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Constitutional Law--Anti-Obscenity Legislation

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CONSTITUTIONAL LAW — ANTI-OBSCENITY LEGISLATION

Commonwealth v. Blumenstein, 396 Pa. 417, 153 A.2d 227 (1959)

Prodded by the District Attorney, three state policemen attended a showing of the film "Uncover Girls" at the Ideal Drive-In Theatre in Greenfield Township, Lackawanna County, Pennsylvania, on the evening of October 12, 1956.[1] After viewing the movie, they closed the theatre, confiscated the film and arrested the manager, Blumenstein, for having unlawfully exhibited an obscene motion picture under a Pennsylvania statute which provided that:

> Whoever gives or participates in or being the owner of any premise, or having control thereof, permits within or on said premises . . . the exhibition of fixed or moving pictures of lascivious, sacrilegious, obscene, indecent or immoral nature and character, or such as might tend to corrupt morals, is guilty of a misdemeanor. . . .[2]

Commonwealth v. Blumenstein was heard without a jury in the Court of Quarter Sessions, and two reels of the confiscated film were exhibited in the courtroom. The trial judge found Blumenstein guilty.[3] He based the decision on his personal belief that the film sections "depicted a series of dancing acts, which were definitely cheap, lewd, obscene and indecent . . . ."[4] The Superior Court viewed the film and affirmed Blumenstein's conviction,[5] but the Supreme Court of Pennsylvania reversed on the ground that the statute upon which the conviction was based was unconstitutional for vagueness.[6]

In rendering its decision the court was faced with the problem of reconciling the holding of the United States Supreme Court in *Roth v. United States*[7] with a series of that Court's memorandum opinions[8] which considered obscenity statutes. The Pennsylvania court's answer to the

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1. The uncut version of this film, the version under consideration here, had previously been refused approval by the Board of Censors under authority of the Motion Picture Censorship Act, Pa. Laws 1915, act 534, as amended, Pa. Laws 1929 act 1655. However, this act was found unconstitutional on March 13, 1956 in Hallmark Productions, Inc., v. Carroll, 384 Pa. 348, 121 A.2d 584 (1956) some five months prior to the showing of "Uncover Girls" at the Ideal Drive-In Theatre.

2. Pa. Laws 1939, act 872, § 528, as amended, PA. STAT. tit. 18, § 4528 (Supp. 1960). This act was found unconstitutional and the amendment resulted from the decision in the principal case, Commonwealth v. Blumenstein, 396 Pa. 417, 153 A.2d 227 (1959).

3. No. 8, Court of Quarter Sessions, Pa., Dec., T., 1956.

4. *Ibid.* Also quoted in 184 Pa. Super. Ct. 83, 85 (1957).

5. 184 Pa. Super. Ct. 83 (1958).

6. 396 Pa. 417, 153 A.2d 227 (1959).

7. 354 U.S. 476 (1957).

8. Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957); Holmby Productions v. Vaughn, 350 U.S. 870 (1955); Superior Films, Inc. v. Department of Education of the State of Ohio, 346 U.S. 587 (1954).

problem is important, for it clarifies, at least for that state, the requirements of a constitutional obscenity statute, while at the same time it endorses a new requirement for consideration in other states.

In *Roth v. United States* the court held that obscenity was not within the area of constitutionally protected speech or press and set up the test for judging obscenity as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole, appeals to prurient interest."[9] Nevertheless, the Court upheld two anti-obscenity statutes on the basis of what it then considered appropriate charges by the trial courts, even though the charges differed from the test developed by the case itself.[10] At the same time in a series of memorandum opinions,[11] both before and after *Roth,* the Court held statutes similar to those involved in *Roth* and in the present case unconstitutional although accompanied by allegedly appropriate, though varied, charges as to the definition of the word "obscene" by the trial courts. However, none of the obscenity tests used in these charges followed word for word the test of obscenity adopted by the Court in *Roth.*[12] In view of these decisions and in view of *Roth* it became difficult to determine exactly what statute accompanied by what charge would be found acceptable. Consequently, the Supreme Court of Pennsylvania (perhaps reflecting developments in the United States Supreme Court) decided, logically, that the way to avoid such confusion and to be certain of not incurring a charge of obscurity is simply to make the *Roth* test mandatory. And it is implying, by basing its decision on statutory construction, that the *Roth* test *must* be incorporated in the anti-obscenity statute itself. This goes beyond *Roth* where the court, while in the very process of setting up the standard under discussion, managed to tolerate, at that

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9. 354 U.S. 476, 489 (1957).

10. "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," and "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires." *Id.* at 486. *But see* 489-90.

11. See note 8 *supra.*

12. MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957) provides that:

"A thing is obscene if, considered as a whole, its predominant appeal is to the prurient interest, *i.e.,* shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even if the obscenity is latent, as in the case of undeveloped photographs. Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such an audience. . . ."

This quotation from the Model Penal Code seems to be the basis for the *Roth* test of obscenity, yet it is interesting to note that the trial court instructions, also accepted by *Roth,* incorporating the traditional tests of tendency to corrupt or tendency to arouse lustful thoughts are specifically rejected by the MODEL PENAL CODE § 207.10(2), comment 6 (Tent. Draft No. 6, 1957).

time anyway, two very dissimilar tests of obscenity by the trial courts.[13] Thus, by making the *Roth* test mandatory the *Blumenstein* court was able to avoid the inconsistency of the *Roth* court, and in so doing, it found a statute similar to the statutes upheld in *Roth*[14] to be unconstitutional.

The Pennsylvania Supreme Court based its decision, principally, upon an analysis of its anti-obscenity statute. Therefore, any special interpretation of the word "obscene" given by the trial court was of no importance to the higher court in arriving at its decision, nor did it show any interest in the film itself. The court simply considered the words of the statute, "lascivious, sacrilegious, obscene, indecent or immoral . . . or such as might tend to corrupt morals," and indicated their inadequacy by citing Supreme Court decisions[15] in which these words had been found wanting on grounds of vagueness. These decisions were not, however, crucial to the interest of the court.

Some five months after the decision in the *Roth* case, the Supreme Court, citing *Roth,* in *Times Film Corporation v. City of Chicago*[16] reversed, per curiam, a decision of the Circuit Court which had held:

> . . . the ordinance now under attack, as we have seen, uses the words "immoral" or "obscene." The Illinois Supreme Court has held, in speaking of this ordinance, that these words are synonymous and that a motion picture is obscene or immoral, within the meaning of the ordinance, if, when considered as a whole, its calculated effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess. With this interpretation of the words "obscene" and "immoral" read into the ordinance now before us, we believe the ordinance is not vague, as contended by plaintiff. Those words are precise and they constitute a proper test in the case at bar.[17]

The Supreme Court of Pennsylvania believed that if this standard in the *Times Film* case could not pass the Roth test, certainly section 528[18] of its Penal Code, under which Blumenstein was convicted, could not either.

The question presented in *Blumenstein* is whether the *Roth* test must be literally applied in regarding an obscenity problem, to the exclusion of all other tests or standards, and, if so, whether this test can be implied in the anti-obscenity statute or whether it must be incorporated, word for word, into the statute itself. As a result of the confusion presented by *Roth* and as a result of the added enigma presented by the *Times Film* case, the Pennsylvania Supreme Court made the obvious and logical de-

13. See note 10 *supra.*

14. 18 U.S.C. § 1461 (1954); CAL. PENAL CODE ANN. 311 (1955).

15. Holmby Productions v. Vaughn, 350 U.S. 870 (1955); Superior Films v. Department of Education of Ohio, 346 U.S. 587 (1945); Burstyn v. Wilson, 342 U.S. 495 (1952).

16. 355 U.S. 35 (1957).

17. 244 F.2d 432, 435 (7th Cir. 1957).

18. See note 2 *supra.*

cision. The court found its statute unconstitutional for reasons of obscurity and set up the *Roth* test as the sole standard by which to measure obscenity. Three months later the Pennsylvania Legislature did incorporate the *Roth* test, word for word, into the very statute declared unconstitutional in *Blumenstein.*[19]

The decision is significant, therefore, in that it clarifies the precise position of the *Roth* test in one state. It has already become, in part, the basis for holding a second statute unconstitutional: in *Goldman v. State Board of Motion Picture Control*[20] and in *Twentieth Century-Fox Film Corporation v. Boehm*[21] the court, citing *Blumenstein* and applying *Roth,* struck down Pennsylvania's brand new Motion Picture Censorship Act.[22] Furthermore, the *Blumenstein* decision now burdens other states with the probable necessity of deciding whether to imply or incorporate *Roth* into their anti-obscenity legislation.

Commonwealth v. Blumenstein is already knocking on Ohio's door, and rightly so, for Ohio is a state uncertain in its approach to anti-obscenity legislation and is thus vulnerable to an attack based on the logic and simple directness of the Pennsylvania decision. In fact, Ohio is susceptible three times over, for it has three awkward statutes in this area: a Motion Picture Censorship Act,[23] a statute prohibiting the sale or possession of obscene literature,[24] and a special statute prohibiting the exhibition of obscene motion pictures.[25]

In *R.K.O. Radio Pictures v. Department of Education*[26] a majority of five judges of the Supreme Court of Ohio were of the opinion that the Supreme Court of the United States in *Superior Films v. Department of Education of the State of Ohio*[27] had in effect found the Ohio Motion Picture Censorship Act to be contrary to the first and fourteenth amendments of the United States Constitution. However, since six members of the Ohio court must agree to declare an act unconstitutional, the act still remains in effect.[28] Likewise in *State v. Mapp*[29] four of the judges felt that the second obscenity statute, prohibiting the sale or possession of obscene literature, was unconstitutional. The necessary majority to so

19. *Ibid.*

20. No. 530 Commonwealth Docket No. 2385, C.P., Dauphin County, Pa., July 30, 1960.

21. No. 538 Commonwealth Docket No. 2387, C.P., Dauphin County, Pa., July 30, 1960.

22. Pa. Laws 1959, act 358.

23. OHIO REV. CODE ch. 3305.

24. OHIO REV. CODE § 2905.34 (Supp. 1960).

25. OHIO REV. CODE § 2905.342 (Supp. 1960).

26. 162 Ohio St. 263, 122 N.E.2d 769 (1954).

27. 346 U.S. 587 (1954).

28. OHIO CONST. art. 4, § 2. *But see* Times Film Corp. v. City of Chicago, 364 U.S. 805 (1961).

29. 170 Ohio St. 427, 166 N.E.2d 387 (1960), *appeal docketed,* No. 236, U.S. Sup. Ct., July 14, 1960, *jurisdiction noted,* October 24, 1960.

declare was once again lacking. Therefore, a majority of the judges of the Supreme Court of Ohio believe that two of Ohio's three obscenity statutes are unconstitutional yet are powerless to affect a remedy.[30] The third statute, prohibiting obscene movies, has not as yet been tested in the Ohio Supreme Court, but it appears even more susceptible to constitutional attack on the ground of obscurity, for the statute simply prohibits the exhibition of obscene movies with no qualifying or restrictive words of any kind to guide a lower court in its decision.[31] Clearly, the Ohio law in this area is inadequate.

If, as in Pennsylvania, the *Roth* test is made the mandatory standard by statute in Ohio, would not some of the ambiguity and confusion surrounding the recent Ohio decisions be alleviated? Such legislation might not directly solve the Ohio censorship problem or the scienter problem involved in the *Mapp* case,[32] but it might ultimately aid in their solution (in the same way in which *Blumenstein* cleared the air for the subsequent decisions on the movie censorship problem in Pennsylvania). Moreover, it would avoid future confusion of the type involved in a recent Ohio decision[33] wherein the court, being specifically challenged with the simplicity and directness of the *Blumenstein* argument, defensively admitted that the *Roth* test was now mandatory.[34] The court then went to the most laborious and incredulous lengths in an attempt to show that although the Ohio anti-obscenity statute was enacted subsequent to the decision in *Roth* and although there was no standard remotely resembling *Roth* embodied in this statute, that nevertheless, the Ohio Legislature intended and did imply the *Roth* test into the statute at the time it was enacted.[35] Such a decision merely adds to the confusion and constitutional burden of these Ohio statutes. It would seem that the Pennsylvania incorporation of *Roth* into its statute is honest on its face in view of the enigmatic position of the Supreme Court of the United States, and such incorporation in Ohio would, at the very least, simplify

30. It might be pointed out that these two statutes use words similar to or at least as susceptible to a charge of vagueness as those found unconstitutional in Pennsylvania. OHIO REV. CODE § 2905.34 provides that "no person shall knowingly sell, lend, give away, or exhibit . . . or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet. . . ." OHIO REV. CODE § 3305.04 provides that the Censorship Board will approve only "such films as are, in . . . [its] judgment, of a moral, educational, or amusing or harmless character. . . ."

31. OHIO REV. CODE § 2905.342 (Supp. 1960) provides that "no person shall produce, sell, lease, lend, give away, or distribute for the purpose of exhibition, or exhibit, or have in possession or under his immediate control for any purpose . . . (A) an obscene motion picture film. . . ."

32. 170 Ohio St. 427, 433, 166 N.E.2d 387, 391 (1960), *appeal docketed,* No. 236, U.S. Sup. Ct., July 14, 1960, *jurisdiction noted,* October 24, 1960.

33. State v. Mahoning Valley Distributing Agency, Inc., 169 N.E.2d 48 (Ohio C.P. 1960).

34. *Id.* at 60, 62.

35. *Id.* at 60, 61.