

1988

RICO Forfeiture and Obscenity: Prior Restraint or Subsequent Punishment?

John J. O'Donnell

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

John J. O'Donnell, *RICO Forfeiture and Obscenity: Prior Restraint or Subsequent Punishment?*, 56 Fordham L. Rev. 1101 (1988).
Available at: <https://ir.lawnet.fordham.edu/flr/vol56/iss6/3>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

RICO FORFEITURE AND OBSCENITY: PRIOR RESTRAINT OR SUBSEQUENT PUNISHMENT?

INTRODUCTION

Society's ongoing debate¹ about pornography² raises many difficult questions. The free speech clause of the first amendment clearly protects sexually explicit materials but excludes materials deemed to be legally obscene.³ Legally obscene materials, therefore, constitutionally may be regulated or banned by the states and the federal government.⁴ The boundary between materials that are legally obscene and those that are sexually explicit but protected by the constitution, however, remains a "dim and uncertain line."⁵

Despite the difficulty in defining "obscenity," the federal government and the states have tried a variety of methods to eradicate it, including

1. Compare I Attorney General's Commission on Pornography, Final Report 433-58 (1986) (advocating expansion and vigorous enforcement of obscenity laws) [hereinafter Final Report I] with The Report of the Commission on Obscenity and Pornography 51-55 (1970) (recommending repeal of existing obscenity laws) [hereinafter 1970 Commission]. There were significant differences of opinion within these commissions. See Final Report I, *supra*, at 335-47; 1970 Commission, *supra*, at 383-510, 511-628. The issue of obscenity has sharply divided the Supreme Court for years, as illustrated by the many dissents in obscenity cases. See, e.g., *Pope v. Illinois*, 107 S. Ct. 1918, 1924 (1987) (Brennan, J., dissenting); *Id.* at 1924 (Stevens, J., and Marshall, J., dissenting); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 70 (1973) (Douglas, J., dissenting); *Id.* at 73 (Brennan, J., dissenting); *Roth v. United States*, 354 U.S. 476, 508 (1957) (Black, J., and Douglas, J., dissenting). See generally F. Schauer, *The Law of Obscenity* 30-48, 49-58 (1976) (summarizing the Supreme Court's involvement with obscenity regulation and discussing arguments both for and against obscenity regulation) [hereinafter *Law of Obscenity*]; Final Report I, *supra*, at 249-75, 299-351 (analyzing in detail the social and legal questions relating to the regulation of obscenity and concluding that it should be regulated).

2. Pornography refers generally to sexually explicit materials. The term "pornography" should be distinguished from "obscenity," which is a legal term of art used to refer to materials that are not protected by the first amendment because they fall within the guidelines established in *Miller v. California*, 413 U.S. 15, 24-25 (1973). See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 330-34 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986); L. Tribe, *American Constitutional Law*, § 12-17, at 920-24 (2d ed. 1988).

3. See *Miller v. California*, 413 U.S. 15, 20-21 (1973) (quoting *Roth v. United States*, 354 U.S. 476, 484-85 (1957)); *supra* note 2. Under *Miller* a work is obscene if:

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

Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted). For a detailed analysis of the *Miller* definition of obscenity and its components, see II Attorney General's Commission on Pornography, Final Report 1263-1312 (1986) [hereinafter Final Report II]; *Law of Obscenity*, *supra* note 1, at 69-115.

4. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973); *Roth*, 354 U.S. at 492.

5. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963); see *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73-93 (1973) (Brennan, J., dissenting). Justice Stewart's famous statement "I know it when I see it" in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), illustrates the difficulty in defining obscenity.

criminal laws punishing the sale and distribution of obscene materials,⁶ civil injunctive proceedings,⁷ nuisance abatement laws⁸ and zoning laws.⁹ Recently, state and federal prosecutors have begun to use the Racketeer Influenced and Corrupt Organizations Act ("RICO")¹⁰ and its state analogues¹¹ against purveyors of obscene materials.¹² In 1984, Congress amended the racketeering law to include obscenity violations as predicate acts¹³ because an arguable connection exists between organized crime and the pornography trade.¹⁴

6. See, e.g., 18 U.S.C. §§ 1461-1465 (1982); Ariz. Rev. Stat. Ann. § 13-3502 (1978 & Supp. 1987); N.Y. Penal Code §§ 235.00 to 235.22 (McKinney 1980 & Supp. 1988); Va. Code Ann. §§ 18.2-374 (1982).

7. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54-55 (1973); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 438-39 (1957).

8. See, e.g., Note, *Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine*, 84 Colum. L. Rev. 1616, 1617-20 (1984) [hereinafter *Enjoining Obscenity*]; Note, *Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power*, 58 N.Y.U. L. Rev. 1478, 1485-89 (1983) [hereinafter *Pornography, Padlocks*]; see also *infra* notes 123-41 and accompanying text.

9. See, e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 52 (1976).

10. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, 84 Stat. 922 (codified as amended at 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986)) (RICO).

11. See Ariz. Rev. Stat. Ann. §§ 13-2312 to -2317 (1978 & Supp. 1987); Cal. Penal Code §§ 186 to 186.8 (West Supp. 1988); Colo. Rev. Stat. §§ 18-17-101 to -109 (1986); Conn. Gen. Stat. Ann. §§ 53-393 to -403 (West 1985); Del. Code Ann. tit. 11, §§ 1501-1511 (1987); Fla. Stat. Ann. §§ 895.01-895.09 (West Supp. 1988); Ga. Code Ann. §§ 16-14-1 to -15 (1984 & Supp. 1987); Haw. Rev. Stat. §§ 842-1 to -12 (1985 & Supp. 1987); Idaho Code §§ 18-7801 to -7805 (1987); Ill. Ann. Stat. ch. 56 1/2, ¶¶ 1651-1659 (Smith-Hurd 1985 & Supp. 1987); Ind. Code Ann. § 35-45-6 (Burns 1985) and § 34-4-30.5 (Burns Supp. 1986); La. Rev. Stat. Ann. §§ 15:1351 to :1356 (West Supp. 1988); Miss. Code Ann. §§ 97-43-1 to -11 (Supp. 1987); Nev. Rev. Stat. Ann. §§ 207.350 to 207.520 (Michie 1986); N.J. Stat. Ann. §§ 2C:41-1 to -6.2 (West 1982 & Supp. 1987); N.M. Stat. Ann. §§ 30-42-1 to -6 (1987); N.Y. Penal Law §§ 460.00 to 460.80 (McKinney Supp. 1988); N.C. Gen. Stat. §§ 75D-1 to -14 (1987); N.D. Cent. Code §§ 12.1-06.1-01 to 06.1-08 (1985 & Supp. 1987); Ohio Rev. Code Ann. §§ 2923.31 to .36 (Anderson 1987 & Supp. 1988); Or. Rev. Stat. §§ 166.715-166.735 (1985); 18 Pa. Cons. Stat. Ann. § 911 (Purdon 1983); R.I. Gen. Laws §§ 7-15-1 to -11 (1985); Tenn. Code Ann. §§ 39-1-1001 to -1010 (Supp. 1987); Utah Code Ann. §§ 76-10-1601 to -1609 (Supp. 1987); Wash. Rev. Code Ann. §§ 9A.82.001 to .170 (West 1988); Wisc. Stat. Ann. §§ 946.80 to 946.87 (West. Supp. 1987).

Puerto Rico also has enacted a RICO statute. See P.R. Laws Ann. tit. 25, §§ 971 to 971p (1979 & Supp. 1986).

12. E.g., *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987); *State v. Feld*, 155 Ariz. 88, 745 P.2d 146 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988); *Bowden v. State*, 402 So. 2d 1173 (Fla. 1981); *Martinez v. Heinrich*, 521 So. 2d 167 (Fla. Dist. Ct. App. 1988); *State v. Sappenfield*, 505 N.E.2d 504 (Ind. Ct. App. 1987), *cert. granted*, 108 S. Ct. 1106 (1988); *4447 Corp. v. Goldsmith*, 479 N.E.2d 578 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom.* *Fort Wayne Books, Inc. v. Indiana*, 108 S. Ct. 1106 (1988). The Justice Department has announced that it plans to seek more racketeering indictments designed to close down major distributors of pornography. See Shenon, *Justice Dept. Plans Anti-Racketeering Drive Against Pornographers*, N.Y. Times, Jan. 12, 1988, at A16, col. 1.

13. The term "predicate acts" refers to the crimes listed in 18 U.S.C. § 1961(1) (Supp. IV 1986) as constituting "racketeering activity."

14. Obscenity crimes were added to the definition of racketeering activity after research indicated that organized crime syndicates were involved in the pornography trade.

RICO constitutes a potent weapon in the prosecutor's arsenal, as it provides for long prison sentences,¹⁵ high fines,¹⁶ severe forfeiture of assets,¹⁷ and a variety of injunctive remedies.¹⁸ The use of RICO's powerful forfeiture and equitable remedies, however, implicates fundamental values of the first amendment of the United States Constitution¹⁹ and the freedom of speech guarantees of state constitutions²⁰ because full application of RICO's provisions can effect a prior restraint on free speech.²¹

The use of RICO to enforce obscenity laws has been challenged by defendants in criminal prosecutions²² and by merchants of sexually explicit materials seeking declaratory and injunctive relief to avoid such prosecutions.²³ The courts adjudicating these challenges have reached differing conclusions. Some have declared the application of RICO to obscenity cases unconstitutional in whole²⁴ or in part because it restrains

See Pub. L. No. 98-473, § 1020, 98 Stat. 1837, 2143 (1984) (codified at 18 U.S.C. § 1961(1) (Supp. IV 1986)); 130 Cong. Rec. S433-57 (daily ed. Jan. 30, 1984) (statement of Sen. Helms); *infra* notes 75-78 and accompanying text; see also Final Report I, *supra* note 1, at 435, 437 (responding favorably to the RICO amendment and recommending similar action to state legislatures). But see also Report of the RICO Cases Committee of the ABA Criminal Justice Section 39-40 (1985) (avoiding inclusion of obscenity violations in proposed model racketeering statute because of first amendment concerns) [hereinafter RICO Cases Report].

15. See 18 U.S.C. § 1963(a) (Supp. IV 1986) (not more than 20 years).

16. See *id.* (not more than \$25,000).

17. See *id.*; see also *infra* notes 37, 43-58 and accompanying text (detailed treatment of RICO forfeiture).

18. See 18 U.S.C. § 1964(a) (1982); see also *infra* notes 40, 59-73 and accompanying text (detailed treatment of RICO's equitable remedies).

19. U.S. Const. amend. I. The first amendment of the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." *Id.* This provision applies to the states through the fourteenth amendment. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

20. Although it is clear that the first amendment applies to the states, see *id.*, the interpretation given to the first amendment by the Supreme Court sets only the minimum level of constitutional protection provided by the amendment. See *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557-58, 503 N.E.2d 492, 494, 510 N.Y.S.2d 844, 846, *on remand from*, 478 U.S. 697 (1986), *cert. denied*, 107 S. Ct. 1301 (1987). States are free to grant greater constitutional protections under provisions of their state constitutions. See *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (search and seizure); *Arcara*, 68 N.Y.2d at 557-58, 503 N.E.2d at 494, 510 N.Y.S.2d at 846 (freedom of speech).

21. See *infra* notes 107-21 and accompanying text.

22. See, e.g., *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987); *State v. Feld*, 155 Ariz. 88, 745 P.2d 146 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988); *Bowden v. State*, 402 So. 2d 1173 (Fla. 1981); *State v. Sappenfield*, 505 N.E.2d 504 (Ind. Ct. App. 1987), *cert. granted*, 108 S. Ct. 1106 (1988); 4447 Corp. v. Goldsmith, 479 N.E.2d 578 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom.* Fort Wayne Books, Inc. v. Indiana, 108 S. Ct. 1106 (1988).

23. See, e.g., *J.N.S., Inc. v. Indiana*, 712 F.2d 303 (7th Cir. 1983); *Sappenfield v. Indiana*, 574 F. Supp. 1034 (N.D. Ind. 1983); *Western Business Sys., Inc.*, 502 F. Supp. 746 (N.D. Ga. 1980).

24. See 4447 Corp. v. Goldsmith, 479 N.E.2d 578 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom.* Fort Wayne Books, Inc. v. Indiana, 108 S. Ct. 1106 (1988).

a defendant's future speech.²⁵ Other courts have held that RICO does not infringe upon first amendment values because its remedies, no matter how draconian, merely punish a defendant after he has been convicted of a crime and do not unconstitutionally restrict his future speech.²⁶

This Note argues that the use of RICO to punish those who distribute obscene materials may infringe upon speech protected by the first amendment.²⁷ This Note suggests, therefore, that the application of RICO's remedial provisions should be narrowly tailored to preserve the balance between the state's interest in regulating obscenity and fundamental first amendment values. Part I examines RICO and its remedial provisions. Part II explains the prior restraint doctrine in the context of first amendment theory. Part III demonstrates how the application of RICO's remedial provisions can act as unconstitutional prior restraints. This Note suggests limiting RICO's forfeiture and equitable remedies to forfeiture of specific materials found to be obscene and the proceeds derived from those obscene materials. Under this analysis, RICO would become a constitutional punishment for the distribution of specific materials that are found to be legally obscene, rather than an unconstitutional prior restraint upon the defendant's prospective protected speech.

I. RICO

Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970,²⁸ hoping to achieve "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."²⁹ Specifically, Congress sought to destroy organized crime by forcing the defendant to disgorge his profit and by separating the defendant from the corrupted enterprise.³⁰ Twenty-seven states and Puerto

25. See *State v. Feld*, 155 Ariz. 88, 98, 745 P.2d 146, 156 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988).

26. See, e.g., *United States v. Pryba*, 674 F. Supp. 1504, 1513 (E.D. Va. 1987); *Western Business Sys., Inc. v. Slaton*, 492 F. Supp. 513, 514 (N.D. Ga. 1980); *4447 Corp. v. Goldsmith*, 504 N.E.2d 559, 565 (Ind. 1987), *cert. granted sub nom. Fort Wayne Books, Inc. v. Indiana*, 108 S. Ct. 1106 (1988). Several courts have declined to address the first amendment issues posed by challenges to RICO's use in obscenity cases. See, e.g., *J.N.S., Inc. v. Indiana*, 712 F.2d 303, 306 (7th Cir. 1983); *Sappenfield v. Indiana*, 574 F. Supp. 1034, 1037-38 (N.D. Ind. 1983); *Western Business Sys., Inc. v. Slaton*, 502 F. Supp. 746, 748 (N.D. Ga. 1980); *Martinez v. Heinrich*, 521 So. 2d 167, 168 (Fla. Dist. Ct. App. 1988).

27. One state has recognized the effects that RICO's remedies may have on the first amendment. See *Utah Code Ann. § 76-10-1603.5(6)* (Supp. 1987) (expressly forbidding a court from entering an order under RICO that might be an unconstitutional prior restraint).

28. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941-48 (codified at 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986)) (OCCA).

29. Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (Statement of Findings and Purpose); see also *Russello v. United States*, 464 U.S. 16, 27 (1983); *United States v. Turkette*, 452 U.S. 576, 588-89 (1981); S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969).

30. See *Russello v. United States*, 464 U.S. 16, 26-28 (1983); S. Rep. No. 617, 91st

Rico³¹ also have RICO statutes sharing the same intent and adopting similar remedies.³²

A convicted RICO defendant³³ may be subject to traditional sanctions

Cong., 1st Sess. 79 (1969); 116 Cong. Rec. 591 (1970) (statement of Sen. McClellan). For detailed accounts of RICO's legislative history, see Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 70-126 (1985) and Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 249-80 (1982) [hereinafter *Blakey, Reflections*] and Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661, 664-713 (1987) [hereinafter *Lynch I*]. Professor G. Robert Blakey was the Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures in 1969-1970 when the Organized Crime Control Act of 1970 was passed.

31. See *supra* note 11.

32. State racketeering laws are usually patterned after the federal statute. See Abrams, *Civil RICO's Cause of Action: The Landscape After Sedima*, 12 Tulane Mar. L.J. 19, 24 n.29 (1987); *Lynch I*, *supra* note 30, 715 n.236. Many states, therefore, use cases construing federal RICO as persuasive authority in construing the state RICO statute. See, e.g., *Alvers v. State*, 489 N.E.2d 83, 87 (Ind. Ct. App. 1986) (Indiana RICO); *Commonwealth v. Yacoubian*, 339 Pa. Super. 413, 419, 489 A.2d 228, 231 (1985) (Pennsylvania RICO). On the other hand, state courts have not hesitated to distinguish federal RICO and the cases construing it. See, e.g., *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 595-96, 667 P.2d 1304, 1310-11 (1983) (noting differences between state and federal RICO statutes); *Dorsey v. State*, 402 So. 2d 1178, 1181 (Fla. 1981) (finding state RICO statute drafted specifically to avoid ambiguity in federal statute); *Commonwealth v. Taraschi*, 327 Pa. Super. 179, 187 n.2, 475 A.2d 744, 748 n.2 (1984) (holding cases construing federal RICO statute not controlling). This Note uses primarily federal case law and history for an explanation of RICO's forfeiture and equitable remedies.

33. RICO forbids four types of conduct: using or investing any income derived from a pattern of racketeering activity in the acquisition of any interest in, establishment, or operation of any enterprise that is engaged in or affects interstate commerce, see 18 U.S.C. § 1962(a) (1982), using a pattern of racketeering activity or the collection of unlawful debt to acquire or maintain an interest in, or control over, any enterprise engaged in or affecting interstate commerce, see 18 U.S.C. § 1962(b) (1982), conducting or participating in the conduct of the affairs of an enterprise engaged in or affecting interstate commerce through a pattern of racketeering activity or collection of unlawful debt, see 18 U.S.C. § 1962(c) (1982), or conspiring to violate any of these provisions, see 18 U.S.C. § 1962(d) (1982). See also *Lynch I*, *supra* note 30, at 680-81 (discussing RICO's substantive provisions).

The definition of "racketeering activity" is a list of enumerated acts that are crimes under either state or federal law. See 18 U.S.C. § 1961(1) (Supp. IV 1986). These acts are thought to be crimes in which members of organized crime groups typically engage. See *Lynch I*, *supra* note 30, at 687-88 & n.124. This section was amended in 1984 to include violations of obscenity laws as predicate acts. See Pub. L. No. 98-473, § 1020, 98 Stat. 1837, 2143 (1984).

Section 1961 defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]" 18 U.S.C. § 1961(4) (1982). This provision includes wholly illegitimate enterprises as "a group of individuals associated in fact." See *United States v. Turkette*, 452 U.S. 576, 587, 591 (1981).

Section 1961(5) provides that a "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of [RICO] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1982). This definition has created a great deal of confusion in the courts. For a thorough discussion of the pattern requirement problem, see Note, *The Pattern Requirement of Civil RICO: Enterprise Criminals and Multiple Schemes*, 56 Fordham L. Rev. 955 (1988).

such as a fine of not more than \$25,000,³⁴ a prison term of not more than twenty years,³⁵ or both.³⁶ More important, he may be subject to two novel remedies authorized by RICO. The first of these, codified at 18 U.S.C. § 1963(a), permits forfeiture of interests obtained through violations of RICO,³⁷ property that affords the defendant a source of influence over the RICO enterprise,³⁸ and any direct or indirect proceeds from racketeering activity.³⁹ The second remedial provision, contained in 18

34. See 18 U.S.C. § 1963(a) (Supp. IV 1986).

35. See *id.*

36. See *id.*

37. 18 U.S.C. § 1963(a)(1) (Supp. IV 1986). Section 1963(a) provides:

Whoever violates any provision of section 1962 of this chapter . . . shall forfeit to the United States, irrespective of any provision of State law—

- (1) any interest the person has acquired or maintained in violation of section 1962;
- (2) any—
 - (A) interest in;
 - (B) security of;
 - (C) claim against; or
 - (D) property or contractual right of any kind affording a source of influence over;
 any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

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

Id. Most states that have racketeering statutes employ similar forfeiture remedies. See Cal. Penal Code § 186.3 (West Supp. 1988); Colo. Rev. Stat. § 18-17-106 (1986); Conn. Gen. Stat. Ann. § 53-397 (West 1985); Del. Code Ann. tit. 11, § 1505 (1987); Haw. Rev. Stat. § 842-3 (1985); Idaho Code § 18-7804(f) (1987); Nev. Rev. Stat. Ann. § 207.420 (Michie 1986); N.J. Stat. Ann. § 2C:41-3 (West 1982 & Supp. 1987); N.M. Stat. Ann. § 30-42-4 (1987); Ohio Rev. Code Ann. § 2923.32 (Anderson 1987); P.R. Laws Ann. tit. 25, § 971e (1979); R.I. Gen. Laws § 7-15-3 & -3.1 (1985); Utah Code Ann. 76-10-1603.5 (Supp. 1987). This includes thirteen states that expressly classify their forfeiture provisions as civil. See Ariz. Rev. Stat. Ann. § 13-2314(D)(6) (1978 & Supp. 1987); Fla. Stat. Ann. § 895.05 (West Supp. 1988); Ga. Code Ann. §§ 16-14-7 (1984); Ind. Code Ann. § 34-4-30.5-3 (Burns Supp. 1986); La. Rev. Stat. Ann. § 15:1356 (West Supp. 1988); Miss. Code Ann. § 97-43-9(2) (Supp. 1987); Nev. Rev. Stat. Ann. § 207.460 (Michie 1986); N.C. Gen. Stat. § 75D-5 (1987); N.D. Cent. Code § 12.1-06.1-05(4)(f) (1985 & Supp. 1987); Or. Rev. Stat. § 166.725 (1985); Tenn. Code Ann. §§ 39-1-1006(b) (Supp. 1987); Wash. Rev. Code Ann. § 9A.82.100(4)(f) (West 1988); Wisc. Stat. Ann. § 946.86(2) (West Supp. 1987). Since a civil forfeiture proceeding does not provide the same protections as a criminal forfeiture proceeding, these provisions raise interesting constitutional questions. See generally Evans, "Civil" Forfeitures Under State RICO Laws: A Legislative Attempt to Circumvent the Constitution, 8 Crim. Just. J. 293 (1986).

38. *Id.* at § 1963(a)(2).

39. *Id.* at § 1963(a)(3); see also *Russello v. United States*, 464 U.S. 16, 22 (1983) (finding profits and proceeds subject to forfeiture as interests under § 1963(a)(1)).

When Congress originally passed RICO its forfeiture provision provided that anyone who violates RICO "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, [sic] any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962." Pub. L. No. 91-452, tit. IX, § 901(a), 84

U.S.C. § 1964, allows the government to seek civil, equitable orders to sever a racketeer's connection with the corrupted enterprise and prevent future violations.⁴⁰

The forfeiture provisions of 18 U.S.C. § 1963 form an integral part of a RICO prosecution.⁴¹ Similarly, some describe the civil provisions of section 1964 as the most important part of RICO's remedies because their flexibility allows the court to fashion the remedy that will best remove the defendant from the enterprise.⁴²

A. Forfeiture

In order to understand RICO forfeiture and its effects, it is necessary

Stat. 922, 943 (1970). Subsequently, two circuit courts interpreted this section to exclude forfeiture of profits and proceeds from racketeering violations. See *United States v. McManigal*, 708 F.2d 276, 283 (7th Cir.), *vacated and remanded*, 464 U.S. 979 (1983); *United States v. Marubeni Am. Corp.*, 611 F.2d 763, 769 (9th Cir. 1980). While review of this interpretation was pending before the Supreme Court, Congress added 18 U.S.C. § 1963(a)(3) to insure that proceeds would be subject to forfeiture even if the Supreme Court reached the opposite conclusion under § 1963(a)(1). See Pub. L. No. 98-473, tit. II, § 302, 98 Stat. 1837, 2040 (1984); S. Rep. No. 225, 98th Cong., 1st Sess. 199, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3382. While the bill was pending, the Supreme Court held that proceeds were subject to forfeiture under § 1963(a)(1). See *Russello v. United States*, 464 U.S. 16, 22 (1983), *aff'g United States v. Martino*, 681 F.2d 952 (5th Cir. 1982) (en banc).

40. See 18 U.S.C. § 1964(a) (1982). Section 1964(a) provides:

The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 . . . by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

18 U.S.C. § 1964(a) (1982); see also *infra* notes 59-73 and accompanying text (discussing RICO's equitable remedies). The RICO statute expressly grants the government standing to bring an action for equitable relief. See 18 U.S.C. § 1964(b) (Supp. IV 1986).

Most state RICO statutes authorize similar civil remedies. See *Ariz. Rev. Stat. Ann.* § 13-2314 (1978 & Supp. 1987); *Colo. Rev. Stat.* § 18-17-106 (1986); *Del. Code Ann.* tit. 11, § 1505 (1987); *Fla. Stat. Ann.* § 895.05 (West Supp. 1988); *Ga. Code Ann.* § 16-14-6 (1984 & Supp. 1987); *Haw. Rev. Stat.* §§ 842-5 to -8 (1985); *Idaho Code* § 18-7805 (1987); *Ind. Code Ann.* § 34-4-30.5-2 (Burns Supp. 1986); *Miss. Code Ann.* § 97-43-9(1) (Supp. 1987); *N.J. Stat. Ann.* § 2C:41-4 (West 1982); *N.C. Gen. Stat.* § 75D-8 (1987); *N.D. Cent. Code* § 12.1-06.1-05(4)(a)-(c) (1985); *Ohio Rev. Code Ann.* § 2923.34 (Anderson 1987 & Supp. 1988); *Or. Rev. Stat.* § 166.725 (1985); 18 Pa. Cons. Stat. Ann. § 911(d)(1) (Purdon 1983); *R.I. Gen. Laws* § 7-15-4 (1985); *Tenn. Code Ann.* § 39-1-1006(a) (Supp. 1987); *Utah Code Ann.* § 76-10-1601 to -1608 (Supp. 1987); *Wash. Rev. Code Ann.* § 9A.82.100(4)(a)-(c) (West 1988); *Wisc. Stat. Ann.* § 946.86(1) (West Supp. 1987). Puerto Rico also allows equitable relief. See *P.R. Laws Ann.* tit. 25, §§ 971f-971h (1980).

41. See United States Department of Justice, *Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors* 76 (1985) [hereinafter *RICO Manual*].

42. See 116 Cong. Rec. 602, 693-94 (1970) (statement of Sen. Hruska, a joint sponsor of S.1861, which was later enacted as RICO); *Blakey, Reflections, supra* note 30, at 261.

to understand its historical roots. Most forfeiture provisions in American law are in rem.⁴³ In rem forfeiture is based upon a legal fiction that considers the property to be the "guilty" party.⁴⁴ Because the property is deemed to be the guilty party, it is named as the defendant and, if it is found to be tainted, may be forfeited despite the owner's innocence.⁴⁵

RICO forfeiture differs from in rem forfeiture because it imposes a criminal, in personam punishment⁴⁶ on a guilty defendant.⁴⁷ If the convicted racketeer's property falls within the broad reach of section 1963(a),⁴⁸ it is subject to forfeiture under RICO. The defendant must forfeit the total amount of his proceeds from racketeering activity and all of his interests in the RICO enterprise.⁴⁹

Because RICO forfeiture is in personam and does not depend upon the legal fiction that the property is tainted, it has been used to cause forfei-

43. See Reed & Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 N.C.L. Rev. 57, 62 (1983). In rem forfeiture has long been part of American jurisprudence. See, e.g., *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827). See generally Reed & Gill, *supra*, at 62-69. The United States Code contains several in rem forfeiture provisions. See, e.g., 19 U.S.C. § 1453 (1982) (forfeiture of property seized for violations of the customs laws); 49 U.S.C. § 782 (1982) (forfeiture of vessels, vehicles and aircraft used to transport contraband); see also Hughes & O'Connell, *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 Pepperdine L. Rev. 613, 618 n.30 (1984) (listing federal in rem forfeiture statutes).

44. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84 (1974) (quoting *The Palmyra*, 25 U.S. (12 Wheat.) at 14-15); Reed & Gill, *supra* note 43, at 62-69.

45. See *Calero-Toledo*, 416 U.S. at 683.

46. In personam forfeiture has strong roots in the English common law. There, conviction of a felony resulted in automatic forfeiture of a defendant's property to the crown and his land to his lord. See Reed & Gill, *supra* note 43, at 60; Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1 N. Ill. U.L. Rev. 225, 229-31 (1981). The most severe type of forfeiture was "corruption of blood." This meant that a convicted felon could neither inherit real property, keep the real property that he possessed, nor pass any property onto his heirs. See Reed & Gill, *supra* note 43, at 61.

This tradition of forfeiture was rejected in the United States. The framers of the Constitution provided that Congress could have the power to declare a punishment for treason, but that it could not enact a "corruption of blood" or provide for any forfeiture, except during the life of the person attainted. See U.S. Const. art. III, § 3, cl. 2.

The only example of in personam forfeiture in American history, other than RICO, was the Confiscation Act of 1862, that allowed forfeiture of property which belonged to leaders of the southern states that seceded from the union. See Act of July 17, 1862, ch. 195, § 5, 12 Stat. 589 (1862), repealed by Act of Mar. 4, 1909, ch. 321, § 341, 35 Stat. 1153 (1909). This Act was later found constitutional. See *Bigelow v. Forrest*, 76 U.S. (9 Wall.) 339, 352-53 (1869); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 312-14 (1870).

47. See *United States v. Ginsburg*, 773 F.2d 798, 800-01 (7th Cir. 1985) (en banc), cert. denied, 475 U.S. 1011 (1986); *United States v. Cauble*, 706 F.2d 1322, 1347 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *United States v. Ambrosio*, 575 F. Supp. 546, 549-50 (E.D.N.Y. 1983); S. Rep. No. 617, 91st Cong., 1st Sess. 79-80 (1969); 116 Cong. Rec. 591-92 (1970) (statement of Sen. McClellan, a joint sponsor of S.1861, which was later enacted as RICO).

48. See *supra* note 37 (text of § 1963(a)).

49. See *United States v. Ginsburg*, 773 F.2d 798, 802 (7th Cir. 1985) (en banc), cert. denied, 475 U.S. 1011 (1986); Reed & Gill, *supra* note 43, at 71-72 (describing scope of RICO forfeiture).

ture of a myriad of assets. For example, money or other property that represents the proceeds from racketeering can be forfeited.⁵⁰ A job, salary or bonus can constitute "interests" and therefore be forfeitable under RICO.⁵¹ A defendant's interest in legitimate business entities, such as corporations,⁵² partnerships,⁵³ or limited partnerships,⁵⁴ that are used in a racketeering scheme are forfeitable. Real property purchased with the proceeds from racketeering activities⁵⁵ or used to further the affairs of a RICO enterprise can be forfeited.⁵⁶ Forfeiture of such assets allows RICO to serve its dual aim of preventing a defendant from profiting from his crime⁵⁷ and severing his connection with the RICO enterprise.⁵⁸

B. *Equitable Remedies*

In addition to forfeiture, RICO gives the government authority to bring a civil action for equitable relief⁵⁹ in order to sever the defendant from the enterprise that he has corrupted and to prevent him from continuing the racketeering activity.⁶⁰ In recent years, the government has made extensive use of RICO's civil provisions to accomplish these remedial aims.⁶¹

50. See *Russello v. United States*, 464 U.S. 16, 22 (1983); 18 U.S.C. § 1963(a)(3) (Supp. IV 1986). Forfeiture of profits refers to "gross," not "net," profits. See *United States v. Lizza Indus., Inc.*, 775 F.2d 492, 498-99 (2d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986); S. Rep. No. 225, 98th Cong., 1st Sess. 199, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3382.

51. See *United States v. Horak*, 833 F.2d 1235, 1242 (7th Cir. 1987); *United States v. Kravitz*, 738 F.2d 102, 103 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); *United States v. Rubin*, 559 F.2d 975, 992 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978), *reinstated in relevant part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979).

52. See *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

53. See *United States v. Zang*, 703 F.2d 1186, 1195 (10th Cir. 1982), *cert. denied*, 464 U.S. 828 (1983); *United States v. Walsh*, 700 F.2d 846, 851 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983).

54. See *United States v. Cauble*, 706 F.2d 1322, 1350 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

55. See *United States v. Washington*, 797 F.2d 1461, 1476 & n.23 (9th Cir. 1986); 18 U.S.C. § 1963(b)(1) (Supp. IV 1986).

56. See *United States v. Zielie*, 734 F.2d 1447, 1459 (11th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *United States v. Godoy*, 678 F.2d 84, 87 (9th Cir. 1982), *cert. denied*, 464 U.S. 959 (1983); 18 U.S.C. § 1963(b) (Supp. IV 1986).

57. See *Russello v. United States*, 464 U.S. 16, 22 (1983).

58. See *United States v. Perholtz*, 842 F.2d 343, 369 (D.C. Cir. 1988), *cert. denied*, 57 U.S.L.W. 3230 (U.S. Oct. 3, 1988) (No. 87-1946); S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969).

59. See *supra* note 40.

60. See S. Rep. No. 617, 91st Cong., 1st Sess. 82 (1969); 116 Cong. Rec. 602 (1970) (statement of Sen. Hruska, a joint sponsor of S.1861, which was later enacted as RICO).

61. See *United States v. Ianniello*, 824 F.2d 203 (2d Cir. 1987), *aff'g* 646 F. Supp. 1289 (S.D.N.Y. 1986); *United States v. Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267 (3d Cir. 1985), *aff'g* 581 F. Supp. 279 (D.N.J. 1984), *cert. denied*, 476 U.S. 1140 (1986); *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 683 F. Supp. 1411 (E.D.N.Y. 1988); *United States v. Local 6A, Cement and Concrete Workers*, 663 F.

Section 1964(a) allows a district court great flexibility in formulating an order to prevent and restrain RICO violations.⁶² The list of remedies in the statute is not "exhaustive."⁶³ Rather, courts should be guided by traditional principles of equity in fashioning an order that will achieve the aim of separating the defendant from the enterprise.⁶⁴

In conformity with these remedial principles, RICO's civil remedies have been used in a variety of innovative ways. For example, orders have been entered appointing a receiver or trustee to conduct the affairs of an enterprise that has been used for racketeering purposes.⁶⁵ Preliminary injunctions have issued to prevent the defendant from engaging in illegal activities.⁶⁶ As a final order, a court may issue a permanent injunction to restrain the defendant from having further contact with the corrupted enterprise.⁶⁷ The government also may seek civil divestiture of the de-

Supp. 192 (S.D.N.Y. 1986); Galen, *Union Suits*, Nat'l L.J., Aug. 31, 1987, at 1; Kohn, *First Civil RICO Suit Filed Against Entire Crime Family*, N.Y.L.J., Aug. 27, 1987, at 1, col. 4.

62. See 18 U.S.C. § 1964(a) (1982) (reproduced *supra* note 40).

63. See H.R. Rep. No. 1549, 91st Cong., 2d Sess. 57, reprinted in 1970 U.S. Code Cong. & Admin. News 4007, 4034.

64. See *id.*; cf. *United States v. United States Gypsum Co.*, 340 U.S. 76, 88-89 (1950) (trial court has broad power to cure ill effects of illegal monopolies and to assure that they do not continue). See generally D. Dobbs, *Remedies* 24-91 (1973).

Congress adopted RICO's equitable remedies in order to apply antitrust remedies to organized crime. See *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1086-87 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987); S. Rep. 617, 91st Cong., 1st Sess. 81-83 (1969); 116 Cong. Rec. 602 (1970) (statement of Sen. Hruska). Since equitable remedies had been used successfully against antitrust violators, it was thought that these remedies could be used effectively to combat organized crime. See *Sedima, S.P.R.L. v. Imrex Corp.*, 473 U.S. 479, 489 (1985); *Id.* at 510-13 (Marshall, J., dissenting); *Wollersheim*, 796 F.2d at 1086-87; S. Rep. 617, 91st Cong., 1st Sess. 81-83 (1969); see also 15 U.S.C. §§ 1-31 (1982) (antitrust laws). See generally Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White Collar Crime?*, 62 Notre Dame L. Rev. 526 (1987). In fact, the Justice Department had already successfully used antitrust laws to combat organized crime infiltration into unions. See *Blakey, Reflections*, *supra* note 30, at 250 n.39 (citing *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 96-98 (1962) and *United States v. Pennsylvania Refuse Removal Ass'n*, 357 F.2d 806, 807 (3d Cir.), *cert. denied*, 384 U.S. 961 (1966)).

65. See *United States v. Ianniello*, 824 F.2d 203, 207 (2d Cir. 1987) (restaurant), *aff'g* 646 F. Supp. 1289 (S.D.N.Y. 1986); *United States v. Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267, 295 (3d Cir. 1985) (union), *aff'g* 581 F. Supp. 279 (D.N.J. 1984), *cert. denied*, 476 U.S. 1140 (1986).

66. See *United States v. Cappelto*, 502 F.2d 1351, 1355 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *United States v. Local 6A, Cement and Concrete Workers*, 663 F. Supp. 192, 194 (S.D.N.Y. 1986); *United States v. Winstead*, 421 F. Supp. 295, 296 (N.D. Ill. 1976).

67. See *United States v. Cappelto*, 502 F.2d 1351, 1355 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); 18 U.S.C. § 1964(a) (1982). In *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 683 F. Supp. 1411 (E.D.N.Y. 1988), the government sought an injunction to prevent the individual codefendants from associating with one another. The court declined to address the defendants' arguments that such an injunction would violate their constitutional right to "freedom of intimate association" because they were premature. See *id.* at 1441-42.

defendant's interest in the enterprise,⁶⁸ and civil disgorgement of the defendant's illegal profit.⁶⁹

Because an action for equitable relief under section 1964(a) is a civil action, the government possesses several procedural advantages that are not available in a criminal prosecution. The burden of proof is a preponderance of the evidence,⁷⁰ the discovery rules of the federal rules of civil procedure allow the government easier access to information,⁷¹ and a defendant convicted in a criminal RICO case is estopped from contesting his guilt in a subsequent civil action.⁷² Because these remedies are flexible and provide prosecutors with some procedural advantages, they are likely to be more widely used in the future.⁷³

C. Obscenity as a Predicate Act

The original version of RICO did not include violations of obscenity laws as predicate acts.⁷⁴ Congress added violations of the federal and state obscenity laws to the list of predicate acts in the Omnibus Crime Control Act of 1984.⁷⁵ Senator Jesse Helms proposed this amendment from the Senate floor because of the "heavy involvement of organized

68. See *id.*

69. See *id.*; 18 U.S.C. § 1964(a) (1982).

70. See *United States v. Local 560, Int'l Bhd of Teamsters*, 780 F.2d 267, 279 n.12 (3d Cir. 1986), *aff'g* 581 F. Supp. 279 (D.N.J. 1984), *cert. denied*, 476 U.S. 1140 (1986); *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); see also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985) (dictum).

71. See *Cappetto*, 502 F.2d at 1359; Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L.Q. 1009, 1043-44 (1980).

72. See *United States v. Local 6A, Cement and Concrete Workers*, 663 F. Supp. 192, 194 (S.D.N.Y. 1986); 18 U.S.C. § 1964(d) (1982); H.R. Rep. No. 1549, 91st Cong., 1st Sess. 27, reprinted in 1970 U.S. Code Cong. & Admin News 4007, 4034; see also *County of Cook v. Lynch*, 560 F. Supp. 136, 140 (N.D. Ill. 1982) (defendant estopped in civil case even where the United States was not the plaintiff).

73. See Blakey, *Using Civil Suits to Fight Racketeers*, N.Y. Times, Sept. 1, 1987, at A23, col. 1.

74. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941 (1970).

75. See Pub. L. No. 98-473, § 1020, 98 Stat. 1837, 2143 (1984). This act also amended the forfeiture provisions of RICO and the Comprehensive Drug Abuse Prevention and Control Act. See *id.* at tit. III, ch. 3, 98 Stat. at 2040.

Many states include obscenity violations as predicate acts by specifically listing federal or state obscenity laws. See *Ariz. Rev. Stat. Ann.* §§ 13-2301(D)(4)(u)-(v) (Supp. 1987); *Cal. Penal Code* § 186.2(a)(19) (West Supp. 1988); *Conn. Gen. Stat. Ann.* § 53-394(a)(11) (West 1985); *Ga. Code Ann.* § 16-14-3(3)(A)(xii) (1984); *Idaho Code* § 18-7803(a)(8) (1987); *Ind. Code Ann.* § 35-45-6-1 (Burns 1985); *N.D. Cent. Code* §§ 12.1-06.1-01(2)(e)(17) & (18) (Supp. 1987); *Or. Rev. Stat.* §§ 166.715(5)(a)(J) & (T) (1985); 18 *Pa. Cons. Stat. Ann.* § 911(H)(1) (Purdon 1983); *Utah Code Ann.* §§ 76-10-1602(1)(fff) & (1)(jjj) (Supp. 1987); *Wash. Rev. Code Ann.* §§ 9A.82.010(14)(s)-(t) (West 1988). Other states list violations of state obscenity laws and incorporate the predicate acts listed in 18 U.S.C. § 1961(1). See *Colo. Rev. Stat.* §§ 18-17-103(5)(a) & (b)(VI) (1986); *Del. Code Ann.* tit. 11, §§ 1502(9)(a) & (9)(b)(7) (1987); *Fla. Stat. Ann.* §§ 895.02(1)(a)(20), (27) & (1)(b) (West Supp. 1988); *N.J. Stat. Ann.* §§ 2C:41-1(a)(1)(e) & (a)(2) (West

crime in the pornography trade."⁷⁶ Studies have substantiated his assertion. For example, in 1986 the Attorney General's Commission on Pornography conducted an extensive investigation into the connection between organized crime and the pornography trade and concluded that organized crime involvement and control was significant.⁷⁷ Moreover, there have been several major criminal prosecutions of organized crime figures for obscenity violations in the past few years.⁷⁸

II. THE PRIOR RESTRAINT DOCTRINE

The first amendment forbids state actions that prevent speech or other forms of expression in advance of actual publication unless it has been judicially determined that the expression is not protected by the first amendment.⁷⁹ Restraining speech without a judicial determination that

1982); N.C. Gen. Stat. §§ 75D-3(c)(1) & (2) (1987); Ohio Rev. Code Ann. §§ 2923.31(I)(1) & (I)(2)(b) (Anderson 1987).

A few states limit obscenity crimes that may be predicate acts under the racketeering law to child pornography violations. See Miss. Code Ann. § 97-43-3(11) (Supp. 1987); N.Y. Penal Law § 460.10(1)(a) (McKinney Supp. 1988); R.I. Gen. Laws § 7-15-1(a) (1985). "States are entitled to greater leeway [under the first amendment] in the regulation of pornographic depictions of children," *New York v. Ferber*, 458 U.S. 747, 756 (1982), because the state's interest in protecting children from harm caused by participation in the commercial pornography industry outweighs the minimal value of child pornography. See *id.* at 756-59.

Hawaii and Puerto Rico so vaguely define "racketeering activity" that it may not include violations of the obscenity laws. See Haw. Rev. Stat. § 842-1 (1985); P.R. Laws Ann. tit. 25, § 971a(b) (1980). Several states omit obscenity violations from their racketeering laws altogether, either because the law itself is limited to narcotics violations, see Ill. Ann. Stat. ch. 56 1/2, ¶ 1653(a) (Smith-Hurd 1985); La. Rev. Stat. Ann. § 15:1352(A) (West Supp. 1988); Tenn. Code Ann. § 39-1-1004(9) (Supp. 1987), or because the legislature did not intend to include obscenity violations as predicate acts, see Nev. Rev. Stat. Ann. § 207.360 (1986); N.M. Stat. Ann. § 30-42-3(A) (1987); Wisc. Stat. Ann. § 946.82(4) (West Supp. 1987).

76. 130 Cong. Rec. S434 (daily ed. Jan. 30, 1984) (statement of Sen. Helms).

77. See Final Report II, *supra* note 3, at 1037-1213. A commission on pornography appointed by President Nixon in 1970 concluded that no concrete evidence existed to support allegations that organized crime controlled distribution of "adult materials." See 1970 Commission, *supra* note 1, at 19, 117-18. The 1986 Commission attributed their opposite conclusions to the fact that the role of organized crime in the pornography trade has increased substantially since the 1970 report was issued. See Final Report II, *supra* note 3, at 1042.

78. See *United States v. DiBernardo*, 775 F.2d 1470 (11th Cir. 1985), *rev'g* 552 F. Supp. 1315 (S.D. Fla. 1982), *cert. denied*, 476 U.S. 1105 (1986); *United States v. Thevis*, 665 F.2d 616 (5th Cir. Unit B), *cert. denied*, 456 U.S. 1008 (1982); see also Final Report II, *supra* note 3, at 1072-1101 (detailed account of the DiBernardo investigation).

79. See *Near v. Minnesota*, 283 U.S. 697 (1931); *Law of Obscenity*, *supra* note 1, at 228; Emerson, *The Doctrine of Prior Restraint*, 20 *Law & Contemp. Probs.* 648, 648 (1955); Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 *Va. L. Rev.* 53, 53 (1984). The prior restraint doctrine was first clearly announced in *Near v. Minnesota*, 283 U.S. 697 (1931). In *Near*, Chief Justice Hughes observed that a chief purpose of the first amendment was to prevent previous restraints on publication. See *Near*, 283 U.S. at 715. Since *Near*, the Supreme Court has continuously reaffirmed and refined the prior restraint doctrine. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *New*

it is unprotected constitutes the most serious and least tolerable infringement on first amendment rights.⁸⁰ The government must meet a heavy burden of showing justification for a prior restraint on free speech,⁸¹ and any government action or statute that is alleged to be a prior restraint will be analyzed according to its operation and effect.⁸² In other words, a court assessing whether a governmental action is an unconstitutional prior restraint must "cut through mere details of procedure" and evaluate its effect upon free speech.⁸³

Courts and commentators regard prior restraints as more drastic infringements on first amendment rights than subsequent punishments.⁸⁴ A prior restraint prevents communication, limiting the "uninhibited, robust and wide-open" debate⁸⁵ on public questions by preventing questionable speech from entering the public domain without adequate public or judicial supervision over the restraint.⁸⁶ A subsequent punishment, on the other hand, merely imposes a penalty after it has been determined

York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam). See generally J. Nowak, R. Rotunda & J. Young, *Constitutional Law*, §§ 16.16-16.17, at 866-71 (3d ed. 1986).

80. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); Nowak, Rotunda & Young, *supra* note 79, § 16.16, at 865.

81. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

82. See *Near v. Minnesota*, 283 U.S. 697, 708 (1931); see also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

83. *Near*, 283 U.S. at 713.

84. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *Near v. Minnesota*, 283 U.S. 697, 714-15 (1931); 4 W. Blackstone, *Commentaries* *151-52; Nowak, Rotunda & Young, *supra* note 79, § 16.16, at 865; Tribe, *supra* note 2, § 12-34, at 1039-40.

85. *New York Times Co. v. United States*, 403 U.S. 713, 723-24 (1971) (Douglas, J., concurring) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

86. It has been argued that RICO's penalties are so draconian that they chill protected speech and, therefore, constitute a prior restraint. See *United States v. Pryba*, 674 F. Supp. 1504, 1512-13 (E.D. Va. 1987). Chilling occurs when a person chooses not to disseminate sexually explicit, but not legally obscene, material for fear of prosecution. See *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965); Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 Cornell L. Rev. 245, 266-69 (1982); Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. Rev. 685, 693 (1978). Unlike a prior restraint, which is imposed by the government, a chilling of speech is self imposed. Mayton, *supra*, at 266-69; Schauer, *supra*, at 693.

The *Pryba* court properly rejected this argument relying upon the traditional distinction between subsequent punishments and prior restraints. See *Pryba*, 674 F. Supp. at 1516. It held that RICO did not "chill" protected speech because any "chilling" resulted from the law's legitimate deterrent effect. See *id.* at 1513. In addition, the *Pryba* court noted that courts have refused to limit the severity of sanctions that may be imposed upon violators of obscenity laws. See *id.* at 1516; see also *Polykoff v. Collins*, 816 F.2d 1326, 1340 (9th Cir. 1987); *511 Detroit St., Inc. v. Kelley*, 807 F.2d 1293, 1298-99 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 3211 (1987). The court, however, did not consider whether the actual effect of RICO forfeiture constitutes a governmental action that restricts future protected speech, see 674 F. Supp. at 1511-16, as this Note suggests.

judicially that a person has engaged in unlawful speech or expression.⁸⁷ The distinction is based upon the notion that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand."⁸⁸

Moreover, because a prior restraint prevents communication before it has been determined judicially that the speech is unprotected, the protections of the adversarial system are not present to guard against restraint of protected speech.⁸⁹ These protections include the right to an adversarial hearing, the right to an appeal, and, if the case is a criminal obscenity case, the full range of constitutional protections that are available to criminal defendants.⁹⁰ Even an injunction restraining a particular book or movie that is unprotected by the first amendment cannot issue without an adversarial hearing.⁹¹

Last, a restraint upon speech before publication, by its very nature, requires adjudication in the abstract, because any analysis of the positive or negative effect that the speech has had upon the public is impossible.⁹² A prior restraint prevents speech without considering public reception of the speech.⁹³ In addition, the mere fact that the speech has been censored or restrained influences how the speech subsequently is received by the public.⁹⁴

The constitutional prohibition against prior restraint is subject to an exception allowing requirements of decency to be enforced against obscene publications.⁹⁵ Obscene materials may be restrained in advance of

87. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); Nowak, Rotunda & Young, *supra* note 79, at § 16.16, at 866-67; Emerson, *supra* note 79, at 657. In *Nebraska Press Association*, the Supreme Court stated: "If it can be said that a threat of . . . sanctions after publication 'chills' speech, [a] prior restraint 'freezes' it . . ." 427 U.S. at 559; see also *supra* note 86 (discussing chilling effect).

88. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (emphasis in original).

89. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Nowak, Rotunda & Young, *supra* note 79, § 16.16, at 866-67; Tribe, *supra* note 2, § 12-35, at 1042 n.1; Emerson, *supra* note 79, at 657.

90. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); Nowak, Rotunda & Young, *supra* note 79, § 16.16, at 866-67.

91. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55 (1973); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 439 (1957).

92. See Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11, 49-54 (1981); Redish, *supra* note 79, at 59, 66.

93. See Blasi, *supra* note 92, at 49.

94. See *id.* at 64-69. For example, if the public knows that a movie has been checked and approved by a censor, they may feel that the movie was 'sanitized' to appease the censor. See *id.* at 67.

95. *Near v. Minnesota*, 283 U.S. 687, 716 (1931); see *New York Times Co. v. United States*, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring); Law of Obscenity, *supra* note 1, at 229. Two other exceptions to the doctrine exist: the government, when the nation is at war, may prevent the publication of the sailing dates of warships and the locations of troops, *Near*, 283 U.S. at 716; see also *New York Times Co.*, 403 U.S. at 714 (per curiam) (denying the exception's application to the Pentagon Papers case); Tribe, *supra* note 2, § 12-36, at 1047-48 (discussing *New York Times Co.*), and the security of the community may be enforced against incitements to acts of violence and overthrowing

publication,⁹⁶ because obscenity is not protected by the first amendment, and the prior restraint doctrine only applies to protected works.⁹⁷ When permitting a prior restraint on allegedly obscene materials, the Supreme Court insists upon strict procedural safeguards to prevent the denial of first amendment protections for materials that may be sexually explicit, but are not obscene.⁹⁸

III. THE PRIOR RESTRAINT DOCTRINE APPLIED TO RICO

A. *Strict Construction of RICO*

Congress has mandated that RICO "shall be liberally construed to effectuate its remedial purposes."⁹⁹ The Supreme Court has consistently adhered to this mandate.¹⁰⁰ The Court has insisted, however, that when dealing with the complex web of freedoms that make up free speech, the method by which the government seeks to restrain an individual's speech must be closely scrutinized¹⁰¹ and that the separation of legitimate from

the government, *Near*, 283 U.S. at 716; see also *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 43-44 (1977) (per curiam) (holding that an order enjoining petitioners from marching with or otherwise displaying anti-Semitic materials required strict procedural requirements).

96. See *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 49 (1961). The *Times Film* Court limited its decision to the narrow question of whether a program of censorship may sometimes be constitutional because of the exceptions listed in *Near v. Minnesota*, 283 U.S. 697, 716 (1931). See *Times Film Corp.*, 365 U.S. at 47-49. The standards that a censorship law must meet in order to pass constitutional muster were delineated in *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965). See *infra* note 98 (discussing *Freedman* safeguards).

97. See *New York Times Co. v. United States*, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring); *Roth v. United States*, 354 U.S. 476, 484-85 (1957); *Law of Obscenity*, *supra* note 1, at 229.

98. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65-66 (1963). In *Bantam Books*, the Court held that "regulation by the States of obscenity [must] conform to procedures that will ensure against the curtailment of constitutionally protected expression" 372 U.S. at 66.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Court established three procedural safeguards for a restraint of allegedly obscene material: the censor must seek a judicial determination on the issue of obscenity and bears the burden of proving that the material is unprotected; any restraint imposed prior to the judicial determination must be imposed for a specified, brief period of time and must be limited to preserving the status quo; and the procedure must ensure a prompt judicial determination of whether the material is protected. *Id.* at 58-59; see also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975) (reaffirming procedural safeguards); *Redish*, *supra* note 79, at 78-83 (discussing the *Freedman* decision and concluding that the Court erred in allowing any prior restraint).

99. Organized Crime Control Act of 1970, Pub. L. 91-452, § 904(a), 84 Stat. 947 (1970).

100. See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985); *Russello v. United States*, 464 U.S. 16, 27 (1983); *United States v. Turkette*, 452 U.S. 576, 587 (1981); see also *supra* notes 33-72 and accompanying text.

101. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975); *Speiser v. Randall*, 357 U.S. 513, 520 (1958).

illegitimate speech calls for "sensitive tools."¹⁰² Close analysis of the government's actions in fighting pornography is required because the line between protected and unprotected speech is difficult to draw¹⁰³ and a person's future speech is presumed to be protected.¹⁰⁴

RICO's forfeiture provisions require strict construction¹⁰⁵ when they are used against distributors of obscene materials because of the first amendment's prohibition against prior restraint. The application of these provisions should be narrowly tailored, despite the liberal construction clause, to prevent RICO from having the effect of restraining a defendant's future, presumptively protected speech.¹⁰⁶ Moreover, a narrow tailoring of these provisions effectively balances the need to preserve important first amendment values and the need to fight organized crime and obscenity.

B. *RICO's Full Effect is a Prior Restraint*

The full effect of RICO forfeiture under section 1963 or divestiture under section 1964 could cause a defendant who operates an adult bookstore to forfeit his entire bookstore or chain of bookstores,¹⁰⁷ because he was convicted of RICO violations.¹⁰⁸ Such an application would prevent the defendant from engaging in protected speech, as well as unprotected expressions of obscene materials.¹⁰⁹ Moreover, RICO effectively would prevent the defendant's future exercise of his first amendment rights be-

102. See *Miller v. California*, 413 U.S. 15, 23-24 (1973); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963); *Smith v. California*, 361 U.S. 147, 155 (1959).

103. *Speiser*, 357 U.S. at 525.

104. See *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973).

105. A strict construction of RICO's forfeiture provisions is not unprecedented. See *United States v. Rubin*, 559 F.2d 975, 991-92 (5th Cir. 1977) (holding that RICO, as a criminal statute, "must be strictly construed, and any ambiguity must be resolved in favor of lenity" where the government sought forfeiture of the defendant's union leadership position), *vacated and remanded on other grounds*, 439 U.S. 810 (1978), *reinstated in part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979); see also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 n.10 (1985) (strict and liberal construction principles are not mutually exclusive and portions of the RICO statute sometimes may be strictly construed). In *Rubin*, the court held that forfeiture of a defendant's leadership position in a union was permissible under RICO's forfeiture provisions, but construed the statute strictly to deny the government's request that the defendant forfeit his right to ever run for a top union position in the future. *Rubin*, 559 F.2d at 992-93.

106. See *State v. Feld*, 155 Ariz. 88, 98, 745 P.2d 146, 156 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988).

107. This Note uses bookstores, which are protected by the first amendment, see *Smith v. California*, 361 U.S. 147, 150-55 (1959), for purposes of illustration. The first amendment protects speech in many other contexts including motion pictures, see *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952), stage plays, see *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975), and presumably videotape stores.

108. For an example of the harsh effects that RICO forfeiture can have, see *infra* notes 164-67 and accompanying text (discussing *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987)).

109. See *4447 Corp. v. Goldsmith*, 479 N.E.2d 578, 592 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom. Fort Wayne Books, Inc. v. Indiana*, 108 S. Ct. 1106 (1988).

cause of his past distribution of obscene materials,¹¹⁰ without regard for the fact that future expressions are presumed protected until proved obscene at a judicial hearing.¹¹¹

A comparison of RICO forfeiture and the holding in *Near v. Minnesota*¹¹² illustrates the harsh effects of RICO forfeiture. In *Near*, the trial court found the defendant guilty of publishing libelous and seditious stories about the local government in his newspaper and enjoined him from further newspaper publishing.¹¹³ The Supreme Court, on review, stressed that a government action alleged to be a prior restraint must be analyzed according to its operation and effect¹¹⁴ and held that the injunction was unconstitutional.¹¹⁵ RICO forfeiture has the same practical effect—it restrains the defendant's future speech because of his past misdeeds.¹¹⁶

In fact, RICO's penalties represent more of an infringement than did the injunction in *Near*. *Near* could have caused the injunction to be lifted if he returned to court and demonstrated that future issues of the newspaper would not be defamatory.¹¹⁷ In a RICO forfeiture case, the defendant has no similar recourse because his forum for communication has been forfeited.¹¹⁸ As RICO's forfeiture provisions are mandatory,¹¹⁹

110. See *State v. Feld*, 155 Ariz. 88, 96-97, 745 P.2d 146, 154-55 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988); *4447 Corp. v. Goldsmith*, 479 N.E.2d 578, 587 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom.* *Fort Wayne Books, Inc. v. Indiana*, 108 S. Ct. 1106 (1988); see also *Carlin Communications v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1296 (9th Cir.) ("Even when a speaker has repeatedly exceeded the limits of the First Amendment, courts are extremely reluctant to permit the state to close down his communication forum altogether."), *cert. denied*, 108 S. Ct. 1586 (1988).

111. See *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973).

112. 283 U.S. 697 (1931).

113. *Id.* at 705. The defendant had challenged the constitutionality of the Minnesota statute on a demurrer to the complaint and the issue was certified to the Minnesota Supreme Court, which sustained the statute. *Id.*; see *State ex rel. Olson v. Guilford*, 174 Minn. 457, 219 N.W. 770 (1928). After the injunction became a final order, the defendant again appealed unsuccessfully to the Minnesota Supreme Court. See *Near*, 283 U.S. at 706. The Minnesota court upheld the injunction, relying upon its earlier decision. See *State ex rel. Olson v. Guilford*, 179 Minn. 40, 228 N.W. 326 (1929). See generally F. Friendly, *Minnesota Rag* (1981) (discussing *Near* in detail).

114. *Near*, 283 U.S. at 708.

115. *Id.* at 722-23.

116. See *State v. Feld*, 155 Ariz. 88, 96-97, 745 P.2d 146, 154-55 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988); *4447 Corp. v. Goldsmith*, 479 N.E.2d 578, 592 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom.* *Fort Wayne Books, Inc. v. Indiana*, 108 S. Ct. 1106 (1988).

117. See *Near*, 283 U.S. at 712.

118. See *4447 Corp. v. Goldsmith*, 479 N.E.2d 578, 592 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom.* *Fort Wayne Books, Inc. v. Indiana*, 108 S. Ct. 1106 (1988); see also Hayes, *A Jury Wrestles With Pornography*, Am. Law. 96, 101 (Mar. 1988) (defendant convicted of RICO left "penniless").

119. See *United States v. Kravitz*, 738 F.2d 102, 104-05 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); *United States v. Godoy*, 678 F.2d 84, 88 (9th Cir. 1982), *cert. denied*, 464 U.S. 959 (1983); *United States v. L'Hoste*, 609 F.2d 796, 810-12 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980); see also S. Rep. No. 225, 98th Cong., 1st Sess. 200

a defendant will be restrained in his exercise of his free speech rights even if his future communications are not obscene.

Although it is true that a defendant may open another bookstore if he has enough money, the fact remains that his future expressions through a particular means of communication—the forfeited bookstore—have been restrained. According to the Supreme Court, “One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”¹²⁰ Moreover, the availability of an alternative means of communication is illusory because a defendant who has been forced to forfeit most of his assets will not have the economic resources to open another bookstore.¹²¹

C. RICO Compared to a Nuisance Abatement Law

Analogy of RICO's forfeiture and equitable remedies to nuisance abatement remedies clearly demonstrates the first amendment concerns raised by RICO's use in an obscenity context.¹²² A nuisance abatement law authorizes civil injunctive relief against obscene materials or places from which obscene materials are distributed on the theory that they are a nuisance to society.¹²³ Usually these laws permit the government to obtain an injunction preventing a defendant from selling a particular book or movie after it has been declared legally obscene.¹²⁴ This clearly is constitutional.¹²⁵

Nuisance laws that authorize a court to issue a blanket injunction for-

(noting with approval that courts had held that RICO forfeiture was mandatory), *re-printed* in 1984 U.S. Code Cong. & Admin. News 3182, 3383.

120. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)). *But see* *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 n.2 (1986) (rejecting prior restraint challenge to closure of a bookstore because the proprietors were “free to carry on their bookselling business at another location . . .”). The *Arcara* reasoning is flawed for several reasons. First, it is inconsistent with the prior jurisprudence of *Southeastern Promotions* and *Schneider*. *See Arcara*, 478 U.S. at 711 (Blackmun, J., dissenting). Moreover, the Supreme Court's argument in *Arcara* is inconsistent with the values protected by the first amendment. If taken to its extreme, this reasoning might allow a state to argue that it should be able to bar all public debate in a city on the theory that the residents can move elsewhere. *See Arcara*, 478 U.S. at 711 (Blackmun, J., dissenting).

121. *Cf. Pornography, Padlocks*, *supra* note 8, at 1506 (closure under nuisance abatement law).

122. *See* 4447 Corp. v. Goldsmith, 479 N.E.2d 578, 587 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom.* Fort Wayne Books, Inc. v. Indiana, 108 S. Ct. 1106 (1988).

123. *See, e.g.,* Ariz. Rev. Stat. Ann. §§ 12-811 to -818 (1982); Fla. Stat. Ann. §§ 823.05 & .13 (West 1976 & Supp. 1988); Idaho Code § 52-401 (1979); N.C. Gen. Stat. §§ 19-1 to -8.3 (1983 & Supp. 1987). *See generally* *Enjoining Obscenity*, *supra* note 8, at 1617-20; *Pornography, Padlocks*, *supra* note 8, at 1478 n.4.

124. *See Enjoining Obscenity*, *supra* note 8, at 1617-20; *Pornography, Padlocks*, *supra* note 8, at 1478 n.4; *e.g.,* Ariz. Rev. Stat. Ann. § 12-816 (1982); N.C. Gen. Stat. § 19-5 (Supp. 1987).

125. *See* *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54-55 (1973); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 444 (1957).

bidding the defendant's distribution of any "obscene" materials¹²⁶ or that order the closing of the premise for any use for up to one year are not constitutional.¹²⁷ The majority of courts find that a statute providing for the forced closure of real property that has been used in distributing obscene materials constitutes an impermissible prior restraint.¹²⁸ Such a statute prevents a person's future exercise of his right to free speech because of his past bad acts.¹²⁹

RICO forfeiture is comparable to enjoining operation of an adult bookstore as a nuisance for three reasons. First, a court assessing a constitutional challenge to a statute must review the challenge according to the nature of the right threatened, rather than by the power being exercised or the specific limitation imposed.¹³⁰ Both RICO forfeiture and closure pursuant to a nuisance statute threaten first amendment rights and have the effect of preventing future expressions of protected as well as unprotected speech.¹³¹ Because nuisance statutes and RICO both

126. See *Universal Amusement Co. v. Vance*, 587 F.2d 159, 169 (5th Cir. 1978) (en banc), *aff'd*, 445 U.S. 308 (1980) (per curiam). See generally *Enjoining Obscenity*, *supra* note 8, at 1619-29 (describing such "standards" injunctions).

127. See *Pornography, Padlocks*, *supra* note 8, at 1478 & n.4 (citing state statutes); *infra* note 128.

128. See, e.g., *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135, 138-39 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 1022 (1981); *Universal Amusement Co. v. Vance*, 587 F.2d 159, 165-66 (5th Cir. 1978) (en banc), *aff'd*, 445 U.S. 308 (1980) (per curiam); *State v. Book-Cellar, Inc.*, 139 Ariz. 525, 532, 679 P.2d 548, 555 (Ct. App. 1984); *People ex rel. Busch v. Projection Room Theatre*, 17 Cal. 3d 42, 59, 550 P.2d 600, 610, 130 Cal. Rptr. 328, 338, *cert. denied*, 429 U.S. 922 (1976); *People v. Sequoia Books, Inc.*, 165 Ill. App. 3d 143, 153, 518 N.E.2d 775, 781 (1988); *State ex rel. Blee v. Mahoney Enterprises*, 154 Ind. App. 244, 289 N.E.2d 519, 521-22 (Ct. App. 1972); *State v. A Motion Picture Entitled "The Bet,"* 219 Kan. 64, 76-78, 547 P.2d 760, 770-71 (1976); see also *4447 Corp. v. Goldsmith*, 479 N.E.2d 578, 587-90 (Ind. Ct. App. 1985) (collecting cases), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom. Fort Wayne Books, Inc. v. Indiana*, 108 S. Ct. 1106 (1988).

One court, however, held forced closure of a defendant's place of business as a penalty for distributing obscene materials constitutional because the closure was a temporary punishment for past crimes and defendant was free to exercise his first amendment rights elsewhere. See *State ex rel. Kidwell v. U.S. Mktg., Inc.*, 102 Idaho 451, 456-57, 631 P.2d 622, 628-29 (1981), *appeal dismissed*, 455 U.S. 1009 (1982). This position ignores clear Supreme Court jurisprudence that one's freedom of speech must not be restrained on the excuse that it may be exercised at some other place. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Pornography, Padlocks*, *supra* note 8, at 1502-06; *supra* notes 120-21 and accompanying text.

129. See *Universal Amusement Co. v. Vance*, 587 F.2d 159, 165-66 (5th Cir. 1978) (en banc), *aff'd*, 445 U.S. 308 (1980) (per curiam); *General Corp. v. State ex rel. Sweeton*, 294 Ala. 657, 665-66, 320 So. 2d 668, 675 (1975), *cert. denied*, 425 U.S. 904 (1976).

130. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (determining standard of review for zoning ordinance forbidding live entertainment by the nature of the right threatened by the state's action); *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (measuring challenge to order enjoining union organizer from speaking against the right threatened).

131. Compare *4447 Corp. v. Goldsmith*, 479 N.E.2d 578, 583 (Ind. Ct. App. 1985) (considering whether RICO threatens free speech), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom. Fort Wayne Books, Inc. v. Indiana*, 108 S. Ct. 1106 (1988) with *Universal Amusement Co. v. Vance*, 587 F.2d 159, 163-66 (5th Cir. 1978) (en banc)

threaten the same rights, courts should subject them to the same analysis.¹³²

Second, a statute that threatens first amendment rights must be judged by its effect upon free speech.¹³³ The operation of both laws has the effect of preventing a defendant's future expressions of protected, as well as unprotected, speech.¹³⁴ A nuisance abatement law prevents future expression because the defendant's means of dissemination has been closed by a court order.¹³⁵ Similarly, in a RICO forfeiture context, the defendant's speech is restricted because his means of engaging in speech have been forfeited to the government.¹³⁶

Third, RICO forfeiture and nuisance abatement laws have similar aims. They both seek to prevent the defendant from operating a bookstore or movie theater from which he can disseminate obscene materials.¹³⁷ RICO seeks to separate the defendant from the RICO enterprise in order to prevent future violations through both its forfeiture and equitable remedies.¹³⁸ RICO would allow forfeiture of a bookstore and restraint of the defendant's future speech to accomplish this aim.¹³⁹

(assessing whether statutory nuisance abatement scheme constitutes an unconstitutional prior restraint), *aff'd*, 445 U.S. 308 (1980) (per curiam).

132. In fact, one of the issues before the Supreme Court in *4447 Corp. v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom.* Fort Wayne Books, Inc. v. Indiana, 108 S. Ct. 1106 (1988) is whether the Indiana Supreme Court erred in not assessing defendant's constitutional claim by the nature of the right threatened. See 56 U.S.L.W. 3602 (Mar. 8, 1988).

133. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963); *Near v. Minnesota*, 283 U.S. 697, 708, 713 (1931).

134. Compare *4447 Corp. v. Goldsmith*, 479 N.E.2d 578, 587 (Ind. Ct. App. 1985) (direct effect of RICO's remedies is the closure of bookstores and theatres), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom.* Fort Wayne Books, Inc. v. Indiana, 108 S. Ct. 1106 (1988) with *Universal Amusement Co. v. Vance*, 587 F.2d 159, 164-66 (5th Cir. 1978) (en banc) (nuisance statute allows the state to close a theatre for one year), *aff'd*, 445 U.S. 308 (1980) (per curiam).

135. See *Universal Amusement Co. v. Vance*, 587 F.2d 159, 163-66 (5th Cir. 1978) (en banc), *aff'd*, 445 U.S. 308 (1980) (per curiam); *Pornography, Padlocks*, supra note 8, at 1501-02.

136. See *4447 Corp. v. Goldsmith*, 479 N.E.2d 578, 587 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom.* Fort Wayne Books, Inc. v. Indiana, 108 S. Ct. 1106 (1988).

137. Compare *4447 Corp.*, 479 N.E.2d at 591 (finding RICO's remedies have goal of restricting future speech—both obscene and nonobscene) with *Universal Amusement Co.*, 587 F.2d at 165-66 (observing that statute seeks to prevent future speech based on past speech).

138. See *United States v. Perholtz*, 842 F.2d 343, 369 (D.C. Cir. 1988), *cert. denied*, 57 U.S.L.W. 3230 (U.S. Oct. 3, 1988) (No. 87-1946); *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983); *United States v. Rubin*, 559 F.2d 975, 992 (5th Cir. 1977), *vacated and remanded on other grounds*, 439 U.S. 810 (1978), *reinstated in part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979); S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969).

139. See *State v. Feld*, 155 Ariz. 88, 94-95, 745 P.2d 146, 152-54 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988); *4447 Corp. v. Goldsmith*, 479 N.E.2d 578, 587 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom.* Fort Wayne Books, Inc. v. Indiana, 108 S. Ct. 1106 (1988).

Similarly, a nuisance abatement statute aims to eliminate an undesirable "nuisance" and prevent distribution of obscene materials by closing down the premises.¹⁴⁰

Because the full extent of RICO's forfeiture provisions threatens the same fundamental first amendment rights, has the same effect of closing bookstores, and has the same purpose of preventing a defendant's future expressions as does a nuisance statute, RICO's forfeiture and equitable remedies also can operate as a prior restraint in some cases.¹⁴¹ Thus, like a nuisance statute, the unlimited application of RICO's remedial provisions should be unconstitutional.

D. Content Neutrality

Several courts assert that RICO forfeiture does not violate the first amendment because it seeks forfeiture only of those assets that constitute the profits from criminal activity.¹⁴² Under this view, forfeiture applies to any chattel whatsoever, without regard to whether it is protected by the first amendment.¹⁴³ Accordingly, the first amendment is not implicated because RICO forfeiture is "content neutral."¹⁴⁴

This view fails to acknowledge that RICO's forfeiture penalties have two aims. One is to cause forfeiture of the defendant's ill-gotten gains.¹⁴⁵ RICO's other, equally important, objective is to sever the defendant's connection with the enterprise and to prevent him from engaging in further criminal activities.¹⁴⁶ The same intention also underlies the civil equitable remedies.¹⁴⁷ Because the statute's intent is to separate a defendant from his means of expression, it cannot be said that the statute merely acts as a "content-neutral" forfeiture of profits.¹⁴⁸ Moreover,

140. See *City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463, 469-70 (6th Cir.), cert. denied, 107 S. Ct. 316 (1986); *Enjoining Obscenity*, supra note 8, at 1617-20.

141. See *4447 Corp. v. Goldsmith*, 479 N.E.2d 578, 587 (Ind. Ct. App. 1985), vacated, 504 N.E.2d 559 (Ind. 1987), cert. granted sub nom. *Fort Wayne Books, Inc. v. Indiana*, 108 S. Ct. 1106 (1988).

142. See, e.g., *United States v. Pryba*, 674 F. Supp. 1504, 1516 (E.D. Va. 1987); *Western Business Sys., Inc. v. Slaton*, 492 F. Supp. 513, 514 (N.D. Ga. 1980); *4447 Corp. v. Goldsmith*, 504 N.E.2d 559, 565-66 (Ind. 1987), cert. granted sub nom. *Fort Wayne Books, Inc. v. Indiana*, 108 S. Ct. 1106 (1988).

143. See *Western Business Sys.*, 492 F. Supp. at 514; *4447 Corp.*, 504 N.E.2d at 565-66.

144. See *Western Business Sys.*, 492 F. Supp. at 514.

145. See *Russello v. United States*, 464 U.S. 16, 28 (1983); *United States v. Ginsburg*, 773 F.2d 798, 802-03 (7th Cir. 1985) (en banc), cert. denied, 475 U.S. 1011 (1986).

146. See *United States v. Perholtz*, 842 F.2d 343, 369 (D.C. Cir. 1988), cert. denied, 57 U.S.L.W. 3230 (U.S. Oct. 3, 1988) (No. 87-1946); *United States v. Horak*, 833 F.2d 1235, 1242 (7th Cir. 1987); *United States v. Cauble*, 706 F.2d 1322, 1350 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir.), cert. denied, 464 U.S. 825 (1983); *United States v. Rubin*, 559 F.2d 975, 991-92 (5th Cir. 1977), vacated and remanded on other grounds, 439 U.S. 810 (1978), reinstated in part, 591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864 (1979); S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969).

147. See supra notes 59-73 and accompanying text.

148. See *State v. Feld*, 155 Ariz. 88, 94-95, 745 P.2d 146, 152-55 (Ct. App. 1987), cert. denied, 108 S. Ct. 1270 (1988); *4447 Corp. v. Goldsmith*, 479 N.E.2d 578, 591 (Ind. Ct.

even if the forfeiture were neutral as to content, the prior restraint doctrine provides no exception for a content-neutral restraint.¹⁴⁹

RICO forfeiture implicates the first amendment because the forfeiture sanction, imposed upon a defendant because he has engaged in unprotected speech, prevents future, presumably protected speech.¹⁵⁰ It is not the content of the assets being forfeited that implicates the first amendment. Rather, it is the restraint that RICO places upon the defendant's future expressions of presumptively protected speech that does so.

E. *Intent of the Closure*

The Supreme Court has permitted the closure of a bookstore in one limited instance. In *Arcara v. Cloud Books, Inc.*,¹⁵¹ the Court upheld the closure of a bookstore because criminal activity, including prostitution and solicitation, occurred on the premises.¹⁵² The Court held that "[b]ookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises."¹⁵³

Under this analysis, RICO forfeiture could be used to forfeit a bookstore if the defendant used the premises to engage in criminal activity unrelated to speech, because ownership or operation of a bookstore by itself does not render a defendant immune from racketeering sanctions.¹⁵⁴ In an obscenity case, however, RICO forfeiture penalizes the

App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom.* Fort Wayne Books, Inc. v. Indiana, 108 S. Ct. 1106 (1988).

149. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), in vacating an injunction that prevented a public interest group from distributing leaflets, the Court noted that the injunction operated "not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind.'" *Id.* at 418-19; *see also* 4447 Corp., 479 N.E.2d at 591; *Pornography, Padlocks*, *supra* note 8, at 1505-06.

150. *See* *State v. Feld*, 155 Ariz. 88, 94-97, 745 P.2d 146, 152-55 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988); 4447 Corp. v. Goldsmith, 479 N.E.2d 578, 591 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom.* Fort Wayne Books, Inc. v. Indiana, 108 S. Ct. 1106 (1988).

151. 478 U.S. 697 (1986).

152. *See id.* at 698-99.

153. *Id.* at 707.

154. *Cf. Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986) (holding closure permissible when based upon fact that prostitution and solicitation were occurring on the premises); *Universal Amusement Co. v. Vance*, 587 F.2d 159, 166 (5th Cir. 1978) (en banc) (ruling one year abatement procedure could be applied in cases of gambling, prostitution, and liquor law violations, but not in cases of obscenity, bullfighting, and live sex show violations), *aff'd*, 445 U.S. 308 (1980) (per curiam); 660 Lindbergh, Inc. v. City of Atlanta, 492 F. Supp. 511, 512 (N.D. Ga. 1980) (holding closure of a business under nuisance statute because of acts of lewdness and public indecency does not constitute a prior restraint). *But see* *People ex rel. Arcara v. Cloud Books, Inc.*, 65 N.Y.2d 324, 335-37, 480 N.E.2d 1089, 1096-98, 491 N.Y.S.2d 307, 315-17 (1985) (finding closure of bookstore unconstitutional even when aimed at prostitution), *rev'd*, 478 U.S. 697, *on remand*, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986) (reaffirming earlier holding under state constitution), *cert. denied*, 107 S. Ct. 1301 (1987).

defendant for his past speech and seeks to restrain his future speech.¹⁵⁵ The important factor in the analysis, therefore, is the purpose of the closure. Closure or forfeiture effected because of the defendant's speech implicates first amendment concerns and requires a first amendment analysis.¹⁵⁶ Thus, when a defendant is indicted under RICO, based on violations of the obscenity laws, first amendment concerns are implicated.¹⁵⁷ Not all applications of RICO's flexible remedies, however, constitute a prior restraint in the obscenity context.¹⁵⁸ RICO, therefore, remains a powerful tool for combatting pornography within first amendment guidelines.

IV. SPECIFIC APPLICATIONS OF RICO PROVISIONS¹⁵⁹

A. Forfeiture

Under section 1963(a), RICO forfeiture allows the government to seize a wide variety of items.¹⁶⁰ In order to conform to the Constitution, the forfeiture provisions should be limited to those assets that are derived from the distribution of obscene materials or the percentage of the enterprise that has been corrupted by the distribution of obscene materials.

The first provision, forfeiture of interests acquired or maintained in violation of section 1962,¹⁶¹ should be strictly construed to reach only those interests obtained through the sale of materials proved to be legally obscene. It is clear that a business entity, such as a bookstore, is subject to forfeiture under this provision.¹⁶² If a defendant is convicted of selling obscene materials through a bookstore that deals in both protected and unprotected materials, however, he should forfeit only that percentage of the enterprise that has been proven to engage in the distribution of legally obscene materials.¹⁶³

155. See *4447 Corp. v. Goldsmith*, 479 N.E.2d 578, 587 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom.* *Fort Wayne Books, Inc. v. Indiana*, 108 S. Ct. 1106 (1988).

156. See *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986) (O'Connor, J., concurring).

157. See *State v. Feld*, 155 Ariz. 88, 94-97, 745 P.2d 146, 152-55 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988); *4447 Corp.*, 479 N.E.2d at 587.

158. See *Feld*, 155 Ariz. at 94-96, 745 P.2d at 152-55; see *infra* notes 160-201 and accompanying text.

159. The analysis in this Note is limited to the final judgment provisions of 18 U.S.C. § 1963(a) (Supp. IV 1986) and 18 U.S.C. § 1964(a) (1982). Prejudgment restraining orders lie beyond the scope of this Note.

160. See 18 U.S.C. § 1963(a) (Supp. IV. 1986); *supra* notes 43-58 and accompanying text; see also *supra* note 37 (text of § 1963(a)).

161. 18 U.S.C. § 1963(a)(1) (Supp. IV 1986).

162. See *supra* notes 52-54 and accompanying text (corporations, partnerships, and limited partnerships subject to forfeiture under RICO). Such an entity is subject to forfeiture only to the extent that it has been tainted by the racketeer's use of the entity for illegal purposes. See *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); S. Rep. No. 225, 98th Cong., 1st Sess. 199, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3382.

163. This argument was made unsuccessfully by the defendant in *United States v.*

For example, in *United States v. Pryba*,¹⁶⁴ the government proved that the defendant sold \$105.00 worth of legally obscene materials.¹⁶⁵ Because the small amount of materials proved to be obscene constituted a "pattern of racketeering activity," the government obtained forfeiture of all of the assets of the defendant's enterprise,¹⁶⁶—three bookstores, eight video stores and \$1 million in assets.¹⁶⁷ In conformity with a constitutional application of RICO, the defendants should have forfeited only the profits from the sale of those materials proved to be obscene and the percentage of the enterprise that was engaged in the distribution of legally obscene materials.

RICO's second forfeiture provision allows forfeiture of property that affords a source of influence over an enterprise.¹⁶⁸ This provision can be used to forfeit items of property that the defendant has used to further the affairs of, or to control, a racketeering enterprise.¹⁶⁹ Under the analysis advanced by this Note, this provision generally is constitutional, but

Pryba. See Hayes, *supra* note 118, at 100 (discussing defendant's proposed jury instructions regarding forfeiture).

164. 674 F. Supp. 1504 (E.D. Va. 1987). The *Pryba* case has generated at least five judicial opinions. See *United States v. Pryba*, 678 F. Supp. 1225 (E.D. Va. 1988) (discussing expert testimony regarding community standards); *United States v. Pryba*, 678 F. Supp. 1218 (E.D. Va. 1988) (ruling on co-defendant's motion for judgment of acquittal); *United States v. Pryba*, 674 F. Supp. 1518 (E.D. Va. 1987) (procedural issues related to RICO forfeiture); *United States v. Pryba*, 674 F. Supp. 1502 (E.D. Va. 1987) (ruling on motion to disqualify counsel).

165. See Corn-Revere, *They'll Know It When They Seize It*, 16 Student Law. 14, 14-15 (May 1988); Hayes, *supra* note 118, at 97.

166. The indictment in *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987), charged the defendants with violating RICO by investing the proceeds from a pattern of racketeering activity in an enterprise, 674 F. Supp. at 1507-08, conducting the affairs of a RICO enterprise through a pattern of racketeering activity, *id.* at 1508, and conspiring to violate RICO, *id.*; see also *supra* note 33 (discussing RICO's substantive prohibitions). The RICO enterprise was alleged to "consist of the Pryba's, [co-defendant Jennifer] Williams, Educational Books and seven unindicted corporations." *Pryba*, 674 F. Supp. at 1508; see also *id.* at 1509-10 (holding that this was a proper RICO enterprise); *supra* note 33 (discussing concept of "enterprise").

In order to prove a "pattern of racketeering activity," which "requires at least two acts of racketeering activity," 18 U.S.C. § 1961(5) (1982) (emphasis added), the government used what arguably could be described as the worst of the defendant's sexually explicit materials to demonstrate at least two violations of obscenity laws that would constitute a pattern. See *United States v. Pryba*, 678 F. Supp. 1225, 1227-28 (E.D. Va. 1988) (description of the obscene materials); Corn-Revere, *supra* note 165, at 16 (noting that although the materials that constituted the pattern would "make a healthy person retch," the remainder of the defendant's business was not obscene and "[b]etween 75 and 80 percent of the tapes were not erotic, but were intended for general audiences").

Once the government proved a pattern of racketeering activity, all of the defendant's interests in the enterprise were subject to mandatory forfeiture. See 18 U.S.C. § 1963(a) (Supp. IV 1986); see *supra* notes 43-58 and accompanying text.

167. See Hayes, *supra* note 118, at 97.

168. See *United States v. Zielie*, 734 F.2d 1447, 1459 (11th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); 18 U.S.C. § 1963(a)(2) (Supp. IV 1986).

169. See RICO Manual, *supra* note 41, at 85-86; *supra* notes 43-58 and accompanying text.

should be subject to certain limitations.¹⁷⁰

For example, items in the bookstore's inventory that have not been proved to be legally obscene may not be forfeited because they are presumed to be protected by the first amendment.¹⁷¹ Neutral instrumentalities of dissemination, such as cash registers and bookshelves, should not be forfeited because that would prevent the defendant from engaging in protected speech.¹⁷² If the defendant owns a bookstore or other real property, the court should not allow RICO forfeiture to prevent the defendant's use of that forum for future expressions.¹⁷³ Such a forfeiture would have the same effect as a nuisance abatement law and, therefore, would prove unconstitutional.¹⁷⁴

The second forfeiture section would be constitutional when the property forfeited has enabled the defendant to control the enterprise but is not vital to the exercise of first amendment rights.¹⁷⁵ For example, a motor vehicle that was used in the enterprise's affairs could be forfeited under this provision.¹⁷⁶

RICO's third forfeiture provision allows forfeiture of profits and proceeds from racketeering activity.¹⁷⁷ This refers only to profits from the sale of materials that are not protected by the first amendment.¹⁷⁸ Materials that have not been declared obscene are presumed protected.¹⁷⁹ Therefore, a defendant cannot be punished for distributing them.¹⁸⁰

Applying the third provision is constitutional if forfeiture is limited to profits and proceeds, or assets bought with the profits, derived from materials specifically adjudged obscene.¹⁸¹ Forfeiture in those circumstances is a subsequent punishment for unprotected expression and, as such, usually is deemed constitutional.¹⁸² Moreover, RICO forfeiture of

170. See *State v. Feld*, 155 Ariz. 88, 97, 745 P.2d 146, 155 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988).

171. See *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973).

172. See *State v. Feld*, 155 Ariz. 88, 97, 745 P.2d 146, 155 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988); *cf.* *State v. Book-Cellar, Inc.*, 139 Ariz. 525, 532-33, 679 P.2d 548, 556 (Ct. App. 1984) (nuisance abatement law); *State v. A Motion Picture Entitled "The Bet,"* 219 Kan. 64, 75-76, 547 P.2d 760, 771 (1976) (same).

173. See *Feld*, 155 Ariz. at 97, 745 P.2d at 155.

174. See *supra* notes 122-41 and accompanying text.

175. See *State v. Feld*, 155 Ariz. 88, 97, 745 P.2d 146, 155 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988).

176. See *Martinez v. Heinrich*, 521 So. 2d 167, 168 (Fla. Dist. Ct. App. 1988).

177. See *Russello v. United States*, 464 U.S. 16, 22 (1983); 18 U.S.C. § 1963(a)(3) (Supp. IV 1986).

178. See *Feld*, 155 Ariz. at 97, 745 P.2d at 155.

179. See *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973).

180. See *State v. Feld*, 155 Ariz. 88, 97, 745 P.2d 146, 155 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988).

181. See *id.*

182. See *United States v. Pryba*, 674 F. Supp. 1504, 1513 (E.D. Va. 1987); see *supra* notes 84-88 and accompanying text (distinguishing between subsequent punishments and prior restraints).

proceeds resembles a fine in the amount of money the defendant obtained through criminal activities,¹⁸³ because it allows the defendant to satisfy the judgment with neutral assets.¹⁸⁴ His future speech, therefore, is not restrained.

B. *Equitable Remedies*

RICO's civil provisions give a district court authority to issue equitable orders directing a defendant to divest himself of his interest in an enterprise, ordering the defendant not to engage in the same activities as the enterprise engaged in or ordering the dissolution of the enterprise.¹⁸⁵ Most of the remedies listed in section 1964(a) probably constitute unconstitutional prior restraints if used against a purveyor of pornography.¹⁸⁶

An order directing the defendant to divest himself of all interests in the enterprise has the same effect as forfeiture of those interests under 18 U.S.C. § 1963(a)(1).¹⁸⁷ Such an order would effectively prevent the defendant's future expressions by forcing him to give up all interest in his means of communication. Thus, a divestiture order would result in an unconstitutional prior restraint because it would prevent the defendant's future, presumptively protected, speech based on his past misdeeds.¹⁸⁸

An injunction preventing the defendant from engaging in the same type of business as the enterprise engaged in also is unconstitutional.¹⁸⁹ If the order directs the defendant not to operate a bookstore or movie theater, it operates as an unconstitutional prior restraint.¹⁹⁰ Even an injunction limited to ordering the defendant not to sell or distribute any type of "obscene materials" has been held unconstitutional as a prior restraint.¹⁹¹ An injunction of this nature falls within constitutional bounds only if it is directed at a specific book or movie that a court has found legally obscene.¹⁹²

Last, an order directing the dissolution or reorganization of an enterprise that has engaged in the dissemination of unprotected speech is also

183. See *United States v. Conner*, 752 F.2d 566, 576 (8th Cir.), *cert. denied*, 474 U.S. 821 (1985).

184. See *United States v. Pryba*, 674 F. Supp. 1504, 1515-16 (E.D. Va. 1987); see also *Polykoff v. Collins*, 816 F.2d 1326, 1337 (9th Cir. 1987) (imposition of a high fine was a criminal penalty, not a prior restraint); *511 Detroit St., Inc. v. Kelley*, 807 F.2d 1293, 1299 (6th Cir. 1986) (fine for illegal activity can be paid from lawfully earned money), *cert. denied*, 107 S. Ct. 3211 (1987).

185. See 18 U.S.C. § 1964(a) (1982). For text of § 1964(a), see *supra* note 40. Many states authorize similar remedies. See *supra* note 40.

186. See *State v. Feld*, 155 Ariz. 88, 96-97, 745 P.2d 146, 154-55 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988).

187. See *id.* at 96-97, 745 P.2d at 154-55; *supra* notes 107-21 and accompanying text.

188. See *Feld*, 155 Ariz. at 96-97, 745 P.2d at 154-55.

189. See *id.*

190. See *id.*

191. See *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135, 138 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 1022 (1981). See generally *Enjoining Obscenity*, *supra* note 8, at 1620-29.

192. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55 (1973); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445 (1957).

unconstitutional.¹⁹³ An order of this nature parallels laws revoking a bookstore's or movie theater's corporate license if the owner is convicted of an obscenity violation.¹⁹⁴ These laws offend the Constitution because they restrain future speech while punishing past, unprotected speech.¹⁹⁵

RICO allows the court a great deal of flexibility in structuring an order to achieve the statute's remedial purpose.¹⁹⁶ Because this flexibility exists, the court could structure an order that accomplishes the purpose of preventing future disseminations of obscene materials, yet still preserves fundamental first amendment rights. For example, one court has used section 1964(a) to appoint a receiver to run a restaurant that had been used by the defendants to skim profits and defraud the government of tax revenues.¹⁹⁷ Similarly, at least one court has used civil RICO to appoint a trustee to conduct the affairs of a union that had been dominated by organized crime figures.¹⁹⁸ In the same way, a court constitutionally could appoint an impartial administrator or receiver to monitor the defendant and insure that he does not distribute materials that are legally obscene. Such an order, of course, must be strictly drawn so as to provide the procedural safeguards necessary to prevent restraints upon protected speech.¹⁹⁹ As the most important of these safeguards is the requirement that the administrator seek judicial review in any case in which the administrator wants to restrain the defendant from distributing particular materials,²⁰⁰ this type of order would require close judicial supervision of the administrator's efforts in order to protect fundamental first amendment interests.²⁰¹

193. See *State v. Feld*, 155 Ariz. 88, 96-97, 745 P.2d 146, 154-55 (Ct. App. 1987), *cert. denied*, 108 S. Ct. 1270 (1988).

194. See 4447 Corp. v. Goldsmith, 479 N.E.2d 578, 591 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom. Fort Wayne Books, Inc. v. Indiana*, 108 S. Ct. 1106 (1988).

195. See, e.g., *City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463, 470 (6th Cir.), *cert. denied*, 107 S. Ct. 316 (1986); *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550, 1552 (11th Cir. 1983) (*per curiam*); *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497, 505-06 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); see also 4447 Corp. v. Goldsmith, 479 N.E.2d 578, 592 (Ind. Ct. App. 1985) (collecting cases), *vacated*, 504 N.E.2d 559 (Ind. 1987), *cert. granted sub nom. Fort Wayne Books, Inc. v. Indiana*, 108 S. Ct. 1106 (1988).

196. See *supra* notes 59-73 and accompanying text.

197. See *United States v. Ianniello*, 824 F.2d 203, 205 (2d Cir. 1987), *aff'g* 646 F. Supp. 1289 (S.D.N.Y. 1986).

198. See *United States v. Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267, 295-96 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

199. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975); *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965); *supra* notes 96-98 and accompanying text; see also *Sable Communications of California, Inc. v. Pac. Tel. & Tel. Co.*, No. CV 84-469 AWT, slip op. (C.D. Cal. Dec. 10, 1987) ("A state may not simply close down the forum of a provider of sexually suggestive messages; instead, it must either prosecute vigorously under its obscenity laws or establish a prior-review permit system with procedures that satisfy the requirements of *Freedman v. Maryland*." (available on LEXIS)).

200. See *Freedman*, 380 U.S. at 58-59.

201. Such an order would require a great deal of judicial supervision, see *id.*, and there-

CONCLUSION

Several states and the federal government use RICO as a weapon in the war against pornography. A connection between organized crime groups and the pornography trade may justify such use. RICO's wide ranging forfeiture and civil remedies have the potential, however, to create unconstitutional prior restraints on a defendant's future, presumptively protected speech. In order to prevent such an unconstitutional application, RICO's remedial provisions should be narrowly tailored to preserve fundamental first amendment freedoms and prevent restrictions upon protected speech.

John J. O'Donnell

fore might impose a burden on the judiciary. First amendment rights are so fundamental, however, that judicial supervision over any censorship program is essential. *See id.*