In *Paris Adult Theatre I v. Slaton*,⁷⁷ decided the same day as *Miller*, the Court held that states could regulate the distribution of obscene materials.⁷⁸ In *Paris Adult Theatre*, a movie theater exhibited two obscene films.⁷⁹ The theater posted a sign on the door limiting the entrance to those persons over twenty-one years of age.⁸⁰ The Court held that states have a legitimate interest in regulating obscene materials, and that restricting admission to "consenting adults" did not give rise to constitutional protection.⁸¹ States, therefore, can ban obscenities displayed in adult movie theaters and bookstores, so long as the applicable law does not infringe on the owner's first amendment rights concerning nonobscene materials.⁸²

III. THE DOCTRINE OF PRIOR RESTRAINT

Laws that attempt to regulate adult bookstores impact on first amendment protections. In determining whether such laws infringe on a bookstore owner's first amendment right to freedom of speech, the courts engage in a two-part test. First, the court must determine whether such sanction acts as a "prior restraint." A prior restraint on speech or publication is the most egregious type of first amendment infringement.⁸³ A "prior restraint" on speech suppresses an act of expression in advance, instead of punishing the expression after it enters the market place.⁸⁴ Such restraints are constitutional only if the material suppressed is unprotected obscenity.⁸⁵ Otherwise, any system of prior restraint bears a heavy presumption against its constitutional validity.⁸⁶

76. *Id.* at 33.

77. 413 U.S. 49 (1973).

78. *Id.* at 57-58.

79. *Id.* at 51. The two films, *Magic Mirror* and *It All Comes Out in the End*, were characterized as "hard core pornography" by the Supreme Court of Georgia. *Id.* at 51-52. See generally *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (Private possession of obscene materials by a consenting adult is not a criminal act.).

80. *Paris Adult Theatre*, 413 U.S. at 52.

81. *Id.* at 68-69. The Court explicitly rejected the argument that obscene materials were protected by the fundamental right of privacy. *Id.* at 65-67.

82. *Id.* at 69.

83. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

84. See *Blasi*, *supra* note 12, at 11 (Acts of expression may not be regulated "in advance.").

85. See *New York v. Ferber*, 458 U.S. 747, 773 (1982) (A statute prohibiting distribution of materials showing children engaged in sexual conduct is constitutional.); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68-69 (1973) (A statute that bans the commercial distribution of obscene materials is constitutional.); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445 (1957) (A statute providing for injunctions against obscene materials is constitutional.).

86. *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Freedman v. Maryland*, 380 U.S. 51, 57

A finding that a law acts as a prior restraint, however, does not mean that it is unconstitutional. In the second phase of the analysis, the court must examine the government's interest in restraining an individual's first amendment rights. Only extraordinary and compelling state interests that cannot be served by less restrictive alternatives can limit first amendment rights and justify a prior restraint.⁸⁷ The Supreme Court has held that prior restraints may be constitutional only in "exceptional cases."⁸⁸ These "exceptional cases" include obscenity,⁸⁹ the publication of sensitive materials during wartime,⁹⁰ and incitements of violence and overthrow of the government by force.⁹¹ Because of this difficult standard, the determination that a statute is a prior restraint in the first part of the test usually amounts to a finding of unconstitutionality.⁹²

State courts that have held the forfeiture provision of RICO unconstitutional have reasoned that it acts as a prior restraint on protected materials.⁹³ In reaching this result, state courts have relied on cases construing moral nuisance abatement statutes.⁹⁴ These moral nuisance abatement laws have been used by the states to close adult bookstores and theaters.⁹⁵ Bookstores constitute a nuisance and vio-

(1965) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

The common law also prohibited prior restraints on speech: "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity." 4 W. BLACKSTONE, COMMENTARIES *152.

87. See *Near*, 283 U.S. at 716 (The protection against prior restraints is not absolutely unlimited.).

88. *Id.*

89. *Id.* Unlike obscene materials, sexually explicit but nonobscene materials are entitled to the same protection as other forms of expressions. *4447 Corp. v. Goldsmith*, 479 N.E.2d 578, 584 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *rev'd sub nom.* *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989).

90. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

91. *Near*, 283 U.S. at 716.

92. See *infra* notes 175-92 and accompanying text.

93. See *State v. Feld*, 155 Ariz. 88, 97, 745 P.2d 146, 155 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988); *4447 Corp.*, 479 N.E.2d at 592.

94. *4447 Corp.*, 479 N.E.2d at 587. Bookstore owners view the forfeiture proceedings under RICO as the functional equivalent of a nuisance or obscenity action. *Id.* The Supreme Court of Indiana disagreed in *4447 Corp. v. Goldsmith*, but failed to state its reason for so doing. 504 N.E.2d at 564.

95. See *General Corp. v. State ex rel. Sweeton*, 294 Ala. 657, 661, 320 So. 2d 668, 671 (1975), *cert. denied*, 425 U.S. 904 (1976) (An action was brought under Alabama's Red Light abatement statute that prohibits showing obscene motion pictures.); *People ex rel. Busch v. Projection Room Theater*, 17 Cal. 3d 42, 47, 550 P.2d 600, 602 (1976) (An action was brought to enjoin the exhibition of obscene books and films under California's Red Light abatement statute and under the general public nuisance statute.), *cert. denied*, 429 U.S. 922 (1976);

late public health laws when they sell obscene materials.⁹⁶ Once an establishment is found to have sold obscene materials, a padlock order closes the entire premises, usually for one year.⁹⁷ Upon entry of a final judgment, the defendant forfeits all property used in conducting the nuisance.⁹⁸ The majority of courts that have addressed moral nuisance abatement laws have held that the padlock provision is unconstitutional because the provision acts as a prior restraint that infringes on an individual's first amendment rights.⁹⁹

Sanders v. State, 231 Ga. 608, 610-11, 203 S.E.2d 153, 155-56 (1974) (A Georgia nuisance statute prohibited the selling or distribution of obscene materials and films.); *State ex rel. Blee v. Mohny Enter.*, 154 Ind. App. 244, 245, 289 N.E.2d 519, 520 (Ct. App. 1972) (An Indiana statute prohibited the maintaining of a nuisance and provided that the building maintaining such nuisance would be closed.). Generally, there are three kinds of nuisance statutes. There are Red Light abatement laws and general nuisance statutes, which do not refer to obscenity. *See, e.g.*, ALA. CODE § 6-5-140 (1977); CAL. CIVIL CODE § 3479 (West 1970); CAL. PENAL CODE § 11225 (West 1982); MICH. COMP. LAWS ANN. § 600.3801 (West 1987); N.Y. PUB. HEALTH LAW § 2320 (McKinney 1985). There are also modern moral nuisance abatement statutes, which are drafted to deal specifically with obscenity. These statutes generally incorporate the *Miller* definition of obscenity. *See, e.g.*, FLA. STAT. § 823.13 (1987); IDAHO CODE §§ 52-401 to 52-417 (1988); N.C. GEN. STAT. § 19-2.1 (1987); OHIO REV. CODE ANN. §§ 3767.03-.07 (Anderson 1988); TEX. REV. CIV. STAT. ANN. arts 4666-4667 (Vernon 1952).

96. Nuisance is generally defined as any activity injurious to the safety, health, or morals of the public. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 643 n.2 (5th ed. 1984) (citing *Commonwealth v. So. Covington & Cincinnati St. Ry. Co.*, 181 Ky. 459, 463, 205 S.W. 581, 583 (1918)).

97. The typical nuisance abatement law provides that the government, or any private citizen who executes a bond can bring an action for abatement of a moral nuisance. *See, e.g.* N.C. GEN. STAT. § 19-2.1 (1987). Upon a showing of good cause, the court may issue an ex parte temporary restraining order preventing the defendant and all other persons from removing any personal property from the premises. *Id.* at § 19-2.3. The defendant may then file a motion to dissolve such order. *Id.* The court must conduct an adversary hearing after the filing of such motion. *Id.* If the court grants the preliminary injunction, the officer serving such order makes an inventory of the personal property and contents on the premises where such nuisance is alleged to exist. *Id.* Once a nuisance is established, final judgment is entered enjoining the defendant from maintaining the nuisance. *Id.* at § 19-5. All obscene materials are then destroyed, and all proceeds received are forfeited. *Id.* The final order may provide for a padlock order closing down the premises. *Id.* Thus, the padlock order and RICO's forfeiture provision are similar sanctions. *See supra* notes 25-33 and accompanying text.

98. *Id.* at § 19-5.

99. *See Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550, 1552 (11th Cir. 1983) (A city ordinance providing for revocation of a business' license where the licensee exhibited obscene videotapes was held to be an unconstitutional prior restraint.); *Nihiser v. Sendak*, 405 F. Supp. 482, 492 (N.D. Ind. 1974) (A nuisance statute which prohibited a theater from producing or displaying obscene films was held to be an unconstitutional prior restraint.), *vacated*, 423 U.S. 976 (1975), *aff'd on appeal after remand*, 431 U.S. 961 (1977); *Sanders*, 231 Ga. at 613, 203 S.E.2d at 157 (A Georgia statute providing for the closure of a bookstore upon evidence that some of its magazines were obscene was unconstitutional.); *New Riviera Arts Theatre v. State ex rel. Davis*, 219 Tenn. 652, 659-60, 412 S.W.2d 890, 893-94 (1967) (An injunction prohibiting the showing of any film, even those not obscene, was unconstitutional.).

For a thorough discussion of the doctrine of prior restraints in the context of nuisance abatement statutes, see Note, *Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power*, 58 N.Y.U. L. REV. 1478 (1983).

The classic case exemplifying the heavy presumption against the constitutionality of prior restraints is *Near v. Minnesota ex rel. Olson*.¹⁰⁰ In *Near*, the Minneapolis Saturday Press was closed down, pursuant to a state statute, because it published a "malicious, scandalous and defamatory" newspaper, and was, therefore, deemed a public nuisance.¹⁰¹ The judgment permanently enjoined the Press from publishing the newspaper.¹⁰² The Supreme Court held that the statute was unconstitutional on the grounds that it constituted an impermissible prior restraint.¹⁰³ The Court noted that the statute was aimed at preventing, rather than punishing speech,¹⁰⁴ and therefore, conflicted with the aim of the first amendment to prevent any prior restraints on publication.¹⁰⁵

In certain cases, courts have adopted the doctrine of prior restraint to prevent a nuisance statute from restricting the distribution of printed, nonobscene materials. For example, in *State ex rel. Blee v. Mohney Enterprises*,¹⁰⁶ an Indiana statute provided that any building deemed a nuisance would be closed.¹⁰⁷ The plaintiff sought an injunction against the owners of an adult bookstore for creating a nuisance by selling obscene materials.¹⁰⁸ The court held that an injunction that seeks to enjoin the distribution of any periodical, including nonobscene printed materials, is a restraint on first amendment rights.¹⁰⁹

Two years later, in *General Corp. v. State ex rel. Sweeton*,¹¹⁰ the Supreme Court of Alabama faced the issue of suppression of non-printed materials.¹¹¹ The doctrine of prior restraint prevented a nuisance statute from depriving an individual of his first amendment rights prospectively.¹¹² In *General Corp.*, the state alleged that the defendants had been showing obscene films at a movie theater.¹¹³ The

100. 283 U.S. 697 (1931).

101. *Id.* at 706.

102. *Id.*

103. *Id.* at 723.

104. *Id.* at 715.

105. *Id.* at 713.

106. 154 Ind. App. 244, 289 N.E.2d 519 (Ind. Ct. App. 1972).

107. *Id.* at 244-45, 289 N.E.2d at 520 (quoting IND. CODE § 35-30-2-1; IND. ANN. STAT. § 9-2701 (Burns 1956)).

108. *Id.* The materials included magazines, periodicals, and a movie containing pictures of nude and semi-nude males and females in suggestive poses engaging in various masochistic and sadistic activities. *Id.* Although the court did not decide that the materials were obscene, they found it difficult to find any redeeming social value in these materials. *Id.*

109. *Id.* at 248, 289 N.E.2d at 521. In dicta, the court stated that a statute may not "prohibit dissemination of materials . . . not yet . . . printed." *Id.*

110. 294 Ala. 657, 320 So. 2d 668 (1975), *cert. denied*, 425 U.S. 904 (1976).

111. *Id.* at 661, 320 So. 2d at 671.

112. *Id.* at 666, 320 So. 2d at 676.

113. *Id.* at 661, 320 So. 2d at 671. Because of the unique nature of motion picture

Supreme Court of Alabama declared its Red Light abatement law applicable to obscenity,¹¹⁴ but held the statute's padlock provision unconstitutional.¹¹⁵ The court further held that the showing of obscene materials in the past was not a sufficient compelling interest to deprive an individual of his first amendment rights in the future.¹¹⁶ The court suggested, however, that an injunction focused on a specific obscene film may fall outside the contours of the doctrine of prior restraint and be held constitutional.¹¹⁷

The minority of courts that have upheld padlock orders have narrowly construed the applicable nuisance statute. In *State ex rel. Ewing v. "Without a Stitch,"*¹¹⁸ the Supreme Court of Ohio upheld a statute closing a theater for one year after the theater showed a single obscene film.¹¹⁹ The court held that the nuisance abated by the statute was limited to a specific obscene film; therefore, the owner was prohibited only from showing that particular film.¹²⁰ The court suggested that a statute cannot require the theater owner to ensure that no obscene films would be shown in the future, implying that such a requirement would create an unconstitutional prior restraint on the defendant's activities.¹²¹

Notwithstanding the previous recognition that certain activities of commercial adult bookstores are constitutionally protected under the doctrine of prior restraint, the Supreme Court recently refused to acknowledge the presence of a first amendment issue in certain lim-

distribution, a film would be classified obscene and thereby would exceed first amendment protection, even before a written description of the same subject. *Id.* at 663, 320 So. 2d at 672. Therefore, when a court holds that a statute acts as an unconstitutional prior restraint towards exhibiting future films, it follows that the statute must act as an unconstitutional prior restraint towards written materials as well.

114. *Id.* at 664, 320 So. 2d at 674. The Red Light abatement statutes usually define public nuisance as "any place in or upon which lewdness, assignation or prostitution" occurs. ALA. CODE § 6-5-140 (1977). See also, CAL. PENAL CODE § 11225 (West 1982); N.Y. PUB. HEALTH LAW § 2320 (McKinney 1985). Although these do not explicitly refer to obscenity, courts have construed "lewdness" to include obscenity. See *Sweeton*, 294 Ala. at 664, 320 So. 2d at 674.

115. *Sweeton*, 294 Ala. at 666, 320 So. 2d at 675.

116. *Id.* at 666, 320 So. 2d at 676.

117. *Id.* See also *People ex rel. Busch v. Projection Room Theater*, 17 Cal. 3d 42, 57, 550 P.2d 600, 609 (For a nuisance statute to be held constitutional, it must be directed at books and films adjudged obscene.), *cert. denied*, 429 U.S. 922 (1976).

118. 37 Ohio St. 2d 95, 307 N.E.2d 911 (1974), *appeal dismissed sub nom. Art Theater Guild, Inc. v. Ewing*, 421 U.S. 923 (1975).

119. *Id.* at 104, 307 N.E.2d at 917.

120. *Id.* at 105, 307 N.E.2d at 918.

121. *Id.* But see *Fehlhaber v. North Carolina*, 675 F.2d 1365, 1371 (4th Cir. 1982) (An injunction prohibiting future distribution of materials not yet declared obscene was held to be constitutional.).

ited circumstances. In *Arcara v. Cloud Books, Inc.*,¹²² the Court held that the first amendment does not preclude closure of a bookstore where prostitution takes place on its premises.¹²³ The defendants, in *Arcara*, operated an adult bookstore that sold sexually explicit publications and had booths available for viewing sexually explicit movies.¹²⁴ In addition to the sale of sexually explicit materials, illicit sexual activities, including the solicitation of prostitution, occurred on the premises.¹²⁵ A New York statute authorized the closure of any building found to be a nuisance, if the building was used as a place for prostitution and lewdness.¹²⁶ The statute, however, did not provide for the seizure of the contents of the building.¹²⁷ The defendants argued that closing the bookstore interfered with their first amendment right to sell nonobscene books on the premises.¹²⁸

The Supreme Court upheld the statute, stating that the factual situation in *Arcara* did not trigger the application of the first amendment.¹²⁹ The Court reasoned that the sexual activity that occurred on the bookstore premises involved nonexpressive activity, which was beyond the scope of first amendment protection.¹³⁰ In addition, the Court rejected a prior restraint argument because the defendants were free to carry on their bookselling business at another location.¹³¹ Finally, the Court concluded that unlawful, public sexual conduct could not be cloaked in legality by relying on the fact that the store also engaged in bookselling — a protected first amendment activity.¹³² In a concurring opinion, Justice O'Connor emphasized that if a nuisance statute was used as a pretext to close down a book-

122. 478 U.S. 697 (1986). For a thorough discussion of *Arcara v. Cloud Books, Inc.*, see Note, *Constitutional Law—First Amendment—First Amendment Does Not Preclude Closure of Adult Bookstore Where Illegal Activity Occurs on Premises*, 17 SETON HALL L. REV. 382 (1987).

123. *Arcara*, 478 U.S. at 707.

124. *Id.* at 698. No issue was presented as to whether the movies or other materials were obscene. *Id.*

125. *Id.* at 698-99.

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

127. *Id.*

128. *Id.* at 700.

129. *Id.* at 707.

130. *Id.* The Court held that illegal sexual activities like prostitution, carry no element of protected expression. *Id.* at 705. First amendment protections are not triggered by linking together the words "sex" and "books." *Id.* See *Commonwealth ex rel. Lewis v. Allouwill Realty Corp.*, 330 Pa. Super. 32, 39, 478 A.2d 1334, 1338 (1984) (A nuisance statute that provides for the closure of a bookstore where illicit sexual activities occurred was upheld as constitutional.); *Commonwealth v. Croatan Books, Inc.*, 228 Va. 383, 391, 323 S.E.2d 86, 90 (1984) (Closing down a bookstore where illicit sexual activities occurred is constitutional.).

131. *Arcara*, 478 U.S. at 705 n.2.

132. *Id.* at 707.

store because it sold indecent books, such action would trigger first amendment protection.¹³³

Apart from the limited holding of *Arcara*, any method of curtailing obscenity rests on the following general rule: A sanction against an adult bookstore that suppresses protected speech, as well as unprotected obscenity, acts as a prior restraint and violates the adult bookstore owner's first amendment rights.

IV. APPLICATION OF THE DOCTRINE OF PRIOR RESTRAINT TO RICO'S FORFEITURE PROVISION

The constitutionality of RICO's forfeiture provision hinges on whether the provision operates as a prior restraint.¹³⁴ To determine whether a prior restraint exists, one must examine the sanction itself. The typical padlock order under a moral nuisance abatement law provides for the closure of an adult bookstore or theater for one year and the ban of all personal property from the premises.¹³⁵ A majority of courts have held that such orders are prior restraints.¹³⁶ RICO imposes even more severe sanctions than moral nuisance abatement laws because it permits seizure orders of indefinite duration and creates remedies of permanent forfeiture.¹³⁷ The forfeiture provision may, therefore, violate the first amendment because it acts as an unconstitutional prior restraint on both present and future protected materials.

133. *Id.* at 708 (O'Connor, J., concurring).

134. Prior restraints occur when the government suppresses speech "in advance" of distribution. Prior restraints on protected speech are presumptively unconstitutional. *See* *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). *See also supra* notes 84-86 and accompanying text.

135. *See supra* note 94 and accompanying text. Under the moral nuisance abatement law, the defendant typically forfeits obscene books and films, and property such as furniture, instruments, equipment, and fixtures. *See, e.g.*, IDAHO CODE § 52-404 (1988); N.C. GEN. STAT. § 19-2.3 (1987).

136. *See* *General Corp. v. State ex rel. Sweeton*, 294 Ala. 657, 320 So. 2d 668 (1975), *cert. denied*, 425 U.S. 904 (1976); *People ex rel. Busch v. Projection Room Theater*, 17 Cal. 3d 42, 550 P.2d 600 (1976); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974); *State ex rel. Blee v. Mohny Enter.*, 154 Ind. App. 244, 289 N.E.2d 519 (Ct. App. 1972); *State ex rel. Ewing v. "Without A Stitch"*, 37 Ohio St. 2d 95, 307 N.E.2d 911 (1974), *appeal dismissed sub nom. Art Theater Guild, Inc. v. Ewing*, 421 U.S. 923 (1975).

137. *See* 4447 Corp. v. Goldsmith, 479 N.E.2d 578, 589 n.8 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *rev'd sub nom. Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989). The permanent forfeiture extends to protected materials and to neutral instrumentalities, such as bookshelves and camera equipment. *Id.*

In *4447 Corp. v. Goldsmith*,¹³⁸ the Supreme Court of Indiana held that RICO does not operate as an impermissible prior restraint as applied to the predicate offense of obscenity.¹³⁹ The state alleged that RICO seeks the seizure as punishment for past criminal activities,¹⁴⁰ and does not attempt to enjoin or restrain future activities.¹⁴¹ This argument, however, is tenuous because the forfeiture provision cannot be seen as an in rem punishment for past behavior. The constitutionality of a statute depends upon an examination of its substance and not its form.¹⁴² A statute must be tested by its effect and not solely its intent.¹⁴³

The Supreme Court in *Near* held that a statute that suppresses future publication of a newspaper was unconstitutional.¹⁴⁴ The Court stressed that the decision rested on the adverse effect the injunction had on future publications, and not on the validity of the charges against the public officials.¹⁴⁵ Similarly, RICO's forfeiture provision

138. 479 N.E.2d 578 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *rev'd sub nom.* Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916 (1989).

139. *4447 Corp.*, 504 N.E.2d at 563-64.

140. Brief for Petitioners-Appellees at 10, *4447 Corp. v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987). In *State ex rel. Kidwell v. U.S. Marketing, Inc.*, 102 Idaho 451, 631 P.2d 622 (1981), *appeal dismissed*, 455 U.S. 1009 (1982), the court upheld a nuisance statute that provided for a forfeiture or closure order of a business. *Id.* at 458, 631 P.2d at 629. The court viewed the forfeiture sanction as an in rem penalty against property used in the past for the crime of exhibiting obscene materials. *Id.* at 457, 631 P.2d at 628. The *Kidwell* court cited the Supreme Court opinion in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), as support for its holding. *Id.* In *Calero-Toledo*, the Supreme Court held that a yacht used for illegal drug trafficking could be seized under a forfeiture statute. *Calero-Toledo*, 416 U.S. at 686-90. The *Kidwell* court noted that the seizure deprived the violator of economic gain and was, therefore, punishment for past illegal activities. *Kidwell*, 102 Idaho at 457, 631 P.2d at 628. Unlike the illegal economic activity in *Calero-Toledo*, the *Kidwell* court dealt with both protected and unprotected speech. *Id.* at 453, 631 P.2d at 624.

141. *4447 Corp.*, 504 N.E.2d at 563. The state alleged that the bookstore owners' inconvenience was caused by their participation in a pattern of criminal activity and not caused by the state's desire to hinder the future distribution of protected materials. Brief for Petitioners-Appellees at 10, *4447 Corp. v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987). The effect of a regulation, however, and not the intent of such regulation is at issue. *See* *Mountain Timber Co. v. Washington*, 243 U.S. 219, 237 (1917); *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U.S. 350, 362 (1914); *United States v. Reynolds*, 235 U.S. 133, 148-49 (1914); *Bailey v. Alabama*, 219 U.S. 219, 244 (1911); *Henderson v. Mayor*, 92 U.S. 259, 268 (1875).

142. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 708-09 (1931). The legislatures in certain states have stated explicitly that their state RICO forfeiture proceeding is an in rem proceeding against the property. *See, e.g.*, GA. CODE ANN. § 16-14-7(c) (1988); N.C. GEN. STAT. § 75D-5(c) (1987). Nevertheless, the constitutionality of these statutes, like those in which the legislature is silent in classifying the forfeiture provision, depends upon an examination of its substance and not its form. *See* *Near*, 283 U.S. at 708-09. The mere classification as an in rem proceeding does not automatically make the forfeiture provision constitutional.

143. *Near*, 283 U.S. at 708-09.

144. *Id.* at 723.

145. *Id.* at 722-23. The injunction struck down in *Near* banned only future publications of

also acts as a prior restraint. Bookstore owners, like newspaper publishers, are distributors of protected speech. RICO's forfeiture provision seizes all of a defendant's assets, whether such assets are adjudged obscene or not.¹⁴⁶ This sanction, therefore, punishes the racketeer for his past behavior in distributing obscene materials. In addition, this sanction limits the future ability of the bookstore owner or newspaper publisher to distribute nonobscene protected materials.¹⁴⁷ Thus, the effect of RICO's forfeiture provision acts as a prospective restraint on both protected and unprotected speech. Moreover, the Supreme Court in *Russello* held that all profits and proceeds derived from the racketeering activity are forfeitable.¹⁴⁸ The state may argue that seizing an adult bookstore's nonobscene materials comes within the holding of *Russello*, since the alleged nonobscene materials were obtained from the profits of the sale of the obscene books and films. Yet, this would punish an individual indefinitely. The effect would be an infringement on the defendant's first amendment rights with respect to nonobscene materials, and therefore the forfeiture would constitute an impermissible prior restraint.

RICO is a vehicle to eliminate organized crime.¹⁴⁹ Obscenity is a part of organized crime.¹⁵⁰ The legislative history of RICO and cases construing RICO support the view that the forfeiture provision is a mechanism to eradicate future obscenity.¹⁵¹ In *Russello*, the Supreme Court stated that RICO was "intended to provide new weapons of unprecedented scope [to curtail] . . . organized crime and its economic roots."¹⁵² This concept operates prospectively. Forfeiture of a

"an obscene, lewd . . . or . . . malicious, scandalous and defamatory newspaper." *Id.* at 702. The effects of RICO's forfeiture provision are broader than the effects of the injunction in *Near* because the forfeiture provision seizes all property including nonobscene books and films. Compare 4447 Corp. v. Goldsmith, 479 N.E.2d 578, 589 n.8 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *rev'd sub nom.* Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916 (1989) (RICO's forfeiture provision permits seizure orders which extend to protected materials and neutral instrumentalities.) with *Near*, 283 U.S. at 702 (Minnesota statute provides for an injunction only against an obscene, lewd, and lascivious newspaper.).

146. See 18 U.S.C. § 1963(a) (1982).

147. See *Near*, 283 U.S. at 708-09.

148. *Russello v. United States*, 464 U.S. 16, 28-29 (1983).

149. *Id.* at 26-27. The view that the forfeiture provision is a mechanism to eradicate future obscenity receives its support from the legislative intent expressly stated in the laws enacting federal RICO: "The provisions of this Title shall be liberally construed to effectuate its remedial purpose." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). Therefore, Congress intended that the forfeiture provision be liberally construed to help eradicate obscenity which is a part of the foundation of organized crime. See *id.* at 84 Stat. 923 ("It is the purpose of this Act to seek the eradication of organized crime in the United States . . .").

150. 18 U.S.C. § 1961(1)(A) (West Supp. 1988). See *supra* note 4 and accompanying text.

151. See *Russello*, 464 U.S. at 26.

152. *Id.*

bookstore's assets prevents the individual from continuing to engage in criminal activities and, in addition, prevents the future distribution of nonobscene materials.¹⁵³ The forfeiture provision, therefore, acts as an unconstitutional prior restraint on a bookstore owner's first amendment rights. Even if bookstore owners sell obscene, unprotected materials in addition to nonobscene materials, this does not justify a prior restraint of first amendment freedoms. The Supreme Court has held that it is better to allow some unprotected speech, than to infringe the first amendment right concerning protected expressions.¹⁵⁴

In *State ex rel. Kidwell v. U.S. Marketing, Inc.*,¹⁵⁵ the Supreme Court of Idaho held that a padlock order was not a prior restraint.¹⁵⁶ The court reasoned that the padlock order restricted *all* speech through the forfeiture of property, and the restraint, therefore, was not aimed at the content of the speech.¹⁵⁷ The padlock order was viewed as an in rem action because the forfeiture was directed at the defendant's property.¹⁵⁸ The *Kidwell* court misinterpreted *Near* as requiring that the regulation of a future expression be content-based before the regulation could be characterized as a prior restraint.¹⁵⁹ Thus, the court in its holding adopted a narrower definition of prior restraint than did the Supreme Court in *Near*. The Supreme Court of Indiana, in *4447 Corp. v. Goldsmith*,¹⁶⁰ indirectly adopted the rationale of *Kidwell*,¹⁶¹ when it held that RICO exacted forfeiture when the elements of a pattern of racketeering activity were shown, regardless of the nature or content of the assets.¹⁶² Moreover, since RICO

153. The fact that an individual distributes obscene materials in the past cannot be grounds to deprive him of his rights to distribute nonobscene, protected materials in the future. *General Corp. v. State ex rel. Sweeton*, 294 Ala. 657, 665, 320 So. 2d 668, 675 (1975), *cert. denied*, 425 U.S. 904 (1976). See *supra* notes 110-17 and accompanying text.

154. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 718 (1931) (quoting Madison, *Report on the Virginia Resolutions*, in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON FOURTH PRESIDENT OF THE UNITED STATES 544 (1884)). But see *Stromberg v. California*, 283 U.S. 359 (1931) (A statute aimed at suppressing communication cannot be sustained on the grounds that it also regulates noncommunicative conduct.).

155. 102 Idaho 451, 631 P.2d 622 (1981), *appeal dismissed*, 455 U.S. 1009 (1982).

156. *Id.* at 458, 631 P.2d at 629.

157. *Id.* at 456-57, 631 P.2d at 627-28.

158. *Id.* at 457, 631 P.2d at 628.

159. *Id.* at 456, 631 P.2d at 627.

160. 479 N.E.2d 578 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *rev'd sub nom.* *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989). The Supreme Court of Indiana's holding that all property may be forfeited regardless of the nature of the property implied that it interpreted the statute to be content-neutral. *4447 Corp.*, 504 N.E.2d at 564.

161. 102 Idaho 451, 631 P.2d 622 (1981), *appeal dismissed*, 455 U.S. 1009 (1982).

162. *4447 Corp.*, 504 N.E.2d at 564. See *Western Business Systems, Inc. v. Slaton*, 492 F. Supp. 513, 514 (N.D. Ga. 1980) (A business' assets may be seized under RICO's forfeiture provision regardless of the assets' nature.).

allows forfeiture of all assets without distinguishing between obscene and nonobscene, the court held it did not constitute a prior restraint.¹⁶³

The definition of prior restraint, however, is not restricted to content-based regulations. In *Near*, the Court defined the objectionable statute as any "previous restraint," and not as previous restraints based on content.¹⁶⁴ Other courts defining prior restraint broadly have followed *Near*. For example, the Supreme Court in *Organization for a Better Austin v. Keefe*,¹⁶⁵ vacated a content-neutral injunction enjoining persons from distributing any leaflets or literature because it acted as an unconstitutional prior restraint.¹⁶⁶ If courts adopt the Supreme Court's broad definition of prior restraint in *Near*, then the forfeiture provision of RICO may be characterized as a prior restraint, even though it was not intended to regulate content-based materials.

The forfeiture provision acts as a prior restraint, regardless of the fact that it restricts dissemination solely on the premises in question. The Supreme Court has held that an individual's first amendment rights cannot be curtailed simply because they may be exercised elsewhere.¹⁶⁷ Nevertheless, the Court in *Arcara v. Cloud Books, Inc.*,¹⁶⁸ held that a closure order under a nuisance statute was not a prior restraint, since the owner was free to carry on his bookselling business at another location.¹⁶⁹ The circumstances underlying violations of RICO are different, however. Once a bookstore owner is found to have violated RICO, he is not free to conduct his business elsewhere.¹⁷⁰ Should the bookstore owner attempt to sell or exhibit non-obscene materials in another location, the state will view the activity at this new location as derived from the proceeds of past criminal activity and, thus, subject the assets to forfeiture.¹⁷¹ Because the owner is not free to carry on his bookselling activities at another loca-

163. *4447 Corp.*, 504 N.E.2d at 564.

164. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931). This definition was derived from Blackstone's quotation adopted by the *Near* court. See *supra* note 86.

165. 402 U.S. 415 (1971).

166. *Id.* at 419-20.

167. See *Schneider v. State*, 308 U.S. 147, 163 (1939). See also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (The availability of an alternative forum does not justify an otherwise unconstitutional prior restraint.).

168. 478 U.S. 697 (1986).

169. *Id.* at 705 & n.2.

170. See 18 U.S.C. 1963 (1982). The state in *4447 Corp. v. Goldsmith* argued that RICO did not operate as an impermissible prior restraint since 4447 Corporation could continue selling nonobscene, protected materials elsewhere. Brief for Petitioners-Appellees at 10, *4447 Corp. v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987).

171. See *Russello v. United States*, 464 U.S. 16, 28 (1983) (All profits and proceeds of a

tion, the forfeiture provision under RICO prevents dissemination of nonobscene materials in a given locality and, therefore, acts as a prior restraint on the individual's first amendment rights.

Once it is determined that RICO's forfeiture provision constitutes a prior restraint on protected speech, there is a presumption that it is unconstitutional.¹⁷² The second part of the prior restraint analysis, as applied to RICO, examines the government's interest in restraining a bookstore owner's first amendment rights. A prior restraint is constitutional only in those exceptional cases in which the government's interests outweigh the defendant's first amendment rights, such as during a time of war.¹⁷³ The existence of less restrictive means to accomplish the statute's purpose indicates that the government's interest is insufficiently compelling to justify a prior restraint on an individual's first amendment rights.¹⁷⁴

At various times, the Supreme Court has held that there is no interest compelling enough to uphold a prior restraint of first amendment rights.¹⁷⁵ In *Near*, the state alleged that the purpose of a statute

racketeering activity are subject to forfeiture.) *But see supra* text accompanying note 33 & 145.

172. *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). *See Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

173. *See Near*, 283 U.S. at 716; *Schenck v. United States*, 249 U.S. 47, 52 (1919).

174. In *United States v. O'Brien*, 391 U.S. 367 (1968), the court enunciated a four-part test upholding the constitutionality of a regulation, even though it incidentally affected protected speech. *Id.* at 376. Under the test, a governmental regulation is justified as a prior restraint if it meets the following requirements:

if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged [f]irst [a]mendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377. When one examines the *O'Brien* factors as applied to RICO, the last factor has been the only factor questioned on grounds that there are other less restrictive means to accomplish RICO's goal. *See infra* notes 199-200 and accompanying text.

175. *But see Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986) (The state's interest in protecting the health of the community is an important governmental interest which is independent of any desire to suppress speech.).

The Supreme Court has viewed the government's interests as compelling in certain obscenity cases. In these cases, prior restraints were upheld as constitutional. *See New York v. Ferber*, 458 U.S. 747, 757 (1982) (holding that a state's interest in preventing the sexual exploitation and abuse of children was a compelling governmental interest); *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-50 (1978) (The Court upheld the sanctions imposed by the FCC against Pacifica's broadcast of an obscene monologue and stressed the government's interest in protecting the well being of children.); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68-69 (1973) (Adult bookstores containing obscene materials can be regulated under "a [s]tate's broad power to regulate commerce and protect the public environment.").

declaring the publication of a malicious and scandalous newspaper a nuisance was to protect "the public peace" from scandal and public officials from defamation.¹⁷⁶ The Court held the statute invalid, reasoning that it was an unconstitutional prior restraint, and that there were other remedies available to achieve the state's goals.¹⁷⁷ The proper remedy for false accusations criticizing local officials was a subsequent libel action, not a prepublication sanction which was, in effect, complete censorship.¹⁷⁸

Although not absolute, the presumption against the constitutionality of prior restraints is so strong, that even a government's interest in protecting an individual's sixth amendment¹⁷⁹ right is insufficiently compelling enough to pass constitutional muster. In *Nebraska Press Ass'n v. Stuart*,¹⁸⁰ the Supreme Court held that a judicial gag order¹⁸¹ imposed upon news organizations to protect an individual's right to a fair trial was invalid.¹⁸² The defendant was being tried for mass murder, and his trial had attracted widespread news coverage.¹⁸³ The trial judge issued a gag order to insure the selection of an unprejudiced jury.¹⁸⁴ The Supreme Court examined the gag order to determine whether "the gravity of the 'evil,' discounted by its improbability, justifie[d] such invasion of free speech as [was] necessary to avoid the danger."¹⁸⁵ The Court held that the gag order infringed on the press' first amendment right because there were other, less restrictive alternatives that could have reduced the harmful effect of such publicity,¹⁸⁶ and the benefits of the gag order were insufficiently compelling to outweigh the constitutional violation.¹⁸⁷ The Court, therefore, refused to allow a prior restraint on the press' first amendment right to freedom of expression, even though it infringed upon another

176. *Near*, 283 U.S. at 720-22.

177. *See id.* at 718-21.

178. *Id.*

179. The sixth amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury. . . ." U.S. CONST. amend. VI.

180. 427 U.S. 539 (1976).

181. The judicial gag order in *Nebraska Press* prohibited the press from releasing to the public any prior testimony. *Id.* at 542. The trial court reasoned that the prior testimony was prejudicial and would make the selection of an impartial jury impossible. *Id.*

182. *Id.* at 570.

183. *Id.* at 542.

184. *Id.*

185. *Id.* at 562.

186. The Court discussed other alternatives, such as change of venue, postponement of trial, and careful voir dire instructing the jurors to decide the case only on the evidence presented. *Id.* at 563-64.

187. *Id.* at 568.

constitutional guarantee.¹⁸⁸

New York Times Co. v. United States,¹⁸⁹ popularly known as the Pentagon Papers case, illustrates the need for the government to satisfy a heavy burden to justify a prior restraint on first amendment rights. In *New York Times*, the government, for national security reasons, sought an injunction to suppress the publication of a classified study of government policymaking during the Vietnam War.¹⁹⁰ The Supreme Court refused to recognize the government's national security reasons as an extraordinary and compelling interest and held that the government's actions constituted a prior restraint.¹⁹¹ Therefore, even a governmental interest such as national security is not extraordinary or compelling enough to overcome the presumption that prior restraints on free speech are unconstitutional.¹⁹²

The constitutionality of the forfeiture provision depends on an examination of the state's interest in regulating adult materials. RICO's sole purpose is to eradicate organized crime.¹⁹³ Under RICO's forfeiture provision, the government may recover property used in the course of, derived from, or realized through, organized crime.¹⁹⁴ It is difficult to view RICO's purpose to eradicate organized crime as an extraordinary and compelling interest when the governmental interest associated with national security is not deemed an extraordinary and compelling interest.¹⁹⁵ A sanction such as the forfeiture of assets may be justified, however, even if it means upholding a prior restraint on protected speech, because organized crime has increasingly infiltrated the area of obscene materials.¹⁹⁶ The trend may be toward upholding prior restraints¹⁹⁷ after the Supreme

188. *Id.* at 570.

189. 403 U.S. 713 (1971) (per curiam).

190. *Id.* at 714.

191. *Id.* In a concurring opinion, Justice White proposed other alternatives, apart from an injunction, which the government could have used to prevent the press from publishing the sensitive materials. *Id.* at 733-40 (White, J., concurring). The newspapers were put on notice of possible criminal sanctions available to the government had the newspapers decided to publish any of the classified information. *Id.* at 735-38.

192. *Id.* at 714.

193. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923 (1970).

194. See generally 18 U.S.C. § 1963 (1982).

195. See *New York Times*, 403 U.S. at 714.

196. See Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 1020, 98 Stat. 2135 (1984).

197. See, e.g., *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562, 571 (1988) (A high school principal exercising control over style and content of a student speech in school-sponsored newspaper does not offend the first amendment.); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683-84 (1986) (The Supreme Court upheld the school's sanction of a student who gave a speech colored by obscene language and stressed the state's interest in protecting minors from vulgar language.); *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478

Court's decision in *Arcara*, in which the Court found that the government's interest in protecting the health of the community outweighed the defendant's first amendment rights.¹⁹⁸

Even if the government's interest is found to be compelling, however, the availability of less restrictive methods to accomplish RICO's goals — such as the traditional sanctions of fine and imprisonment —¹⁹⁹ seems to indicate that the government's interest in using the forfeiture provision may not pass constitutional muster. Moreover, courts have noted that injunctions aimed at removing particular items adjudged to be obscene are appropriate.²⁰⁰ The availability of these less draconian sanctions deflates even the strongest of the government's compelling interest arguments.

V. CONCLUSION

Suppression of obscene materials has always been a primary goal of the government. Attempts at regulating obscenity, however, have proven to be constitutionally difficult. Unable to suppress obscenity through nuisance and zoning laws, the federal and state governments have recently turned to a criminal sanction: prosecution under RICO. The sponsors of RICO intended to provide the government with an effective tool to combat the racketeering activities that infiltrated the adult bookstores and to seize the proceeds from such activities. RICO's forfeiture provision was the tool provided to accomplish this goal.

Regardless of the method employed, separating unprotected, obscene materials from protected, nonobscene materials has raised troublesome first amendment issues.²⁰¹ Under moral nuisance abatement laws, the padlock order and injunction were held to be unconstitutional prior restraints on an individual's first amendment rights.²⁰² Similarly, RICO's forfeiture provision constitutes a prior restraint which infringes on an individual's first amendment right to freedom of speech. A compelling or extraordinary governmental interest,

U.S. 328, 348 (1986) (Puerto Rico statute restricting the advertising of casino gambling to protect the health, safety, and welfare of citizens was upheld as constitutional); *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Georgia sodomy statute was held not to violate the fundamental rights of homosexuals).

198. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986).

199. 18 U.S.C. § 1963(a) (1982). See *supra* note 20 & 25 and accompanying text.

200. See *People ex rel. Busch v. Projection Room Theater*, 17 Cal. 3d 42, 57, 550 P.2d 600, 609 (A nuisance statute directed at particular obscene books or films is constitutional.), *cert. denied*, 429 U.S. 922 (1976).

201. See *Speiser v. Randall*, 357 U.S. 513, 525 (1958) (The line is finely drawn between constitutionally guaranteed free speech and speech which may be regulated.).

202. See *supra* note 97-99 and accompanying text.

however, may justify the prior restraint. *4447 Corp.* and other related cases raise the question whether the government's goal of eradicating organized crime is a sufficiently compelling interest that justifies total forfeiture of an adult bookstore's assets. These decisions highlight the difficulties courts face when balancing an individual's first amendment right against the government's interest in suppressing racketeering.

One troubling aspect of RICO's forfeiture provision involves the effect of such a sanction. Since many sellers of obscene materials also distribute protected, nonobscene materials, a large percentage of these protected materials will be subsequently unavailable if the forfeiture provision is upheld. Forfeiture of a defendant's assets is not the only remedy, however. Prior restraints against future distribution of particular items adjudged to be obscene are also a viable alternative. Yet the most alarming implication arising from the forfeiture cases is that this may only be the "tip of the iceberg." The threat of criminal prosecution and forfeiture of a business' assets is likely to have a "chilling effect upon publishers, libraries, motion picture exhibitors and the like."²⁰³

A close examination of the forfeiture provision indicates that it is an unconstitutional prior restraint of first amendment rights under nuisance law analysis. Moreover, the government's interest in eradicating organized crime is not a sufficiently compelling interest to forego first amendment protection. RICO's forfeiture provision as applied to adult bookstores and theaters, therefore, is too harsh a remedy to survive constitutional scrutiny.

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203. *State v. Feld*, 155 Ariz. 88, 93, 745 P.2d 146, 151 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988).