ROTH v. UNITED STATES
SUPREME COURT OF THE UNITED STATES
354 U.S. 476
June 24, 1957
[6 - 3]

Two cases are "consolidated" in this opinion. One dealing with Mr. Roth, the other dealing with Mr. Alberts.

OPINION: Justice Brennan...In *Roth*, the primary constitutional question is whether **the federal obscenity statute** violates the provision of the **First Amendment** that "**Congress** shall make no law...abridging the freedom of speech, or of the press..."

In *Alberts*, the primary constitutional question is whether the obscenity provisions of the **California Penal Code** invade the freedoms of speech and press as they may be incorporated in the liberty protected from state action by the Due Process Clause of the **Fourteenth Amendment**.

The **federal obscenity statute** provided, in pertinent part:

> "Every **obscene**, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an **indecent character**; and –
>
> Every written or printed card, letter, circular, book, pamphlet, **advertisement**, or notice of any kind **giving information**, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be

obtained or made...

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever **knowingly** deposits for mailing or delivery, anything declared by this section to be nonmailable...shall be fined...[or imprisoned]."

The **California Penal Code** provides, in pertinent part:

"Every person who **wilfully** and lewdly, either:

Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any **obscene or indecent** writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any **obscene or indecent** picture or print; or molds, cuts, casts, or otherwise makes any **obscene or indecent** figure; or,

Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure;...is guilty of a misdemeanor..."

Other constitutional questions are: whether these statutes violate due process, because too vague to support conviction for crime; whether power to punish speech and press offensive to decency and morality is in the States alone, so that the federal obscenity statute violates the Ninth and Tenth Amendments (raised in *Roth*); and whether Congress, by enacting the federal obscenity statute, under the power delegated by Art. I, §8, cl. 7, to establish post offices and post roads, pre-empted the regulation of the subject matter (raised in *Alberts*).

In other words, (1) does government have the power to punish obscenity and, if so, (2) does that power abide in Federal government alone or in State government alone or in both?

Roth conducted a business in New York in the publication and sale of books, photographs and magazines...He was convicted by a jury...[of] mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute...**Alberts** conducted a mail-order business from Los Angeles. He was convicted by the Judge...under a misdemeanor complaint which charged 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...Both convictions were affirmed...We granted certiorari.

[Question: Is "obscenity" a form of speech protected by the Constitution?] Although this is the first time the question has been squarely presented to this Court,...expressions...in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.

The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon" in imitation or mimicking of religious services. Thus, profanity and obscenity were related offenses...

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. **But implicit in the history of the First Amendment is the rejection of obscenity as <u>utterly without redeeming social importance</u>.** This [reasoning] is...reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956...[See] *Chaplinsky v. New Hampshire*[1]*:*

> "...There are certain well-defined...classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene...**[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."**

<u>We hold that obscenity is not within the area of constitutionally protected speech or press</u>.

That is all well and good, but how does one define "obscenity"?

It is strenuously urged that these obscenity statutes offend the constitutional guaranties because they punish incitation to impure sexual *thoughts*, not shown to be related to any overt antisocial conduct which is or may be incited in the persons stimulated to such *thoughts*. In *Roth*, the trial judge instructed the jury: "The words 'obscene, lewd and lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts*." In *Alberts*, the [test laid down by the trial judge was] whether the material has "a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires." **It is insisted that the constitutional guaranties are violated because convictions may be had without proof either that obscene material will perceptibly create a <u>clear and present danger</u> of antisocial conduct, or will probably induce its recipients to such conduct.** But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in *Beauharnais v. Illinois:*

> "Libelous utterances not being within the area of constitutionally protected speech,

---

[1]Case 1A-S-8 on this website.

> it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing [that it presents a clear and present danger.] Libel, as we have seen, is in the same class."

However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest.

"Prurient" = restless craving. *Webter's New Collegiate Dictionary*.

The portrayal of sex, *e. g*., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. As to all such problems, this Court said in *Thornhill v. Alabama*:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully **all matters of public concern** without previous restraint or fear of subsequent punishment...Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. **Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States.**

Isn't that the unique thing about this Country? Our most fundamental governing document permits all of us to ceaselessly protect ourselves (the "People") from ourselves (Elected Representatives).

The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. **It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.**

The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina* v. *Hicklin*. Some American courts adopted this standard...

Given this Court's prior statement that **"this is the first time [this] question has been squarely presented to this Court,"** it might be a bit confusing to you for them to now say "**some American courts [have] adopted [an obscenity] standard**." All this means is that prior to this case, the Supreme Court had never addressed the question of whether obscenity is "protected speech" head on, although numerous lower courts had obviously done so.

...but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive...

In other words, a legitimate medical textbook discussing human sexuality "might offend the most susceptible person."

On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity. Both trial courts below...used the proper definition of obscenity. In addition, in the *Alberts* case,...the trial judge indicated that...he was judging **each item as a whole as it would affect the normal person**, and in *Roth*, the trial judge instructed the jury as follows:

> "...The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved ...**The test in each case is the effect of the...publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community.** The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion...You may ask yourselves does it offend the common conscience of the community by present-day standards. In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious -- men, women and children."

Whoops! It does not appear that the Court or the defendant ever raised a problem with the last two words of this jury instruction. If it had been noticed, I would find it very hard to believe the Court would have approved of the phrase "and children." I am quite confident the jury was not supposed to judge the material under an obscenity standard that includes the "conscience of children." What do you think?

It is argued that the statutes...violate the constitutional requirements of due process. The federal obscenity statute makes punishable the mailing of material that is "**obscene**, lewd, lascivious, or filthy...or other publication of an **indecent character**." The California statute makes punishable the keeping for sale or advertising material that is "**obscene or indecent.**" The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere.

Many decisions have recognized that these terms...are not precise. **This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process.** "...The Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices..." *United States v. Petrillo*. These words, applied according to the proper standard for judging obscenity...give adequate warning of the conduct proscribed and mark "...boundaries sufficiently distinct for judges and juries fairly to administer the law...That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense..." In summary, then, **we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give...adequate notice of what is prohibited**.

Roth's argument that the federal obscenity statute unconstitutionally encroaches upon the powers reserved by the Ninth and Tenth Amendments to the States and to the people to punish speech and press where offensive to decency and morality is hinged upon his contention that obscenity is expression not excepted from the sweep of the provision of the First Amendment that "***Congress* shall make *no law*...abridging the freedom of speech, or of the press...**" That argument falls in light of our holding that obscenity is not expression protected by the First Amendment. We therefore hold that the federal obscenity statute punishing the use of the mails for obscene material is a **proper exercise of the postal power** delegated to Congress by Art. I, §8, cl. 7.

Alberts argues that because his was a mail-order business, the California statute is repugnant to Art. I, §8, cl. 7, under which the Congress allegedly pre-empted the regulatory field by enacting the federal obscenity statute punishing the mailing or advertising by mail of obscene material.

In other words, Alberts is saying that because Congress has enacted laws to punish obscenity in the mail, California cannot do so, as well. He lost that argument.

The federal statute deals only with actual mailing; it does not eliminate the power of the state to punish "keeping for sale" or "advertising" obscene material. The state statute in no way imposes a burden or interferes with the federal postal functions...The judgments are *Affirmed*.

CONCURRENCE: Chief Justice Warren...**The line dividing the salacious or pornographic from literature or science is not straight and unwavering.** Present laws depend largely upon the effect

that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.

I'm not entirely sure what Justice Warren means. Perhaps, for example, he suggests that a publication in the hands of a sociologist for the sole purpose of legitimately studying all aspects of American culture might be protected speech, whereas that same publication in the hands of an "adult bookstore dealer" may not be so protected. What do you think?

The personal element in these cases is seen most strongly in the requirement of [knowledge]. Under the California law, the prohibited activity must be done "**wilfully** and lewdly." The federal statute limits the crime to acts done "**knowingly**." In his charge to the jury, the district judge stated that the matter must be "calculated" to corrupt or debauch. The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide...

DISSENT: Justice Harlan...I do not think that reviewing courts can escape this responsibility by saying that the...jury or judge... has labeled the questioned matter as "obscene," for, if "obscenity" is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of **constitutional *judgment* of the most sensitive and delicate kind.** Many juries might find that Joyce's "Ulysses" or Bocaccio's "Decameron" was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could convince me, without more, that these books are "utterly without redeeming social importance." In short, **I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based. I am very much afraid that the broad manner in which the Court has decided these cases will tend to obscure the peculiar responsibilities resting on state and federal courts in this field and encourage them to rely on easy labeling and jury verdicts as a substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case...**

We are faced here with the question whether the federal obscenity statute, as construed and applied in this case, violates the First Amendment to the Constitution...

I cannot agree that any book which tends to stir sexual impulses and lead to sexually impure thoughts necessarily is "utterly without redeeming social importance." Not only did this

charge fail to measure up to the standards which I understand the Court to approve, but as far as I can see, much of the great literature of the world could lead to conviction under such a view of the statute. Moreover, in no event do I think that the limited federal interest in this area can extend to mere "thoughts." The Federal Government has no business, whether under the postal or commerce power, to bar the sale of books because they might lead to any kind of "thoughts."

It is no answer to say, as the Court does, that obscenity is not protected speech. The point is that this statute, as here construed, defines obscenity so widely that it encompasses matters which might very well be protected speech. I do not think that the federal statute can be constitutionally construed to reach other than what the Government has termed as "hard-core" pornography. Nor do I think the statute can fairly be read as directed only at *persons* who are engaged in the business of catering to the prurient minded, even though their wares fall short of hard-core pornography. Such a statute would raise constitutional questions of a different order. That being so, and since in my opinion the material here involved cannot be said to be hard-core pornography, I would reverse...[and] dismiss the indictment.

DISSENT: Justice Douglas/Black...When we sustain these convictions, we make the legality of a publication turn on the purity of thought which a book or tract instills in the mind of the reader. I do not think we can approve that standard and be faithful to the command of the First Amendment, which by its terms is a restraint on Congress and which by the Fourteenth is a restraint on the States.

In the *Roth* case the trial judge charged the jury that the statutory words "obscene, lewd and lascivious" describe "that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts." He stated that the term "filthy" in the statute pertains "to that sort of treatment of sexual matters in such a vulgar and indecent way, so that it tends to arouse a feeling of disgust and revulsion." He went on to say that the material "must be calculated to corrupt and debauch the minds and morals" of "the average person in the community," not those of any particular class. "You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards."

...By these standards punishment is inflicted for thoughts provoked, not for overt acts nor antisocial conduct...This issue cannot be avoided by saying that obscenity is not protected by the First Amendment. The question remains, what is the constitutional test of obscenity?

The tests by which these convictions were obtained require only the arousing of sexual thoughts. Yet the arousing of sexual thoughts and desires happens every day in normal life in dozens of ways... The test of obscenity the Court endorses today gives the censor free range over a vast domain. **To allow the State to step in and punish mere speech or publication that the judge or the jury thinks has an *undesirable* impact on thoughts but that is not shown to be a part of unlawful action is drastically to curtail the First Amendment**. As recently stated by two of our outstanding authorities on obscenity, "The danger of influencing a change in the current 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."

If we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature. But it is by no means clear that obscene literature, as so defined, is a significant factor in influencing substantial deviations from the community standards..."The Kinsey studies show the minor degree to which literature serves as a potent sexual stimulant..."

The absence of dependable information on the effect of obscene literature on human conduct should make us wary. It should put us on the side of protecting society's interest in literature, except and unless it can be said that the particular publication has an impact on action that the government can control.

As noted, the trial judge in the *Roth* case charged the jury in the alternative that the federal obscenity statute outlaws literature dealing with sex which offends "the common conscience of the community." That standard is, in my view, more inimical still to freedom of expression.

The standard of what offends "the common conscience of the community" conflicts, in my judgment, with the command of the First Amendment that "Congress shall make no law...abridging the freedom of speech, or of the press." **Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved.** How does it become a constitutional standard when literature treating with sex is concerned?

Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, juries can censor, suppress, and punish what they don't like, provided the matter relates to "sexual impurity" or has a tendency "to excite lustful thoughts." This is community censorship in one of its worst forms. It creates a regime where in the battle between the literati and the Philistines, the Philistines are certain to win. If experience in this field teaches anything, it is that "censorship of obscenity has almost always been both irrational and indiscriminate." The test adopted here accentuates that trend.

I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct.

I can understand (and at times even sympathize) with programs of civic groups and church groups to protect and defend the existing moral standards of the community...**Government should be concerned with antisocial conduct, not with utterances.** Thus, if the First Amendment guarantee of freedom of speech and press is to mean anything in this field, it must allow protests even against the moral code that the standard of the day sets for the community. In other words, literature should

not be suppressed merely because it offends the moral code of the censor.

The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience. By either test the role of the censor is exalted, and society's values in literary freedom are sacrificed.

The Court today suggests a third standard. It defines obscene material as that "which deals with sex in a manner appealing to prurient interest." Like the standards applied by the trial judges below, that standard does not require any nexus between the literature which is prohibited and action which the legislature can regulate or prohibit. Under the First Amendment, that standard is no more valid than those which the courts below adopted...

I do not think that the problem can be resolved by the Court's statement that "obscenity is not expression protected by the First Amendment"...I reject too the implication that problems of freedom of speech and of the press are to be resolved by weighing against the values of free expression, the judgment of the Court that a particular form of that expression has "no redeeming social importance." The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position.

Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it...As a people, we cannot afford to relax that standard. For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is to incite a lascivious thought or arouse a lustful desire. **The list of books that judges or juries can place in that category is endless.**

I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.

I understand what Justice Douglas is saying; however, is the last sentence consistent? When he says he **"has confidence in the ability of our people to reject noxious literature,"** does that mean his opinion turns on his degree of confidence? If he were living, would his confidence in 1957 America have been shaken by the realities of 2009 America? In other words, did his "legal opinion" turn solely on the degree of the perceived "problem"?