OBSCENITY AND PORNOGRAPHY

The Law Under the First Amendment

by Daniel S. Moretti

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General Editor
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PREFACE

The format of this Legal Almanac is somewhat different from most volumes in this series in that much of the text analyzes the development of case law dealing with the topic of obscenity and pornography. It is not enough simply to state the law. Understanding the law of obscenity and pornography requires something more than this. Our author, Mr. Moretti, has therefore presented here a heavier dose of vocabulary in the discussion. We are confident, however, that the reader will therefore come to understand the subject in a comprehensive manner as well as gain some insight into judicial reasoning and constitutional principles.

Irving J. Sloan
General Editor

INTRODUCTION

The First Amendment to the United States Constitution prohibits the enactment of any law abridging the freedom of speech or press. Yet in 1957 the U.S. Supreme Court decided that obscene material is an exception to the First Amendment. As a result, that material which is deemed obscene may be legally banned. Today, both the federal government and the states have enacted laws making it a criminal offense to produce, distribute, or exhibit obscene material.

Since obscene material is not protected by the First Amendment, it is crucial that judges, legislators, and citizens, be able to determine what is or is not obscene. As the reader will soon realize, defining obscenity has been, and continues to be, a most difficult task. The judicial effort to find an acceptable definition of obscenity constitutes one of the longest and most arduous struggles in the history of American jurisprudence.

For these reasons, much of this book will focus on the current definition of obscenity, how it was reached, and how it is applied. This book will also concentrate on certain areas of our society where courts have found that material need not

be obscene to be prohibited. For example, photographs in adult magazines which are not obscene might very well be banned if broadcast on commercial television. However, these same pictures might not be prohibited if shown on cable television (although this may soon change). Furthermore, these same pictures could not be banned if shown in a movie theatre with an "X" rating. The net result is that obscenity law has become increasingly complex. Hopefully this book will serve to lessen the complexities of modern obscenity law for the reader.

Finally, it must be remembered that although obscenity is very similar to pornography, in the eyes of the law, these terms are not synonomous. Material which is pornographic is generally protected by the First Amendment. In most instances, only if material is first judged obscene may it be prohibited.

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Chapter 1
DEFINING OBSCENITY — THE EARLY HISTORY

Much of our law has been derived from English law and obscenity is no exception. The most important English case on the subject was Regina v. Hicklin, decided in 1868. There, Lord Cockburn established a strict test for obscenity which was later adopted in the United States. The test was whether the material charged as obscene tended to deprave and corrupt those whose minds are open to such immoral influences. The Hicklin test permitted courts to view isolated passages of a book, and judge them according to their harmful effects upon the most susceptible individuals. Despite some problems, the Hicklin test soon became the cornerstone of early American obscenity law.

The Hicklin test was thoroughly established in the United States by the beginning of the twentieth century, and it was also at about this time that the test began to undergo a series of challenges in the courts. In United States v. Kennerly, 209 F. 119 (1913), Judge Learned Hand criticized the test as being unduly harsh. He gave two reasons for his criticism.

First, the test judged literature in terms of those most open to being corrupted. Since children were the most susceptible individuals, they were used as the basis for the test. Hand stated that the test would "reduce our treatment of sex to the standards of a child's library in the supposed interest of a salacious few...." Hand also criticized the test because it permitted judges to isolate allegedly obscene passages from their setting as a whole. Hand reasoned that obscene material by itself might not be so obscene if it were "honestly relevant to the expansion of innocent ideas...." In other words, a scientific work could be banned as obscene if it so much as contained one instance of obscenity. Judge Hand simply found the test was outdated. The Hicklin test did not "answer to the understanding and morality of the present time...." Despite his objections, however, Judge Hand applied the test because he felt he was required to by precedent; consequently, the test remained an effective force in twentieth century obscenity law.

The second major case invoking the Hicklin test came in 1933 in United States v. One Book Entitled Ulysses, 5 F.Supp. 182 (1933). The Court held James Joyce's Ulysses not obscene. The Court also rejected the Hicklin test and established a new test for determining obscenity. It

was held that the first inquiry was whether the material was written with "pornographic intent." If the author's intent was pornographic then the book would be judged obscene. However, if there was no pornographic intent, courts could then look to the work's effect upon the average member of the community. The Court's opinion stated that obscenity decisions should be based upon the work in its entirety, not on the alleged obscene nature of isolated passages of the book. Finally, it was established that if a work which was determined to contain pornographic intent tended to "stir the lustful thoughts," it would be deemed obscene. The second circuit Court of Appeals affirmed the decision. Although the new test was limited to that circuit, it greatly reduced the impact of the Hicklin test and signaled a relaxation of the then existing obscenity standards.

However, some federal courts continued to abide by the Hicklin test as late as the early 1950's. For example, in 1953, a Federal District Court in California applied the Hicklin test to two books by Henry Miller. Viewing only isolated passages of Miller's Tropic of Cancer and Tropic of Capricorn the court held both books to be obscene. The decision was also affirmed by the Ninth Circuit Court of Appeals.

Although the Hicklin test was being eroded by federal courts in New York, it remained a powerful legal force in the state courts. In 1944 Lady Chatterly's Lover by D.H. Lawrence, was held obscene by a New York court in People v. Dial Press, 182 Misc. 416. Several years earlier a Massachusetts bookseller was convicted for selling copies of An American Tragedy by Theodore Dreiser in Commonwealth v. Fried, 271 Mass. 318 (1930). Both state courts relied exclusively on the Hicklin test in making their determinations. State Courts continued to rely on the Hicklin test through the 1950's.

By the 1950's obscenity law in the United States was by no means uniformly applied. A book that would be held obscene by a federal court in California might not be held obscene by a federal court in New York. Furthermore, most state courts would apply a more stringent standard than any of the federal courts. Whether a work was obscene often depended on where the suit was brought. By the 1950's the definition of obscenity was long ripe for adjudication by the United States Supreme Court.

Chapter 2
THE SUPREME COURT SPEAKS — *ROTH v. UNITED STATES*

In addition to establishing a uniform test for obscenity, the Supreme Court was also compelled to determine the constitutional implications of permitting the censoring of obscene material. Specifically, the Supreme Court had yet to determine whether obscene material was an exception to the First Amendment. The First Amendment prohibits Congress from passing any law abridging the freedom of speech or press. Although the Supreme Court seemed to assume in several earlier decisions that obscenity was an exception to the First Amendment, it had never dealt directly with that issue. Finally, in 1957 the Court sought both to define obscenity and to rule on its standing in regard to the First Amendment.

The case was Roth v. United States, 354 U.S. 976 (1957). There, Samuel Roth was convicted for violating Federal Obscenity Statute, 18 U.S.C. 1461 (see Appendix B). Roth was convicted because he sold books and magazines that authorities claimed were obscene. Another case heard along with Roth's was that of Alberts who had been convicted for selling obscene material by a California State

Court. Both Roth and Alberts claimed the materials they were selling were protected under the First Amendment.

The Supreme Court ruled obscene material was not protected by the First Amendment. Relying on the history of obscenity, Justice Brennan, writing for the majority, held that "the unconditional phrasing of the First Amendment was not intended to protect every utterance." According to the Court the First Amendment was by no means absolute; consequently obscenity was not to be within the area of constitutionally protected speech or press.

The Roth Court found that the purpose of the First Amendment would not be served by allowing obscenity constitutional protection. Brennan noted that the protections afforded free speech and press were there to assure "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." The Court found that obscene material possessed little, if any, social value. Furthermore, it was damaging to public morals. Quoting from Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), the Roth Court stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of

> which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . . It has been well observed that such 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. . . .

Having established that obscene material is not protected by the Constitution, the Roth Court found itself faced with another difficult question: how to define obscenity. At the outset, the Court explicitly denounced and rejected the Hicklin test as "unconstitutionally restrictive of the freedoms of speech and press." Instead the Court sought to formulate a less restrictive test which would be more likely to prevent constitutionally protected speech and press from being labeled obscene.

The Court established that obscene material "deals with sex in a manner appealing to the prurient interest." The term "prurient" meant "material having a tendency to excite lustful thoughts." However, the Court made it clear that the showing of sex in art, literature, and scientific works was not itself enough reason to deny material the protections of

freedom of speech and press. The Court stated:

> 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 utterly without redeeming social importance.

In conclusion, the Roth Court established a two-part test for obscenity. The first part asked:

> Whether the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.

The second part of the Roth test asked whether the material in question was "utterly without redeeming social importance." In other words, even if the alleged obscene material appealed to the prurient interest, it would not be obscene if it were shown to possess some redeeming social importance. Applying this test the Court affirmed the convictions of both