

The Burger Court Opinion Writing Database

Rosenfeld v. New Jersey

408 U.S. 901 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

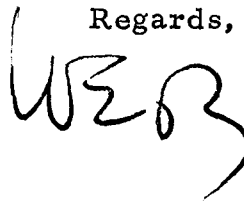
June 5, 1972

Re: No. 71-1044 - Rosenfeld v. New Jersey
No. 70-5323- Lewis v. City of New Orleans

Dear Bill:

Please join me in your dissent.

Regards,

A handwritten signature in black ink, appearing to be "WEB", written in a cursive, stylized manner.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

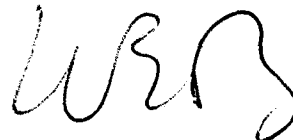
June 16, 1972

Re: No. 71-1044 - Rosenfeld v. New Jersey

Dear Lewis:

Please join me in your dissent in the above.

Regards,

A handwritten signature in dark ink, appearing to be "W. E. B.", likely representing Warren E. Burger.

Mr. Justice Powell

Copies to the Conference

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell ✓
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: JUN 16 1972

Recirculated: _____

No. 71 - 1044 -- Rosenfeld v. New Jersey*

MR. CHIEF JUSTICE BURGER, dissenting.

I am constrained to express my profound disagreement with what the Court does in these two cases on the basis of Gooding v. Wilson, _____ U.S. _____ (1972).

The important underlying aspect of these cases goes really to the function of law in preserving ordered liberty. Civilized people refrain from "taking the law into their own hands" because of a belief that the government, as their agent, will take care of the problem in an organized, orderly way with as nearly a uniform response as human skills can manage. History is replete with evidence of what happens when the law cannot or does not provide a collective response for conduct so widely regarded as impermissible and intolerable.

It is barely a century since men in parts of this country carried guns constantly because the law did not afford protection. In that setting, the

*Together with No. 70-5323 -- Lewis v. City of New Orleans

Supreme Court of the United States
Washington, D.C.
June 19, 1972

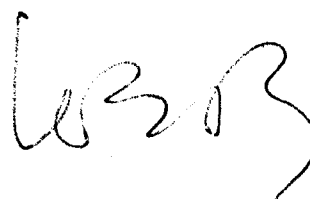
CHAMBERS OF
THE CHIEF JUSTICE

No. 71-1044 -- Rosenfeld v. New Jersey
No. 70-5323 -- Lewis v. City of New Orleans
No. 71-6535 -- Brown v. State of Oklahoma

Dear Harry and Bill:

I will be glad to have my dissent cover all
three cases.

Regards,



Mr. Justice Blackmun
Mr. Justice Rehnquist

cc: Mr. Justice Powell ✓



To: Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]

1st DRAFT

SUPREME COURT OF THE UNITED STATES

DAVID A. ROSENFELD *v.* NEW JERSEY

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

Circulated:

Recirculated:

JUN 21 1972

MALLIE LEWIS *v.* CITY OF NEW ORLEANS

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

WILBERT MONTELL BROWN *v.* STATE OF
OKLAHOMA

ON APPEAL FROM THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

Nos. 71-1044, 70-5323, and 71-6535. Decided June —, 1972

MR. CHIEF JUSTICE BURGER, dissenting.

I am constrained to express my profound disagreement with what the Court does in these three cases on the basis of *Gooding v. Wilson*, — U. S. — (1972).

The important underlying aspect of these cases goes really to the function of law in preserving ordered liberty. Civilized people refrain from "taking the law into their own hands" because of a belief that the government, as their agent, will take care of the problem in an organized, orderly way with as nearly a uniform response as human skills can manage. History is replete with evidence of what happens when the law cannot or does not provide a collective response for conduct so widely regarded as impermissible and intolerable.

It is barely a century since men in parts of this country carried guns constantly because the law did not afford protection. In that setting, the words used in these cases, if directed toward such an armed civilian, could well have led to death or serious bodily injury. When we undermine the general belief that the law will give

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No file.
Want one

The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

DAVID A. ROSENFELD v. NEW JERSEY

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

No. 71-1044. Decided May —, 1972

PER CURIAM.

The judgment is vacated and the case is remanded to the Appellate Division of the Superior Court of the State of New Jersey for reconsideration in the light of *Cohen v. California*, 402 U. S. 15 (1971), and *Gooding v. Wilson*, 405 U. S. — (1972).

PS JOINS

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE
Sanford, California 94303-6000



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LAW (TITLE 17, U.S. CODE)

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 1, 1972

Re: No. 71-1044 - Rosenfeld v. New Jersey
No. 70-5323 - Lewis v. City of New Orleans ✓

Dear Bill:

Please join me in your proposed dissent to
the disposition of the above appeals.

Sincerely,

H. A. B.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 14, 1972

Re: No. 71-1044 - Rosenfeld v. New Jersey

Dear Lewis:

Please join me in your dissent.

Sincerely,

H. A. B.

Mr. Justice Powell

cc: The Conference

May 3, 1972

No. 71-1044 Rosenfeld v. New Jersey

Dear Chief:

I have noted Mr. Justice Brennan's Per Curiam opinion in the above case.

My recollection is that you indicated that you might write a dissent. Knowing how heavily committed you are, I wonder if it would be helpful if I relieved you of this and undertook to write briefly myself.

Sincerely,

LFP

The Chief Justice

FILE COPY
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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

Circulated: **JUN 14 1972**

DAVID A. ROSENFELD v. NEW JERSEY

Recirculated: _____

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

No. 71-1044. Decided June —, 1972

MR. JUSTICE POWELL, dissenting.

It has long been established that the First and Fourteenth Amendments forbid the States from punishing all but the most "narrowly limited classes of speech." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). The right of free speech, however, has never been held to be absolute at all times and under all circumstances. To so hold would sanction invasion of cherished personal rights and would deny the States the power to deal with threats to public order. As the Court noted in *Chaplinsky*,

"... it is well understood that the right of free speech is not absolute at all times and under all circumstances. 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, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of slight social value as a stop to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution and its

P.1
Stylistic Changes Throughout

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2nd DRAFT

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

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

DAVID A. ROSENFELD v. NEW JERSEY

Circulated:

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

Recirculated: JUN 21 1972

No. 71-1044. Decided June —, 1972

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE
and MR. JUSTICE BLACKMUN join, dissenting.

It has long been established that the First and Fourteenth Amendments forbid the States from punishing all but the most "narrowly limited classes of speech." *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571 (1942). The right of free speech, however, has never been held to be absolute at all times and under all circumstances. To so hold would sanction invasion of cherished personal rights and would deny the States the power to deal with threats to public order. As the Court noted in *Chaplinsky*,

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

John. Rehnquist, J.

DAVID A. ROSENFELD v. NEW JERSEY

Circulated: 6/1/72

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Re-circulated: _____

MALLIE LEWIS v. CITY OF NEW ORLEANS

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

Nos. 71-1044 and 70-5323. Decided June —, 1972

MR. JUSTICE REHNQUIST, dissenting.

In *Lewis*, the police were engaged in making an arrest of petitioner's son on grounds not challenged here. While the police were engaged in the performance of their duty, petitioner intervened and ultimately addressed the police officers as "G-- d-- m--- police." At that point she was herself arrested for violation of a city ordinance providing:

"It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty."

In *Rosenfeld*, appellant appeared and spoke at a public school board meeting which was held in an auditorium and was attended by more than 150 men, women, and children of mixed ethnic and racial backgrounds. It was estimated that there were approximately 40 children and 25 women present at the meeting. During his speech, appellant used the adjective "M-----f-----" on four different occasions while concluding his remarks. Testimony varied as to what particular nouns were joined with this adjective, but the latter were said to include teachers, the community, the school system, the school board, the country, the county, and the town.

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES *Rehnquist, J.*

DAVID A. ROSENFELD v. NEW JERSEY

Circulated: _____

Recirculated: 6/2/72

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

MALLIE LEWIS v. CITY OF NEW ORLEANS

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

Nos. 71-1044 and 70-5323. Decided June —, 1972

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Mr. Justice Blackmun
Mr. Justice Powell

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

SUPREME COURT OF THE UNITED STATES

DAVID A. ROSENFELD v. NEW JERSEY

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MALLIE LEWIS v. CITY OF NEW ORLEANS

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

WILBERT MONTELL BROWN v. STATE OF
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