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## Constitutional Law - Obscenity Not Protected by the First Amendment

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## CASE NOTES

### CONSTITUTIONAL LAW—OBSCENITY NOT PROTECTED BY THE FIRST AMENDMENT

Roth conducted a business in New York in the publication and sale of books, photographs and magazines. He used circulars and advertising matter to solicit sales. He was convicted on four counts of a twenty-six count indictment charging him with mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute.<sup>1</sup>

Alberts conducted a mail order business. He was convicted on a complaint charging him with lewdly keeping for sale obscene and indecent books, and with writing, composing and publishing an obscene advertisement of them, in violation of the California Penal Code.<sup>2</sup> The Supreme Court of the United States held that obscenity is not within the area of constitutionally protected speech or press. *Roth v. United States and Albert v. California*, 354 U.S. 476 (1957).

Prior to the instant cases there was dictum but no square holding by the Supreme Court that obscenity is not protected by the First Amendment.<sup>3</sup>

In the instant case the majority opinion of the Supreme Court stated that "the dispositive question is whether obscenity is utterance within the area of protected speech and press"<sup>4</sup> and held "that obscenity is not within the area of constitutionally protected speech or press."<sup>5</sup>

The main constitutional issue<sup>6</sup> in *Roth* was whether the statute violates the provision of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The primary constitutional question propounded in the *Alberts* case was whether the

<sup>1</sup> 18 U.S.C.A. § 1461 (1950).

<sup>2</sup> Cal. Penal Code Ann. (West, 1955) § 311.

<sup>3</sup> E.g., *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571, 572 (1942); *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

<sup>4</sup> *Roth v. United States and Albert v. California*, 354 U.S. 476, 481 (1957).

<sup>5</sup> *Ibid.*, at 485.

<sup>6</sup> Aside from the primary constitutional questions, objection to the statutes as being too vague to support conviction for crime, and, in *Roth*, whether the power to punish speech and press offensive to decency and morality is in the states alone so that the federal statute violates the Ninth and Tenth Amendments, and, in *Alberts*, whether by enacting the federal obscenity statute under the power delegated by Article I to establish post offices and post roads the federal government had preempted the regulation of the subject matter, were raised and disposed of.

obscenity provisions of the California Penal Code invade the freedoms of speech and press as they are incorporated into the Due Process clause of the Fourteenth Amendment.

The Court delivered its opinion based on the premise that there was no issue presented in either case concerning whether or not the material involved was obscene. Therefore, as far as their definition of the term which they held to be unprotected by the Constitution, the Court considered the matter as divorced from the fact situations involved. They stated that "all ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests."<sup>7</sup> Obscenity has been held to be utterly without redeeming social importance.<sup>8</sup> The Court defined obscene material to be "material which deals with sex in a manner appealing to prurient interest."<sup>9</sup> This, of course, means the material, taken as a whole, is appealing to prurient interest.<sup>10</sup>

Further, the decision states that in view of the holding that obscenities are not protected speech, it need not be shown that the material will create a clear and present danger of antisocial conduct or will probably induce its recipients to such conduct. As stated by Mr. Justice Douglas in the dissenting opinion of the instant case, "By these standards punishment is inflicted for thoughts provoked, not for overt acts nor antisocial conduct."<sup>11</sup> This, the dissent goes on to state, drastically curtails the First Amendment. As to the greater harm of impinging upon our rights of freedom of speech and of the press, the following is pertinent:

<sup>7</sup> Authority cited note 4 supra at 484. As to the limitations on liberty of the press which have been recognized in prior decisions, see authority cited note 10 infra.

<sup>8</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>9</sup> 354 U.S. 476, 487 (1957). For definition of "prurient" the Court cites Webster's New International Dictionary, (2d ed., 1949). Also: Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957).

<sup>10</sup> The old rule of *Regina v. Hicklin*, [1868] 3 Q.B. 360, allowed material to be judged by the effect of an isolated excerpt on a particularly susceptible person. In *United States v. Kennerly*, 209 F.119, 120, 121 (S.D. N.Y., 1913), Justice L. Hand expressed his doubt as to this standard by stating: "I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses." In *United States v. Dennett*, 39 F.2d 564 (C.A. 2d, 1930), 76 A.L.R. 1092 and *United States v. One Book called "Ulysses,"* 5 F.Supp. 182 (S.D. N.Y., 1933), aff'd 72 F.2d 705 (C.A. 2d, 1934), among others, the doctrine of *Regina v. Hicklin* was overruled and today the standard appears to be whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. Refer to *Butler v. Michigan*, 352 U.S. 380 (1957).

<sup>11</sup> *Roth v. United States and Albert v. California*, 354 U.S. 476, 509 (1957).

The danger of influencing a change in the current of moral standards of the community, or of shocking or offending readers, or of stimulating sex thoughts or desires apart from objective conduct, can never justify the losses to society that result from interference with literary freedom.<sup>12</sup>

By testing the legality of a publication either by the purity of thought which it instills in the mind of the reader or by the degree to which it offends the community conscience, "the role of the censor is exalted and society's values in literary freedom are sacrificed."<sup>13</sup>

Thus, while the Court maintained in its decision that it is vital that the standards for judging obscenity safeguard the protection of freedom of speech and press, i.e., the definition of the class of unprotected words should be such that informational and educational publications, etc., should not be without protection, nevertheless, couched in its broad language, the decision in the *Roth* and *Alberts* cases may lead to indiscriminate censorship, since all a publication need do is incite a lascivious thought or arouse a lustful desire. Again quoting from the dissent, "the test that suppresses a cheap tract today can suppress a literary gem tomorrow."<sup>14</sup>

A concept as broad as this one, the doctrine of which seemingly punishes the provoking of thought, closes a door on one facet of our freedoms which we so jealously guard. Once closed, it is likely to remain so, for now the doctrine is law, and, as stated by Moore in his poem "Growth of Law":

I own, of our protestant laws I am jealous  
And long as God spares me will always maintain,  
That *once* having taken men's rights or umbrellas,  
We ne'er should consent to restore them again.<sup>15</sup>

As to whether or not the state courts will lean toward the full implication of the decision in these two cases yet remains to be seen. The *Roth* and *Alberts* cases were cited in the case of *Excelsior Pictures Corp. v. Regents of the University of the State of New York*<sup>16</sup> for the proposition that censorship of true obscenity is valid and essential. The majority of the court went on to hold that there was no legal basis for not allowing a license to show the motion picture "Garden of Eden" which is a fictionalized depiction of the activities of the members of a nudist group in a secluded private camp in Florida. This decision, however, was clouded

<sup>12</sup> *Ibid.*, at 510. For a discussion of the case refer to Lockhart & McClure, *Literature, The Law of Obscenity, And The Constitution*, 38 *Minn. L. Rev.* 295, 387 (1954).

<sup>13</sup> *Roth v. United States and Albert v. California*, 354 U.S. 476, 513 (1957).

<sup>14</sup> *Ibid.*, at 514.

<sup>15</sup> *Judicial Censorship of Obscene Literature*, 52 *Harvard L. Rev.* 40, 47 (1938).

<sup>16</sup> 3 N.Y.S. 2d 237, 144 N.E. 2d 31 (1957).

with other issues, i.e., the statute controlling licensing of the exhibiting of motion pictures,<sup>17</sup> and a criminal statute.<sup>18</sup> In any event, the court held that "nudity in itself and without lewdness or dirtiness is not obscenity in law or in common sense"<sup>19</sup> and appears not to adhere to the possible extension of obscenity to that which provokes lustful or lascivious thoughts, as it quotes the following from the decision rendered in *People v. Muller*:

If the test of obscenity or indecency in a picture or statue is its capability of suggesting impure thoughts, then indeed all such representations might be considered as indecent or obscene.<sup>20</sup>

That the decisions of the Supreme Court in *Roth* and *Alberts* have crystallized some of the concepts and removed many of the ambiguities existing in the treatment of obscene publications is evident. To what degree they have set the stage for indiscriminate and arbitrary censorship remains to be seen.

<sup>17</sup> N.Y. Education Law (McKinney, 1953) c. 16, §§ 122 and 124 give the Regents the duty of licensing motion pictures unless the film or a part thereof is "obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime."

<sup>18</sup> *Ibid.*, at c. 39, § 1140(b), making any person guilty of a misdemeanor "... who in any place wilfully exposes his private parts in the presence of two or more persons of the opposite sex whose private parts are similarly exposed. . . ." This statute mentions neither movies nor nudism.

<sup>19</sup> Authority cited note 16 supra at 241 and 34.

<sup>20</sup> 96 N.Y. 408, 411 (1884).

### CONTRACTS—IMPOSSIBILITY EXISTING AT THE TIME OF THE FORMATION OF THE CONTRACT NO DEFENSE

On February 19, 1942, Dr. Zellmer was sued for divorce. The decree stipulated that Dr. Zellmer pay the premiums on several life insurance policies, and make his children, one of whom was the plaintiff, beneficiaries of the policies. At the time of the promise the policies had been lapsed for non-payment of premiums for eleven years and therefore performance of the promise was impossible when made. Dr. Zellmer died and the policy was uncollectible. The named insured filed the present claim against Dr. Zellmer's estate for breach of contract. The estate's defense of existing impossibility was overruled and the claim was allowed for the amount of the policy. *In re Estate of Zellmer*, 1 Wis. 2d 46, 82 N.W. 2d 891 (1957).

Although this precise point of law has seldom been encountered in the courts of this country, the *Zellmer* case illustrates a fundamental point in impossibility law. The governing principle of law is stated in the Re-