The Burger Court Opinion Writing Database

Miller v. California

413 U.S. 15 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–73

Marvin Miller, Appellant, *v.* State of California. On Appeal from the Appellate Department, Superior Court of California, County of Orange.

[May —, 1972]

Memo to the Conference.

Here are my views on the above case. I begin with the facts.

Appellant was convicted by jury of violating California Penal Code § 311.2, a misdemeanor, by willfully and knowingly distributing obscene matter. His conviction was based on his conduct in causing five unsolicited advertising brochures to be sent through the mails in an envelope addressed to a restaurant in Newport Beach, California as part of a mass mailing of such brochures. The envolope was opened by the manager of the restaurant and his mother, who then complained to the police.

The brochures advertise four books entitle "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography," and a film entitled "Marital Intercourse." While they contain some descriptive printed material, listings of other available publications, and order blanks, they primarily consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

An examination of the materials reveals that by any standard they are "hard core" pornography of a kind not protected by the First Amendment. Nevertheless,

CHAMBERS OF
THE CHIEF JUSTICE

Supreme Court of the United States
Washington, D. C. 20543

June 14, 1972

No. 70-73 -- Miller v. California

Dear Bill:

I have your very interesting memo on the broad problem of the above case. In the short time you have had I marvel at how you have done this job. We need more exchanges of this kind to develop our thinking.

Given the lateness of the season, I will undertake to comment with less than the time I would like on a matter of this importance.

1. I accept your proposition, if I read you correctly, that the Court has not been able to come up with a definition that will separate protected from non-protected "sex material."

2. I think I agree that people in the commercial world are uncertain of the standards. We are, and they merely reflect our uncertainty. I confess I do not see it as a threat to genuine First Amendment values to have commercial porno-peddlers feels some unease. For me the First Amendment was made to protect commerce in ideas, but even at that I would go a long way concerning ideas on the subject that has had a high place in the human animal's consciousness for several thousand (?) years. In short, a little "chill" will do some of the "pornos" no great harm and it might be good for the country.

Even accepting that the "Redrup technique" compounds uncertainty, I prefer it to a new, uncharted swamp.

3. I strongly agree with you that there are some obscene materials not protected by the Constitution.

4. I agree we must at some point make it possible for governments to stop pandering and touting by mail or otherwise with brochures, etc., that offend. My views in Rowan coincide with your memo.

5. I agree (if it is your view) that all public display that goes beyond mere nudity and depicts or suggests conduct can be barred. I think if it can be barred on 14th and Constitution Avenue, it can be barred in a saloon and probably theatre.

6. I consider the state free to make a serious felony out of any conduct that permits access of minors to non-protected material.

7. In general I agree that traffic via words in print is in a different category from pictures, movies, or live shows. I would cover this by the "access" and "anti-solicitation" route.

8. I read your memo as drawing substantially on the recommendations of the Commission on Obscenity and Pornography. For me, the Commission's Report is interesting but I do not think I am ready to make it a basis for constitutional adjudication. I question the "ripeness" of the ideas of the Report.

9. I am by no means content with my own approach in the Miller memo I circulated, but the Court has made enough false steps. We now need to

retrace so that I feel we need to be very cautious about embarking on a new broad scale "solution." I fear that no solution will ever really be final -- First Amendment problems do not readily "finalize."

Since I circulated my Miller memo on May 19, I put my hand to something of the course you have laid out, but I concluded it was, for me at least, not ready for circulation.

I think I would prefer to continue with one step at a time, clarifying the "national standard" concept in Miller and let the other problems continue to "marinate."

I would therefore stand on Miller as proposed, but treat Thurgood's Stanley holding as I have in my memo on the border-importation case, and would follow the border case in Orito for interstate commerce.

Within this framework, I welcome suggestions that would lead any others to join Miller in what I consider to be a step-by-step treatment of one problem at a time.

Regards,

WEB

Mr. Justice Brennan

Copies to Conference

To : The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

No. 70–73

Circulate: 3/22/72

Recirculated: _____

Marvin Miller, Appellant, *v.* State of California. On Appeal from the Appellate Department, Superior Court of California, County of Orange.

[March —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

We judges who work at the appellate level have an understandable tendency to write essay-like opinions that announce general constitutional principles, but often are far removed from the gritty facts of the case.

Today we send a man to prison for distributing brochures which advertised books and a movie. A basic premise of criminal law under our Constitution is that it must give fair warning. I submit that the law of obscenity as defined by legislatures and by courts is so vague as not to give fair warning. Some make it a crime to sell a book which deals with sex "in a manner appealing to prurient interests." [1] Some define obscenity as literature which is "patently offensive because it affronts contemporary standards." [2] Others make a book obscene when it is "utterly without redeeming social im-

[1] *Roth* v. *United States*, 354 U. S. 476, 487.

California defines "obscene matter" as "matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, *i. e.*, a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." Calif. Penal Code § 311 (a).

[2] *Id.*, 489.

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–73

Marvin Miller, Appellant, *v.* State of California. | On Appeal from the Appellate Department, Superior Court of California, County of Orange.

[March —, 1972]

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[2] *Id.*, 489.

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–73

Marvin Miller, Appellant,
v.
State of California.

On Appeal from the Appellate Department, Superior Court of California, County of Orange.

[May —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

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[2] 354 U. S., at 489.

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–73

Marvin Miller, Appellant, v. State of California. | On Appeal from the Appellate Department, Superior Court of California, County of Orange.

[May —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

We judges who work at the appellate level have an understandable tendency to write essay-like opinions that announce general constitutional principles, but often are far removed from the gritty facts of the case.

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[2] 354 U. S., at 489.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 22, 1972

MEMORANDUM TO THE CONFERENCE

RE: No. 70-73 - Miller v. California

With all respect, the Chief Justice's proposed solution to the obscenity quagmire will, in my view, worsen an already intolerable mess. I've been thinking for some time that only a drastic change in applicable constitutional principles promises a way out. I've decided that I shall use this case as a vehicle for saying that I'm prepared to make that change. I'll write in effect that it has proved impossible to separate expression concerning sex, called obscenity, from other expression concerning sex, whether the material takes the form of words, photographs or film; that Stanley (as well as the Chief Justice's 12, 000 Reels of Film?) has already eroded that concept; that we should treat obscenity not as expression concerning sex excepted from First Amendment speech but as expression, although constituting First Amendment speech, that is regulable to the extent of legislating against its offensive exposure to unwilling adults and dissemination to juveniles. I'll try in due course to circulate my views.

W.J.B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 13, 1972

MEMORANDUM TO THE CONFERENCE

RE: No. 70-73 - Miller v. California

The pressures on the Print Shop which have been aggravated by injuries and illnesses of one or two of the printers required me to accept the attached before it was proofread. I am nevertheless circulating it because I think it will at least give you some idea of my thinking.

W.J.B. Jr.

Wm. Lorgh

Oct 72

I think I am in agreement with your views, subject

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Brennan, J.

Circulated: 6/13/72

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 70–73

Marvin Miller, Appellant, v. State of California. | On Appeal from the Appellate Department, Superior Court of California, County of Orange.

[June —, 1972]

Memorandum of MR. JUSTICE BRENNAN.

I think that the time has come when the Court should admit that the standards fashioned by it to guide administration of this Nation's obscenity laws do not work, and that we must change our constitutional approach if we are to bring stability to this area of the law. This memorandum will trace the sources of the difficulty and propose a solution.[1]

Roth v. *United States*, 354 U. S. 476 (1957), of course, held that obscenity, although expression, is not within the area of speech or press constitutionally protected under the First and Fourteenth Amendments against federal or state infringement.[2] But *Roth* also emphasized that "sex and obscenity are not snyonymous," *id.*, at 484, and that sexually oriented matter not obscene has the full protection of the Constitution, this because

[1] I do not address here the problem of live performances involving sexual acts, which may bring into play considerationc not relevant to the analysis of written, pictorial, or three-dimensional sexually oriented expression.

[2] Even under Roth, it should be pointed out, governmental regulation of obscenity has been subject to the commands of reasonableness under the Due Process Clause, see *Ginsberg* v. *New York*, 390 U. S. 629 (1968), and the Federal Government has been limited to the exercise of its enumerated powers.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 23, 1972

MEMORANDUM TO THE CONFERENCE

RE: No. 70-73 - Miller v. California

Now that we've laid over the obscenity cases, I am circulating the attached revision of my memorandum in the above for your files.

W. J. B. Jr.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

J. Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 70–73 Recirculated: 6/23

Marvin Miller, Appellant,
v.
State of California.

On Appeal from the Appellate Department, Superior Court of California, County of Orange.

[June —, 1972]

Memorandum of MR. JUSTICE BRENNAN.

I think that the time has come when we should admit that the standards we have fashioned to guide administration of this Nation's obscenity laws do not work and that we must change our constitutional approach if we are to bring stability to this area of the law. This memorandum will trace the sources of the difficulty and propose a solution.[1]

Roth v. *United States*, 354 U. S. 476 (1957), held that obscenity, although expression, is not within the area of speech or press constitutionally protected under the First and Fourteenth Amendments against federal or state infringement.[2] But *Roth* also emphasized that "sex and obscenity are not synonymous," *id.*, at 484, and that sexually oriented matter not obscene has the full protection of the Constitution, this because

[1] I do not address here the problem of live performances involving sexual acts, which may bring into play considerations not relevant to the analysis of written, pictorial, or three-dimensional sexually oriented expression.

[2] Even under *Roth* governmental regulation of obscenity has been subject to the commands of reasonableness under the Due Process Clause, see *Ginsberg* v. *New York*, 390 U. S. 629 (1968), and the Federal Government has been limited to the exercise of its enumerated powers.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 22, 1972

No. 70-73 - Miller v. California

Dear Bill,

I am most interested to learn of the views described in your memorandum and am grateful that you propose to write them out. I think that they offer a most hopeful approach toward extrication from what you correctly describe as an "intolerable mess." I shall suspend further consideration of the issues in this case pending receipt of what you write.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 15, 1972

70-73 - Miller v. Calif.

Dear Bill,

I have read your memorandum in this case with much interest. It is a thorough and convincing piece of work and I am in basic agreement with it.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 15, 1972

Re: No. 70-73 - Miller v. California

Dear Bill:

I think I am in agreement with your memorandum.

Sincerely,

T.M.

Mr. Justice Brennan

cc: Conference