

The Burger Court Opinion Writing Database

Kois v. Wisconsin

408 U.S. 229 (1972)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



1st DRAFT

SUPREME COURT OF THE UNITED STATES

JOHN R. KOIS *v.* STATE OF WISCONSIN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME
COURT OF WISCONSIN

No. 71-5625. Decided April —, 1972

MR. JUSTICE DOUGLAS, concurring.

I concur in the judgment because neither logic, history, nor the plain meaning of the English language will support the obscenity exception this Court has engrafted onto the First Amendment. *United States v. 12 200-Ft. Reels of Film, ante*, at — (DOUGLAS, J., concurring).

This case, moreover, is further testimony to the morass in which this Court has placed itself in the area of obscenity. *Miller v. California, ante*, at — (DOUGLAS, J., dissenting). Men are sent to prison under definitions which they cannot understand and on which lower courts and members of this Court cannot agree. Here, the Court is forced to examine the thematic content of the two newspapers for the publication of which petitioner was prosecuted in order to hold that they are constitutionally protected. Highly subjective inquiries such as this do not lend themselves to a workable or predictable rule of law, nor should they be the basis of fines or imprisonment.

In this case, the vague umbrella of obscenity laws was used in an attempt to run a radical newspaper out of business and to impose a two-year sentence and a \$2,000 fine upon its publisher. If obscenity laws continue in this uneven and uncertain enforcement, then the vehicle has been found for the suppression of any unpopular tract. The guarantee of free expression will thus be diluted and in its stead public discourse will only embrace that of which five members of this Court will approve.

To: The Chief Justice
Mr. Justice Thompson
Mr. Justice McLean
Mr. Justice D'Avignon
Mr. Justice Ross
Mr. Justice McTavish
Mr. Justice Doherty
Mr. Justice McLean
Mr. Justice D'Avignon
Mr. Justice Ross
Mr. Justice McTavish
Mr. Justice Doherty

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Circulation

JOHN R. KOIS *v.* STATE OF WISCONSIN

Recirculated:

5-22

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HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE
Seaford, California, May 1918

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR. April 4, 1972

RE: No. 71-5625 - Kois v. Wisconsin

Dear Bill:

This is just formally to say that I agree
with the Per Curiam you have prepared in
the above.

Sincerely,

Rehnquist

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

Potter Stewart

April 3, 1972

71-5625 - Kois v. Wisconsin

Dear Bill,

I should appreciate your adding the following at the foot of the Per Curiam you have circulated in this case:

"MR. JUSTICE STEWART concurs in the judgment."

Sincerely yours,

P. S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 14, 1972

Re: No. 71-5625 - Kois v. Wisconsin

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

Copies to Conference

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CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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

June 19, 1972

*Send back
Concurring
Opinion*

Re: No. 71-5625 Kois v. Wisconsin

Lew
Dear Bill:

One of the unfinished items on my agenda is voting in the above case.

Unless a decision is made to hold it, you may note me as joining you.

Sincerely,

Lewin

Mr. Justice Rehnquist

cc: The Conference

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE
Sanford, California 94305-6010



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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

From: Rehnquist, J.

JOHN R. KOIS v. STATE OF WISCONSIN Circulated: _____

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME Recirculated: _____
COURT OF WISCONSIN

No. 71-5625. Decided April —, 1972

PER CURIAM.

Petitioner was convicted in the state trial court of violating a Wisconsin statute prohibiting the dissemination of "lewd, obscene or indecent written matter, picture, sound recording, or film." He was sentenced to consecutive one-year terms in the Green Bay Reformatory and fined \$1,000 on each of two counts. The Supreme Court of Wisconsin upheld his conviction against his contention that he had been deprived of freedom of the press in violation of the Fourteenth Amendment.

Petitioner was the publisher of an underground newspaper called "Kaleidoscope." In an issue published in May, 1968, that newspaper carried a story entitled "The One Hundred Thousand Dollar Photos" on an interior page. The story itself was an account of the arrest of one of Kaleidoscope's photographers on a charge of possession of obscene material. Two relatively small pictures, showing a nude man and nude woman embracing in a sitting position, accompanied the article and were described in the article as "similar" to those seized from the photographer. The article said that the photographer, while waiting in the district attorney's office, had heard that bail might be set at \$100,000. The article went on to say that bail had in fact been set originally at \$100, then raised to \$250, and that later the photographer had been released on his own recognizance. The article purported to detail police tactics which were described as an effort to "harass" Kaleidoscope and its staff.

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Stanford, California 94305-0600



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Mr. Justice 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

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Circulated: _____

Recirculated: 4/4/72

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