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DePaul Journal of Art, Technology & Intellectual Property Law

Volume 5
Issue 1 *Winter 1994/Spring 1995*

Article 4

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COMMENTS

THE RICO THREAT TO ARTISTIC FREEDOMS: AN INDIRECT CONSEQUENCE OF THE ANTI-PORNOGRAPHY CRUSADE?

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I. INTRODUCTION

A man and a woman walk into a lawyer's office. The attorney, a specialist in criminal defense, asks them to sit down. Their story is as shocking as any case the attorney has ever taken on. The woman describes their business, a gallery of modern art, and the show they put on entitled, "Sex through the ages." Their plan was to show a wide variety of erotic art, from early Greek pottery to recent works by artists such as Robert Mapplethorpe and Jeff Koons. They did not realize the consequences that could stem from the display of sexually explicit art.

The local district attorney had the couple arrested for a violation of RICO, the Racketeering Influenced and Corrupt Organizations act.[1] The basis for their arrests was the display of obscene art. Under the provisions of RICO, the commission of two predicate offenses[2] subjects a defendant to a wide variety of criminal and civil penalties, which includes complete, and total, asset forfeiture.[3] The couple displayed works of art that are sexually graphic and offended the district attorney. In consequence, the couple could face a jail sentence, a huge fine, and could loose the gallery and any money that they have earned through the gallery.

The above account may seem fictional, but because of recent Supreme Court precedent, it is not unthinkable that an art gallery could unknowingly violate RICO. This paper will analyze this torrid area of law, and demonstrate how the Court neglected the First Amendment in the course of punishing speech that five Justices do not like.

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1. 18 U.S.C.A. §§ 1961-68 (1988).

2. A predicate offense, or racketeering activity, is a state or federal crime that is incorporated into the RICO framework by 18 U.S.C. § 1961(1).

3. 18 U.S.C.A. § 1963.

II. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

A. LET'S GET THAT DARN MAFIA

The Racketeering Influenced and Corrupt Organizations statute (RICO)[4], enacted as Title IX of the Organized Crime Control Act of 1970,[5] was designed by Congress to prevent organized criminal activity from branching into legitimate endeavors.[6] RICO's original goal was to destroy organized crime "by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[7] Congress did not define what organized crime is.[8] Instead, the statute concentrates on the person's conduct, not merely criminalizing membership in a criminal organization.[9] Congress has mandated that RICO is to "be liberally construed to effectuate its remedial purposes."[10] An example of this was the Supreme Court's decision, *Sedima, S.P.R.L. v. Imrex*,[11] which not only held that RICO applies to legitimate businesses,[12] but also that the civil RICO plaintiff need not allege any additional "racketeering injury" beyond the injury caused by the predicate acts themselves.[13]

B. DON'T MAKE MY LEGITIMATE BUSINESS ILLEGAL

RICO indictments require that the government prove: "(1) that the defendant, (2) through the commission of two or more [predicate] acts, (3) constituting a 'pattern', (4) of 'racketeering activity,' (5) directly or indirectly invest[ed] in, or maintain[ed] an interest in, or participate[d] in, (6) an 'enterprise,' (7) the activi-

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4. Pub. L. No. 91-452, §§ 901-904, 84 Stat. 922, 941-48 (1970) (codified at 18 U.S.C.A. §§ 1961-68 (1988)).

5. Pub. L. No. 91-452, 84 Stat. 922 (codified at scattered sections of 18 U.S.C.A.).

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

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

7. Pub. L. No. 91-452, 84 Stat. 922, 923.

8. 116 CONG. REC. 18,913 (1970) (statement of Sen. McClellen).

9. *See* 18 U.S.C. § 1961 (a)-(c).

10. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (codified as note to 18 U.S.C. § 1961).

11. 473 U.S. 479 (1985).

12. *Id.* at 499-500.

13. *Id.* at 495-97.

ties of which affect[ed] interstate or foreign commerce."[14]

A racketeering activity, or predicate offense, is any one or more of a laundry list of crimes that Congress felt represented conduct of organized crime.[15] The RICO defendant does not need to be convicted of each "racketeering activity," before a substantive RICO offense can be charged.[16] All that is required is that the "racketeering activity" is "chargeable" or "indictable" under an applicable criminal statute.[17]

The federal RICO statute[18] defines a pattern of racketeering activity as the commission of at least two acts of racketeering activity within a ten year period.[19] It is this pattern along with the enterprise requirement that distinguishes RICO from single episode criminal conduct.[20] The Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*[21] recognized that the plaintiff or prosecutor must show both "relationship" and "continuity" to prove up a pattern of racketeering activity.[22] The relationship prong is defined by the connection of the defendant's criminal acts to one another.[23] "Continuity" is successfully proved if a plaintiff can show continuity or the threat of continuity of racketeering activity.[24]

An art gallery could fall within the RICO parameters if any of its works were to be judicially declared legally obscene. A pattern could be established either by repeated dealings in single works of sexually explicit, legally obscene art, or a single art show. Shows by artists such as Mapplethorpe,[25] Koons,[26] Lee Friedland or David Salle[27] could be deemed to contain separate works of obscenity,

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14. Arthur Patrick Breshnahan, et al., *Racketeer Influenced and Corrupt Organizations*, 30 AM. CRIM. L. REV. 847, 853 n.44 (1993) (quoting from Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984)) (alteration by Breshnahan).

15. 18 U.S.C. § 1961(1).

16. *Sedima*, 473 U.S. at 488.

17. *Id.*

18. Approximately 31 states have enacted RICO-like statutes (not discussed in this paper). Most of these are directed at similar activity targeted by the federal RICO statute; *see* Breshnahan, *supra* note 14, at 907, for a list of the state RICO statutes.

19. 18 U.S.C. § 1961(5).

20. Stephen D. Brown & Alan M. Lieberman, *RICO Basics: A Primer*, 35 VILL. L. REV. 865, 869 (1990).

21. 492 U.S. 229 (1989).

22. *Id.* at 239.

23. Breshnahan, *supra* note 14, at 857.

24. *Northwestern Bell*, 492 U.S. at 242.

25. Mapplethorpe's exhibit included photographs of children with exposed genitals, male frontal nudity, and homoerotic art. *See* Tom Mathews, *Fine Art or Foul?*, NEWSWEEK, July 2, 1990, at 46.

26. Koons' exhibit was featured in a Sonnabend exhibit of sexual works portraying himself and his wife Ilona Staller, a former porn star. *See* Mark Stevens, *Adventures in the Skin Trade*, NEW REPUBLIC, Jan. 20, 1992, at 29. It should be noted that Stevens described pictures at Koons' exhibitions as "softly hard-core," *id.* at 30, a magic word that the Supreme Court deems the gate between First Amendment speech and obscenity. *See* discussion on Miller v. California, *infra* note 104 and accompanying text.

27. The two artists' exhibitions concentrated "obsessively on the female nude," in an "unabashed exercise of a politically incorrect gaze." Brooks Adams, *Lee Friedlander and David Salle: Truth or*

or if taken as a whole, the exhibit could be seen as obscene. Once art is found obscene, the art gallery has taken the leap into RICO law.

C. THESE ARE THE VOYAGES OF THE STATUTORY ENTERPRISE

In order to violate RICO, a person must acquire interests in, or administer an "enterprise."[28] An enterprise is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[29] To prove the existence of an enterprise, prosecutors must show the existence of an ongoing organization that functions as a "continuing unit."[30] It is the use of the enterprise to commit the two predicate racketeering acts that makes the enterprise unlawful.[31] The charged enterprise does not need to be an illegitimate business.[32] Acts of the enterprise that may be lawful, whether predominant or incidental to the business, become part of the enterprise and thus also criminal activities.[33]

In the art gallery context, the gallery could be the enterprise.[34] By having a common purpose of selling art, an organizational structure of some sort, and a continuity of existence,[35] the court could find that the gallery is covered under the statute. If the gallery then sells at least two works found to be legally obscene, and those sales are not single incidents, the gallery will have committed the required predicate acts. Since the commission of the racketeering activity renders the enterprise illegal, all of its activities will be deemed to be unlawful. In other words, if Mapplethorpe's works could be found to be obscene and the gallery presented multiple versions of this "obscenity," the entire gallery's contents, from its Picasso to its Van Gogh, would be part of an illegal activity.

D. PROHIBITED ACTIVITIES

Section 1962 establishes three substantive violations and one conspiracy violation.[36] Section 1962(a) prohibits any person[37] "who has received any income derived . . . from a pattern of racketeering activity" from investing or using such income to acquire any interest in or to establish or operate "any enterprise which

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Dare?, ART IN AM., Jan. 1992, at 67.

28. 18 U.S.C.A. § 1962(a)-(c).

29. 18 U.S.C.A. § 1961(4).

30. United States v. Turkette, 452 U.S. 576, 583 (1981).

31. *See* 18 U.S.C.A. § 1962.

32. *Turkette*, 452 U.S. at 584-85.

33. 18 U.S.C. § 1962(c).

34. Enterprises have been found in private businesses. *See, e.g.*, United States v. Zemek, 634 F.2d 1159, 1166-67 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).

35. United States v. Mazzei, 700 F.2d 85, 89 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983); United States v. Bledsoe, 674 F.2d 647, 664-65 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982).

36. 18 U.S.C.A. § 1962. RICO not only deals with the prevention of racketeering activity in general, but the "collection of unlawful debt." *Id.*

37. Section 1961(3) defines "person" as "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C.A. § 1961(3). The definition includes virtually every individual or entity within the scope of RICO.

is engaged in, or the activities of which affect, interstate or foreign commerce."[38] This requires the prosecution to prove that the defendant "both committed the alleged predicate activities and invested the income from those activities in the targeted manner."[39] This section prohibits investment of racketeering income or its proceeds into a legitimate business; it does not prohibit engaging in the underlying predicate act.[40] This is the classic mafia type violation whereby the mafia uses money derived from its illegal activities to buy an art gallery, resulting in the investment itself being deemed illegal.

Section 1962(b) prohibits "any person" from acquiring or maintaining, "through a pattern of racketeering activity," an interest in "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."[41] Unlike section 1962(a), section 1962(b) "does not require that the defendant receive proceeds from the pattern,"[42] it only "requires the purpose of the pattern to be to acquire or maintain an interest in an enterprise."[43]

The third violation, other than conspiracy,[44] is section 1962(c) which prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity."[45] It is this section that renders the enterprise itself illegal. Section 1962(c) prevents the use of the enterprise to commit the predicate acts, and this performance renders the enterprise's activities cumulatively illegal. The former sections, in contrast, basically prevent investment in an enterprise through the commission of racketeering activity.

If the gallery engages in a pattern of racketeering activity, selling or displaying legally obscene art, and uses proceeds from this pattern to maintain the gallery, or pay the expenses, the gallery's actions are a violation of RICO. The Cincinnati Contemporary Art Center (CAC), embroiled in the Mapplethorpe prosecution controversy, is a prime example of how an art gallery could violate RICO. To avoid any public funding debate, the CAC received funding from a local business and increased the usual admission fee.[46] If the Mapplethorpe photographs were found to be legally obscene, and CAC was brought up on RICO charges, the prosecutor would note that CAC used proceeds from the predicate acts, money raised from ticket sales to see the exhibit, to maintain the enterprise, the gallery. Under this frightening scenario, the gallery would have unknowingly violated RICO and would suffer the draconian penalties required by RICO. Additionally, Dennis Barrie, the director of CAC, could himself be brought up on

38. 18 U.S.C.A. § 1962(a).
39. Breshnahan, *supra* note 14, at 861.
40. Brown & Lieberman, *supra* note 20, at 870.
41. 18 U.S.C.A. § 1962(b).
42. Breshnahan, *supra* note 14, at 862.
43. Brown & Lieberman, *supra* note 20, at 870.
44. 18 U.S.C.A. § 1962(d).
45. 18 U.S.C.A. § 1962(c).
46. STEVEN C. DUBIN, ARRESTING IMAGES: IMPOLITIC ART AND UNCIVIL ACTIONS 184 (1992).

RICO charges because of his role in the enterprise.[47]

E. THIS SURE DOESN'T LOOK LIKE A HOCKEY PENALTY BOX

The benefits of a RICO action to the prosecutor or plaintiff are the expansive penalties in both the civil and criminal actions that are often, but not always, more excessive than penalties imposed for two violations of the incorporated offenses.[48] Criminal violations of any of the four provisions of section 1962 lead to fines, imprisonment, or both, and mandatory asset forfeiture.[49]

The asset forfeiture is RICO's most potent weapon because it forces the separation of the defendant from the criminal enterprise and the permanent closure of that enterprise.[50] The convicted defendant must forfeit (1) any interest acquired or maintained in violation of section 1962;[51] (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise;[52] and (3) any property constituting or derived from any proceeds which the person obtained directly or indirectly from a violation of section 1962.[53] Unlike an in rem forfeiture, which is limited in application to contraband and articles put to unlawful use or, at its extreme, to proceeds traceable to unlawful activity,[54] the RICO in personam criminal forfeiture extends even further in scope to provide "new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[55] The goal of RICO forfeiture is to "'incapacitate, and . . . directly to remove the corrupting influence from the channels of commerce'."[56] In asset forfeiture, this goal is certainly achieved.

An example of this draconian forfeiture device is *United States v. Pryba*.[57] In *Pryba*, the government proved that the defendant sold legally obscene materials.[58] One hundred and five dollars worth of legally obscene materials were deemed to constitute a pattern of racketeering activity.[59] The government, therefore was able to obtain mandatory forfeiture of all the assets of the defendant's enterprise, including three bookstores, eight video stores and $1 million in assets.[60]

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47. *See* 18 U.S.C.A. § 1962(c).

48. Breshnahan, *supra* note 14, at 850.

49. 18 U.S.C.A. § 1963(a).

50. Amanda M. McGovern, *Obscenity Predicates, RICO, and the First Amendment*, 9 U. MIAMI ENT. & SPORTS L. REV. 301, 307 (1992).

51. 18 U.S.C.A. § 1963(a)(1).

52. *Id.* § 1963(a)(2).

53. *Id.* § 1963(a)(3).

54. Alexander v. United States, 113 S. Ct. 2766, 2778 (1993) (Kennedy, J., dissenting).

55. *Id.* at 2778 (quoting Russello v. United States, 464 U.S. 16, 26 (1983)).

56. *Russello*, 464 U.S. at 28 (1983) (quoting remarks of Sen. McClellan during legislative discussion).

57. 674 F. Supp. 1504 (E.D. Va. 1987).

58. *Id.* at 1518.

59. *Id.* at 1510.

60. *Id.*

RICO also provides in section 1964 that either the Attorney General,[61] or "any person injured in his business or property by reason of a violation of section 1962"[62] may bring a civil action to recover damages. Civil remedies include divestiture,[63] restrictions of future activities, and an order of dissolution or reorganization of the enterprise.[64] A private civil plaintiff may obtain treble damages, costs, attorney fees, and general equitable relief.[65] If there is a final judgment or decree in favor of the United States in a criminal proceeding against the defendant, the defendant is estopped from denying the essential allegations of the criminal offense in the subsequent civil proceeding brought by the United States.[66]

The civil RICO action also provides an incentive to the government. In *Sedima, S.P.R.L. v. Imrex Company*,[67] the Court stated that it was not "convinced that the predicate acts must be established beyond a reasonable doubt"[68] in a civil RICO proceeding. The Court proceeded to cite a number of cases which dealt with criminal conduct that could be punished only upon proof beyond a reasonable doubt, but which supported civil sanctions under a preponderance standard.[69] Without officially deciding the standard of proof issue, the Court noted that merely because "the offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards or that the consequences of a finding of liability in a private civil action are identical to the consequences of a criminal conviction."[70] This lower standard effectively could allow the government to skirt required criminal procedures and achieve the same results, in an easier manner, than engaging in a criminal prosecution.

F. JESSE HELMS AND RICO, A MATCH MADE IN HEAVEN

The initial RICO statute did not contain the predicate offense of obscenity. According to the self proclaimed protector of the sensibilities of the United States, Jesse Helms, obscenity was "the third largest source of income for organized crime."[71] Senator Helms' allegations have arguably been substantiated by the 1986 Attorney General's Commission on Pornography.[72] Unlike the other

61. 18 U.S.C.A. § 1964(b).

62. *Id.* § 1964(c).

63. An order directing the defendant to divest himself of all interests in the enterprise is effectively the same as § 1963(a)(1) forfeiture, and as such, should be analyzed in accordance with the forfeiture section.

64. 18 U.S.C.A. § 1964(a).

65. *Id.* § 1964(c).

66. *Id.* § 1964(d).

67. 473 U.S. 479 (1985).

68. *Id.* at 491.

69. *Id. See, e.g.*, United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972); Helvering v. Mitchell, 303 U.S. 391, 397 (1938); United States v. Regan, 232 U.S. 37, 47 (1914).

70. 473 U.S. at 491.

71. 103 CONG. REC. 844 (1984) (statement of Sen. Helms).

72. ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT, at 1037-1213. *But*

predicate offenses, the use of an obscenity predicate act directly implicates constitutional considerations of freedom of speech and the press under the First Amendment.[73] The consequence of adding a speech offense "to a statutory scheme designed to curtail a different kind of criminal conduct went far beyond the imposition of severe penalties for obscenity offenses."[74] This leaves vulnerable "to government destruction any business daring to deal in sexually explicit materials."[75] As seen above, the art gallery that sells works declared legally obscene could be prosecuted under RICO.

III. OBSCENITY UNDER THE FIRST AMENDMENT

The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[76] There is no written exception to this amendment pertaining to sexual materials. There are two separate definitions for sexual materials that differ based upon their ability to command First Amendment protections. Pornography refers generally to sexually explicit materials, and like other forms of speech, it is presumptively protected by the First Amendment. Obscenity, on the other hand, is a legal term of art that refers to sexual materials not protected by the First Amendment.[77] The legal definition of obscenity is ambiguous and results in paternalistic control over what Americans can see, hear, or read because of the opinion of either some members of the government, or a few independent religious or moralistic zealots. There is no logical reason why the "lone bibliophile or film fanatic in Maine or Mississippi should not have the same right to receive the information, ideas, and entertainment she chooses as those sinful folks in Las Vegas and New York."[78]

A. HISTORIC DEVELOPMENT OF OBSCENITY LAW

Although governments throughout history have tried to control creative expression, until the nineteenth century the focus was on blasphemy (criticizing the church) and sedition (criticizing the state), rather than eroticism.[79] In fact, "sex has occupied a central role in human artistic creations from the very beginning of recorded history. Sexual symbolism, notably the phallus, played an important part in primitive magic and religious rituals, especially fertility rites."[80] The first

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see, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970) (recommending repeal of existing obscenity laws).

73. McGovern, *supra* note 50.

74. Alexander v. United States, 113 S. Ct. 2766, 2778 (1993).

75. *Id.* at 2778.

76. U.S. CONST. amend. I.

77. McGovern, *supra* note 50.

78. MARJORIE HEINS, SEX, SIN AND BLASPHEMY, A GUIDE TO AMERICA'S CENSORSHIP WARS 23 (1993).

79. *Id.* at 16.

80. MOSHE CARMILLY-WEINBERGER, FEAR OF ART: CENSORSHIP AND FREEDOM OF EXPRESSION IN ART 174 (1986).

reported obscenity case in the United States, *Commonwealth v. Sharpless*,[81] occurred in 1815 and held that it was an offense at common law to exhibit for profit a picture of a nude couple.[82] Later, in response to a New York City grocer named Anthony Comstock and his personal war to suppress obscenity, Congress in 1873 made it a criminal offense to send obscene material through the mails.[83] Historic obscenity prosecutions have consistently suppressed genuine creative works, not just the sleazy porn thought of as obscene today. For example, under the Comstock Law, Aristophanes' *Lysistrata*, Rabelais' *Garguantua*, Chaucer's *Canterbury Tales*, Boccaccio's *Decameron*, and even *The Arabian Nights* have been labeled as obscene materials.[84]

The first widely adopted obscenity standard, as defined in *Regina v. Hicklin*,-[85] was "whether the tendency of the matter charged . . . is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[86] It came to stand for a double proposition that "obscenity was to be measured by its effect on the most susceptible, and that obscenity of the work as a whole was to be judged by the effect of isolated passages."[87] The break with the *Hicklin* test began with two opinions holding James Joyce's *Ulysses* not obscene.[88] Both the trial court and the appellate court suggested a standard based on the effect on the average reader of the dominant theme of the work as a whole, and not the *Hicklin* test.[89]

B. THE SUPREME COURT'S MISADVENTURES INTO OBSCENITY

1. Roth v. United States - down the slippery slope we go

The Supreme Court had been involved in obscenity litigation as early as the nineteenth century,[90] but it was not until 1957 that the Court squarely pronounced what legal obscenity was. The Court had often mentioned that obscenity

81. 2 S. REP. 91 (1815).

82. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 906 (2d ed. 1988).

83. 17 Stat. 599 (1873). The current federal obscenity statute that was added as a RICO predicate offense is codified at 18 U.S.C.A. §§ 1461 *et seq.* It states, among others, that "every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . . is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier."

84. HEINS, *supra* note 78, at 27.

85. L.R. 3 Q.B. 360 (1868).

86. *Id.* at 368.

87. TRIBE, *supra* note 82, at 906.

88. *Id.* at 907 (discussing United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934)).

89. *Id.*

90. Rosen v. United States, 161 U.S. 29 (1896).

was not protected by the First Amendment,[91] and *Roth v. United States*[92] continued the assumption that obscenity is not within the area of constitutionally protected speech or press.[93] Ironically, Justice Brennan, who later in his career would be the champion for First Amendment values,[94] structured the doctrinal exception for obscene speech. The *Roth* test for obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[95] Thus, the focus of the judicial concern in earlier cases shifted from the alleged "immoral influence" of the work to a judgment about its "prurient appeal."[96]

2. Memoirs v. Massachusetts - a moment of rationality

The Court's next major visit into the obscenity realm was *Memoirs v. Massachusetts*.[97] The plurality treated lack of redeeming social importance not as the reason to exclude obscenity, but as part of its definition.[98] The three prong test refused protection to speech only when: (1) the dominant theme of the material taken as a whole appealed to a prurient interest in sex;[99] (2) the material was patently offensive because it affronted contemporary community standards relating to the description or representation of sexual matters;[100] and (3) the material utterly lacked redeeming social significance.[101]

Although censorship should never be condoned, the *Memoirs* test at least seemed to create a balance between those who would ban anything to do with sex and First Amendment absolutists, such as Justices Black and Douglas, who would have reversed essentially all obscenity convictions. By emphasizing that the material must "utterly lack redeeming social significance,"[102] the *Memoirs* test seemed to allow more protection to sexual speech. It should also be noted that such a standard, while difficult for the prosecution to prove, was within the abilities of the jury to decide.[103] But, whenever the Court recognizes more ex-

91. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In that decision Justice Murphy outlined classes of speech that were to be considered outside of the First Amendment protections. These included the "lewd and obscene, the profane, the libelous, and the insulting or 'fighting words." In most cases, except for obscenity, these categories have been either dropped, or sufficiently narrowed.

92. 354 U.S. 476 (1957).

93. *Id.* at 481-85.

94. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (upholding the right to burn the flag as political speech). Justice Brennan did reject the state's power to regulate obscenity except as to children or unconsenting adults in Paris Adult Theater I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).

95. Roth v. United States, 354 U.S. 476, 489 (1957).

96. TRIBE, *supra* note 82, at 908.

97. 383 U.S. 413 (1966).

98. TRIBE, *supra* note 82, at 908-09.

99. 383 U.S. at 418.

100. *Id.*

101. *Id.*

102. *Id.*

103. *See supra* note 86 and accompanying text.

pansive freedoms, it reaches in and limits them to the point of non-existence.

3. Miller v. California - the present obscenity standard

In *Miller v. California*,[104] a five justice majority decided that the test for obscenity should be:

> (1) Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
>
> (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[105]

The court also explicitly rejected the 'utterly without redeeming social value' test of *Memoirs*.[106] Examples of what states could define under subsection (2) of the new test were also graciously given by the Court: (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[107] The Court concluded its new definition by stating that "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed.[108]

C. THE MILLER OBSCENITY STANDARD AND ART - OH, WHAT A MESS

In *City of Cincinnati v. Barrie*[109] an antipornography crusading sheriff boldly went where no sheriff had gone before; he brought an art museum up on charges of pandering obscenity and illegal use of minors. Prosecutions of traditional pornography distributors had been successful before, but this suit broke new ground and pushed the fragile *Miller* test to the brink. Dennis Barrie, director of

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104. 413 U.S. 15 (1973).

105. 413 U.S. at 24. Since *Miller* has been decided, and not including child pornography cases, no obscenity case has been decided by more than a five justice majority. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 413 U.S. 115 (1973); United States v. Orito, 413 U.S. 139 (1973); Smith v. United States, 431 U.S. 291 (1977); Ward v. Illinois, 431 U.S. 767 (1977); Pope v. Illinois 481 U.S. 497 (1987) (five justices joined the entire majority opinion; however, Justice Scalia filed an additional concurring opinion; while a sixth justice, Justice Blackmun, filed an opinion concurring in part and dissenting in part).

106. 413 U.S. at 24.

107. *Id.*

108. *Id.* at 27.

109. 90 CRB11699-A & B, 90 CRB11700-A & B, Hamilton County Municipal Court, Ohio (1990). Pre-trial opinions of the court can be found in 566 N.E.2d 214 (Ohio Cty. Ct. 1990), 566 N.E.2d 207 (Ohio Cty. Ct. 1990). *See also* Contemporary Arts Center v. Ney, 735 F. Supp. 743, 745 (S.D. Ohio 1990) (preliminary injunction issued to prevent interference with the photographic exhibit before a judicial determination of obscenity).

Cincinnati's Contemporary Arts Center (CAC), was charged with breaking the law by including sexually explicit photographs by Robert Mapplethorpe in that artist's retrospective, "The Perfect Moment."[110] The photos in question are not easy to look at: one shows a man urinating in another man's mouth; three show penetration of a man's anus with various objects; one shows a finger inserted in a penis; two show children with their genitals exposed.[111] In fact, one juror expressed that as far as the jury was concerned, the photographs "were gross and lewd."[112]

The *Miller* test does not prohibit the gross or the lewd; the *Miller* test "merely" prohibits that elusive concept of "obscenity." The job of the jury, then, was to decide whether these photographs were legally obscene. The subject matter of the seven photographs was difficult, and the judge did his best to emphasize this difficulty by holding that the photographs in question would be judged separately, not as part of the retrospective as a whole.[113] This ruling, based on the opinion of one prosecution witness,[114] was contrary to expectations and prior obscenity trials. By ruling that the seven photographs would stand individually,[115] the judge thus denied the nature of a retrospective collection.

After a ten-day trial and two hours of deliberations, the jury announced that they had decided to acquit Barrie and the CAC on every charge.[116] "We felt we had no choice," a juror stated, "even though we may not have liked the pictures. We learned that art doesn't have to be pretty."[117] In describing how they came to acquit, the juror explained that they had to decide whether the photographs were art or not, an exception to legal obscenity. Their decision was based on the fact that "the prosecution didn't have witnesses that testified to the contrary."[118] Another juror stated that the defense "experts helped me form an opinion on the law."[119]

What the case points out is that the decision to convict a person on obscenity charges depends upon the opinion of an "art expert." While expert opinion has become the norm in criminal trials, these experts typically testify to scientific questions, such as ballistics, or to the mental competence of the defendant. Unlike this use of expert opinion that is used to explain collateral materials that the jury may or may not understand, the use of the expert in an obscenity prosecu-

110. Robin Cembalest, *The Obscenity Trial: How they voted to acquit*, ARTNEWS, Dec. 1990, at 136.

111. *Id.*

112. *Id.*

113. City of Cincinnati v. Contemporary Arts Center, 566 N.E.2d 214 (Ohio 1990).

114. The witness presented by the prosecution had studied sexually explicit photographs for the American Family Association (AFA), Donald Wildmon's repressive organization. Although she was objected to by the defense as "not an art expert" and because she had "a particular political agenda," the Judge allowed her to testify anyway. Cembalest, *supra* note 110, at 138.

115. City of Cincinnati v. Contemporary Arts Center, 566 N.E.2d 214, 218-19 (Ohio 1990).

116. Cembalest, *supra* note 110, at 137.

117. *Id.* (quoting Juror Eckstein).

118. *Id.*

119. *Id.*

tion tells the jury what to think about the issue in litigation and takes away from the decision making purpose of the jury. It can be argued that the definition of legal obscenity is one of those areas where the lay jury is incapable of understanding the issues themselves, but, if anything, this points out the flaw of *Miller*. Nothing makes one person more qualified than another to give an opinion on an issue of taste, and it seems ridiculous that such issues can lead to the harsh penalties associated with a criminal statute like RICO. For art galleries and their directors, this precedent means little. With another jury, another prosecutor, and better experts for the State, such defendants could be convicted of obscenity and/or RICO possibly resulting in the closing of the gallery.

IV. FIRST AMENDMENT JURISPRUDENCE

There are three important First Amendment doctrines that come into play in the RICO/obscenity context- prior restraint, overbreadth, and vagueness. The theories underlying these doctrines will be outlined because defendants in the two major RICO/obscenity cases, *Fort Wayne Books v. Indiana* and *Alexander v. United States*, unsuccessfully argued these doctrines before the Supreme Court.[120]

A. PRIOR RESTRAINT

Regulations which suppress speech or expression prior to dissemination are unconstitutional.[121] The Court established the framework for the prior restraint doctrine in the landmark case of *Near v. Minnesota*.[122] In *Near*, a Minnesota statute provided for the abatement, as a public nuisance, of a "malicious, scandalous and defamatory newspaper, magazine or other periodical."[123] The lower court enjoined the publication of a newspaper which had violated the statute on prior occasions.[124] The lower court thus attempted to control the defendant's future speech. The Supreme Court invoked the prior restraint doctrine to strike down the statute as an unlawful suppression of freedom of the press.[125] The Court feared that if the statute was upheld, the legislature, in the exercise of its discretion, could impose a 'complete system of censorship' which would stifle the content of all future printed materials.[126]

The government therefore must meet a heavy burden of showing justification

120. Alexander v. United States 113 S. Ct. 2766 (1993); Fort Wayne Books v. Indiana, 489 U.S. 46 (1989).

121. Near v. Minnesota, 283 U.S. 697 (1931).

122. *Id.*

123. *Id.* at 701.

124. *Id.* at 705-706.

125. *Id.* at 722-723. The Court recognized that when the First Amendment was approved by the First Congress, it was "undoubtedly intended to prevent government's imposition of any system of prior restraints similar to the English licensing system under which nothing could be printed without the approval of the state or church authorities." TRIBE, *supra* note 82, at 1039.

126. Tod R. Eggenberger, *RICO vs. Dealers in Obscene Matter: The First Amendment Battle*, 22 COLUM. J.L. & SOC. PROBS. 71 (1988).

for a prior restraint on free speech.[127] Prior restraints are "the most serious and the least tolerable infringement on First Amendment rights."[128] In its most obvious form a prior restraint "is a law which requires submission of speech to an official who may grant or deny permission to utter or publish it based upon its content."[129] A subsequent punishment, in contrast, imposes a penalty after it has been judicially determined that the defendant has engaged in unlawful activities.[130] The distinction between a prior restraint and a subsequent punishment is based upon the idea 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."[131]

Notwithstanding this presumption against prior restraints, the Court does not absolutely bar government authorities from imposing such devices. In *Near*, the Court listed "exceptional cases," including obscenity, which would rebut the ordinary presumption.[132] Even with obscenity, however, statutes imposing prior restraints must first pass rigorous judicial scrutiny,[133] especially when these statutes restrict both obscene and non-obscene materials.[134] Therefore, "it is enough to say that in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect."[135]

To limit the effect on protected speech, the Court in *Freedman v. Maryland*[136] established constitutional guidelines which must condition injunctive remedies to combat obscenity. In *Freedman*, a Maryland statute required movie distributors to submit all films for review before exhibition.[137] There was no time limit or precise guidelines for the review, and the Court saw this as an invalid prior restraint. The Court set out three basic requirements for any statutory scheme which attempts to suppress unprotected expression. First, the censor must bear the burden of proof that the material represents unprotected expression.[138] Second, there must be a prompt adversarial hearing and final adjudication on the issue of actual obscenity.[139] Finally, any prior restraint device entered before judicial review must be strictly limited.[140]

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127. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (Pentagon papers case).

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

129. Alexander v. United States, 113 S. Ct. 2766, 2779 (1993) (Kennedy, J., dissenting).

130. John J. O'Donnell, Note, *RICO Forfeiture and Obscenity: Prior Restraint or Subsequent Punishment?*, 56 FORDHAM L. REV. 1101, 1113-14 (1988).

131. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975).

132. Near v. Minnesota, 283 U.S. 697, 716 (1931).

133. NAACP v. Button, 371 U.S. 415 (1963).

134. *See, e.g.*, Erznoznik v. Jacksonville, 422 U.S. 205 (1975) (invalidating a movie ordinance which had the effect of deterring theaters from showing non-obscene films containing nudity).

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

136. 380 U.S. 51 (1965).

137. *Id.* at 55.

138. *Id.* at 58.

139. *Id.* at 58-59.

140. *Id.* at 59-60.

B. OVERBREADTH

"A law is void on its face if it 'does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise' of protected expressive or associational rights."[141] A plausible challenge to a law void for overbreadth can be made only when "(1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory way of severing the law's constitutional application from its unconstitutional application so as to excise the latter clearly in a single step from the law's reach."[142] Because the resulting deterrent to protected speech is not effectively removed by a case-by-case determination of the statute, "[t]he only solution, then, is to strike down such an overbroad law altogether until it is rewritten or until an appropriate court authoritatively narrows it."[143]

The overbreadth doctrine is considered an exception to the traditional rules of constitutional standing.[144] Typically a litigant can only try to show that a statute was unconstitutional in its application to him. The overbreadth doctrine, however, permits the challenger to show that the statute would violate first amendment rights of others not before the court. In overbreadth analysis, "challengers *are* in effect permitted to raise the rights of third parties; and the court invalidates the entire statute 'on its face' or 'as construed,' not merely 'as applied.'"[145] The factor that motivates this type of adjudication is the concern with the "'chilling,' deterrent effect of the overbroad statute on third parties not courageous enough to bring suit."[146] The Court has made the overbreadth doctrine more narrow by requiring the party to demonstrate "substantial" overbreadth.[147] Therefore, a "statute drafted narrowly to reflect a close nexus between the means chosen by the legislature and the permissible ends of government is thus not vulnerable on its face simply because occasional applications that go beyond constitutional bounds can be imagined."[148]

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141. TRIBE, *supra* note 82, at 1022 (quoting Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (statute prohibiting all picketing void on its face since it bans peaceful picketing protected by the First Amendment)).

142. TRIBE, *supra* note 82, at 1022.

143. *Id.* at 1023.

144. GERALD GUNTHER, CONSTITUTIONAL LAW 1191 (1991).

145. *Id.*

146. *Id.* at 1192. *See* Alexander v. United States, 113 S. Ct. 2766 (1993) (petitioner's real complaint was an improper chilling effect, not overbreadth).

147. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). In *Broadrick*, the Court rejected an overbreadth challenge to Oklahoma's Merit System Act that restricted political activities by classified civil servants. The Court noted that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.*

148. TRIBE, *supra* note 82, at 1025. Tribe cited to Cox v. Louisiana, 379 U.S. 559 (1965) ("statute prohibiting picketing 'near' courthouse upheld against overbreadth challenge and found to be a 'precise, narrowly drawn' regulation, but prosecution held unconstitutional as applied to demonstration which police officials had indicated was permissible"). TRIBE, *supra* note 82, at 1025 n.1.

C. *VAGUENESS*

An unconstitutionally vague statute also creates risks of a "chilling effect," and, like overbreadth, leads to the facial invalidation of a statute.[149] The vagueness challenge rests on the procedural due process requirement of adequate notice. Justice Brennan described a vague statute as one "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[150] The focus of the doctrine is both on actual notice to citizens and prevention of arbitrary enforcement.[151] The Court has recognized that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement."[152] Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."[153]

Another problem can result when a court, faced with overbreadth, attempts to "prun[e] a statute of its overbroad sections"[154] and leaves the remaining statute impermissibly vague. For example, a hypothetical statute stating that "It shall be a crime to say anything in public unless the speech is protected by the first and fourteenth amendments"[155] would not be unconstitutionally overbroad because it literally forbids nothing constitutionally protected. The statute, however, is patently vague, and because there is no notice about what is or is not protected, it would be declared unconstitutional.

V. RICO OBSCENITY = NO FIRST AMENDMENT PROTECTION

The combination of RICO and the predicate offense of obscenity would at the very least implicate the First Amendment doctrines discussed above.[156] Two recent cases decided by the Supreme Court demonstrate that in the context of obscenity, even the most tried and true constitutional doctrines can be ignored in order to protect the public from access to "dirty" speech.

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149. GUNTHER, *supra* note 144, at 1202.

150. Zwickler v. Koota, 389 U.S. 241 (1967) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

151. Kolender v. Larson, 461 U.S. 352, 358 (1983).

152. Smith v. Goguen, 415 U.S. 566, 574 (1974).

153. *Id.* at 575.

154. TRIBE, *supra* note 82, at 1030.

155. *Id.* at 1031.

156. *See, e.g.*, McGovern, *supra* note 50; Eggenberger, *supra* note 126; O'Donnell, *supra* note 130. All three authors came to the conclusion that the RICO forfeiture provisions were an unconstitutional prior restraint on speech. While in the case of obscenity their theories may have been refuted by Chief Justice Rehnquist in Alexander v. United States, 113 S.Ct. 2766 (1993), in the case of sexually explicit art, the theories may still have legitimacy. See discussion of the faults of *Alexander*, *infra* note 185 and accompanying text.

A. *FORT WAYNE BOOKS V. INDIANA*[157]

In *Fort Wayne Books*, the Court reviewed two decisions of Indiana courts[158] involving the application of that state's RICO statute[159] to bookstores that allegedly sold obscene materials. In the *Fort Wayne Books* case, Indiana filed a civil action against three corporations and certain of their employees[160] alleging that the defendants engaged in a pattern of racketeering activity by repeatedly violating the state obscenity law.[161] The complaint alleged that the defendants had thirty-nine prior criminal obscenity convictions, and that the stores in question had, at the time of the suit, obscene materials for sale.[162] The state alleged that sales of the obscene materials were being used to operate and maintain the stores in question.[163]

The obvious constitutional problem was the state's request for an immediate seizure of all property subject to forfeiture as set forth in the complaint. In an *ex parte* hearing, the court entered an order finding probable cause to conclude that Fort Wayne Books was violating the state RICO statute and directed the immediate seizure of all property associated with the stores operated by the defendants.[164] An adversarial hearing on defendant's motion to vacate the order based on federal constitutional grounds failed.[165] The Indiana Supreme Court reversed the appellate court decision's that the relevant provisions of the state's RICO statute violated the United States Constitution[166] and instead held that the pretrial seizure was constitutional.[167]

In the *Sappenfield* case, the defendant was charged with six counts of violating the obscenity statute and two charges of RICO violations.[168] The Indiana Court of Appeals, relying on the Indiana Supreme Court's opinion in *Fort Wayne Books*,[169] reversed the trial court's determination that the RICO statute was unconstitutionally vague as applied to obscenity predicate offenses.[170]

On the issue of whether obscenity as a predicate act in a RICO action is unconstitutional, the Supreme Court found that it was not.[171] First, it ruled that

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157. Fort Wayne Books v. Indiana, 489 U.S. 46 (1989).

158. 4447 Corp. v. Goldsmith, 504 N.E.2d 559 (Ind. 1987) and Sappenfield v. Indiana, 505 N.E.2d 504 (Ind. Ct. App. 1987).

159. IND. CODE. §§ 34-4-30.5-1 *et seq.* (1988).

160. *Fort Wayne Books* itself was a consolidation of two Indiana court decisions: 4447 Corp. v. Goldsmith and Fort Wayne Books, Inc. v. State. Only Fort Wayne Books chose to appeal the case to the Supreme Court.

161. *Fort Wayne Books*, 489 U.S. at 50-51.

162. *Id.* at 51.

163. *Id.*

164. *Id.* at 52.

165. *Id.*

166. *Id.* at 52-53.

167. 4447 Corp. v. Goldsmith, 504 N.E.2d 559 (Ind. 1987).

168. *Fort Wayne Books*, 489 U.S. at 53.

169. 504 N.E.2d 559 (Ind. 1987).

170. Sappenfield v. Indiana, 505 N.E.2d 504, 506 (Ind. Ct. App. 1987).

171. *Fort Wayne Books*, 489 U.S. at 62.

because the *Miller* standard is not unconstitutionally vague, RICO's use of obscenity as a predicate offense is also not unconstitutionally vague.[172] The Court also explicitly refused the invitation to overturn *Miller*.[173] Second, the Court found that the more severe penalties for RICO than for the underlying obscenity offense did not create an impermissible chill.[174] It noted that because deterrence of the sale of obscene materials is a legitimate end of the state, the "mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedents."[175] Next, the Court noted that "[a]s long as the standard of proof is the proper one with respect to all of the elements of the RICO allegation — including proof, beyond a reasonable doubt, of the requisite number of constitutionally prescribable predicate acts — all of the relevant constitutional requirements have been met."[176] Thus the Court held that there is no requirement of a "warning shot" before the defendant can be prosecuted for a RICO violation.[177]

The Court followed its historical prior restraint doctrine to reverse the judgment sustaining the pretrial seizure order in *Fort Wayne Books*.[178] Specifically, the Court emphasized the line of cases dating back to *Marcus v. Search Warrant*[179] and *A Quantity of Copies of Books v. Kansas*,[180] that required rigorous procedural safeguards to be employed before expressive materials can be seized as obscene.[181] The Court stated that "while the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances), it is otherwise when materials presumptively protected by the First Amendment are involved."[182] Thus, mere probable cause to believe a legal

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172. *Id.* at 58.

173. *Id.*

174. Specifically the court noted that a guilty sentence of the two counts of RICO would lead to 10 years in prison and a $20,000 fine. In comparison, the maximum punishment for the obscenity offense was six years in jail and $30,000 in fines. *Id.* at 59. The Court noted that the Indiana RICO provisions were similar to other enhanced sentencing schemes upheld for multiple obscenity offenses. *See* Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). It should be noted that the federal RICO statute authorizes fines and imprisonment of 20 years. 18 U.S.C. § 1963(a).

175. *Fort Wayne Books*, 489 U.S. at 59. *See* Adult Video Ass'n v. Barr, 960 F.2d 781 (9th Cir. 1992), *vacated and remanded,* Reno v. Adult Video Ass'n, 113 S. Ct. 3028 (1993). In *Adult Video Ass'n*, the defendant alleged that the adult video store decided not to rent or sell sexually explicit videotapes due to the distributor's liability concerns. The court found *Fort Wayne Books* dispositive of the chilling issue. *Barr*, 960 F.2d at 787. This can be used to show that any attempt to demonstrate that a chilling effect is unconstitutional will fail.

176. *Fort Wayne Books*, 489 U.S. at 61.

177. *Id.* In two minor issues the Court first held that use of prior obscenity convictions in other communities was constitutional as long as the determinations had followed the appropriate community standard. *Id.* at 62. The Court also rejected the defendant's contention that he should have been provided with a prompt adversarial hearing after his arrest to determine the question of obscenity. *Id.*

178. *Id.*

179. 367 U.S. 717 (1961).

180. 378 U.S. 205 (1964).

181. *Fort Wayne Books*, 489 U.S. at 62.

182. *Id.* at 63 (*citing* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 n. 5 (1979)).

violation has transpired is not adequate to remove books or films from circulation.[183] Even though the motion for seizure was brought under the RICO statute, a restraint on speech is still a restraint no matter how the state law characterizes it.[184]

B. *ALEXANDER V. UNITED STATES*[185]

The *Fort Wayne Books* opinion, although certainly not a flawless protection of the First Amendment, explicitly rejected the opportunity to reach the question of the constitutionality of post-trial forfeitures.[186] This question was left up to the Court in *Alexander*, and Chief Justice Rehnquist changed the face of First Amendment doctrine.

The defendant in *Alexander* commanded an empire of 13 retail stores that specialized in "adult entertainment."[187] In 1989, federal authorities charged defendant with thirty-four counts of obscenity violations and three RICO counts predicated on the obscenity charges.[188] Following a four month jury trial, defendant was convicted of twelve counts of transporting obscene material in interstate commerce,[189] five counts of engaging in a business of selling obscene materials[190] and three RICO offenses, including one count of receiving and using income derived from a pattern of racketeering activity,[191] one count of conducting a RICO enterprise,[192] and one count of conspiring to conduct a RICO enterprise.[193] These convictions were based upon a jury finding that four magazines and three videotapes, in multiple copies, graphically depicted "hard core" sexual acts and were thus obscene.[194]

The defendant was sentenced to six years in prison, fined $100,000 and ordered to pay costs.[195] At the forfeiture proceeding, pursuant to 18 U.S.C. §1963(a)(2), the Government sought forfeiture of the business and real estate that represented petitioner's enterprise,[196] the property that afforded petitioner influence over that enterprise,[197] and all assets and proceeds obtained from his

183. *Id.* at 66. *See, e.g.*, New York v. P.J. Video, Inc., 475 U.S. 868 (1986); Heller v. New York, 413 U.S. 483 (1973).

184. *Id.*

185. 113 S. Ct. 2766 (1993).

186. *Fort Wayne Books*, 489 U.S. at 66 n. 11.

187. *Alexander*, 113 S. Ct. at 2769. Among the terrible things that the defendant did in his stores was to sell pornographic magazines and sexual paraphernalia, show sexually explicit movies, and rent and sell videotapes.

188. *Id.*

189. 18 U.S.C.A. § 1465.

190. *Id.* § 1466.

191. 18 U.S.C.A. § 1962(a).

192. *Id.* § 1962(c).

193. *Id.* § 1962(d).

194. Alexander v. United States, 113 S. Ct. 2766, 2770 (1993).

195. *Id.*

196. 18 U.S.C.A. § 1963(a)(2)(A).

197. *Id.* § 1963(a)(2)(D).

racketeering offenses.[198] The court ordered the defendant to forfeit his wholesale and retail businesses (including all the assets of those businesses) and almost $9 million found to be acquired through racketeering activity.[199] Because the government did not wish to "go into the business of selling pornographic materials,"[200] the government destroyed all of the defendant's materials, regardless of their obscenity.[201] All of this was because the jury found that seven items were legally obscene.

The majority opinion, written by Chief Justice Rehnquist, rejected every First Amendment argument presented by the defendant. The Court first rejected defendant's prior restraint argument as "stretch[ing] the term "prior restraint" well beyond the limits established by our cases."[202] Distinguishing *Near*, the Court held that RICO forfeiture only "deprives [the defendant] of specific assets that were found to be related to his previous racketeering violations."[203] The Court assumed that if defendant had "sufficient untainted assets to open new stores, restock his inventory, and hire staff,"[204] he could go back into business the next day.[205] The opinion continued to contrast all prior restraint cases by stating that the infirmity in them was that the "Government had seized or otherwise restrained materials suspected of being obscene without a prior judicial determination that they were in fact so,"[206] and here the assets were seized only after being found directly related to petitioner's past racketeering violations.[207] In contrast to *Fort Wayne Books*, here the Court found that requisite procedural safeguards were present.[208]

In rejecting the defendant's prior restraint argument, the Court also relied on *Arcara v. Cloud Books, Inc.*[209] In *Arcara*, a New York statute authorized closure of a building found to be a public health nuisance if it was used for prostitution and lewdness.[210] At the defendant bookstore, authorities observed that illicit sexual activities, including solicitation of prostitution, occurred on the premises.[211] It was held that the First Amendment did not preclude closing of

198. *Id.* §§ 1963(a)(1), (3).
199. *Alexander*, 113 S. Ct. at 2770.
200. *Id.* at 2770 n.1.
201. *Id.*
202. *Id.* at 2771.
203. *Id.*
204. *Id.*
205. *Id.* The Court makes an incorrect assumption because the government seized every asset that the defendant commanded in his enterprise and $9 million. Even if it is ignored that the defendant had been sentenced to six years in jail, the Court's assumption is naive at best and insulting in reality.
206. *Id.* at 2771-72. The Court pointed to, among others, Marcus v. Search Warrant, 367 U.S. 717 (1961), Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), and A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964).
207. *Alexander*, 113 S. Ct. at 2771-72.
208. *Id.* at 2772.
209. 478 U.S. 697 (1986).
210. *Id.* at 699.
211. *Id.*

the bookstore for one year.[212] The Court also found that there was no prior restraint because the defendants were free to carry on their business during the year at another location, and that the closure was made on the basis of an advance determination of illegality.[213] In *Alexander*, the Court held that *Arcara* was applicable and that the RICO forfeiture was a punishment for past criminal conduct, not a prior restraint.[214]

Finally, the Court rejected defendant's prior restraint argument because it would "undermine the time-honored distinction between barring speech in the future and penalizing past speech."[215] The Court worried that accepting the defendant's argument would blur the line between prior restraints and subsequent punishments "to such a degree that it would be impossible to determine with any certainty whether a particular measure is a prior restraint or not."[216]

The Court also rejected defendant's overbreadth challenge. The Court began by stating that "we have in the past rejected First Amendment challenges to statutes that impose severe prison sentences and fines as punishment for obscenity offenses."[217] The defendant argued that the RICO forfeiture provisions were constitutionally overbroad, because they were not limited to solely obscene materials and their proceeds. The Court merely stated that the RICO statute did not criminalize constitutionally protected speech and therefore is materially different from the overbreadth cases.[218]

The Court recharacterized the defendant's argument into an improper chill argument and explicitly followed *Fort Wayne Books*. The Court quoted from *Fort Wayne Books* that "deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws, and our cases have long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene'."[219] Therefore the Court found that the threat of forfeiture has no more of a chilling effect than a threat of a prison term or a large fine.[220] The Court stated that a lengthy prison sentence or large fine, both constitutional under *Fort Wayne Books*, would be more of a deterrent than mere forfeiture.[221]

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212. *Id.* at 705.

213. *Id.* at 705-706.

214. Alexander v. United States, 113 S. Ct. 2766, 2772 (1993).

215. *Id.* at 2773.

216. *Id.*

217. *Id. See, e.g.*, Ginzburg v. United States, 383 U.S. 463, 464-465 n.2 (1966), Smith v. United States, 431 U.S. 291, 296 n.3 (1977), Fort Wayne Books v. Indiana, 489 U.S. 46, 59 n.8 (1989).

218. *Alexander*, 113 S. Ct. at 2774. Because of the enterprise relationship in the RICO statute, any activity of the enterprise, legal or illegal, becomes an illegal activity once there have been two predicate acts committed by the enterprise. As such, the Court's theory is flawed.

219. Fort Wayne Books v. Indiana, 489 U.S. 46, 60 (1989) (quoting Smith v. California, 361 U.S. 147, 154-55 (1959)).

220. *Alexander*, 113 S. Ct. at 2774.

221. *Id.* When an order of forfeiture is entered, however, the business loses everything. Although a large fine could put a defendant out of business, he still retains the assets of the business and can do

The Court also noted that, in *Arcara*, an order closing down an entire business engaged in expressive activity was authorized.[222] Because the order was not directed at the content of the speech,[223] and this was not a case where a statute based on nonexpressive activity had the effect of singling out those engaged in expressive activity,[224] the First Amendment was not implicated in *Arcara*.[225] Due to the reading given to *Arcara* by the *Alexander* Court, the forfeiture provisions did not implicate the First Amendment because obscenity can be regulated or proscribed.[226]

The only benefit given to the defendant by the Court was on the Eighth Amendment argument.[227] The Eighth Amendment prevents a sentence that is disproportionate to the gravity of the offenses either as a "cruel and unusual punishment" or an "excessive fine." While the majority of the defendant's arguments in both the First and Eighth Amendment contexts dealt with proportionality, the Court held that proportionality would be decided only in relation to the Eighth Amendment.[228] The excessive fines clause specifically "limits the Government's power to extract payments, whether in cash or in kind, as punishment for some offense."[229] Emphasizing the District Court's finding that the defendant was convicted for "creating and managing" an "enormous racketeering enterprise," the Court also specified that the question of whether the forfeiture was excessive must be considered in light of the "racketeering enterprise" conducted "over a substantial period of time."[230] This inferentially deems the forfeiture, at least in this case, not excessive and thus not an Eighth Amendment violation. While this remand could be beneficial to the defendant, it is far too limited of a ground to rest the most cherished of First Amendment rights.

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with them as he pleases.

222. *Id. See Arcara*, 478 U.S. at 707.

223. United States v. O'Brien, 391 U.S. 367 (1968).

224. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (tax on newspaper paper).

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

226. *Alexander*, 113 S. Ct. at 2775.

227. Although an in depth discussion of the provisions of the Eighth Amendment is beyond the scope of this paper, the Court's remand may be illusory if the issue, fully litigated, is appealed. The Court in recent years has promoted real property rights, *see, e.g.*, Nollan v. California Coastal Commission, 483 U.S. 825 (1987) (government may not condition permission for an owner's use of his property on an act or forbearance not related to the stated goal of the act or forbearance), and First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304 (1987) (landowner whose property is taken under inverse condemnation is entitled to damages from the time between the acts constituting the taking and judicial determination that a taking had occurred). The Burger and Rehnquist Courts have been less than enthusiastic about extending any criminal defendant's rights. *Compare* Miranda v. Arizona, 384 U.S. 436 (1966) *with* New York v. Quarles, 467 U.S. 649 (1984) (no *Miranda* warnings necessary prior to questioning of a custodial suspect in a situation positing a public safety threat) *and compare* Mapp v. Ohio, 367 U.S. 643 (1961) *with* United States v. Leon, 468 U.S. 897 (1984) (good faith exception to the exclusionary rule).

228. *Alexander*, 113 S. Ct. at 2776 n. 3.

229. *Id.* at 2775 (quoting from Austin v. United States, 113 S. Ct. 2801 (1993)).

230. *Id.* at 2776.

VI. WHERE, OH WHERE DID OUR FIRST AMENDMENT FREEDOMS GO?

Alexander and *Fort Wayne Books* present interesting problems in the First Amendment area. While a bare majority still cling to the assumption that there is something inherently terrible about sexually explicit speech, the denial of imperative First Amendment protections cannot be justified no matter how awful the speech may be. Dispensing with First Amendment principles because of the unfavorability of the speech has consistently been rejected and must also be rejected in this context. If the Court wishes to retain legitimacy as the protector of First Amendment freedoms, a job directly related to its implicit function as the protector of the minority from the tyranny of the majority, the Court must rethink the decisions handed down in this area of First Amendment jurisprudence. This final section will point out the flaws of the *Miller/Fort Wayne Books/Alexander* line of cases and emphasize the Court's abandonment of its duty.

A. *MILLER'S INHERENT FLAW - VOID-FOR-VAGUENESS*

In a critique of the Court's actions in the RICO/obscenity area, the obvious starting point is the *Miller* test itself. The jurors' statements in the Mapplethorpe case represent the key flaw in the *Miller* test: an expert's opinion on a subject of taste can lead to a conviction for a crime. There can be no question that such a procedure should be held void-for-vagueness. Because *Pope v. Illinois*[231] held that the third prong of *Miller* is an objective test, the Court quietly invited a parade of experts into the courtroom to decide whether the work in question could be considered art.

The defense in the Mapplethorpe case, for example, prepared an onslaught of carefully selected experts to explain to the jury that the photographs in question were art. A juror stated that "the expertise of the defense witnesses was persuasive,"[232] and that the prosecution's sole expert witness "did not make a big impression."[233] The question then remains whether the defense was successful in persuading the jury that the Mapplethorpe photos were not obscene because of the inherent nature of the photos, or whether the prosecution misread the jury from an ultra-conservative city and did not prove the case to its fullest possibility.

This standardless standard, no different than Justice Stewart's famous obscenity definition, "I know it when I see it,"[234] is unconstitutionally vague. While the Court in *Fort Wayne Books* was comfortable that the *Miller* standard was not unconstitutionally vague,[235] prior cases have held equally "unambiguous" statutes or standards void-for-vagueness.[236] Due process, derived from both the

231. 481 U.S. 497 (1987).

232. Cembalest, *supra* note 110, at 136-137, 140.

233. *Id.* at 140.

234. Jacobellis v. Ohio, 378 U.S. 184, 197 (1984) (Stewart, J., concurring).

235. Fort Wayne Books v. Indiana, 489 U.S. 46, 58 (1989).

236. *See, e.g.*, Kolender v. Larson, 461 U.S. 352 (1985) (statute requiring persons who loiter or

Fourteenth and Fifth Amendments, requires adequate notice before a defendant can be convicted of a crime, and if not, the statute is void-for-vagueness. As seen in the Mapplethorpe prosecution, the *Miller* obscenity test determines the illegality of art only after it has been brought up on charges and scrutinized by experts. Although this is technically consistent with the prior restraint doctrine, which allows a subsequent punishment for those who violate the law, it cannot be said that the test gives adequate notice to those who may come under its scope. To put it mildly, "it's *impossible* for creators, retailers, or distributors to figure out which depictions or accounts of nudity or sexual activity predominantly appeal to a prurient interest in sex, are patently offensive to prevailing standards in any particular community, or lack serious literary, artistic, political, or scientific value."[237]

Even if Chief Justice Burger's conclusion, that *Miller* would "provide fair notice to a dealer in [hard core sexual conduct] that his public and commercial activities may bring prosecution,"[238] is sufficient to put the dealer in adult materials or pornography on notice, it is insufficient for the art gallery. The line between art that could be obscene and art that is protected is thin, and yet the Court, as noted in *Fort Wayne Books*,[239] is satisfied to rest cherished First Amendment principles on opinion.

Due to the prosecution of CAC, even calling a work "art" is no longer the lynch-pin of protection that *Miller* presumes. Any time a work of art challenges the perceived norm, censors decry the work as "obscene." For example, the Serrano work "Piss Christ" was labeled obscene by some of its harshest critics even though the work had nothing to do with sexual behavior. Does the Jeff Koons work that portrays his wife kissing his erect penis qualify as art,[240] or does it step over the line into "obscenity?" Does the Mapplethorpe photograph of the torso of a man with his penis outside of his pants demonstrate an artistic notion, or is it a "lewd exhibition of the genitals?"[241]

The *Miller* test cannot be said to provide adequate notice to the dealer in sexually explicit art. If *Miller* can be said to be functional for the dealer in adult entertainment, the test must be held to be unconstitutionally vague as applied to works of art. The art gallery cannot know whether the work is obscene until there has been a battle of experts in the courtroom. This gives insufficient notice

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wander on streets to provide "credible and reliable" identification unconstitutionally vague); Smith v. Goguen, 415 U.S. 566 (1974) (provisions of flag misuse statute that subjects to criminal liability to anyone who publicly treats the U.S. flag contemptuously are void-for-vagueness); *but see, e.g.*, Village of Hoffman Estates v. Flipside, 455 U.S. 489 (1982) (village ordinance language "designed for use" was not unconstitutionally vague on its face, since objective standard encompassed at least one item that was principally used with illegal drugs); Grayned v. City of Rockford, 408 U.S. 104 (1972) (statue prohibiting willfully making noise or diversion that tends to disturb or disturbs the peace or good order of a school session is not unconstitutionally vague).

237. HEINS, *supra* note 78, at 33 [emphasis added].

238. Miller v. California, 413 U.S. 15, 28 (1973).

239. *Fort Wayne Books*, 489 U.S. at 57.

240. Stevens, *supra* note 26, at 30.

241. *Miller*, 413 U.S. at 25.

for the gallery as to what is legally obscene under *Miller*, and therefore, *Miller* and the statutes that have been derived from it should be held void-for-vagueness at least to works of art. The *Pope/Miller* test is litigation about taste and allows courts to decide "What is Beauty?", a decision Justice Scalia calls "a novelty even by today's standards."[242] This standard is unconstitutionally vague and must be held inapplicable to art in order to preserve the functions of the First Amendment. Adding an exception to the obscenity doctrine that this standard is inapplicable to art should not pose any constitutional problems because it was the Court who created the First Amendment obscenity exception in the first place.

B. THE WARNING SHOT - WHY NOT?

A related issue to the void-for-vagueness argument is the Court's rejection of requiring the predicate acts of obscenity to be "affirmed convictions."[243] In *Fort Wayne Books*,[244] the Court was content to rest on the presumption that if the standard of proof is proper to all elements of the RICO allegation, relevant constitutional requirements have been met.[245] The conclusion was derived from *Sedima*,[246] where the Court, in dicta, rejected the proposition that a civil action can proceed only after a criminal conviction.[247] The Court concluded that a prior conviction requirement cannot be found in the definition of "racketeering activity."[248]

This conclusion is faulty, and the Court's limited analysis granted to the issue implies a disregard for any constitutional safeguards for this subject. Unlike the other RICO predicate acts, the determination of whether there has been an obscenity violation is post hoc. Among the crimes included in §1961(1) "racketeering activity" are murder, kidnaping, gambling, arson, or dealing in narcotics.[249] Although each substantive crime has gradations and mitigating factors, it is at least possible to assume that the perpetrator knows that he *may* have done something illegal.[250] If a person kills another person, justified or not, that person should know that he *may* have committed a crime. In the case of obscenity, as described above, the defendant cannot know whether what he or she sells is

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242. *Pope*, 481 U.S. at 504 (Scalia, J., concurring). Although Justice Scalia called for the reexamination of Miller v. California, 413 U.S. 15 (1973), it is arguable that even he does not really want *Miller* reexamined. This is seen by his joining the majority in Alexander v. United States, 113 S. Ct. 2766 (1993) (affirming the RICO forfeiture of an adult entertainment enterprise because of the predicate offense of obscenity).

243. *Fort Wayne Books*, 489 U.S. at 61.

244. 489 U.S. 46 (1989).

245. *Id.*

246. 473 U.S. 479 (1985).

247. *Id.* at 488. *Sedima* involved a suit based on the predicate acts of mail and wire fraud.

248. *Id.*

249. 18 U.S.C.A. § 1961(1).

250. This conclusion is admittedly greatly over- and under-inclusive, because it does not include the various mental abilities and conclusions the alleged perpetrator makes. For illustrative purposes though, the mentioned crimes are those that, by their nature, a person of reasonable abilities can understand.

legally obscene. This is even more of a problem in the case of sexually explicit art. As described above, the *Miller* test is unconstitutionally vague and does not provide adequate notice to the defendant as the other predicate act definitions do. An "affirmed convictions" requirement, as rejected by the Court, could have provided the notice to the defendant that what he is doing is illegal.[251] Subsequent violations then would allow a prosecutor to confidently say that the defendant knew he was committing an illegal act.

Even if it is assumed that obscenity as applied to the adult entertainment defendant is similar to murder and does not require "affirmed convictions," this cannot be the case for sexually explicit art. When the Court speaks in broad generalizations good may be achieved by its guidance,[252] but it may also sweep aside specific applications of a more general theory. In the case of the Court rejecting the "warning shot" for obscenity violations, it refused to realize the inherent ambiguity of the *Miller* test, at least as applied to art, and therefore limited the force of the First Amendment.

C. THE PRIOR RESTRAINT MISTAKES

The *Miller* test as a permissible base of the RICO/obscenity doctrine is the basic flaw in First Amendment protection of sexually explicit art and those who dare to deal in it. The Court's misapplication of the prior restraint doctrine in *Alexander*,[253] however, makes the problems only more destructive for sexually explicit art. The distinction between a prior restraint and a subsequent punishment is rooted in the English common law.[254] This distinction may be at best academic because a statute can act as both a prior restraint and a subsequent punishment. It must again be pointed out that in dealing with a prior restraint issue a court must look to "substance and not to mere matters of form," a test that looks at the systems's "operation and effect."[255] In this regard, the Court in *Alexander* engaged in a "flat misreading" of precedent.[256] The Court's fear that holding the RICO forfeiture as a prior restraint would "blur the line separating prior restraints from subsequent punishment to such a degree that it would be

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251. There would not be a prior restraint problem. By following the required procedural safeguards there would not be a fear of a licensing type of system that has consistently been struck down. The prosecution would come about as any typical obscenity prosecution, and if found legally obscene, the defendant will suffer the traditional punishments.

252. *See, e.g.*, Miranda v. Arizona, 384 U.S. 426 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); and, depending on to whom one talks, Roe v. Wade, 410 U.S. 113 (1973).

253. 113 S. Ct. 2766 (1993).

254. *Id.* at 2779 (Kennedy, J., dissenting). Kennedy cited Blackstone's distinction, "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no pervious restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he places before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity." 4 W. BLACKSTONE, COMMENTARIES 151-152.

255. Near v. Minnesota, 283 U.S. 679, 708 (1931).

256. *Alexander*, 113 S. Ct. at 2782 [internal citation omitted].

impossible to determine with any certainty whether a particular measure is a prior restraint or not"[257] is not only mistaken, but the sheer formalism of the statement is insulting to courts below that can differentiate between the two categories.

The first mistake the Court made was in declaring that a prior restraint includes measures that only impose a "legal impediment."[258] In *Bantam Books, Inc. v. Sullivan*[259] the state legislature created a commission to investigate and recommend prosecutions of state obscenity laws.[260] It was the practice of the commission to notify a distributor that the work at issue might be obscene,[261] thus "implying that criminal prosecutions could follow if their warnings were not heeded."[262] The effect of the notices was "clearly to intimidate the various book and magazine wholesale distributors and retailers"[263] and hamper their business activities.

In holding the scheme an impermissible prior restraint the Court noted that "the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line."[264] Of great importance, the Court once again stated that "we are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."[265]

The Court's misreading of this precedent is unfortunate. *Bantam Books*[266] dealt with an impermissible warning system. The commission had no legal powers and thus could not have imposed any type of "legal impediments" to the dissemination of constitutionally protected speech. As Justice Kennedy stated, "If mere warning against sale of certain materials was a prior restraint, I fail to see why the physical destruction of a speech enterprise and its protected inventory is not condemned by the same doctrinal principles."[267] This single example of precedent looking through the form of the regulation to the substance demonstrates the Court's abdication of its role of engaging in exacting First Amendment scrutiny.

The second mistake the Court makes in analyzing the prior restraint doctrine is the refusal to analogize nearly identical prior restraint cases to the RICO forfeiture provisions. Two cases the majority itself cites as contrasting the RICO

257. *Id.* at 2766.
258. *Id.* at 2771.
259. 372 U.S. 58 (1963).
260. *Id.* at 59.
261. *Id.* at 61.
262. *Alexander*, 113 S. Ct. at 2781.
263. *Bantam Books*, 372 U.S. at 63.
264. *Id.* at 66.
265. *Id.* at 67.
266. *Id.* at 58.
267. Alexander v. United States, 113 S. Ct. 2766, 2782 (1993).

forfeiture provision, *Organization for a Better Austin v. Keefe*,[268] and *Vance v. Universal Amusement Co., Inc.*,[269] are absolutely analogous and not inconsistent as the majority seems to read them. In *Keefe*,[270] a real estate broker brought suit to enjoin a community organization from distributing leaflets describing his practices unfavorably as a violation of his right of privacy.[271] The organization had passed out two leaflets accusing Keefe of "panic peddling" and "block busting."[272] The lower court issued a temporary injunction, and the appellate court affirmed.[273] The Supreme Court held that the proffered justification was "not sufficient to support an injunction against peaceful distribution of informational literature."[274]

In *Vance*,[275] the Court again entertained a case where a prior restraint was entered against a defendant for past actions. In *Vance*,[276] a Texas nuisance statute authorized courts, on the basis of a showing that obscene films had been presented in the past, to prohibit the future presentation of films that had not yet been found to be obscene.[277] The Court struck the statute down because it did not provide "any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures."[278]

The conclusion that can be drawn from these cases is that a procedure imposing restraints on future speech, without determination of its protected character, on account of past conduct, is a prior restraint and unconstitutional. When a RICO defendant is convicted, he is required to forfeit everything.[279] This forfeiture proceeding should be considered a prior restraint in two ways. First, the forfeiture of all assets implies that presumably protected materials will also be forfeited. As seen in *Vance*[280] and *Keefe*,[281] restraining future speech on account of past conduct without regard to the fact that future expression is presumed protected until proved legally obscene is constitutionally infirm.[282] Arguing that "the assets in question were not ordered forfeited because they were believed to be obscene, but because they were directly related to petitioner's past

268. 402 U.S. 415 (1971).
269. 445 U.S. 308 (1980).
270. 402 U.S. 415.
271. *Id.* at 417.
272. It was alleged that Keefe would warn white homeowners in the area of the incoming "black tide," and the resulting scare would enable Keefe to list their houses and sell to a black family. 402 U.S. at 415-16. The organization in question was dedicated to racial stability in the community, in other words, it did not want blacks to move in. *Id.*
273. 253 N.E.2d 76 (Ill. App. Ct. 1971).
274. *Keefe*, 402 U.S. at 419.
275. 445 U.S. 308 (1980).
276. *Id.*
277. *Id.* at 311.
278. *Id.* at 317.
279. 18 U.S.C.A. § 1963(a).
280. 445 U.S. 308 (1980).
281. 402 U.S. 415 (1971).
282. *Keefe*, 402 U.S. 415; *Vance*, 445 U.S. 308.

racketeering violations"[283] does not change the constitutional infirmity of the system. Presumably protected materials are being punished because of past conduct on the part of the defendant without the requisite procedural safeguards to determine their legality. It is a prior restraint plain and simple.

Second, the seizure of effectively every asset commanded by the defendant cannot logically allow the defendant to re-engage in speech. Although the Court in *Alexander*[284] thought the defendant could run right out and start selling erotic materials again,[285] this conclusion defies any form of reasoned thought.[286] Forfeiting everything means everything goes to the government. The RICO forfeiture provision is intended to not only deter unlawful conduct, but to "incapacitate, and . . . directly to remove the corrupting influence from the channels of commerce."[287] It cannot be more plain that the defendant who is incapacitated will be unable to start right back up. Without any assets, the defendant will be hard pressed to begin engaging in protected expression. The forfeiture provision is therefore a prior restraint on speech.

The conclusion then is that the Court misapplied the prior restraint doctrine. Defining the RICO forfeiture provisions as a prior restraint is not a novel legal theory,[288] but it is the correct conclusion when one looks at the "operation and effect" of the statute. The Court in *Alexander* did not look at the "operation and effect" of the statute and failed to notice the detrimental prior restraint the RICO forfeiture provision actually is.

D. So Many Doctrines To Misapply, So Little Time

After the Court in *Alexander* decimated the prior restraint doctrine, the Court mistakenly proceeded to also reject the overbreadth doctrine both in its traditional form and its protection against the chilling effect. The Court quickly rejected the traditional overbreadth claim because RICO "does not criminalize constitutionally protected speech and therefore is materially different from the statutes at issue in our overbreadth cases."[289] Under RICO, the use of proceeds from a

283. Alexander v. United States, 113 S. Ct. 2766, 2771 (1993).

284. *Id.*

285. *Id.* at 2771.

286. There is no question that the members of the Court can be presumed to be some of the keenest legal minds in the country. This conclusion though does not take anything away from the respect or admiration the Court deserves. What it does point out though is that the Court often becomes detached from reality in its marble fortress and often is blinded to the reality of its decisions.

287. *Alexander*, 113 S. Ct. at 2782 (quoting Russello v. United States, 464 U.S. 16, 28 (1983)).

288. In addition, Justice Kennedy's eloquent dissent in *Alexander*, 113 S. Ct. at 2776, see McGovern, *supra* note 50; Eggenberger, *supra* note 126; O'Donnell, *supra* note 130; Andrew J. Melnick, Note, *A "Peep" at RICO:* Fort Wayne Books, Inc., v. Indiana *and the Application of Anti-Racketeering Statutes to Obscenity Violations*, 69 B.U. L. REV. 389 (1989); Glenn Rudolph, *RICO: The Predicate Offense of Obscenity, The Seizure of Adult Bookstore Assets, and the First Amendment*, 15 N. KY. L. REV. 585 (1988); Ken Nuger, *The RICO/CRRA Trap: Troubling Implications for Adult Expression*, 23 IND. L. REV. 109 (1990).

289. *Alexander*, 113 S. Ct. at 2774. To support its proposition, the Court cited to Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (resolution declared facially

pattern of racketeering activity to acquire, establish or operate an enterprise is prohibited.[290] The use of the enterprise to commit the predicate acts renders the enterprise itself criminal, and thus all of the enterprise's activities are also illegal.[291] In other words then, presumptively protected speech is rendered criminal by the statute, which is a typical example of overbreadth. Since the court again misconstrues the power of RICO, it refuses to apply its prior overbreadth cases[292] and leaves a statute that places an overly broad restriction on speech intact.

The Court also misapplied the underlying purpose of the overbreadth doctrine, to prevent an unconstitutional chill on free expression by "deterring others from engaging in protected speech."[293] The court followed *Fort Wayne Book's* rejection of a similar argument, "Deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws, and our cases have long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene'."[294] The Court seemed content to say that a forfeiture "has no more of a chilling effect on free expression than the threat of a prison term or a large fine,"[295] both of which were held "clearly constitutional under *Fort Wayne Books*."[296]

Even if the argument that deterrence of the sale of obscene materials is a legitimate end is accepted,[297] the deterrence created by RICO forfeitures is not comparable to the extensive penal forfeitures previously held constitutionally appropriate.[298] The Court in *Fort Wayne Books* did not decide the issue of post-

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unconstitutional for overbreadth because all First Amendment activities within the central Terminal Area of the airport were prohibited).

290. *See* 18 U.S.C.A. § 1962.

291. McGovern, *supra* note 50 (citing to 18 U.S.C.A. § 1962(c)).

292. Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (resolution prohibiting all First Amendment activities within the central airport terminal held unconstitutionally overbroad); Houston v. Hill, 482 U.S. 451 (1987) (city ordinance which made it illegal, in any manner, to oppose, molest, abuse or interrupt a police officer in execution of his duties held unconstitutionally overbroad); Bockett v. Spokane Arcades, 475 U.S. 491 (1985) (statute dealing with obscenity, while misdefining "prurient," was not facially invalidated because of a severability clause).

293. *Alexander*, 113 S. Ct. at 2773.

294. Fort Wayne Books v. Indiana, 489 U.S. 46, 60 (1989) (quoting Smith v. California, 361 U.S. 147, 154-155 (1959)).

295. *Alexander*, 113 S. Ct. at 2774.

296. *Id.*

297. This deterrence is constitutionally adequate because precedent holds that obscenity can be regulated or actually proscribed and still be consistent with the First Amendment. *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957); Miller v. United States, 413 U.S. 15 (1973). The Court's allowance of inhibitory effects on protected materials runs counter to the typical First Amendment jurisprudence. Five members of the Court may be afraid of the effects of sexually explicit expression, but the Court should not turn a blind eye to the detrimental effects on protected speech that these statutes cause.

298. *See, e.g.*, Ginzburg v. United States, 383 U.S. 463 (1966) (five years in prison, $5000 fine); Smith v. United States, 431 U.S. 291 (1977) (subsequent convictions result in 10 years in jail and a $10,000 fine per conviction).

trial forfeitures, and the *Alexander* Court's limited treatment of the issue as decided by *Fort Wayne Books* is unfortunate. While some self-censorship may be unavoidable while the Court insists on following unwise precedent, "the alarming element of the forfeiture scheme here is the pervasive danger of government censorship."[299] The Court is correct that the severity of loss of liberty that a prison term entails is more serious that any fine may be,[300] but a fine is not comparable to the RICO forfeiture.

In *Alexander*, the defendant was sentenced to six years in prison, fined $100-,000 and costs, and had to forfeit his wholesale and retail businesses including all related assets and nine million dollars acquired through the racketeering activity.[301] Cumulatively, this sentence is draconian at the least, but it is the forfeited assets that stand out. It is true that a six year jail sentence is a terrible loss of life and liberty to the defendant, but when he is released, he will literally come back to nothing. It defies logic to understand how the court could conclude that forfeiting a 13 store entertainment chain is less of a deterrent to protected speech than either six years in jail or $100,000 in fines. If museums were deterred from displaying Mapplethorpe's retrospective out of fear of loosing NEA funding, how can it be any less of a deterrent to protected speech if the museum could lose everything for obscenity violations. If it can be argued that the Court was merely mistaken in the disposition of the other issues raised in *Alexander*, the Court was plainly wrong in deciding the chilling effect argument.

E. AN EXPLANATION FOR THE COURT'S MISTAKES?

On its face, the Court's analysis of the issues in *Alexander* is incorrect. The Court misapplied both the overbreadth doctrine and the prior restraint doctrine to allow an incredible deterrence of presumptively protected, sexually explicit art. An explanation for the Court's misapplication is its mistaken reading of *Arcara*.[302] If the Court were to overrule this ridiculous line of cases, the Court could simply use this reading of *Arcara* as a scapegoat instead of admitting a sheer abdication of the First Amendment as was evident in *Alexander*.

The Court incorrectly used *Arcara* first in its prior restraint analysis. The Court's major mistake was the failure to recognize that the statute in *Arcara*, which allowed the closure of buildings declared to be a public nuisance,[303] only closed the building for one year.[304] The closure penalty was not subject to First Amendment scrutiny even though there were collateral consequences for First

299. *Alexander*, 113 S. Ct. at 2779 (Kennedy, J., dissenting).

300. Blanton v. City of North Las Vegas, 489 U.S. 538 (1989).

301. *Alexander*, 113 S. Ct. at 2769.

302. Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986).

303. The New York Public Health Law in question provided in part that "Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, or prostitution is guilty of maintaining a nuisance." N.Y. PUB. HEALTH LAW § 2320 (McKinney 1985).

304. *Id.* at § 2329.

Amendment concerns,[305] because the "criminal penalty followed conduct 'manifest[ing] absolutely no element of protected expression.'"[306] The Court evidently missed the point of *Arcara*. It is difficult to understand how the temporary closure of a book store can be equated "with a forfeiture punishment mandating [a] permanent destruction."[307]

Second, the Court misapplied *Arcara* in its overbreadth analysis. In *Arcara*, the Court stated that it would apply a "least restrictive means" test only "where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in [*United States v.*] *O'Brien*,[308] or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in *Minneapolis Star* [*& Tribune Co. v. Minnesota Comm'r of Revenue*][309]."[310] The Court in both *Arcara* and *Alexander* found that the First Amendment was not implicated. The problem though is that in *Arcara* the Court recognized the "difference between a punishment imposed for a speech offense and a punishment for some other crime." When the art gallery is merely a front for a criminal's activities, the RICO forfeiture of the art gallery is not related to the ongoings at the art gallery but because of the owner's outside acts. Where RICO forfeiture "stems from a previous speech offense, the punishment serves not only the government's interest in purging organized-crime taint, but also its interest in deterring the activities of the speech related business itself."[311] In the words of Justice Kennedy, "[t]he threat of a censorial motive and of on-going speech supervision by the state justifies the imposition of First Amendment protection."[312]

VII. CONCLUSION

The Court misread, misused, and misconstrued precedent to achieve the result that it wanted. The First Amendment requires the state to use 'sensitive' tools in regulating speech,[313] but RICO has been described as "arm[ing] prosecutors not with scalpels to excise obscene portions of an adult bookstore's inventory but with sickles to mow down the entire undesired use."[314] The five justice majorities that make up these overly paternalistic cases unduly hamper First Amendment freedoms in order to keep "dirty" works form the American people. The art by Mapplethorpe, Koonz and others is often disturbing, but it is the viewers' choice to see the work. The Court's decisions in this area run on an "undifferen-

305. *Alexander*, 113 S. Ct. at 2779 (Kennedy, J., dissenting).
306. *Id.* (quoting Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986)).
307. *Id.*
308. 391 U.S. 367 (1968).
309. 460 U.S. 575 (1983) (tax imposed on paper and ink products consumed in production of publications violated the First Amendment by imposing significant burden on freedom of the press).
310. Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986).
311. *Alexander*, 113 S. Ct. 2766, 2783 (1993) (Kennedy, J., dissenting).
312. *Id.*
313. Speiser v. Randall, 357 U.S. 513, 525 (1958).
314. Fort Wayne Books, v. Indiana, 489 U.S. 46, 85 (Stevens, J., dissenting).

tiated fear or apprehension of disturbance,"[315] that traditionally are not enough to overcome the majestic right of freedom of expression.[316] If it can be said that "one man's vulgarity is another's lyric,"[317] it is hard to believe that one person's determination that a work of art is vulgar can lead to the art gallery that displays that art losing everything in a RICO action. There is no rationale for the rejection of sexually explicit expression in the marketplace of ideas. For the number that disapproves of the art in question, they should "avert their eyes," they should not try to enforce their beliefs on the others who wish to view the art.

The future for obscene speech may be promising. The retirement of Justice White leaves a gaping hole in the *Alexander* majority. Justice Souter's concurrence in *Alexander*[318] that "petitioner has not demonstrated that the forfeiture at issue here qualifies as a prior restraint as we have traditionally understood that term,"[319] leaves open the possibility that in another case he will vote to overturn the RICO forfeiture provisions. Justice Breyer should do nothing to the ideological balance of the court but could actually be the leading force for a moderate court that currently lacks direction. A five justice majority of Kennedy, Stevens, Ginsburg, Breyer, and Souter could overrule *Alexander* or even overrule *Miller*. The strong First Amendment beliefs of Kennedy and Souter could sway this majority to finally take the Court out of judgments of taste. Justice Scalia, on days that he is consistent, may even vote to overturn at least *Miller*.[320] Because Justice Thomas has the habit of following Scalia on most issues, a *Miller* overruling could even rope him in.

For the Court to regain integrity it needs to overrule these cases, and in so doing, it would ensure that the couple depicted in the introduction will not have to fear reprisals from a puritanical district attorney. Sexually explicit art has been, and will continue to be, part of society. It is illogical to wish it away by making statutes so draconian that artists will be prevented from using the beauty of the human body out of fear of RICO prosecution. The only victim the crime of obscenity has is the First Amendment.

315. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969).
316. *Id.*
317. Cohen v. California, 403 U.S. 15 (1971).
318. 113 S. Ct. at 2776.
319. *Id.*
320. *See* Pope v. Illinois, 481 U.S. 497, 504 (1987) (Scalia, J., concurring).