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RICO Forfeiture of Sexually Explicit Expressive Materials: Another Weapon in the War on Pornography, Or an Impermissible Collateral Attack on Protected Expression?

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RICO FORFEITURE OF SEXUALLY EXPLICIT EXPRESSIVE MATERIALS: ANOTHER WEAPON IN THE WAR ON PORNOGRAPHY, OR AN IMPERMISSIBLE COLLATERAL ATTACK ON PROTECTED EXPRESSION?—


Ronald M. Goldberg†

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I. INTRODUCTION

In *Alexander v. United States*,¹ the United States Supreme Court vacated and remanded a forfeiture order against petitioner Ferris Alexander, who had been convicted of violating the

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¹ 113 S. Ct. 2766 (1993).
Racketeer Influenced Corrupt Organizations Act (RICO). The Court, in a split decision, dismissed Alexander's argument that RICO's forfeiture provisions, triggered by multiple speech-related offenses, violated his First Amendment right to engage in free speech. However, the Court held that, while the forfeiture order did not merit review under the Eighth Amendment's prohibition of cruel and unusual punishments, the court below failed to consider whether the forfeiture order violated Alexander's Eighth Amendment right against excessive fines. The Court subsequently vacated the Eighth Circuit's judgment, and remanded the case for consideration of the excessive fines issue.

Prior to the RICO conviction and forfeiture, Alexander owned and operated a business empire that included bookstores, video stores and theaters, and that acted as a wholesaler of books, magazines and videotapes. His business dealt primarily in media with sexually explicit content—magazines, books, videotapes and movies, which represented the product and inventory of the business. Charges against Alexander included multiple counts of violating statutes prohibiting trafficking in obscene materials, federal tax evasion and violating RICO. At the trial court level, the jury examined thirteen allegedly


3. Alexander v. United States, 113 S. Ct. at 2770-71. Chief Justice Rehnquist delivered the Court's opinion, joined by Justices White, O'Connor, Scalia and Thomas. *Id.* at 2769-76. Justice Souter filed an opinion concurring in the judgment in part and dissenting in part. *Id.* at 2776. Justice Kennedy wrote a dissenting opinion, joined by Justices Blackmun and Stevens, and joined in Part II by Justice Souter. *Id.* at 2776-86.


5. Alexander v. United States, 113 S. Ct. at 2775-76. Justice Souter joined in the Court's opinion on the Eighth Amendment issue. *Id.* at 2776. Justice Kennedy's dissent did not dispute the Court's opinion, but rather noted that the dissenters would not have reached this issue, as the First Amendment violation would have been dispositive. *Id.* at 2786.

6. *Id.* at 2776.

7. *Id.* at 2769; see also Petitioner's Brief at 8.

8. See Alexander v. United States, 113 S. Ct. at 2769.

9. *Id.* at 2766, 2769-70; see also Petitioner's Brief at 8. Alexander was charged with thirty-four counts of violating federal obscenity statutes, three counts of violating RICO (stemming from the anti-obscenity violations) and four counts of violating the federal tax code. Petitioner's Brief at 8; see infra note 102 and accompanying text.
obscene materials and adjudged seven items to be obscene. These seven convictions served as the bases, or predicate offenses, for the subsequent RICO convictions. As a result, Alexander forfeited a business empire that he valued at $25 million, including about $9 million in cash assets. In addition, the court imposed fines and costs upon Alexander totalling over $200,000 as well as concurrent prison sentences representing six years in prison. Following the Eighth Circuit's decision confirming the trial court's order of forfeiture, but before the Supreme Court acted upon Alexander's petition for certiorari, the government destroyed Alexander's inventory of books, magazines, and videotapes. Thus, by using the RICO statute invoked by the obscenity-related convictions, the government accomplished what it had been unable to do under federal obscenity law—it conclusively terminated Alexander's thirty-year reign as a purveyor of sexually explicit expressive materials.

The Court focused on RICO's forfeiture procedures and concluded that even protected expressive materials, otherwise shielded by the First Amendment right to free speech, are

10. Alexander v. United States, 113 S. Ct. at 2769. Alexander was acquitted on 17 obscenity counts. Id. The obscenity counts followed the jury's finding that four magazines and three videotapes were obscene. Id. at 2770. The obscenity convictions served as predicate offenses for the jury's subsequent conviction of Alexander on three counts of violating RICO. Id. at 2769.
12. Petitioner's Brief at 10. The estimate of $25 million represented Alexander's estimate of the combined value of the businesses as going concerns plus the value of their "hard" assets. Id.
14. Id. at 836.
16. Alexander v. United States, 113 S. Ct. at 2770; see also Petitioner's Brief at 10; Steve Brandt, Confiscated Stimulant is a Blast in the Trash, STAR TRIB. (Minneapolis), Oct. 19, 1991, at 1B (noting that "three tons of magazines, videotapes and sexual paraphernalia" confiscated from Alexander were destroyed by either burning or crushing in October of 1991).
properly forfeited when tainted by the predicate offense. Justice Kennedy's dissenting opinion focused not on the procedure but on the substantive result. The dissent concluded that the First Amendment could not abide a collateral attack whereby a speech offense triggered confiscation and destruction of presumptively protected materials. The Court, in a 5-4 decision, decided to permit such a collateral attack. Subsequent to the decision in this case, the Court underwent a compositional change when Justice White, who voted with the majority, retired, and Justice Ginsburg joined the Court.

Part II of this comment reviews RICO and the substantive obscenity statute that can trigger RICO, focuses on the First Amendment and public policy implications when RICO forfeiture is triggered by a speech-related offense, and reviews the Eighth Amendment implications of criminal forfeiture. Part III sets forth the facts, the holding, and the Court's analysis in Alexander v. United States. Part IV analyzes the Court's holding in Alexander and discusses the impact of Justice Ginsburg's

17. Alexander v. United States, 113 S. Ct. at 2772. The Court cited Petitioner's concession that expressive businesses and assets can be forfeited for a narcotic-related RICO predicate offense. Id. at 2774 (quoting Petitioner's Brief at 11); see also United States v. Pryba, 900 F.2d 748, 755 (4th Cir. 1990) (noting that a drug cartel could not protect its ill-gotten gains by investing the proceeds in a newspaper or broadcasting business), cert. denied, 498 U.S. 924 (1990).
18. Id. at 2785-86 (dissenting opinion).
19. Id. at 2785; see also Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 85 (1989) (ruling that where expressive material has not been adjudicated as obscene, pretrial seizure of the materials is improper). In Fort Wayne Books, Justice Stevens, concurring in part and dissenting in part, directly attacked the analogy of commercial business to expressive enterprises relied on by the Court:

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. Seldom will First Amendment protections have any relevance to the sanctions that might be invoked against an ordinary commercial establishment. Nor will use of [RICO] to rid that type of enterprise of illegal influence, even by closing it, engender suspicion of censorial motive. 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 [Indiana RICO] scheme promotes such extermination through elimination of the very establishments where sexually explicit speech is disseminated. Fort Wayne Books, 489 U.S. at 84-85.
20. See supra note 3. It was on this point that Justice Souter departed from the Court's opinion and joined the dissent. Alexander v. United States, 113 S. Ct. at 2776.
appointment on RICO forfeiture jurisprudence in the context of the predicate offense of obscenity. This Comment concludes that should the current Court revisit the issue, Justice Kennedy's dissent in *Alexander v. United States* is likely to be the law of the land.

II. HISTORY OF THE LAW

A. RICO

Congress first passed the Racketeer Influenced Corrupt Organizations Act (RICO) in 1970.21 Congress passed RICO as a measure to attack the "economic base through which [racketeers] constitute such a serious threat."22 A RICO offense is defined by classifying specified state and federal felonies as "racketeering activities,"23 and by classifying two or more such predicate acts committed within ten years as a "pattern of racketeering activity."24 Once violated, RICO provides a broad
range of remedies designed to dismantle "root and branch" the criminal enterprise directing the racketeering activity. Thus, through RICO, Congress defined organized crime in terms of certain felonious "racketeering activities" characteristically committed by organized crime. Racketeering activities include "any act or threat involving murder, kidnaping [sic], gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs" chargeable at the state level as a felony offense, as well as a corresponding array of violations of federal statutes proscribing similar crimes. The difference between a felon and a racke-

25. United States v. Alexander, No. CRIM.4-89-85, 1990 WL 117882, at *6 (D. Minn. Aug. 10, 1990). The court noted that "Congress made clear its intent: a RICO enterprise is to be dismantled, root and branch." Id. Although the court recognized the facial disproportionality between the relatively few items adjudicated to be obscene and the enormous scope and value of the forfeiture order, it held that:

The proceeds clearly supported the RICO scheme by providing the means and methods of transporting and selling obscene materials. Underlying those materials which the jury found obscene is that vast support system which made their existence and sale in this state possible.

Id. Thus, although the court analyzed RICO as an in personam forfeiture, rather than an in rem forfeiture, Id. at *4 (citing United States v. Robilotto, 828 F.2d 940, 948-49 (2d Cir. 1987), cert. denied, 484 U.S. 1011 (1988), and United States v. Ginsburg, 775 F.2d 798, 800 (7th Cir. 1985), cert. denied, 475 U.S. 1011 (1986)), the court's analysis supports the conclusion that RICO forfeiture both separates the criminal from his ill-gotten benefits (in personam forfeiture) and confiscates "guilty" items (in rem forfeiture). United States v. Alexander, No. CRIM.4-89.85, 1990 WL 117882, at *4.

26. See infra notes 36-40 and accompanying text.


28. 18 U.S.C. § 1961(1) (1988 & Supp. V 1993). Federal crimes include: bribery; sports bribery; counterfeiting; felonious theft from interstate shipment; embezzlement from pension or welfare funds; extortionate credit transactions; fraud and related activity in connection with access devices; transmission of gambling information; mail fraud; wire fraud; financial institution fraud; dealing in obscene matter; obstruction of justice; obstruction of criminal investigations; obstruction of state or local law enforcement; tampering with a witness, victim, or an informant; retaliating against a witness, victim, or an informant; interference with commerce by robbery or extortion; racketeering; interstate transportation of wagering paraphernalia; unlawful welfare fund payments; illegal gambling businesses; laundering of monetary instruments; engaging in monetary transactions in property derived from specified unlawful activity; use of interstate commerce facilities in the commission of murder-for-hire; sexual exploitation of children; interstate transportation of stolen motor vehicles; interstate transportation of stolen property; trafficking in certain motor vehicles or motor vehicle parts; trafficking in contraband cigarettes; white slave traffic; violating restrictions on loans or payments to labor organizations; embezzlement of union funds; fraud relating to sale
ter, therefore, is that the racketeer is a subset of the group of felons who have committed two predicate felonies within a ten-year period. Therefore, a racketeer can be not only the stereotypical mobster orchestrating a criminal empire but also the video store owner who naively offers two obscene video tapes for rental.

RICO invokes federal jurisdiction by linking the "pattern of racketeering" activity to interstate commerce and prohibiting the following activities with respect to such commerce: 1) using or investing income derived from racketeering or the collection of an unlawful debt to acquire an interest in an enterprise affecting or engaging in interstate or foreign commerce; 2) acquiring or maintaining an interest in or control of an enterprise affecting or engaging in interstate or foreign commerce through a pattern of racketeering activity or collection of an unlawful debt; 3) conducting the affairs of an enterprise affecting or engaging in interstate or foreign commerce through a pattern of racketeering activity or collection of an unlawful debt; or 4) conspiring to do any of the above.

The consequences of violating RICO are disproportionately greater than the sum of two predicate crime violations. The remedies for violating RICO include: 1) a civil penalty of treble damages for victims claiming business or property injuries resulting from a RICO violation; 2) criminal fines potentially up to twice the amount of the ill-gotten gains, in addition to

of securities; narcotic-related offenses; and acts indictable under the Currency and Foreign Transactions Reporting Act. Id. § 1961(1)(B)-(E).

29. Id. § 1961(5).

30. See, e.g., Kathleen F. Brickey, RICO Forfeitures as "Excessive Fines" or "Cruel and Unusual Punishments" 35 Vill. L. Rev. 905, 906-07 (1990) (discussing the breadth of activities that may trigger RICO violation).


32. Id. § 1962(b).

33. Id. § 1962(c).

34. Id. § 1962(d).

35. Melnick, supra note 27, at 396. Melnick notes that:

[Prosecutors can go after the enterprise itself, imposing such remedies as asset forfeiture to successfully ensure permanent closure. In contrast, successful prosecutions under obscenity or nuisance statutes merely result in the payment of fines, temporary closures, or injunctions against the underlying nuisance, but permit the continued existence of the perpetuating enterprise.

Id.

imprisonment of up to twenty years (or life, if the predicate statute so provides), and 3) forfeiture of:

i) any interest acquired or maintained in the commission of a pattern of racketeering activity;

ii) any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over any enterprise conducting or participating in a pattern of racketeering activity; and

iii) any proceeds constituting or derived from any proceeds obtained either directly or indirectly from racketeering activity.

The Supreme Court has defined property subject to RICO forfeiture to include both property used in the racketeering activity and all profits and proceeds derived from such activity. RICO operates as an in rem forfeiture (forfeiture of the offending "thing"), in that it requires forfeiture of any interest acquired or maintained in the commission of a pattern of racketeering activity. RICO further requires forfeiture of an interest in any enterprise the racketeer has established, operated, controlled, conducted, or in which the racketeer has participated. Thus, RICO is sometimes characterized as in personam forfeiture (forfeiture by the offending person). Finally, as an additional measure of in personam punishment, RICO requires forfeiture of "any property constituting, or derived from, any proceeds... obtained, directly or indirectly, from racketeering activity."

37. Id. § 1963(a).
38. Id. § 1963(a) (1).
39. Id. § 1963(a) (2).
40. Id. § 1963(a) (3).
42. 18 U.S.C. § 1963(a) (1).
43. Id. § 1963(a) (2). RICO defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961 (4).
44. See supra note 25. However, this is not purely in personam; courts have consistently held that there must be a "nexus," or some taint beyond merely ownership by a criminal, between the racketeering activity and property properly subject to RICO forfeiture. See, e.g., Alexander v. Thornburgh, 943 F.2d 825, 834 (8th Cir. 1991), vacated sub nom. Alexander v. United States, 113 S. Ct. 2766 (1993); United States v. Pryba, 900 F.2d 748, 755 (4th Cir. 1990), cert. denied, 498 U.S. 924 (1990).
45. 18 U.S.C. § 1963(a) (3). In this class of property interests, the assets are not used in the criminal activity; however, the assets would not have been accumulated but for the racketeering activity. See, e.g., Pryba, 900 F.2d at 755 (noting that defendant
B. Obscenity

One class of felonies that RICO defines as a predicate "racketeering activity" is offenses under 18 U.S.C. § 1461, the so-called "anti-obscenity" statute.

1. The Current Standard

Obscenity is judicially defined as:
(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 46

The Court designed this so-called Miller test 47 to provide "[t]he basic guidelines for the trier of fact." 48 This standard, though perhaps no more useful as a bright-line standard than an "I know it when I see it" 49 test, serves as the standard for gauging obscenity since the Court's 1973 pronouncement in Miller.

2. Obscenity as a RICO Predicate Offense

In its 1984 amendments to the RICO statutes, Congress expanded the scope of racketeering activity to include crimes involving obscenity at both the state and federal level. 50 The amendment added the following to the list of RICO predicate offenses: 1) dealing in obscene matter chargeable under state law, and 2) "any act which is indictable under [18 U.S.C.] sections 1461-1465 (relating to obscene matter). . . ." 51

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47. Id.
48. Id.
federal offenses include mailing obscene or crime-inciting matter, importation or transportation of obscene matter, mailing indecent matter on wrappers or envelopes, broadcasting obscene language, and transportation of obscene matter for sale or distribution.\textsuperscript{52} However, engaging in the business of selling or transferring obscene matter is not included as a federal-level predicate offense.\textsuperscript{58}

Notwithstanding RICO, federal law already provides prosecutors the tool of forfeiture for combating obscenity under the anti-obscenity statute.\textsuperscript{54} The statute provides for mandatory forfeiture because obscene materials, as well as property traceable to proceeds of the obscenity offense, \textit{shall} be forfeited.\textsuperscript{55} The statute further provides for discretionary forfeiture because property used in the commission of the crime \textit{may} be forfeited at the court's discretion.\textsuperscript{56} The court, in making such a discretionary determination, is to consider the "nature, scope, and proportionality of the use of the property in the offense."\textsuperscript{57} Thus, obscenity prosecuted under the federal anti-obscenity statute provides for a proportionality test, while obscenity prosecuted under RICO provides for no such test.\textsuperscript{58} The only difference triggering the alternative forfeitures is that RICO requires a second offense within ten years of the first offense.\textsuperscript{59} In contrast to RICO, the forfeiture remedy provided by the predicate obscenity offense is less severe, and allows the court the discretion to fit the punishment to the crime.\textsuperscript{60}

Under the \textit{Miller} test, obscenity is defined by looking to "contemporary community standards."\textsuperscript{61} Thus, what is obscene in Minneapolis might not necessarily be obscene in New York.

\textsuperscript{52} Id. §§ 1461-65.
\textsuperscript{53} See id. § 1961(1)(B).
\textsuperscript{54} Id. § 1467(a).
\textsuperscript{55} Id. § 1467(a)(1)-(2).
\textsuperscript{56} Id. § 1467(a)(3).
\textsuperscript{57} Id. See infra notes 81-97 and accompanying text for a discussion of "proportionality."
\textsuperscript{58} Compare 18 U.S.C. § 1467(a)(3) (stating that court has discretion in deciding what assets are subject to forfeiture) with 18 U.S.C. § 1963 (stating that court has no discretion in deciding what assets are subject to forfeiture).
\textsuperscript{60} See, e.g., United States v. California Publishers Liquidating Corp., 778 F. Supp. 1377, 1390 (N.D. Tex. 1991) (analyzing the "nature, scope, and proportionality of the use of the properties" at issue to determine whether forfeiture was excessive).
\textsuperscript{61} Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted).
City. By extension then, what constitutes a federal offense in one state might not constitute a federal offense in another state. This somewhat incongruous result is inherent in the RICO statutory scheme and brings into question whether RICO is the proper tool for combatting interstate obscenity.

3. Obscenity and First Amendment Jurisprudence

The First Amendment, a traditional shield raised in defense of obscenity charges, likewise has been a typical defense raised against RICO charges where obscenity is the predicate offense.  

The First Amendment provides, in part, that "Congress shall make no law . . . abridging the freedom of speech. . . ." Purveyors of sexually explicit materials convey their products through communicative media—books, magazines, videotapes and films, by the written and spoken word, as well as by the visual arts—all of which, by definition, are "speech." When a state attempts to regulate or prohibit obscenity, it is drawing a distinction between protected (non-obscene) and unprotected (obscene) expression, and any such regulation will be strictly scrutinized. A communication judged "obscene" enjoys no constitutional protection. The Court has not established a "bright-line" test for finding obscenity; it is a question reserved for the finder of fact.

Federal prosecutors and legislators, as well as many state and local prosecutors and their respective legislative counterparts, have exhibited a preference to eliminate not only obscene materials, but also marginally protected sexually explicit expressive materials. Assuming arguendo that obscenity can

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63. U.S. CONST. amend. I.
64. See, e.g., United States v. Pryba, 900 F.2d 748, 750-52 (4th Cir. 1990) (listing various types of communicative media).
65. See, e.g., Alexander v. United States, 113 S. Ct. at 2775 (noting that obscenity violations are expressive conduct, albeit unprotected by the First Amendment).
66. Id. at 2774-75.
68. Miller v. California, 413 U.S. 15, 24 (1973); see also supra notes 46-49 and accompanying text.
69. See, e.g., 2 U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-75.001 at 2 (2d ed. rev. Oct. 1988) (discussing the use of RICO and noting that “[p]rosecutive priority should be given to cases involving large-scale distributors who realize substantial
be clearly defined, and further assuming that a challenged statute aims only to outlaw conduct properly relating to obscenity, there is still a serious issue with respect to how far such a statute can go toward achieving its goal without offending the First Amendment.

Challengers of obscenity statutes generally wage the following First Amendment battles: (1) the challenged statute is an impermissible prior restraint of expression yet to be judged illegal, rather than a subsequent punishment for illegal conduct;70 (2) the challenged statute is overbroad, in that its "dragnet" gathers up both unprotected and protected speech;71 (3) the challenged statute does not merely punish unprotected speech, but also discourages protected expression by chilling such permissible conduct through an ambiguous standard coupled with severe penalties for violating that standard;72 or (4) challenges based upon any combination of the above.73

In cases arising from three different circuits,74 the Court upheld RICO forfeitures resulting from obscenity predicate offenses against the foregoing constitutional attacks.75 As to the prior restraint argument, because RICO forfeiture occurs only after a criminal trial "hedged about with the procedural safeguards of the criminal process,"76 such forfeiture is not considered a prior restraint on expression.77 Regarding the

income from multi-state operations . . .

70. See, e.g., Near v. Minnesota ex rel. Olson, 283 U.S. 697, 722-23 (1931) (holding a Minnesota statute authorizing proceedings in restraint of publication to be an unconstitutional infringement of the liberty of the press).

71. See, e.g., Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (finding that administrative commission's sanctions, although informal, were so indefinite as to effect prior restraint on the distribution of publications).

72. See, e.g., id. at 70-72 (holding that administrative sanctions for distributing allegedly "objectionable" materials may constitute an impermissible "chilling" effect on protected speech).


74. See supra notes 73 and accompanying text.

75. See supra note 73.


77. Adult Video Ass'n, 960 F.2d at 789-90; Alexander v. Thornburgh, 943 F.2d at 834-35; Pryba, 900 F.2d at 753-56. In Adult Video Ass'n, the Ninth Circuit noted that "[t]here is a historical distinction between prior restraints and criminal penalties in the first amendment setting. . . ." 960 F.2d at 789 (quoting Polykoff v. Collins, 816 F.2d
overbreadth argument, "judged in relation to the statute's plainly legitimate sweep," 78 RICO has been held not to "sweep" protected speech within its prohibition. 79 Finally, referencing the "chilling effect" argument, because obscenity is unprotected, and because RICO does not alter the definition of what is obscene, and because deterrence of obscenity is a legitimate state end, any additional deterrent effect is an acceptable consequence. 80 Thus, these decisions suggest that RICO First Amendment jurisprudence is firmly settled.

C. RICO and Eighth Amendment Jurisprudence

1. The Eighth Amendment

Because RICO is not so much a substantive offense as it is a procedural means of magnifying the punishment for predicate offenses, RICO defendants seek to invoke the Eighth Amendment as a defense.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." 81 The Court has interpreted this to mean that, generally, "a criminal sentence must be proportionate to the crime." 82

1326, 1337 (9th Cir. 1987)).
79. Adult Video Ass'n, 960 F.2d at 787-88; Alexander v. Thornburgh, 943 F.2d 825, 835 (8th Cir. 1991), vacated on other grounds sub nom. Alexander v. United States, 113 S. Ct. 2766 (1993); United States v. Pryba, 900 F.2d 748, 756 (4th Cir. 1990), cert. denied, 498 U.S. 924 (1990). Courts have been generally hostile to this prong of the First Amendment challenge to RICO, usually characterizing it as a repetition of the other prongs. See, e.g., Adult Video Ass'n, 960 F.2d at 787; Pryba, 900 F.2d at 756.
80. Adult Video Ass'n, 960 F.2d at 786-87; Alexander v. Thornburgh, 943 F.2d at 834-35; Pryba, 900 F.2d at 756. The Supreme Court conclusively terminated debate on this prong with its opinion in Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 60 (1989) (recognizing 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'" (quoting Smith v. California, 361 U.S. 147, 154-55 (1959))).
81. U.S. CONST. amend. VIII.
82. Solem v. Helm, 463 U.S. 277, 290 (1983). In Solem, the Court stated three factors to examine in judging whether the punishment fits the crime: (1) compare the gravity of the offense against the harshness of the penalty; (2) compare whether more serious crimes in the same jurisdiction are subject to the same penalty or to less serious penalties; and (3) compare whether sentences imposed for commission of the same
RICO provides severe penalties for violations of its provisions—jail, fines and forfeiture.\textsuperscript{83} Challengers to RICO’s forfeiture provisions mount an Eighth Amendment attack under two of the amendment’s three prongs—the Excessive Fines Clause and the Cruel and Unusual Punishments Clause.\textsuperscript{84} However, the arguments generally take the same form: the magnitude and scope of RICO forfeiture and other punishment meted out by the court, given that the predicate conviction may be only selling a few obscene videotapes or magazines, is grossly disproportionate to the offense.\textsuperscript{85}

Aside from capital punishment-related cases, Supreme Court jurisprudence in the Eighth Amendment arena is thin. In its first, and last, opinion ever to strike down a non-capital punishment as violative of the Eighth Amendment, the Court in Solem crime in other jurisdictions are more or less severe. \textit{Id.} at 292. However, the Court tempered this test with the admonition that the legislature was to be given “substantial deference” in its power to set punishment for crime. \textit{Id.} at 290.

83. \textit{See supra} notes 36-40 and accompanying text.


85. \textit{See, e.g.}, Alexander v. Thornburgh, 943 F.2d at 835-36; Pryba, 900 F.2d at 757.

It is argued that all Eighth Amendment cases, outside of the death penalty issue, reduce to an analysis of proportionality—whether the argument is based on the Cruel and Unusual Punishments Clause, the Excessive Fines Clause, or the Excessive Bail Clause. Brickey, \textit{supra} note 30, at 911-12. Brickey states:

The route to resolving excessive punishment issues outside the context of death penalty litigation is a relatively uncharted course. There is no definitive case law on the subject of what constitutes an excessive fine, and the Supreme Court has provided us with a small but incoherent body of decisions applying the cruel and unusual punishments clause to resolve eighth amendment challenges to arguably disproportionate prison terms. It is out of that cluster of cases that the proportionality analysis evolves. \textit{Id.}

With its recent decisions, \textit{infra} note 98, the Court settled Brickey’s threshold question of whether RICO forfeiture is a “fine” or a “punishment”; however, as she noted, it does not matter, since the Court has never stated how to address the content of what is an “excessive” fine. Brickey, \textit{supra} note 30 at 913.

Brickey concludes that the proportionality analysis in \textit{Solem} is probably the proper standard for gauging excessiveness. The Court “weighs the relative gravity of offense and the harshness of the penalty, and compares sentences imposed on other defendants in the same jurisdiction and compares sentences imposed for the same crime in other jurisdictions.” \textit{Id.} Additionally, the Court gives “substantial deference” to the legislature. \textit{See supra} note 82 and accompanying text. Brickey places great weight on the “substantial deference” element, since the Court has only once struck down a sentence on the ground that it was disproportionate. Brickey, \textit{supra} note 30, at 913 (discussing \textit{Solem} v. Helm, 463 U.S. 277 (1983) (striking down as disproportionate a sentence of life imprisonment for repeated nonviolent and relatively minor felonies)).
RICO v. Helm\textsuperscript{85} overturned a sentence based upon a South Dakota sentencing provision.\textsuperscript{87} Reminiscent of RICO, the provision stated that upon a third conviction of a certain degree the offender would receive a sentence of life in prison without parole.\textsuperscript{88} Although not evident in the holding, in Solem, the Court found that this extreme deprivation of liberty was disproportionate to the three relatively minor crimes the defendant committed, and as a result, overturned the sentence.\textsuperscript{89} Solem has come to stand for the proposition, as noted in the Alexander opinion, that the legislature is to be given substantial deference in its power to proscribe criminal conduct and set criminal sentencing.\textsuperscript{90}

The Supreme Court re-examined Solem's applicability to cases with sentencing less severe than life in prison without parole in Harmelin v. Michigan.\textsuperscript{91} Although the Court refused to strike down a Michigan state court sentence of life in prison for drug possession, only two justices agreed with the proposition first espoused in Solem, that proportionality review is not available for sentences less than life in prison without parole.\textsuperscript{92} A plurality of four members of the Harmelin Court supported a three-part test first enunciated in Solem to determine whether a given punishment violates the Eighth Amendment.\textsuperscript{93} The

\textsuperscript{86} 463 U.S. 277 (1983).
\textsuperscript{87} Id. at 281-82.
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 303.
\textsuperscript{90} Id. at 290 ("Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is per se constitutional.")
\textsuperscript{91} 501 U.S. 957 (1991) (Scalia, J., plurality opinion).
\textsuperscript{92} Id. at 994. Justice Scalia, writing for himself and Chief Justice Rehnquist, noted that "[s]evere, mandatory penalties may be cruel, but they are not unusual." Id. In Justice Scalia's words, "Solem was simply wrong." Id. at 965. Since only those two justices signed on to this part of the opinion, it would be incorrect to say that Solem's central holding was overturned.
\textsuperscript{93} Harmelin, 501 U.S. at 1021 (dissenting opinion of Justices White, Blackmun and Stevens); see also supra note 82 which sets forth the three factors of the test. To satisfy the Eighth Amendment, a "punishment must be tailored to a defendant's personal responsibility and moral guilt." Harmelin, 501 U.S. at 1021. Justice Marshall joined the dissenters in their main thesis, but chose to write separately to emphasize his consistent position that the death penalty (although not at issue here), was never constitutionally permissible. Id. at 1027.
remaining three justices saw Solem narrowed to a "gross disproportionality" test. 94

Reading the Harmelin decision broadly, the Court interprets the decision in Solem to hold that the Eighth Amendment minimally guarantees that a defendant’s punishment cannot be grossly disproportionate to the crime. 95 Thus, a RICO defendant hoping to invoke review of a forfeiture order under Harmelin would need to make a prima facie demonstration that the forfeiture is grossly disproportionate. 96 Because RICO forfeiture is merely a punishment, and not compensatory, 97 this threshold showing would seem to be quite high.

2. RICO Forfeiture and the "Excessive Fines" Clause

The Supreme Court provides some guidance in the area of proportionality with its recent holdings in Austin v. United States and Alexander v. United States that forfeiture, whether in a civil or a criminal context, is subject to the Eighth Amendment’s "excessive fines" limitation. 98 The Court’s opinions in Austin

94. Harmelin, 501 U.S. at 1001. Justices Kennedy, O’Connor and Souter wrote separately to state that they would narrow the three-part Solem test to a single prong asking whether a defendant’s sentence was grossly disproportionate to the crime. Id. at 997.

95. See State v. Bartlett, 830 P.2d 823, 826 n.2 (Ariz. 1992) (“The vast majority of federal and state courts that have assessed the validity of the Solem proportionality analysis in the wake of Harmelin have applied or assumed the validity of at least the gross disproportionality standard advocated by Justice Kennedy.”), cert. denied, 113 S. Ct. 511 (1992), and cases cited therein. The Arizona Supreme Court noted that “[a]pply[ing] the view of the Court [in Harmelin] is difficult when the Justices’ opinions are so diverse and expressed in five separate opinions.” Bartlett, 830 P.2d at 826.

96. See, e.g., Tart v. Massachusetts, 949 F.2d 490, 503 n.16 (1st Cir. 1991).


98. In the arena of forfeiture, the Supreme Court conclusively settled this issue in two cases handed down the same day: Austin v. United States, 113 S. Ct. 2801, 2812 (1993) (holding that Eighth Amendment’s Excessive Fines Clause applies to civil in rem forfeiture proceedings) and Alexander v. United States, 113 S. Ct. 2766, 2775-76 (1993) (holding that Eighth Amendment’s Excessive Fines Clause applies to criminal in personam forfeiture proceedings). Despite its firm pronouncement in this area, the Court did not define “excessivity,” preferring instead to leave this to the lower courts.

Prior to those decisions, the Fourth and Eighth Circuits had held that no proportionality review was required. See, e.g., Alexander v. Thornburgh, 943 F.2d 825, 835-36 (8th Cir. 1991), vacated on other grounds sub nom. Alexander v. United States, 113 S. Ct. 2766 (1993); United States v. Fryba, 900 F.2d 748, 757 (4th Cir. 1990), cert. denied, 498 U.S. 924 (1990). The Ninth Circuit, however, has held that a proportionality review might be required. Adult Video Ass’n, 960 F.2d at 791. This requirement, in the court’s opinion, stemmed not from the Eighth Amendment guarantee against
and Alexander allow, for the first time, forfeiture to trigger some sort of "excessivity" analysis. In Alexander, quoting Austin, the Court stated that "the Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, as punishment for some offense." Unfortunately, the Court did not state the standard for gauging excessivity, preferring to leave the development of that sort of review to the lower courts.

While it may be tempting to conclude that the Solem test of proportionality remains the proper means of analysis under either clause of the Eighth Amendment, this conclusion seems incorrect for two reasons: first, it would render either the Excessive Fines or the Cruel and Unusual Punishments Clauses superfluous by eliminating the distinction; and second, the Alexander Court suggested Solem's proportionality test was not the correct form of analysis. Thus, this would seem to call for a different analysis than that found in Solem and Harmelin, which were "gross disproportionality" tests emanating from the Eighth Amendment's Cruel and Unusual Punishments Clause.

III. ALEXANDER V. UNITED STATES

A. Facts

Ferris Alexander operated a number of bookstores, video stores and theaters, as well as a wholesale distributorship of books, magazines and videotapes, all of which were generally excessive punishment, but rather from the First Amendment's guarantee against suppression of expression by unusually severe penalties for marginally unprotected conduct. Id.

Thus, the Supreme Court has decided, for now, that RICO forfeiture is subject to the Eighth Amendment prohibition against excessive fines, meaning that some sort of review is required.


100. The Eighth Circuit has held that no proportionality review is required where the sentence is less than life in prison without parole. Alexander v. Thornburgh, 943 F.2d at 835-36. The Fourth Circuit has also held that no proportionality review is required. Pryba, 900 F.2d at 757.

101. The Court did note the distinction that "unlike the Cruel and Unusual Punishment Clause, which is concerned with matters such as the duration or conditions of confinement, "the Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, as punishment for some offense." Alexander v. United States, 113 S. Ct. at 2775 (quoting Austin, 113 S. Ct. at 2805-06).
involved in either the rental or sale of so-called "adult entertainment." In 1989, Alexander was charged with thirty-four counts of obscenity violations, three RICO counts for which the obscenity violations served as predicate offenses and four counts of violating the Internal Revenue Code. Following a jury trial, he was found guilty of seventeen obscenity counts, serving as predicates for three RICO convictions; in addition, he was found guilty of the four tax-related charges. The district court entered an order compelling Alexander to forfeit his wholesale and retail business, all the assets of the business, and nearly $9 million in cash. In addition to the forfeiture order, which produced an estimated $25 million gain in property for the federal government, the court sentenced

102. Petitioner's Brief at 8. Alexander's adult entertainment holdings consisted of thirteen retail outlets and a warehouse, located generally in the cities of Minneapolis and St. Paul in the State of Minnesota. Id.

103. Id. Alexander had prior convictions for obscenity violations. See United States v. Alexander, 498 F.2d 934 (2nd Cir. 1974) (refusing to set aside Alexander's New York conviction); United States v. Manarite, 448 F.2d 583, 586 (2nd Cir. 1971), cert. denied, 404 U.S. 947 (1971) (recalling Alexander's conviction in New York Federal Court for conspiracy and transportation in interstate commerce of obscene material for purposes of sale or distribution). However, he had not been prosecuted on obscenity charges in the jurisdiction of Minnesota since he successfully defended a suit in the mid-1970's. Petitioner's Brief at 8. From that time until the case at bar, federal prosecutors had prosecuted no obscenity-related cases in that jurisdiction. Id.

104. United States v. Alexander, No. CRIM.4-89-85, 1990 WL 117882 at *1. Specifically, the jury found Alexander guilty of the following: twelve counts of interstate transportation of obscene materials in violation of 18 U.S.C. § 1465; six counts of selling obscene material in violation of 18 U.S.C. § 1466; one count of RICO conspiracy in violation of 18 U.S.C. § 1962(d); two counts of substantive RICO activity in violation of 18 U.S.C. § 1962(a) and (c); one count of conspiracy to commit tax fraud in violation of 18 U.S.C. § 371; two counts of filing false tax returns in violation of 26 U.S.C. § 7206; and one count of using a false social security identification number in violation of 42 U.S.C. § 408(g)(2). Id. The obscenity convictions were based upon a jury's finding four magazines and three videotapes to be obscene. Alexander v. Thornburgh, 943 F.2d 825, 829 (8th Cir. 1991), vacated sub nom. Alexander v. United States, 113 S. Ct. 2766 (1993). The four tax-related convictions (including the false social security number charge) were not related to, and did not serve as a predicate for the RICO convictions.

105. Respondent's Brief at 10. The forfeiture order included "film projectors, television monitors, video cassette players, cash registers, shelves, office equipment, and three company vehicles . . . ", as well as the inventory of "untold thousands of books, magazines, and videotapes" representing Alexander's communicative business. Id. at 9.

106. Petitioner's Brief at 10. The estimate of $25 million represented Alexander's estimate of the combined value of the businesses as going concerns plus the value of their "hard" assets as well as the actual cash forfeiture. Id.
the then 73-year-old Alexander to six years in prison, and ordered him to reimburse the government for the costs of prosecution, incarceration, and supervised release.\textsuperscript{107}

Alexander appealed the forfeiture order to the Eighth Circuit Court of Appeals, which subsequently affirmed the district court.\textsuperscript{108} On that appeal, Alexander argued that the forfeiture order violated both his First Amendment right to freedom of expression\textsuperscript{109} and his Eighth Amendment right not to be subjected to cruel and unusual punishments or excessive fines.\textsuperscript{110} The court struck down Alexander's First Amendment argument on the grounds that the penalty was a subsequent punishment for engaging in trafficking in obscenity, rather than a prior restraint on that activity.\textsuperscript{111} The court further held that, because Alexander forfeited only assets "tainted" by his racketeering activity, the forfeiture order was not an impermissibly overbroad restraint on speech.\textsuperscript{112} Finally, the court rejected Alexander's Eighth Amendment argument of disproportionate punishment based on pre-existing Eighth Amendment doctrine and case law, holding that the amendment "does not require a proportionality review of any sentence less than life imprisonment without the possibility of parole."\textsuperscript{113}

The United States Supreme Court granted Alexander's petition for certiorari, and in granting the writ it agreed to review both Alexander's First and Eighth Amendment challenges to RICO forfeiture.\textsuperscript{114}

\begin{enumerate}
\item Alexander v. United States, 113 S. Ct. at 2770. In his brief, Alexander estimated the costs to be reimbursed to the government to be over $200,000. Petitioner's Brief at 6.
\item Id. at 834-35.
\item Id. at 835-36.
\item Id. at 834.
\item Id. at 835.
\item Id. at 836 (quoting United States v. Pryba, 900 F.2d 748, 757 (4th Cir. 1990)).
\item Alexander v. United States, 112 S. Ct. 3024 (1992). The Court certified two questions on appeal:
\begin{enumerate}
\item Does RICO forfeiture constitute prior restraint of the kind condemned in Near v. Minnesota, 283 U.S. 697 (1931), or otherwise violate First Amendment, when used to close $25 million chain of bookstores, video stores, and theaters, to confiscate all their property including five years' proceeds, and to burn their inventories, solely on basis of seven obscene videotapes and magazines?
\item Does forfeiture of $25 million media business, in combination with six-year prison term and fines in excess of $200,000, all as punishment for
\end{enumerate}
\end{enumerate}
B. Holding

The United States Supreme Court vacated the Eighth Circuit Court of Appeals' judgment and remanded the case to the Eighth Circuit for further proceedings.\(^{115}\)

The Court separated its analysis of Alexander's First Amendment challenge into four parts. First, the Court characterized the application of RICO's forfeiture provision to this case as a constitutionally permissible subsequent punishment, rather than an impermissible prior restraint.\(^{116}\) Second, the Court held that severe criminal penalties and forfeiture, meted out either together or separately for obscenity law violations, do not contravene the First Amendment.\(^{117}\) Third, because RICO does not criminalize speech protected by the Constitution, the Court found that RICO is not impermissibly overbroad.\(^{118}\) Finally, the Court found that the threat of forfeiture is no more "chilling" to free speech than the threat of jail or fines, the latter being constitutionally permissible penalties for trafficking in obscenity.\(^{119}\)

The Court\(^{120}\) divided Alexander's Eighth Amendment challenge into a two-part analysis. First, it agreed with the appellate court's holding that RICO forfeiture does not violate the Eighth Amendment proscription against cruel and unusual punishments.\(^{121}\) The Court did not review RICO forfeiture under the \textit{Solem} disproportionality test, but rather seemed to

\textsuperscript{115} Alexander v. United States, 113 S. Ct. 2766, 2776 (1993).

\textsuperscript{116} Id. at 2770-73.

\textsuperscript{117} Id. at 2773-75.

\textsuperscript{118} Id. at 2773-75.

\textsuperscript{119} Id.

\textsuperscript{120} Chief Justice Rehnquist wrote the opinion, which was joined by Justices White, O'Connor, Scalia and Thomas. Id. at 2769.

\textsuperscript{121} Id. at 2775-76.
accept the lower court's holding that no review is necessary for a sentence less than life in prison without parole.

However, in the second part of this sub-analysis the Court found that since RICO forfeiture is a monetary punishment equivalent to a "fine," the appellate court should have continued its Eighth Amendment analysis by examining whether RICO forfeiture in this case was "excessive" in violation of the Eighth Amendment's proscription against excessive fines. 122 Because the appellate court failed to analyze the forfeiture under this standard, the Court vacated the Eighth Circuit's judgment and remanded the case for a determination of whether the forfeiture was "excessive." 123 After subsequent review, the Eighth Circuit remanded the case to the district court. 124

C. Supreme Court's Analysis

The Supreme Court dealt first with Alexander's First Amendment challenge. 125 Alexander's central theme in this argument was that the forfeiture order had the practical effect of a prior restraint, as condemned by the Court in Near v. Minnesota ex rel. Olson. 126 The Court distinguished the forfeiture order, which was punishment for past acts, from a prior restraint, which enjoins future conduct. 127 The Court noted that the forfeiture order in no way enjoined Alexander from future communicative activity, nor did it require him to seek

122. Id. at 2776.
123. Id.
124. United States v. Alexander, 32 F.3d 1231, 1237 (8th Cir. 1994); see supra note 115.
126. Id. at 2770-71. In Near, the Court struck down an injunction against a newspaper that had printed articles in violation of a state nuisance statute. Near v. Minnesota ex rel. Olson, 283 U.S. 697, 722-23 (1931). The trial court had permanently enjoined the publisher from any future "malicious, scandalous and defamatory" publication. Id. at 701-02, 705.
government approval before engaging in such conduct.\(^{128}\) Thus, because the forfeiture order imposed no legal prohibition on Alexander's future expressive activity, it could not be a prior restraint.\(^{129}\) Though Alexander no longer had the means to resume his business, in the Court's opinion, this situation did not legally stop him from doing so.\(^{130}\)

The line of cases relied upon by both the government and Alexander in support of their respective arguments regarding prior restraint and involving obscenity were characterized by the Court as cases where the "[g]overnment had seized or otherwise retrained [sic] materials suspected of being obscene without a prior judicial determination that they were in fact so."\(^{131}\) In the present case, noted the Court, Alexander did not forfeit expressive materials because of their content, but because of their direct relationship to Alexander's past racketeering activity.\(^{132}\) Further, the government had not impermissibly sidestepped "requisite procedural safeguards";\(^{133}\) it had seized

\(^{128}\) Alexander v. United States, 113 S. Ct. at 2771. The Court stated, perhaps a bit disingenuously:

> Assuming, of course, that [Alexander] has sufficient untainted assets to open new stores, restock his inventory, and hire staff, petitioner can go back into the adult entertainment business tomorrow, and sell as many sexually explicit magazines and videotapes as he likes, without any risk of being held in contempt for violating a court order.

\(^{129}\) Id.

\(^{130}\) Id.

\(^{131}\) Id. at 2771-72. In support of this proposition, the Court cited Vance v. Universal Amusement Co., 445 U.S. 308, 315-17 (1980) ("[P]rior restraints would be more onerous and more objectionable than the threat of criminal sanctions after a film has been exhibited, since nonobscenity would be a defense to any criminal prosecution."); Roaden v. Kentucky, 413 U.S. 496, 501-06 (1973) (seizing allegedly obscene film without warrant was unreasonable, because prior restraint of the right of expression "calls for a higher hurdle in the evaluation of reasonableness"); A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 210-11 (1964) (holding that seizure of allegedly obscene books was constitutionally deficient, since all copies of the allegedly obscene titles were seized and plaintiff was not afforded a hearing on the question of the obscenity, even of the seven books filed with the information); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70-72 (1963) (holding that administrative commission's ban on display or sale of certain "objectionable" materials to minors constituted prior restraint, since the commission was not a judicial body and did not follow judicial determinations of which publications could be lawfully banned); and Marcus v. Search Warrant of Property at 104 East Tenth Street, Kansas City, Missouri, 367 U.S. 717, 729-38 (1961).

\(^{132}\) Alexander v. United States, 113 S. Ct. at 2772.

\(^{133}\) The Court has condemned practices of the government that, though procedurally valid, substantively restrain free speech. See, e.g., Speiser v. Randall, 357 U.S. 513, 526 (1958) (striking down a statute that "produce[d] a result which the State
the materials only after the RICO conviction.\textsuperscript{134} The Court concluded this portion of its analysis by reaffirming the "bright line" distinction between prior restraint and subsequent punishment as simply one of timing.\textsuperscript{135}

Having dealt with Alexander's prior restraint argument, the Court quickly dispensed with his First Amendment related arguments that RICO forfeiture was either constitutionally "overbroad," gathering both protected and unprotected speech in its sweep, or worked a "chilling" effect on his right to engage in free speech.\textsuperscript{136} The Court noted that, because RICO does not "criminalize constitutionally protected speech," there was no could not command directly," that is, punishing marginally protected speech). In \textit{Speiser}, the appellants were denied tax exemptions provided by state statute because they refused to sign an oath that they did not advocate the overthrow of the federal or state government. \textit{Id.} at 515. The California Supreme Court upheld this statute on the ground that the exemption was to be denied only to those citizens who engaged in criminal, and unprotected, speech. \textit{Id.} at 516-17. The Court held that, because the line separating lawful from unlawful speech in this "political" area was "finely drawn," \textit{Id.} at 525, the possibility of deterring free speech (given the punishment) was great enough to effectively be a means of impermissibly controlling protected speech. \textit{Id.} at 526.

\textsuperscript{134} Alexander v. United States, 113 S. Ct. at 2772. Here, the Court took pains to distinguish the case at hand from \textit{Fort Wayne Books}, Inc. v. Indiana, 489 U.S. 46 (1989). In \textit{Fort Wayne Books}, the Court struck down pre-trial seizure of expressive materials presumptively forfeitable under RICO where the trial court had found only probable cause that a RICO violation had occurred. \textit{Id.} at 66. Here, noted the Court, Alexander had "a full criminal trial" that established "beyond a reasonable doubt" that Alexander had violated RICO and triggered its forfeiture provisions. Alexander v. United States, 113 S. Ct. at 2772.

\textsuperscript{135} Alexander v. United States, 113 S. Ct. 2766, 2773 (1993). The Court noted that a prior restraint "\textit{forbid[s]} certain communications when issued in advance of the time that such communications are to occur." \textit{Id.} at 2771 (quoting MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, at 4-14 (1984) (emphasis added by the Court)). Examples of "classic" prior restraints, noted the Court, include temporary restraining orders and permanent injunctions—these are court orders that "\textit{forbid} speech activities." \textit{Id.} Somewhat tautologically, the Court concluded that, since RICO forfeiture orders forbid no activity, forfeiture could not be a priori a prior restraint. \textit{Id.}

It has been pointed out that this argument follows an incorrect interpretation of the RICO statutory scheme; RICO forfeiture, 18 U.S.C. § 1963, must be distinguished from the actual RICO transgression, 18 U.S.C. § 1962(c). Amanda M. McGovern, Comment, \textit{Obscenity Predicates, RICO, and the First Amendment} 9 U. MIAMI ENT. & SPORTS L. REV. 301, 326-29 (1992). McGovern points out that, had the Court focused not on forfeiture but rather on criminalizing the operation of an expressive business, the statute would have been found unconstitutional, and the forfeiture issue therefore would not have been reached. \textit{Id.} at 329-30.

\textsuperscript{136} Alexander v. United States, 113 S. Ct. at 2773-75.
issue of overbreadth. Further, it rejected Alexander's contention that RICO's severe consequences impermissibly "chilled" his ability to engage in marginally protected expressive activity. It noted that "forfeiture has no more of a chilling effect on free expression than the threat of a prison term or a large fine," both of which are constitutionally permissible statutory punishments for obscenity violations.

In closing its First Amendment analysis, the Court noted that sanctions having an incidental effect on expressive activity are subject to "First Amendment scrutiny." However, since obscenity is not protected by the First Amendment, it enjoys no such scrutiny, so it presumably follows that sanctions for obscenity offenses need not be narrowly tailored to minimize the impact on protected speech.

The Court dealt last with Alexander's Eighth Amendment challenge. In the context of criminal forfeiture, the Court found that the Eighth Amendment prohibits both "cruel and unusual punishments" and "excessive fines." Without further analysis, the Court assented to the Eighth Circuit's opinion that Alexander's forfeiture was not "cruel and unusual punish-

137. *Id.* at 2774. RICO, as noted earlier, does not create new crimes, but merely adds penalties for repeated commissions of existing crimes. *See supra* notes 21-24 and accompanying text.

Of course, obscenity can be constitutionally criminalized. *See* Miller v. California, 413 U.S. 15, 24 (1973); *supra* notes 46-48 and accompanying text.


139. *Id.* at 2774-75. "First Amendment scrutiny," it is presumed, is equal to strict scrutiny, although why the Court did not choose to use the term of art it usually uses in the First Amendment arena is not known. Under the doctrine of "strict scrutiny," the Court will only uphold a statute that is narrowly tailored to advance a compelling state interest. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 381-82 (1968). The Alexander Court held that "First Amendment scrutiny" will be applied to sanctions against (1) "conduct with a significant expressive element"; or against (2) nonexpressive activity, with the "inevitable effect of singling out expressive activity. . . ." Alexander v. United States, 113 S. Ct. at 2775. The Court conceded to Alexander that RICO punishes "conduct with a significant expressive element," but nonetheless concluded that because obscenity is not protected by the First Amendment, it evidently does not enjoy the protection of "First Amendment scrutiny." *Id.*


141. *Id.* at 2775-76.

142. *Id.*
ment,” thus validating the lower court’s interpretation of *Solem* to decline review where the sentence is less than life in prison without parole. However, the Court stated that the appellate court had erroneously neglected to analyze whether the forfeiture was an “excessive penalty” under the Eighth Amendment’s second prong, covering any exercise of government power “to exact payment, whether in cash or in kind, as punishment for some offense.” The Court elected to remand Alexander’s appeal, asking the Eighth Circuit to address whether the forfeiture was “excessive” within the meaning of the Eighth Amendment, but without providing the lower court any guidelines for determining “excessivity.”

The dissent, on the other hand, was not satisfied with merely a remand on the Eighth Amendment issue. Justice Kennedy, calling the majority opinion a “grave repudiation of

143. *Id.* at 2775.

144. *Id.*; see also *Austin v. United States*, 113 S. Ct. 2801, 2812 (1993) (holding that Eighth Amendment’s Excessive Fines Clause applies to civil in rem forfeiture proceedings). The *Austin* case, though reported after the case at hand, was decided the same day, and in fact the Court in *Alexander* relied upon *Austin* for its conclusion that in personam criminal forfeiture is also subject to the Eighth Amendment proscription against excessive fines. *Alexander v. United States*, 113 S. Ct. at 2775-76.

The Court’s opinion in *Austin* has been characterized as “a dramatic extension of the excessive fines clause of the Eighth Amendment.” David O. Stewart, *Supreme Court Report*, A.B.A. J., Oct. 1993, at 58. In *Austin*, the defendant Austin had brought two ounces of cocaine from his mobile home to the site of a drug sale. *Austin*, 113 S. Ct. at 2803. Upon his conviction for violating South Dakota’s drug statutes, the United States sought forfeiture of, inter alia, the mobile home as an in rem instrumentality of the crime. *Id.* In resolving a conflict among the circuit courts, the Court held that the Eighth Amendment prohibition against excessive fines applied to in rem civil forfeiture. *Id.* at 2812. The Court remanded the case for a determination of what factors “should influence a decision” as to what constitutes an excessive fine, as well as for a determination as to whether Austin was fined excessively. *Id.*

145. *Alexander v. United States*, 113 S. Ct. 2766, 2776 (1993). Although the Court offered the circuit courts no guidance on the determination of excessivity, it did state that in Alexander’s case, this should be determined in light of his having created and managed an “enormous racketeering enterprise,” engaging in “extensive criminal activities” conducted “over a substantial period of time.” *Id.* at 2776. To the extent that the Court sincerely intended the Eighth Circuit to address the question of excessivity “in the first instance,” the Court has apparently stated two elements of an excessivity test: (1) how extensive the criminal activity was; and (2) how long it was operated. *Id.*

146. Justice Kennedy filed the dissenting opinion, in which Justice Blackmun and Justice Stevens joined, and in Part II of which Justice Souter joined. *See supra* note 3.
First Amendment principles," attacked the opinion on four fronts.\textsuperscript{147}

1. Forfeiture "cannot be equated with traditional punishments such as fines and jail terms";\textsuperscript{148}
2. Forfeiture gives the government unrestrained power;\textsuperscript{149}
3. Forfeiture increases the danger of government censorship;\textsuperscript{150} and
4. Forfeiture is a proxy for government censorship.\textsuperscript{151}

In summary, the dissenter believed that the forfeiture of Alexander's presumptively protected inventory, absent a finding of obscenity, violated the First Amendment because the predicate offense was speech-related.\textsuperscript{152} Alexander was punished for past speech-related violations by removing his capacity to communicate and violate the laws again in the future. This is essentially the type of prior restraint that the Court condemned in \textit{Near}.\textsuperscript{153}

IV. ANALYSIS

A. Introduction

This analysis begins by revisiting the Court's First Amendment jurisprudence on RICO forfeiture in the context of an obscenity-related predicate offense. Then this analysis revisits the Court's Eighth Amendment jurisprudence in the same context. In both instances, it will show that the Court's opinion in \textit{Alexander} is likely only a transitional point in terms of both First and Eighth Amendment jurisprudence. Finally, this analysis will conclude with a prediction as to the direction that the Court is headed.

\textsuperscript{147} Id. at 2776. See Michelle Madden, Alexander v. United States: Can RICO's Forfeiture Provisions Survive Alexander's Challenge?, 20 J. CONTEMP. L. 180, 185 (1994).
\textsuperscript{148} Alexander v. United States, 113 S. Ct. at 2777.
\textsuperscript{149} Id. at 2779.
\textsuperscript{150} Id. at 2778.
\textsuperscript{151} Alexander v. United States, 113 S. Ct. 2766, 2778 (1993).
\textsuperscript{152} Id. at 2784.
\textsuperscript{153} Near v. Minnesota \textit{ex rel.} Olson, 283 U.S. 697 (1931).
B. First Amendment

In Alexander, the defendant's counsel asserted the standard First Amendment defenses to an obscenity charge. 154 While it is true that obscenity is a subset of all speech, it is not true that under current law obscenity enjoys less protection than the remaining elements in that subset. The definition of obscenity is judicially crafted and essentially represents that subset of speech that enjoys no First Amendment protection, since by definition, obscenity is unprotected speech. 155 Thus, under existing First Amendment jurisprudence, Alexander conceded his First Amendment-based defense when the trial court jury found that he had committed violations of the obscenity statutes. The only way he could win was to convince the Court to differentiate the crime of dealing in obscene matter from the RICO predicate offense encompassing the same behavior, an invitation which only the dissent accepted. 156

The key distinction between the nominal offense and the predicate offense is in the degree and nature of the punishment. Both federal obscenity statutes and the RICO statute provide for forfeiture as a permissible punishment. 157 However, they differ in two significant ways: first, the nominal offense provides for permissive forfeiture, while the predicate offense provides for mandatory forfeiture; and second, the nominal offense provides for specific forfeiture of assets, while the predicate offense provides for general forfeiture of assets. 158 RICO was drafted to provide for general forfeiture in order to attack the economic base supporting the criminal enterprise. 159 Traditional forfeiture provisions, though narrowly tailored, seemed to attack only the symptoms and not the disease. 160

154. See supra notes 70-72 and accompanying text.
156. See supra notes 145-51 and accompanying text.
158. Id.
159. See supra part II.A.
The point here is that the supposedly identical crime (by statutory definition) of dealing in obscenity can result in dramatically different punishments depending upon the prosecutor's choice of prosecution. Since the punishments are different, it appears fallacious to argue that the crimes are identical. Alexander did not seize upon this distinction. He instead invited the Court to focus on the fact that the identical crime could have different punishments.\(^\text{161}\) At this point, his argument was lost, since the Court could only accept his defense by setting aside the existing First Amendment indifference to obscene communication. Further, the Court, armed with an arsenal of doctrine that had steadfastly allowed no quarter for obscenity, dismissed Alexander's First Amendment-based defense merely by reliance on existing precedent.\(^\text{162}\)

Had Alexander instead focused on convincing the Court that he had been convicted of a newly-defined crime involving obscenity, he might have presented his arguments in a different cast. Instead of positing RICO as an unconstitutional provision of sentence enhancement, he might have enjoyed more success by examining the statute as a government exercise in overreaching constitutional bounds to attack speech not otherwise vulnerable to prosecution. This theory is explored below.

In the area of prior restraint, the basic rule is that sexually explicit speech may not be restrained without a prior judicial determination that the speech is unprotected obscene communication.\(^\text{163}\) By statutory definition, however, sexually explicit communicative materials, whether or not obscene, are forfeited to the government without such a prior finding.\(^\text{164}\) The government's position in Alexander, supported by the RICO statutory provisions, was deceptively simple and inviting: the non-obscene, sexually explicit material was not forfeited for its communicative content, but rather for its connection, or nexus, to the offending enterprise.\(^\text{165}\) Neither the government's argument nor the Court's analysis truly looked for a nexus; there was absolutely no evidence to show that dollar for dollar, the expressive but protected materials were in whole or in part

\(^{162}\) Id.
\(^{163}\) Id. at 2771.
\(^{165}\) Alexander v. United States, 113 S. Ct. at 2772.
tainted by the unprotected obscene materials. At a minimum, this called for a demonstration that obscene materials had overwhelmingly tainted non-obscene materials. On the contrary, Alexander's massive forfeiture was triggered by an almost inconsequential (by comparison) obscenity conviction. This forfeiture of expressive materials was accomplished without regard for its effect upon constitutionally protected speech. In fact, this dichotomy literally begs for an investigation into government motive, to which this analysis momentarily digresses.

It has never been questioned that RICO's purpose is to decimate or destroy the criminal enterprise violating its statutory provisions.\textsuperscript{166} Whereas this motive is generally constitutionally neutral, the neutrality crumbles for two related reasons: first, in such a context, this purpose is unacceptable as a means of prior restraint; and second, it elevates form over substance in order to provide a means for the government to attack otherwise protected speech. The purpose behind RICO is not punishment;\textsuperscript{167} this could be accomplished by seeking a conviction under the nominal obscenity offense. Instead, the purpose is suppression of the offender's conduct.\textsuperscript{168} This is acceptable if the offending conduct is murder-for-hire, but cannot be so when the offending conduct implicates speech. As a final word on the subject of motive, the government's purpose in seeking Alexander's conviction was clearly to destroy his stock of sexually explicit materials, whether or not protected by the First Amendment.\textsuperscript{169} The store of communicative materials was destroyed without regard for its content, and well before Alexander had a chance to exhaust his route of appeals.\textsuperscript{170} The government's quick response to the court forfeiture order suggested another motive—to remove expressive materials with which it did not

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\item\textsuperscript{166} See sources cited supra note 22 and accompanying text.
\item\textsuperscript{167} See supra note 23 and accompanying text. But see supra note 97 and accompanying text (stating that RICO forfeiture is a punishment).
\item\textsuperscript{168} See supra note 22 and accompanying text.
\item\textsuperscript{169} Alexander v. United States, 113 S. Ct. 2766, 2779, 2785-86 (1993) (Kennedy, J. dissenting).
\item\textsuperscript{170} Id. at 2785-86. Had the government's purpose been to diligently eradicate pornography while at the same time safeguarding protected expression, it could have analyzed the forfeited expressive materials, destroyed the obscene materials (perhaps with the cooperation of a lay jury to opine on whether materials were obscene), and sold the merely sexually expressive materials. Since the latter enjoyed constitutional protection, resale would have served a two-fold purpose of enlarging the public fisc and encouraging the diversity of communication in the community.
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agree from public circulation, regardless of the constitutional constraints.

At its heart, RICO criminalizes expressive materials by linking them to speech violations. As the dissent in Alexander makes clear, this clearly violates the First Amendment, and is without precedent; such materials may be forfeited or otherwise removed from the public’s reach only after having been determined to be unlawful. The majority in Alexander finds this crime to be simply a nexus to the criminal defendant; under RICO, these materials were somehow tainted by the predicate offense. This argument is sound if the forfeited item is illegal narcotics, or an instrument of the crime such as a vehicle used to transport those drugs, or even a set of encyclopedias bought with the profits from the sale of those drugs. However, this argument is not sound where the assets forfeited are expressive materials made illegal only because of past speech violations; in essence, future speech is enjoined because of past speech violations.

C. Eighth Amendment

The Alexander opinion’s effect on Eighth Amendment law is notable both for what it says and for what it does not say. Alexander is important because, taken together with Austin, the decision stands for the proposition that the Eighth Amendment’s protection against excessive fines includes a review of forfeiture orders. The various circuit courts’ quick dismissal of Eighth Amendment challenges to forfeiture, triggered by RICO or otherwise, can no longer be justified by noting that the punishment fell short of life in prison without parole.

Neither Alexander nor its counterpart Austin set forth what an “excessive fines” analysis should look like. In Alexander, the Court helpfully suggests that the forfeiture should be considered “in light of the extensive criminal activities which petitioner

171. Id. at 2778.
172. Id.
173. Id. at 2772 (reasoning that RICO forfeiture “was not a prior restraint on speech, but a punishment for past conduct”).
174. Id. at 2784.
175. See supra note 98 and accompanying text.
176. See supra note 98 and accompanying text.
apparently conducted . . . over a substantial period of time." Thus, this amorphous standard seems to include some kind of balancing test, placing the forfeiture on one side of the scale, and on the other the magnitude of the racketeering offense, both considered as to scope and time.

The foregoing analysis does little to distinguish the Eighth Amendment's Excessive Fines Clause from the "grossly disproportionate" test under the Eighth Amendment's Cruel and Unusual Punishments Clause. Although these two clauses must stand for different things, it may be that, in fact, they embrace different rights, embodied by the same test: the Cruel and Unusual Punishments Clause applies to prison sentences equal or greater than life in prison without parole, while the Excessive Fines Clause applies to punishments outside of prison sentences, such as fines and forfeitures. Although this conclusion must await ratification of the Court, it is consistent with both the Court's opinion in Alexander, prior case law, and judicial interpretation.

D. The Future

As noted in the beginning of this paper, the Court's refusal to overturn Alexander's conviction on First Amendment grounds

178. Alexander v. United States, 113 S. Ct. at 2776. Justice Souter concurred in this part of the opinion. Id.
179. This would be consistent with the Court's position in Alexander v. United States, 113 S. Ct. 2766, 2775 (1993). See also supra notes 98-99 and accompanying text.
180. See Harmelin v. Michigan, 501 U.S. 957 (1991) (holding that imposition of mandatory sentence of life in prison without possibility of parole on conviction of possessing more than 650 grams of cocaine, without considering mitigating factors, did not constitute cruel and unusual punishment); see also Solem v. Helm, 463 U.S. 277 (1983); supra note 82.
181. The United States Department of Justice has already responded to the Alexander and Austin opinions in the latest revision of its Asset Forfeiture Manual. Forfeiture Manual Signals Help For Victims, PRENTICE HALL LAW AND BUSINESS, at 2-4 (Sept. 6-20, 1993). The Department of Justice has apparently taken the position that these cases have very narrow applicability, applying to forfeiture of only so-called "facilitating property." Id. at 3. On the other hand, the Department of Justice maintains that the loss of criminally-obtained proceeds and profits, although certainly forfeited, is outside the ambit of the Court's ruling and of the Eighth Amendment. Id. Furthermore, in the realm of "facilitating property," the Department of Justice has taken the position that "excessive" merely means "incalculable," and so the Court's pronouncements are generally not relevant in most cases. Id. Thus, the Court's ambiguity and unwillingness to set a clear test of excessivity in Austin and Alexander foreshadows further litigation on the question of what protections the Eighth Amendment offers regarding forfeiture and fines.
enjoyed a slim majority,\textsuperscript{182} a majority that was lost when Justice White retired and Justice Ginsburg was appointed to the Court. Ginsburg has been labelled as "the ultimate centrist," but also labelled as "hard to label."\textsuperscript{183}

On the specific issues of RICO, forfeiture and the First Amendment, Ginsburg's time on the District of Columbia Circuit Court of Appeals provides little insight into her position on these topics. However, Ginsburg appears willing to grant litigants access to courts,\textsuperscript{184} which can only work to the advantage of the next party to challenge a RICO obscenity forfeiture order. \textit{Alexander} represented the Court's first look at RICO forfeiture in an obscenity context. The Court is likely to revisit this issue on appeal in the near future for two reasons: first, the boundaries of the Excessive Fines Clause have yet to be delimited; and second, at least four justices were clearly dissatisfied with the majority opinion.

In the future, the question will be whether Justice Ginsburg follows the strict constructionist lead of Justice Scalia, a fellow District of Columbia Circuit Court of Appeals alumnus, or whether she opts for the more facilitative interpretation espoused by the Court's centrists. It has been noted that Justice Ginsburg rarely dissents, and then only to protect a litigant's right of access to the courts.\textsuperscript{185} On the other hand, she has been willing to use the bench as a means of focusing and pressing the evolution of law in new areas, which is different from using the bench to make new law.\textsuperscript{186} This is where opponents of RICO forfeiture in the obscenity context stand the best chance of convincing Justice Ginsburg to join the \textit{Alexander} dissenters. As Justice Kennedy pointed out, when writing for the dissenters, forfeiture of future expressive capability, triggered by past speech violations, has historically been deemed unconstitutional; RICO forfeiture is merely a new way of getting around

\begin{itemize}
\item \textsuperscript{182} See supra note 5.
\item \textsuperscript{183} Ginsburg's Opinions Reveal Willingness to Grant Access to Litigants, PRENTICE HALL LAW AND BUSINESS, at 1 (Aug. 1993).
\item \textsuperscript{184} Id.
\item \textsuperscript{185} Id. at 3.
\item \textsuperscript{186} Doe v. Dominion Bank of Wash., N.A., 963 F.2d 1552, 1559-60 (D.C. Cir. 1992) (Ginsburg, J.) (holding that a commercial landlord must exercise reasonable care to protect tenants from foreseeable criminal conduct occurring in common areas within the landlord's control).
\end{itemize}
the constitutional prohibition.187 If the Court has never before found such a constitutional problem in the obscenity context, as loudly argued by Chief Justice Rehnquist,188 it is only because this area is a new and evolving area of law. The Court in this arena has been willing to stand for less and less interference with First Amendment rights. It denied certiorari in United States v. Pryba189 in 1990, and on essentially the same facts it commanded a bare majority against the petitioner in Alexander. With Justice Ginsburg’s assistance, the next time the Court hears this issue, the First Amendment should prevail.

V. CONCLUSION

Petitioner Alexander fought “the law” on constitutional grounds, which is the hardest fight to win. He won a minor victory on the Eighth Amendment battlefield; minor because it was not really a victory but a remand, and one that most likely will go against him or merely decrease the enormous forfeiture order from “excessive” to one that merely leaves him insolvent. He lost on the major front, the First Amendment challenge that would have resulted in a total victory had he triumphed. However, in that defeat lies the key to a future court victory against RICO forfeiture in an obscenity context: four justices already agree that forfeiture of expressive materials without a judicial determination of obscenity is per se unconstitutional. By extension, those justices recognize that RICO’s statutory scheme is inherently at odds with a predicate offense involving expressive conduct. It only remains for the next appellant to present the right combination of crime and punishment to convince the newest justice to join the dissenters, to find the First Amendment defeating this back-door challenge.

187. See supra text accompanying notes 161-62.