The RICO/CRRA Trap: Troubling Implications for Adult Expression

Ken Nuger*

I. Introduction

Among the numerous freedoms Americans possess, perhaps the most cherished is the right to free speech.[1] It is a freedom so firmly rooted in Western society that its development can be viewed as a reaction against the authoritarian nature of societies in the middle ages.[2] Yet, while speech is normally viewed as a preeminent liberty, society may sometimes feel compelled to place realistic limitations on its exercise.[3] As early as 1798, Congress passed the Alien and Sedition Acts[4] to punish citizens who espoused views deemed dangerous to the security of the nation. Near the close of World War I, Congress passed the Espionage and Sedition Acts[5] to quell political unrest that developed as a result of the war and the successful Bolshevik revolution in Russia.[6] Free expression, however, is essential to maximize intelligent decision making in a democratic society. Therefore, restrictions on speech should be subject to careful judicial scrutiny.

Although the first amendment theoretically grants speech absolute protection, it is not accorded absolute protection in practice. Accordingly, limitations on free speech cause considerable controversy. In the twentieth century in particular, the Supreme Court has painstakingly debated the

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* Assistant Professor of Political Science, San Jose State University. B.A. 1975, California State University, Northridge; M.A. 1978, University of Nevada, Reno; Ph.D. 1983, Miami University, Ohio.

1. Nearly all commentators recognize the importance of free speech. Perhaps Justice Cardozo best summarized the essential character of free speech when he wrote that the freedom of thought and speech is the "matrix, the indispensable condition, of nearly every other form of freedom." Palko v. Connecticut, 302 U.S. 319, 327 (1937).

2. *See* J. Nowak, R. Rotunda & J. Young, Constitutional Law 858 (1983).

3. While the first amendment is framed in absolute terms, "Congress shall pass no law . . . abridging the freedom of speech . . .," the Supreme Court has upheld a variety of restrictions on several forms of speech.

4. Alien Act of June 25, 1798, ch. 58, 1 Stat. 570. Sedition Act of July 14, 1798, ch. 74 1 Stat. 596.

5. Espionage Act of June 15, 1917, ch. 30, 40 Stat. 217. Sedition Act of May 16, 1918, ch. 75, 40 Stat. 553.

6. *See, e.g.*, Murray, Red Scare 3-17 (1955).

reasonable limits government may impose on speech.[7] Depending on the speech form utilized, the Supreme Court has variously ruled that communication deserves from none to near absolute constitutional protection.[8]

This Case Note addresses one speech form, sexual expression, and the appropriate degree of constitutional protection to be afforded to it—a subject which provokes considerable controversy. While fraught with theoretical difficulties, sexual expression has been classified into one of three groups: 1) communication embraced by the first amendment; 2) obscene communication not protected by the first amendment; and 3) communication that, depending on one's view of its content, could enjoy first amendment protection. The controversy centers on the amount of protection that surrounds obscene communication. For example, once sexual expression is judged to be obscene, some courts argue, per *Chaplinsky v. New Hampshire*,[9] that it enjoys no first amendment protection.[10] Another view is the absolute approach espoused by Justice Hugo Black which argues the first amendment shields all forms of sexual expression.[11]

In addition to the controversy surrounding the degree of first amendment protection afforded to sexual expression, a debate has arisen over government seizure of sexual expression not yet judged as obscene. This analysis will explore whether governmental seizures of sexual expression

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7. Perhaps the most outspoken advocate for absolute constitutional protection of speech is Justice Hugo Black. His absolutist approach to the first amendment is best summarized in his dissent in Konigsberg v. State Bar of California, in which he argued the language of the first amendment precludes any balancing test by the courts or restrictive statutes by any legislative body. 366 U.S. 36, 60-61, 63 and 68 (1961). However, the absolutist view of free speech has never commanded a majority. Instead, the Supreme Court has adopted a balancing approach to speech. Generally, as Justice Harlan recognized for the majority in *Konigsberg*, some forms of speech, or speech in certain contexts, may be outside the scope of constitutional protection. Balancing criteria may be used to weigh the communication against perceived important governmental objectives. *Id.* at 49-51.

8. In Chaplinsky v. New Hamshire, Justice Murphy stated that certain forms of expression may not be protected by the first amendment. Included were fighting words, libel and obscenity. Justice Murphy distinguished these speech forms because they add nothing to the exposition of ideas and their very utterance could inflict injury or promote breaches of the peace. 315 U.S. 568, 571-72 (1942). However, for most speech forms, it is well established that protection is accorded unless the utterance, when taken in the context of surrounding circumstances, could create some type of clear and present danger to valid governmental objectives. *See* Schenck v. U.S., 249 U.S. 47, 52 (1919). Several sources discuss the development of the clear and present danger doctrine. *See, e.g.*, NOWAK, ROTUNDA AND YOUNG, *supra* note 2; L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1988).

9. 315 U.S. 568 (1942).

10. *See* Roth v. United States, 354 U.S. 476, 485 (1957). While subsequent cases involving sexual expression are often concerned with definitions distinguishing obscene from non obscene expression once expression is defined obscene, courts exclude the material from first amendment protection. Miller v. California, 413 U.S. 15, 24 (1973).

11. *See supra* note 7.

not yet judicially defined as obscene results in an improper prior restraint of speech. This paper's framework shall: 1) trace the development of the prior restraint doctrine in American constitutional law and discuss the doctrine's realistic limitations; 2) argue that sexual expression has an important societal purpose deserving first amendment protection; 3) argue that unconstitutional prior restraint results when the government employs racketeering and civil recovery statutes to seize sexual expression without first utilizing a judicial determination that seized inventory is obscene; and 4) analyze the recent Supreme Court decision in *Fort Wayne Books, Inc. v. Indiana*,[12] which declared Indiana's pretrial seizure clause contained in the state's Civil Remedies for Racketeering Activity (CRRA) statute unconstitutional in part.[13] While the Court held that Indiana's CRRA forfeiture clause, when applied to expressive material, violates the first amendment, it left open the possibility for government to use the clause to seize non-expressive material, a result which could significantly deter free speech.

II. Prior Restraints and Constitutional Theory

A. Views on Prior Restraint

In its simplest form, a prior restraint proscribes publishing or uttering expressive material. It is distinguished from other forms of speech restrictions that punish only after the expressive material is published. While both forms of restraint can ultimately suppress speech, a prior restraint has a very different social impact. While restriction on published material occurs *after* the speech is communicated, a prior restraint censors communication, thereby depriving potential readers the benefit of the expressive element of the speech. The language of the first amendment addresses this concern. As Judge James B. McMillan[14] noted, the possibility for governmental tyranny embodied in a system of prior restraints did not go unnoticed by the country's founding fathers.[15] The framers of the Constitution were mindful of the atrocities of the Spanish Inquisition.[16] They knew too well of the English Crown's attempt to suppress expression.[17] They were especially conscious of the infamous

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12. 109 S. Ct. 916 (1989).
13. *Id.* at 927-30.
14. Federal District Court Judge, Western District, North Carolina.
15. McMillan, *Free Speech—Now More Than Ever*, 19 Wake Forest L. Rev. 1, 2 (1983).
16. *Id.*
17. *Id.*

seditious libel trial of colonial publisher Peter Zenger. In that trial, the Colonial judge kept the jury locked up without food or water in order to ensure the conviction of Zinger for his editorial criticism of the Royal Governor.[18] Recognizing the historical pattern of societal atrocities from governmental censorship, Judge McMillan believed it was not accidental that the first amendment was written using explicit terminology.[19]

While some scholars argue the sole purpose of the first amendment is to prevent prior restraints of any expressive material,[20] courts have recognized a few exceptions. Among material susceptible to prior restraint is communication which may pose a clear and present danger.[21] Similarly, material declared obscene enjoys no first amendment protection and may therefore be subject to a prior restraint.[22]

While one may be able to justify prior restraints under certain conditions, several problems remain with the concept. First, prior restraints infringe on one's right to disseminate expressive material. Second, they become operative before a judicial tribunal finally determines that the material enjoined falls outside first amendment protection.[23] Since prior restraints require substantial governmental justification before a court will sustain its use, and since speech is generally stringently protected, prior restraints are rare. However, courts do impose prior restraints under certain conditions. Therefore, consideration of the evolution of the doctrine and justification is appropriate before analyzing the relationship between prior restraints and sexual expression.

B. Constitutional Law and the Doctrine of Prior Restraint

In the landmark decision of *Near v. Minnesota*,[24] the Supreme Court first enunciated narrow, but definitive, forms of expression that may be curtailed by prior restraint. In *Near*, the Court reversed a state court conviction of the publishers of *The Saturday Press*, who had published a series of antisemitic articles about local officials.[25] In reversing the

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18. *Id.*
19. *Id.*
20. Comment, *Regulation of Obscenity Through Nuisance Statutes and Injunctive Remedies—The Prior Restraint Dilemma*, 19 WAKE FOREST L. REV. 7, 9 (1983). *See supra* note 15 for a brief analysis supporting the absolute characteristics of the first amendment free speech clause. Both L. Levy and Z. Chaffee assert that English Common Law after the English Licensing System expired in 1695 supported the view that a prior restraint was a drastic infringement on free speech, even more so than a subsequent punishment for the effects of speech already printed or uttered. *Id.* at note 14.
21. Schenck v. United States, 249 U.S. 47, 52 (1919).
22. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).
23. *Chaplinsky*, 315 U.S. 568.
24. 283 U.S. 697 (1931).
25. *Id.*

conviction, the Court ruled unconstitutional a Minnesota statute authorizing an injunction against any person regularly publishing or circulating obscene, lewd or lascivious, or malicious, scandalous and defamatory material.[26] The Court reasoned:

> The operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter . . . and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is the essence of censorship.[27]

Significantly, *Near* suggests some areas of communication may be susceptible to a prior restraint. By recognizing that government can impose restraints to prevent clear and present dangers to the security of society and to prevent publishing obscene or libelous material, the Court established new criteria determining speech limitations.[28] While some writers were initially outraged at *Near's* implications, its rationale is now only sporadically challenged.[29]

Courts currently apply prior restraints to sexual expression, but only with specific procedural safeguards in order to assure due process protection. In 1957, the Supreme Court ruled in *Kingsley Books, Inc. v. Brown*[30] that a prior restraint can properly be attached to material judicially declared obscene. However, in keeping with constitutional due process requirements, persons, firms or corporations enjoined are entitled to a trial within one day of the injunction and a final decision on the merits within two days after the trial's end.[31]

The Supreme Court further defined procedural due process requirements required for speech injunctions in 1965 when it decided *Freedman v. Maryland*.[32] In *Freedman*, the Court developed a three pronged process that censoring agents must utilize to assure the constitutionality of prior restraint imposed on a film.[33] First, the censor must bear the burden

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26. *Id.* citing MINN. STAT. §§ 10123-1 to -3 (1927).
27. *Near*, 283 U.S. at 713.
28. *Id.* at 716.
29. *See, e.g.*, Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 649 (1955).
30. 354 U.S. 436 (1957).
31. *Id.* at 437 n.1.
32. 380 U.S. 51 (1956).
33. *Id.* at 58-59.

of proving that the content of the material lacked constitutional protection.[34] Second, any restraint prior to judicial review may only be imposed for a specified brief period and only to preserve the *status quo*.[35] Third, a prompt judicial determination must be made available to determine whether the material is subject to constitutional protection.[36]

Freedman's implications are unmistakable. Prior restraints on speech may only be acceptable if clearly defined procedural safeguards assuring one's first amendment guarantees are written into the statute. *Freedman* does not necessarily require the same levels of proof to enjoin sexual expression as might be necessary in a case involving political expression. However, requiring the censor to justify its action in a judicial proceeding would minimize the chance that unbridled governmental discretion would result in a first amendment violation.

The procedural requirements of *Freedman* have been applied in other censorship cases. In *Southeastern Promotions, Ltd. v. Conrad*,[37] the Supreme Court invalidated a municipal action quashing the production of the rock opera "Hair" because the requirements necessary to obtain an injunction were inconsistent with the standards required by *Freedman*.[38] More recently, the Supreme Court in *Vance v. Universal Amusement Co.*[39] declared unconstitutional two Texas statutes[40] allowing authorities to enjoin individuals from creating a nuisance. The statute defined nuisance as the commercial manufacturing, distribution or exhibition of obscene materials.[41] The *Vance* Court concurred with the findings of both the district and appellate courts, holding that the statute impermissably allowed prior restraints of an indefinite duration on motion pictures not yet declared obscene.[42] Specifically, the statute stated that if the attorney general, county, or district attorney believed a nuisance exists, they may initiate a suit immediately, enjoining the defendant from

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34. *Id.*

35. *Id.* Current racketeering statutes fail to require specific brief periods between the time an injunction is issued and timely judicial review regarding the injunction's permissibility. E.g., in Fort Wayne Books v. Indiana, 109 S. Ct. 916 (1989) the property seizure and resulting padlocking lasted over a year without a final judicial determination that the government had met the burden of proof to justify the seizure. Also, when a property seizure is exercised on inventory already on display and not material waiting to be placed on display, as was the case in *Freedman*, the seizure has the effect of altering, not ensuring, the *status quo*.

36. *Freedman*, 380 U.S. at 59.

37. 420 U.S. 546 (1975).

38. *Id.*

39. 445 U.S. 308 (1980).

40. Tex. Rev. Civ. Stat. Ann. art. 4666 (Vernon 1952); Tex. Rev. Civ. Stat. Ann. art 4667(a) (Vernon 1982).

41. Tex. Rev. Civ. Stat. Ann. art. 4667(a) (Vernon 1982 and Supp. 1989).

42. *Vance*, 445 U.S. at 316.

pursuing the alleged nuisance pending final adjudication on the complaint.[43] According to the statute, if the court ruled in favor of the state, the activity would be suppressed for one year unless the defendant met the state's requirement to alleviate the nuisance.[44]

In *Vance*, the Court distinguished between regulating normal nuisances from expressive material which enjoys a heightened degree of first amendment protection.[45] In essence, the state could not define an area of expressive material a public nuisance and restrain it unless strict procedures stating time tables, as required by *Freedman*, were in place to guide prompt judicial review.[46] Ultimately, the Court adopted the Texas Court of Appeal's conclusion by stating: "[T]he burden of supporting an injunction against a future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication."[47] Rooted in this statement is the theory recognized in *Southeastern Promotions*[48] that when society attempts to quash speech, there must be prompt procedures assuring the limitation conforms with established first amendment principles.[49]

The holding of the *Vance* Court should not be construed to create insurmountable barriers prohibiting government from instituting speech injunctions prior to a judicial determination of whether the speech is constitutionally protected. Some case law suggests that injunctive standards requiring only a swift evidentiary hearing and ultimate, judicial determination assures the constitutionality of an injunction imposed on expression not yet been declared outside first amendment protection. For example, in *Ohio ex rel. Ewing v. A Motion Picture "Without a Stitch"*,[50] the Ohio Supreme Court upheld a statute[51] which permitted a temporary restraining order on material not yet judged beyond first amendment protection.[52] The statute empowered any citizen with the authority to initiate an abatement action in the name of the state in order to prevent a public nuisance.[53] Upon making an application for

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43. *See supra* note 42.

44. *Id.*

45. *Vance*, 445 U.S. at 315.

46. *Id.* at 317. Under Texas Rules of Civil Procedure, the state could obtain a temporary restraining order and have a hearing on the restraining order within ten days. Beyond that, there is no provision governing the final adjudication on obscenity charges. *See* TEX. R. CIV. P. ANN. art. 680-88 (Vernon Supp. 1989).

47. *Vance*, 445 U.S. at 315-16.

48. 420 U.S. 546 (1975).

49. *Vance*, 445 U.S. at 316, n. 13 (citing *Southeastern Promotions* 420 U.S. 546 at 559).

50. 37 Ohio St.2d 95, 307 N.E.2d 911 (1974).

51. OHIO REV. CODE ANN. §§ 3767.03 (Anderson 1988).

52. *Ewing*, 37 Ohio St. 2d at 97, 307 N.E.2d at 913.

53. OHIO REV. CODE ANN. § 3767.05 (Anderson 1988).

a temporary injunction, the statute required a judge to conduct a hearing within ten days to determine whether a public nuisance existed.[54] If the judge ruled that the nuisance could exist, he could authorize a temporary restraining order that would become permanent if the material was ultimately declared obscene after a trial on the issue.[55]

The constitutionality of this statute was upheld because it required some judicial determination that a public nuisance could exist before government could issue a temporary restraining order. Unlike the procedure used in *Freedman*, the Ohio statute addresses films currently being shown, rather than individuals seeking a license to show a film some time in the future. However, as in *Freedman*, the court required that some initial judicial determination commence within a quick and specified time period. While the temporary restraining order may last indefinitely pending a final judicial determination, it is at least premised on a hearing on the merits.

A temporary injunctive procedure was also upheld in *South Florida Art Theatres, Inc. v. Florida ex rel. Mounts*.[56] In this case, Florida law permitted a circuit court to issue a temporary injunction after the state attorney, county solicitor, or prosecuting attorney filed a complaint.[57] As in *Vance* and *Freedman*, the Florida statute required a prompt summary judicial examination of the material. Specifically, an adversary hearing was required on the first business day after the injunction was issued to determine whether the order should continue pending a final ruling on the case.[58] While the Florida Supreme Court warned that temporary restraining orders should be cautiously used, the constitutionality of the statute was upheld because the strict procedural requirements found in the statute were consistent with the due process standards set forth in *Freedman*, *Vance*, and *Southeastern Promotions*.[59]

C. The Relationship Between Standards Injunctions and Prior Restraint

In his dissenting opinion in *Vance*, Justice White opined that the Texas statute at issue presented no first amendment problem because the statute required a prompt judicial hearing after the injunction issued.[60] Courts have accepted this view and have held that, as long as there is

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54. *Id.*
55. *Id.*
56. 224 So. 2d 706 (Fla. Dist. Ct. App. 1967).
57. FLA. STAT. ANN. § 847.011(8)(a) (West 1976).
58. 224 So. 2d at 713.
59. *Id.*
60. *Vance*, 445 U.S. at 320-25 (White, J., dissenting).

a timely judicial hearing, statutes enjoining speech not yet declared obscene may still be acceptable. This development is squarely inconsistent with the conclusion in *Near* that any prior restraint bears a heavy presumption of unconstitutionality. As a result, these standards injunctions[61] legitimize government's ability to determine one form of conduct unacceptable and prohibit it prior to final adjudication.

Justice White's position would find "any injunction that is sufficiently analogous to a criminal prohibition justifying subsequent criminal punishment [would be] constitutionally permissible."[62] While supporters of the standards injunction argue that they are merely personalized criminal obscenity statutes that punish after adjudication, key differences between standards injunctions and criminal statutes exist. While it may be true that "nothing substantive has changed: the same obscenity definition is being applied,[63] the same procedural safeguards are in place,[64] and punishment in the form of imprisonment or fine is still not imposed until obscenity is proven,"[65] the fact that an injunction has been issued charges enforcement of obscenity laws.[66] From the distributors' position, the changes in enforcement of obscenity prohibitions create important, if subtle, difficulties for the procedurally fair administration of criminal justice.

One commentator correctly recognizes that standards injunctions alter the choice of whom to prosecute.[67] He notes that:

> Since the injunctive prohibition is judicially created it involves an implicit commitment of resources. The standards injunction puts judicial authority in question and a prosecutor, in order to maintain that authority, must be certain to enforce the in-

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61. Professor Rendleman defines a standards injunction as one that prohibits individuals from displaying unnamed obscene matter. Essentially, the statute identifies a prohibited form of conduct, here obscenity, and then prohibits activity that could be construed as the prohibited conduct. Rendleman, *Civilizing Pornography: The Case for an Exclusive Obscenity Nuisance Statute*, 44 U. CHI. L. REV. 509 (1977).

62. Note, *Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine*, 84 COLUM. L. REV. 1616, 1621 (1984) [hereinafter *Enjoining Obscenity*].

63. *Id.* at 1624.

64. *Id.* The author seems to assume that the procedures are all essentially similar in obscenity prosecutions. The general procedural requirements pertaining to obscenity challenges are defined in Freedman v. Maryland, 380 U.S. 51 (1965).

65. *Enjoining Obscenity*, *supra* note 62, at 1624. That punishment is not imposed until obscenity is proven "is inherent in the criminal context. It is also true of the standards injunction: dissemination of sexually explicit materials by an enjoined party results in a violation of the standards injunction only after the material has been determined obscene in a contempt proceeding." *Id.* n.66.

66. *Id.* at 1624.

67. *Id.*

> junction's prohibition. Thus, decisions regarding allocation of limited prosecutorial resources—decisions that have a recognized role in our judicial system are skewed. Prosecutors may bring actions not against those distributors they feel are most invidious, but against those distributors already under a standards injunction. An enjoined distributor will recognize this increased prosecutorial attention and will be led to self-censorship.[68]

Issuing an injunction, therefore, is but another deterrent government may employ against those disseminating sexual expression.[69] Issuing an injunction, even a temporary order, is a primary judicial tool to enforce compliance of judicial decisions because it permits individuals and the government to cease activity perceived to be offensive, but not, as of the moment, illegal.[70] Enjoined individuals, though not yet convicted of a crime, will be reluctant to violate the injunction.[71] Ultimately, therefore, injunctions prohibiting speech not yet declared obscene create a new regulatory system intended to forcefully and personally suppress forms of conduct some individuals and government officials find offensive, but not necessarily illegal.[72]

Individuals faced with the ability of the government to use standards injunctions will feel the need to impose heightened self censorship.[73] Since one cannot know precisely what is obscene until final court adjudication, individuals will now find that government can effectively punish them for behavior not yet ruled obscene. Government's increased ability to regulate activity not yet declared obscene will cause individuals engaged in disseminating sexual expression to be much more cautious. While some may applaud the government for pursuing activities that increase society's awareness of what may be illegal behavior to the point that individual self restraint is heightened, doing so with potentially protected speech jeopardizes first amendment rights.

Even if one recognizes that governmental mechanisms, such as a standards injunction, act as a type of prior restraint susceptible to constitutional scrutiny, advocates of this form of censorship justify the restraint on the basis that the relationship of sexual expression to free speech is substantially less than other forms of speech. Therefore, presumptions of the unconstitutionality of the restraint can be rationally mitigated by the decreased utility of sexual expression in the marketplace

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68. *Id.* at 1624-25 (notes omitted).
69. *Id.* at 1626.
70. *Id.* at 1625.
71. *Id.*
72. *Id.* at 1625.
73. *Id.* at 1624-26.

of ideas.[74] This view is recognized either inferentially or explicitly in several Supreme Court rulings and works of legal scholarship. For example, in *Chaplinsky v. New Hampshire*,[75] one of the earliest cases iterating views on obscenity, Justice Murphy argued that "lewd and obscene" speech is among "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems."[76] However, since *Chaplinsky*, the Court has recognized some value in sexual expression and has grappled with the extent of constitutional protection given to sexual expression not declared obscene.[77] Similarly, scholars have theorized about the worth of sexual expression and the degree of constitutional protection it deserves.[78]

III. A Defense of Sexual Expression

A. Historical Antecedents

One could argue that all speech, including sexual expression, should enjoy substantial, if not absolute, first amendment protection. This argument has an historical basis and can easily fit into our contemporary, culturally diverse society. Professor David Richards argues that all expressive material bearing on the value of living should enjoy first amendment protection.[79] Professor Richard's argument is historically rooted and based on the religion clause of the first amendment. His argument equates the right to free speech with the right to conscience guaranteed

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74. The marketplace of ideas theory of speech relies on the premise that the ultimate good is more realistically reached when all ideas compete freely in society. For a more detailed constitutional justification of the marketplace of ideas theory of free speech, see Justice Holmes' dissenting opinion in Abrams v. United States, 250 U.S. 616, 630 (1919).

75. 315 U.S. 568 (1942).

76. *Id.* at 571-72.

77. The Supreme Court, beginning with Roth v. United States, 354 U.S. 476 (1957), decided a series of cases attempting to ascertain when sexual expression is protected speech and when it is merely obscene. The Court's major focus in these cases has been to determine whether and to what extent sexual expression has some social, artistic, scientific, literary or medical value to society.

78. Scholarship on sexually oriented expression has been developed within myriad frameworks. A cursory review of the literature substantiates the notion that over the years, scholarship on the subject runs well into the thousands. The mere volume of these writings suggest that sexual expression is a subject which people hold passionate. With the massive intrigue commanded by sexual expression, this commentator finds it somewhat inconsistent to assume that sexual expression does not significantly affect the marketplace of ideas.

79. Richards, *Pornography Commissions and the First Amendment*, 39 Me. L. Rev. 275, 289 (1987) [hereinafter *Pornography and the First Amendment*].

by the religion clause.[80] Professor Richards finds support in Madison's view that the first amendment prevents government from imposing restrictions on speech because this would require the government to judge the worth of different ideas.[81] Further support is found by Richards in Jefferson's view that religious liberty should not be subject to any governmental regulations.[82] While Jefferson emphasized that religious liberty should be nearly absolute because it is an expression of the most fundamental values guiding personal and ethical conduct,[83] Madison believed the same principles justifying the exalted status of religious liberty should be applied to all forms of speech.[84] Richards recognizes that the core of this argument is predicated on John Locke's assumption that each individual should have an absolute right to engage in communication linking one's own views to moral and ethical conduct. Regulating both moral and ethical conduct places an aura of superiority on a particular belief system over another.[85] Richards argues this type of regulation insults and degrades peoples' moral competence to reasonably entertain other beliefs.[86] In sum, Richards argues that both individuals and society must remain free from stifling governmental regulations. This will foster everyone's unalienable right to access all expressive material that bears upon the exercise of their rationality and reasonableness to form theories of how best to find authentic value in their personal and ethical lives.[87]

B. Juxtaposing Historical With Contemporary Viewpoints

The historical context of Richard's argument is easily assimilated in contemporary first amendment theory. Barry Lynn advances a most persuasive argument suggesting that sexual expression must enjoy substantial first amendment protection.[88] Contrary to views traditionally espoused by the Supreme Court, Lynn argues sexual expression fulfills the traditional functions of speech.[89] It transmits ideas, promotes self-realization and can serve as a safety valve for both speaker and audience

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80. *Id.*
81. *Id.* at 288.
82. *Id.* at 283-84.
83. *Id.* at 277-88.
84. *Id.*
85. *Id.* at 285 n.66.
86. *Id.*
87. *Id.* at 289.
88. Lynn, *Civil Rights Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation*, 21 HARV. C.R.-C.L. L. REV. 27 (1986) [hereinafter *New Developments in Pornography Regulation*].
89. *Id.* at 48.

alike.[90] Sexual expression also has educational value because it often depicts and describes sexual activity in detail.[91]

It is beyond dispute that sexual expression transmits potentially important ideas by promoting and provoking a variety of attitudes about sexuality. Sexual expression can promote a myriad of emotions such as joy, hostility, romance, love, hate, as well as promote aesthetics, views of morality, and perceptions of beauty or ugliness. The range of emotions affected by sexual expression could be endless. These ideas can be isolated to bear only on sexual matters or can be extrapolated in a way that has definite political overtones.

Since political expression is deemed to be highly valued and thus enjoys heightened first amendment protection,[92] attaching the same value to sexual expression would have the effect of raising the constitutional protection afforded sexual expression. Sexual expression is much like political expression. It can influence ones' view on morality, about the status of men and women toward each other and their proper roles in society, thereby promoting different political and ideological viewpoints.[93] For example, feminists may see sexual expression as discriminatory.[94] Many religious groups perceive sexual expression as immoral, while still others argue strict regulation of sexual expression fosters moral intolerance. Sexual expression may be calculated to provoke feelings of male superiority over women, or conversely, female superiority over men. Literature about homosexuality and lesbianism advances views about particular alternative lifestyles. Indeed, the array of politically relevant viewpoints generated from sexual expression are so numerous one may wonder how individuals can dwell only on the possible harms created by this form of expression.

C. Sexual Expression as High Value Speech

The notion that sexual expression has high value, or is important speech, was given credibility by the Seventh Circuit Court of Appeals in *American Booksellers Association v. Hudnut.*[95] This case centered on an Indianapolis ordinance defining "pornography" as a practice that

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90. *Id.*

91. *Id.*

92. For an excellent discussion ranking speech to assess degrees of first amendment protection, see generally BONNICKSEN, CIVIL RIGHTS AND LIBERTIES (1982).

93. *See New Developments in Pornography Regulation*, *supra* note 88.

94. For one of the more comprehensive views supporting the argument that pornography creates discriminatory views in society, see Sunstein, *Pornography and the First Amendment*, DUKE L. J., 609, 609-19 (1986).

95. 771 F.2d. 323 (7th Cir. 1985).

discriminates against women.[96] More specifically, the ordinance prohibited the "graphic, sexually explicit subordination of women, whether in pictures or in words."[97] The ordinance prohibits these sexually explicit scenes without regard for the potential literary, artistic, political or scientific value of the work in question.[98]

Judge Easterbrook, writing for the circuit court, found the ordinance unconstitutional on several grounds. First, the court objected to the premise that speech content could be absolutely regulated without regard to the work's potential literary, artistic or political qualities.[99] Further, the ordinance made material depicting women in an approved manner, based on equality, absolutely lawful, but it made materials depicting women in a disapproved manner, based on submission, absolutely unlawful.[100] Judge Easterbrook reasoned that since sexual expression has such a powerful effect on peoples' emotions, the link between pornography and speech is further supported.[101] The contention that pornography may condition people to undesirable ends does not in itself justify a ban on the material.[102] Racial bigotry, anti-semitism, violence on television, reporters' biases, all of these forms of speech can negatively influence our culture.[103] However, bans on speech have not been traditionally acceptable merely because a potential for societal harm exists. Most, if not all, forms of communication have some sort of conditioning effect. Should our society ban these communications? Can our society selectively choose what sort of potentially harmful communication may or may not deserve constitutional protection? Can our government declare what is proper, what is truthful and prohibit communication that does not fit government's definition?

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96. Indianapolis Code § 16-3(q).

97. *Id.* The ordinance outlines a variety of situations generally depicting women in a degrading and/or humiliating fashion, including but not exclusively confined to presenting women in scenes where women are tortured, dismembered, dominated, mutilated or where they are portrayed as enjoying pain, being penetrated by objects and/or animals or being raped.

98. *Id.* The Indianapolis ordinance did not forbid obscenity, but pornography. In Miller v. California, 413 U.S. 15 (1973), the Court held that before sexual expression can lose its constitutional protection, it must be defined *obscene*. The *Miller* standard requires that the publication, taken as a whole, "must appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value." *See also American Booksellers*, 771 F.2d at 324 (citing Brockett v. Spokane Arccades, Inc., 472 U.S. 491 (1985)). The Indianapolis ordinance attempted to deny first amendment protection of material not defined as obscene.

99. 771 F.2d. at 325.

100. *Id.*

101. *Id.* at 329.

102. *Id.*

103. *Id.* at 330.

These questions guided the circuit court to conclude that even potentially harmful speech has a place in the marketplace of ideas. Unpopular, even repulsive speech may have substantial merit in the marketplace of ideas. Pornography, even that which may be sexually explicit in projecting a disgusting idea, may still provide substantial utility to society.[104] As long as communication has some defined artistic, literary, political or social value, it has a place in the marketplace of ideas. Government policies that proscribe communication without first determining whether the banned material meets first amendment constitutional guidelines is an arbitrary and unacceptable proscription. Therefore, as it applied in this case, the Indianapolis ordinance was unconstitutional because it placed a blanket prohibition on communication containing undesirable characteristics without regard to the potential merit of the communication.[105]

While one cannot easily deny that sexual expression affects political viewpoints, protecting sexual expression can also be justified because it helps promote an individual's self expression and/or self fulfillment.[106] America's Victorian parameters of sexual morality can create difficulties for an individual's ability to express their innermost sexual desires. Having a diverse outlet for sexual expression that allows individuals to find others who think as they do fosters important political feelings.[107] Sexual expression should not be banished merely because it falls outside socially accepted norms. Justice Douglas addressed this problem in his dissenting opinion in *Ginzburg v. United States*.[108] He stated:

> Some of the tracts for which these publishers go to prison concern normal sex, some homosexuality, some the masochistic yearning that is probably present in everyone and dominant in some. . . . Why is it unlawful to cater to the needs of this group? . . . But we are not in the realm of criminal conduct, only ideas and tastes. . . . When the Court today speaks of "social value," does it mean a 'value' to the majority? Why is not a minority "value" cognizable? . . . If we were wise enough, we might know that communication may have greater therapeutical value than any sermon that those of the "normal" community can ever offer. But if the communication is of value to the masochistic

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104. *Id.*

105. *Id.*

106. The Supreme Court addressed the notion that speech deserves first amendment protection if it helps both those conveying ideas and those receiving ideas in First National Bank v. Bellotti, 435 U.S. 765, 783 (1978) and also in Police Department of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

107. *See New Developments in Pornography Regulations*, *supra* note 88, at 52.

108. 383 U.S. 463, 489-90 (1966) (Douglas, J., dissenting).

> community or to others of the deviant community, how can it be said to be "utterly without redeeming social importance?" "Redeeming" to whom? "Importance" to whom?[109]

Self expression and personal fulfillment may also be enhanced by the free exchange of sexual expression because it can further the exploration of fantasy. As Lynn noted,[110] the Feminist Anti-Censorship Taskforce argued that depictions of ways of living and acting different than one's own reality can help one grasp the potentialities of human behavior. Fantasy imagery allows us to experience conditions we may not wish to experience in real life. This enlarged vision of human conduct can help individuals in decision-making on a wide range of social and ethical issues.[111]

Finally, distributing sexually expressive material may act as a safety valve on potentially aggressive behavior or provide an outlet for those who are realistically deprived of experiences that lead to sexual satisfaction. While evidence regarding the safety valve theory is inconclusive, one of the effects of viewing erotica is that it may reduce aggressive responses in people who are predisposed to aggression.[112] Fantasy exploration from sexual expression can also help individuals who are unable to fulfill their sexual needs any other way. The aged, shy, unattractive, or physically disabled may find sexually oriented literature the only feasible means available to satisfy their sexual urges.[113]

While there is little question that sexual expression can include repulsive and shocking depictions of sexuality, it is also true that sexual expression retains high expressive value for millions of people in a variety of different contexts. The preceding section is not so much a blanket defense to protect every form of sexual expression as it is a reminder that sexual expression can be highly valuable. If one accepts this proposition, it becomes difficult to also accept government interpretations of racketeering seizure clauses enabling them to seize all adult bookstore inventory on the mere probability that some of the inventory is obscene. The following section examines this problem as it relates to the recent Supreme Court decision of *Fort Wayne Books, Inc. v. Indiana.*[114]

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109. *Id.*

110. *See New Developments in Pornography Regulations*, *supra* note 88, at 98.

111. *Id.* (*quoting* Amicus Brief of the Feminist Anti-Censorship Taskforce at 29, American Booksellers Ass'n v. Hudnut, 771, F.2d 323 (7th Cir. 1985)).

112. *Id.* (*quoting* Amicus Brief of the Feminist Anti-Censorship Taskforce at 29, *Bookseller's Ass'n*, 771 F.2d 323).

113. *Id.* at 55.

114. 109 S. Ct. 916 (1989).

IV. Racketeering Property Seizure Clauses as a Form of Prior Restraint

A. Overview of Fort Wayne Books v. Indiana

Obscenity is traditionally prosecuted through criminal proceedings. As outlined in *Miller v. California*,[115] judges must first determine whether sexual expression is obscene before imposing a criminal sanction. Recently, however, states have begun to use racketeering and civil remedy statutes patterned after the federal racketeering law[116] to enable states to seize complete bookstore inventories without following the procedures outlined in *Miller*. For example, the Supreme Court faced a challenge to Indiana's Racketeer Influenced and Corrupt Organization[117] (RICO) and Civil Remedies for Racketeering Activity[118] (CRRA) in the companion cases of *Fort Wayne Books, Inc. v. Indiana*[119] and *Ronald Sappenfield v. Indiana*.[120]

In order to appreciate the decision in *Fort Wayne Books*, the interrelationship between Indiana's RICO and CRRA statutes must be understood. Indiana's RICO law defines, as a class C felony, anyone convicted of a pattern of racketeering activity.[121] It also defines racketeering activity as committing, attempting to commit or conspiring to commit or aiding and abetting a series of defined acts or conduct including obscenity.[122] A pattern of racketeering activity means engaging in at least two incidents of the proscribed behavior within a five year period with the first incident beginning after August 31, 1980.[123] An individual convicted of two predicate offenses defined in the RICO statutes may be subject to criminal prosecution under the RICO provisions as well as civil action under the CRRA. Provisions within the CRRA statute allow a prosecuting attorney to initiate a forfeiture action in a circuit

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115. 413 U.S. 15 (1973).

116. The Racketeering Influenced and Corrupt Organizations Act defines racketeering activity to include any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, and dealing in obscene matter. . . . 18 U.S.C. § 1961 (1970).

117. Ind. Code §§ 35-45-6-1 to -2 (1980).

118. Ind. Code §§ 34-4-30.5-1 to -6 (1980).

119. 109 S. Ct. 916 (1989).

120. *Id.*

121. Ind. Code § 35-45-6-2(3) (1980).

122. Indiana's racketeering statutes include murder, kidnapping, child exploitation, arson, burglary, receiving stolen property, forgery, fraud, bribery, official misconduct, conflict of interest, perjury, tampering, intimidation, promoting prostitution, promoting gambling, dealing in controlled substances and as amended in 1984, obscenity as prohibited activities. Ind. Code § 35-45-6-1(2) (1980).

123. *Id.*

or superior court of evidence allegedly tied to a racketeering violation. Upon a showing by a preponderance of the evidence that the property in question was used or intended for use, derived from, or realized through racketeering activity, the court may order the property seized and forfeited to the state.[124] It is important to note that the CRRA does not require the state to set a trial date on the CRRA complaint. Therefore, the seizure could last indefinitely without a final judicial determination on the merits of the complaint.

In *Fort Wayne Books*, the trial court agreed with the district attorney that there was probable cause to believe that Fort Wayne Books was violating state RICO law, directed the immediate seizure of the real estate, publications, and personal property, and ordered the county sheriff to padlock the stores.[125] The trial court based its decision on an affidavit executed by a local police officer, which recounted thirty-nine prior criminal convictions of Fort Wayne Books for selling obscene books and films at the locations where the materials were being seized.[126]

After the seizure, Fort Wayne Books petitioned to vacate the *ex parte* seizure order, but was denied relief.[127] The trial court, however, certified the constitutional issues to the Indiana Court of Appeals, which held the relevant RICO/CRRA provisions violated the United States Constitution.[128] The Indiana Supreme Court reversed the court of appeals and held that both the RICO and CRRA statutes constitutional.[129]

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124. IND. CODE § 34-4-30.5-3(a) of the CRRA states:

> The prosecuting attorney in a county in which any of the property is located, may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of I.C. 35-45-6-2. An action for forfeiture may be brought in any circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of I.C. 35-45-6-2, the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provisions for the rights of innocent persons.

IND. CODE § 34-4-30.5-3(b) states:

> When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of I.C. 35-45-6-2 involving the property in question has occurred.

125. *Fort Wayne Books*, 109 S. Ct. at 921.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 921-22.

B. Applying Indiana's CRRA Forfeiture Provision on Expressive Material Creates an Impermissible Prior Restraint

While the *Fort Wayne Books* Court was confronted with a variety of issues, two constitutional issues which were raised in the case will be discussed here. First, the Court addressed whether including the substantive offense of obscenity as a predicate offense in Indiana's RICO law would render the entire statute unconstitutionally vague.[130] Second, the Court considered whether Indiana's CRRA pretrial seizure clause, as applied to sexual expression in this case, created an impermissible prior restraint.[131] The Court held that including obscenity as a predicate offense in RICO statutes did not make the statute unconstitutionally vague as applied to obscenity predicate offenses.[132] The Court did find, however, that the CRRA pretrial seizure clause, as applied to sexual expression, constituted an impermissible prior restraint.[133]

Justice White delivered the majority opinion which, depending on the particular issue addressed, was joined by an interesting mix of justices. With regard to the Court ruling accepting obscenity as a predicate offense in a RICO prosecution, Justice White was joined by Chief Justice Rehnquist and Justices Blackmun, Scalia, and Kennedy. With regard to holding that Indiana's CRRA pretrial seizure provision created an unconstitutional prior restraint, Justice White was joined by Chief Justice Rehnquist and Justices Brennan, Blackmun, O'Connor, Scalia and Kennedy, who were joined in concurrence by Justice Marshall.

In determining whether the CRRA seizure clause was an impermissible prior restraint, the Court first addressed whether obscenity could be constitutionally attached to RICO statutes.[134] If the Court ruled that obscenity could not be included as a predicate offense in RICO statutes, that holding would serve as a sufficient condition to preclude the use of the CRRA pretrial seizure clause on sexual expression.

In upholding the inclusion of obscenity as a valid predicate offense in RICO statutes, Justice White rejected the petitioner's argument that the 'inherent vagueness' of the requirements established by the Court in *Miller v. California*[135] require a finding that the RICO statute, prosecution for which could be based on predicated acts of obscenity, was unconstitutional.[136] The Court noted that the RICO laws encompassed

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130. *Id.* at 924-27.
131. *Id.* at 925-30.
132. *Id.* at 924-25.
133. *Id.* at 927-30.
134. *Id.* at 924-27.
135. 413 U.S. 15 (1973).
136. 109 S.Ct. at 924-25.

Indiana obscenity law, which was in conformance with the requirements of *Miller*.[137] Because the obscenity law was not unconstitutionally vague, the RICO provision incorporating the obscenity laws were not vague.

The Court did reject the constitutionality of the CRRA property seizure clause as it applied to sexually expressive material.[138] The Court noted several precedents[139] condemning seizures with no pretrial due process guarantees and indicated that "pretrial seizures of expressive materials could only be undertaken pursuant to a procedure designed to focus searchingly on the question of obscenity."[140] It is important to note that the Court distinguished between taking a single copy of expressive material for evidentiary purposes, which is allowed,[141] from the type of massive seizure authorized by Indiana's CRRA statute.

The Court also noted that while the fourth amendment permits the government to seize "any and all contraband, instrumentalities, and evidence of crimes upon probable cause,"[142] this rule is not applicable to expressive materials[143] because expressive material, unlike non-expressive material, is braced with first amendment protection.[144]

In *Fort Wayne Books*, the Indiana Supreme Court justified the seizure with the argument that the books merely represent assets used and acquired through racketeering activity.[145] The Indiana Supreme Court believed it was irrelevant to consider whether the seized material contained expressive value protected by the first amendment.[146] It argued the CRRA forfeiture remedy was intended to disgorge assets from racketeering activity and not necessarily restrain the distribution of constitutionally protected speech.[147] The United States Supreme Court dismissed the analysis of the Indiana Supreme Court as a simplistic distinction to bypass the strict procedural requirements intended to safeguard expression from impermissible prior restraints. While the Supreme Court agreed that RICO statutes could define obscenity as a category of racketeering activity,[148] and that bookstore inventories could be forfeitable like other

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137. *Id.*

138. *Id.* at 927-30.

139. *Id.* at 927 (citing Marcus v. Search Warrant, 367 U.S. 717 (1961); A Quantity of Books v. Kansas, 378 U.S. 205 (1964); Lee Art, Inc. v. Virginia, 392 U.S. 636 (1968); Heller v. New York, 413 U.S. 483 (1973), New York v. P.J. Video, Inc., 475 U.S. 868 (1986); Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979)).

140. *Fort Wayne Books*, 109 S. Ct. at 927.

141. Heller v. New York, 413 U.S. at 492.

142. Lo-Ji Sales, Inc. v. New York, 442 U.S. at 326.

143. *Id.*

144. *See* Maryland v. Macon, 472 U.S. 463, 470 (1985).

145. 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 565 (Ind. 1987).

146. 109 S. Ct. at 928.

147. *Id.*

148. 109 S. Ct. at 925.

property,[149] it rejected the conclusion of the state court that expressive property lacked first amendment protection against the CRRA forfeiture provision.[150] The Court noted:

> Here there was not—and has not been—any determination that the seized items were 'obscene' or that a RICO violation *has occurred*. True, the predicate crimes on which the seizure order was based had been adjudicated and are unchallenged. But the petition for seizure and the hearing thereon were aimed at establishing no more than *probable cause to believe* that a RICO violation had occurred, and the order for seizure recited no more than probable cause in that respect. As noted above, our cases firmly hold that mere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation. The elements of a RICO violation other than the predicate crimes remain to be established . . . e.g, whether the obscenity violations . . . established a pattern of racketeering activity, and whether the assets seized were forfeitable under the State's CRRA statute. Therefore, the pretrial seizure at issue here was improper. . . .
>
> At least where the RICO violation claimed is a pattern of racketeering that can be established only by rebutting the presumption that expressive materials are protected by the First Amendment, that presumption is not rebutted until the claimed justification for seizing books or other publications is properly established in an adversary proceeding.[151]

On the surface, the Supreme Court recognized that sexual expression possesses sufficient expressive value to deny a blanket seizure of these materials. On one hand, the Court recognized there may have been probable cause to believe a pattern of racketeering activity existed because the accused had been previously convicted of at least two predicate offenses as required by the RICO statute. However, the Court rejected the notion that just because an individual has had prior obscenity convictions, and may possibly have obscene material contained within his business inventory, that all of the expressive material is obscene. Due process requires that a judicial tribunal first determine which material is obscene and then separate it from other sexual expression. Omitting this safeguard, the ensuing seizure becomes overly broad and therefore an impermissible prior restraint. Yet by construing the *Fort Wayne Books*

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149. *Id.* at 926.
150. *Id.*
151. *Id.* at 929-30.

decision narrowly, states may have tremendous powers to utilize RICO statutes in a way that can both suppress and oppress sexual expression. The following section addresses this possible application of RICO statutes.

C. Fort Wayne's Effect on Free Speech: The Dissenting View

This Case Note stresses the view that government may not seize sexual expression before a judicial tribunal determines that the material is obscene. This thesis is predicated on the notion that sexual expression should remain braced with strict procedural safeguards to afford first amendment protection. While the Court embraced this thesis to strike down the applicability of the forfeiture clause of the CCRA provisions, the Court left unresolved issues that could allow the RICO/CRRA relationship to develop into a powerful tool that states could use to fight unpopular forms of expressive material. The majority agreed that civil forfeiture provisions still applied to non-expressive property. Therefore, the forfeiture provisions could still become a potent tool to deny first amendment protection to sexual expression. Justices Stevens, joined by Justices Brennan and Marshall, addressed this problem in the dissent in *Fort Wayne Books*.[152]

The dissent reasoned that applying RICO statutes to sexual expression misplaces the purpose of RICO statutes and creates a dangerous precedent.[153] RICO statutes are intended to curtail corrupt business practices. This view is supported from the fact that violators of the Indiana RICO statute are class C felons, guilty of "corrupt business practice."[154] However, there is a fundamental difference between curtailing corrupt business practices and curtailing immoral thoughts.[155]

While one can argue that a relationship exists between corrupt business practices and adult sexual expression retailers, it is improper

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152. *Id.* at 931-39.

153. *Id.* at 932-34.

154. IND. CODE § 35-45-6-2(a)(3) (1982).

155. The dissent takes note of Professor Henkin's argument that obscenity laws are rooted in this country's religious antecedents and of governmental responsibility for communal and individual decency and morality. Henkin argued that:

> Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the consumer. Obscenity, at bottom, is not crime.

Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963).

to assume this is the case. This is implied by listing obscenity as a predicate offense in RICO statutes. Justice Stevens argued:

> [T]here is a difference of constitutional dimension between an enterprise that is engaged in the business of selling and exhibiting books, magazines, and videotapes and one that is engaged in another commercial activity, lawful or unlawful. A bookstore receiving revenue from sales of obscene books is not the same as a hardware store or pizza parlor funded by loan sharking proceeds. The presumptive First Amendment protection accorded the former does not apply either to the predicate offense or to the business use in the latter. . . . Prosecutors in such cases desire only to purge the organized-crime taint; they have no interest in deterring the sale of pizzas or hardware. Sexually explicit books and movies, however, are commodities the state does want to exterminate. The RICO/CRRA scheme promotes such extermination through elimination of the very establishments where sexually explicit speech is disseminated.[156]

In essence, the dissent argued that by accepting the constitutionality of obscenity as a predicate offense in RICO statutes, the Court clouds the rationale of racketeering statutes and gives the state two additional methods to fight morality rather than corrupt business practices. In other words, the government gains at least two additional and potentially more powerful tools beyond that of traditional obscenity statutes to fight sexual expression.[157]

First, persons convicted of at least two prior obscenity violations could face much stiffer penalties if prosecuted under a RICO statute.[158] For example, if the petitioners in *Sappenfield* were convicted of all six misdemeanor obscenity offenses, they would face a maximum of six years in prison and a $30,000 fine. However, if they were convicted of two RICO offenses, both class C felonies, they would face up to 10 years in person and $20,000 in fines.[159] Therefore, attaching obscenity violations to RICO statutes imposes, as argued by the petitioners in *Sappenfield*, sanctions that are so draconian, they improperly chill first amendment protection.[160]

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156. 109 S. Ct. at 939.

157. In Indiana, a RICO statute conviction is a class C felony while conviction of an obscenity statute is a misdemeanor. More severe penalties associated with a racketeering conviction can act as greater deterrent than being convicted of an obscenity violation. *See Fort Wayne Books*, 109 S. Ct. at 918.

158. *See* IND. CODE §§ 35-45-6-1 to -2 (1980).

159. 109 S. Ct. at 925.

160. *Id.*

The majority in *Sappenfield* recognized the RICO scheme may make some cautious booksellers practice self-censorship and remove from their shelves materials protected by the first amendment.[161] However, the *Sappenfield* majority rejected the petitioner's argument and instead concluded that because deterrence of the sale of obscenity has traditionally been a goal of anti-obscenity statutes,[162] the mere assertion of some possible self-censorship resulting from a statute was not enough to render the statute unconstitutional.[163] Therefore, the Court accepted the rationale that applying the harsher penalties contained in RICO statutes to book store proprietors was not unconstitutional because of its possible extra deterrent affect.[164]

Second, and more directly, Indiana's RICO/CRRA scheme gives government a powerful tool to seize an enterprise's non-expressive property, effectively crippling an enterprise's ability to conduct business. The majority opinion erased the distinction between an obscenity violation and a corrupt business practice. However, one should not assume that a person who violates an obscenity statute automatically does so in a way that fits the definition of a corrupt business practice. This assumption, the dissent argued, is why obscenity should not be included as a predicate offense.[165]

By accepting the juxtaposition of obscenity and RICO statutes, the majority potentially opens sexual expression to the shims of a community's sexual mores. Even if Indiana chooses not to conform its CRRA forfeiture provision to the procedural requirement of the fourth amendment, the state would only have to show that an enterprise had two prior obscenity convictions before it could use the CRRA procedures to dissolve the enterprise, forfeit its non-expressive property and enjoin the defendant from engaging in the same type of business in the future.[166]

This possibility effectively allows government to circumvent the majority's position that the CRRA forfeiture provision conform to proper due process requirements when applied to expressive material by effectively letting the adult bookstore owner have his expressive material yet seize all non-expressive property used to sell the material.[167] Further, the state could prohibit the owner from engaging in the same business in

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161. *Id.*
162. *Id.* at 925-26.
163. *Id.*
164. *Id.*
165. *Id.* at 930-31.
166. *Id.* at 931.
167. The majority concluded that the CRRA forfeiture provision violated due process only after it excluded from its holding pretrial seizures of non-expressive material. *Id.* at 929.

the future.[168] Therefore, the dissent argued the majority is creating a scheme that gives the state drastic measures to curtail undesirable activities.[169] Because the holding in *Fort Wayne Books* was not extended to non-expressive material in obscenity based racketeering prosecutions, the state could have an effective mechanism to combat its view of immorality, even if it is not connected with corrupt business practices. Justice Stevens recognized this inherent danger:

> Whatever harm society incurs from the sale of a few obscene magazines to consenting adults is indistinguishable from the harm caused by the distribution of a great volume of pornographic material that is protected by the First Amendment. Elimination of a few obscene volumes or videotapes from an adult bookstore's shelves thus scarcely serves the State's purpose of controlling public morality.[170]

In sum, the dissenters chided the majority for juxtaposing obscenity violations with RICO prosecutions. The scheme dilutes the clarity of RICO intent to a statute that vastly increases the power of the state to control sexual expression. Justice Stevens reasoned that:

> Reference to a "pattern" of at least two violations only compounds the intractable vagueness of the obscenity concept itself. The Court's contrary view rests on a construction of the RICO statute that requires nothing more than proof that defendant sold or exhibited to a willing reader two obscene magazines-or perhaps just two copies of one such magazine. I would find the statute unconstitutional even without the special threat to First Amendment interests posed by the CRRA remedies.[171]

Finally, recognizing the suppressive and oppressive nature of this holding, the dissent, relying on both *Near v. Minnesota*[172] and quoting *Stanley v. Georgia*,[173] stated:

> "It is better to leave a few . . . noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits," for the "right to receive information and ideas, regardless of their social worth, is fundamental to our free society."[174]

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168. *Id.* at 937.
169. *Id.*
170. *Id.*
171. *Id.* at 937.
172. 283 U.S. 697 at 718 (1931) (Hughes, C.J. quoting 4 WRITINGS OF JAMES MADISON 544 (1965).
173. 394 U.S. 557, 564 (1969) (citation omitted).
174. *Fort Wayne Books*, 109 S. Ct. at 939.

V. Conclusion

Fort Wayne Books clearly requires a judicial determination that materials are obscene before a state invokes a CRRA forfeiture provision. Yet, by not extending the prohibition to non-expressive property used to disseminate expressive property, the possibility exists that RICO/CRRA applications against adult expressive enterprises may become more common in the future.

The increasingly solid conservative coalition developing on the Supreme Court will likely be strengthened during the Bush administration. It is likely that William Brennan and Thurgood Marshall, the two most liberal justices on the Court regarding free speech, will soon retire. It is virtually certain that their successors will reflect, at the very least, a more moderate position on free speech and criminal procedure.

As the Supreme Court evolves an increasingly conservative focus, RICO/CRRA forfeiture applications on non-expressive property may well be accepted, even if the forfeiture effectively closes the business. The mere threat of that drastic action may have significant deterrent effects. One aspect of the majority opinion supports these possibilities. The majority was not sympathetic that RICO applications may have an additional deterrent effect on those who might sell obscene materials.[175] The majority iterated that:

> [D]eterrence 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."[176]

Fort Wayne Books gives mixed signals regarding the commitment of the Supreme Court to protect sexual expression. One may construe the majority's distinction between expressive and non-expressive property as merely an obvious division necessary to address the speech implications inherent in the CRRA forfeiture clause. On one hand, it seems logical to continue to apply CRRA forfeiture provisions to non-expressive materials. On the other hand, using RICO and CRRA statutes to effectively seize non-expressive property can have a total chilling effect on establishments disseminating sexual expression that in the past have been convicted of at least two obscenity violations.

Whether government will utilize RICO and CRRA statutes in this fashion and how the Supreme Court will judge these actions is still open

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175. *Id.* at 926.
176. *Id.* at 926.

to speculation. Yet it is vital that society recognize the important role speech plays in a democratic polity. Especially when speech has the potential to affect how people develop ideas related but not necessarily limited to science, art, politics, literature and human relationships, it should be perceived as having high value and accorded serious protection. For the moment, the Supreme Court has accorded sexual expression a high enough value that it survived Indiana's recent effort to seize it absent judicial determinations of which materials were obscene. However, the decision in *Fort Wayne Books* is narrow and in no way marks the end of the obscenity controversy. Society must recognize that, even if unpleasant at times, sexual expression has value and must be protected. If not, our society will have taken a step closer toward intellectual intolerance where non-conformist ideas are held captive by majoritarian interests.