The Burger Court Opinion Writing Database

United States v. 12,200-Ft. Reels of Super 8MM. Film

413 U.S. 123 (1973)

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

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall (2)
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

October 31, 1972 Chief Justice

Circulated: OCT 31 1972

Recirculated: ~~October 31, 1972~~

Re: No. 70-2 - U.S. v. 12 200-Ft. Reels of Super 8 mm Film
No. 70-69 - U.S. v. Orito
No. 70-73 - Miller v. California
No. 71-1051 - Paris Adult Theatre I v. Slaton
No. 71-1315 - Alexander v. Virginia
No. 71-1422 - Kaplan v. California

MEMORANDUM TO THE CONFERENCE:

I. The Obscenity Problem

The obscenity cases argued last week again put before this Court what Justice Harlan aptly described as "the intractable obscenity problem." Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704. As I have said in my previous memoranda, I do not see any easy Judicial "solution," short of abandoning this Court's responsibility to the Constitution by adopting the absolutist approach which, for me, is an abdication of the judicial function. As in other major areas of First Amendment controversy relating to free expression, this Court will inevitably be required to make difficult judgments.

It may be useful to summarize again the elements of the obscenity problem presented by the pending cases. First, there is the need to

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

CHAMBERS OF
THE CHIEF JUSTICE

November 13, 1972

Re: Obscenity Cases

MEMORANDUM TO THE CONFERENCE:

Apropos of the above cases, it was agreed at Conference that the time had come for "a division of the House" so that some specific writing can begin.

Bill Brennan and I have each tried to articulate a general approach on what seems to me the basic problems in Miller v. California and comparable cases. I still consider Orito and 12 Reels problems peripheral and far less important in the whole scheme. Millions of people are offended and injured by the public displays; only a small number of true "Stanleys" are skulking around and I can "take or Leave" their aberrations.

If we treat the broad problems of Miller et al as Part I and the Orito-12 Reels as Part II, it would now help Bill and me if you would indicate that you "generally agree" with Bill or with me.

We can then begin to put the pieces together.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

November 20, 1972

Re: Obscenity Cases

MEMORANDUM TO THE CONFERENCE:

In light of the "returns", written and oral, I will undertake to pick out one of the "movie" cases and possibly a "picture" case and propose something more concrete in the way of an opinion. I do not believe a national standard exists that can be defined in the abstract except to say what kind of graphic description of conduct is not protected by the First Amendment. The thrust, therefore, will be to define what conduct, publicly exhibited, is not protected by the First Amendment and hence is subject to regulation under state police power. Necessarily this will also define "public exhibition." The Court has already defined places of public accommodation in other contexts and I will draw on that definition the kinds of places state police power can reach.

I regard the importation and interstate transportation of materials as relatively minor compared with the "main" show of public pornography and I am prepared to let Reidel and 37 Photos stand as the limits of Stanley.

When I finish you will have a choice between the Brennan solution and mine.

Regards,

WEB

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

1st DRAFT

Circulated: JAN 12 1973

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 70–2

United States, Appellant, *v.* 12 200-Ft. Reels of Super 8mm. Film et al. | On Appeal from the United States District Court for the Central District of California.

[January —, 1973]

Memorandum from MR. CHIEF JUSTICE BURGER.

We noted probable jurisdiction to review the decision of a three-judge district court holding that 19 U. S. C. § 1305 (a) was unconstitutional on its face. That statute provides in pertinent part:

> "All persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral . . . . No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: . . . . *Provided, further,* That the Secretary of the Treasury may, in his discretion, admit the so-

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

CHAMBERS OF
THE CHIEF JUSTICE

March 19, 1973

MEMORANDUM TO THE CONFERENCE:

Soon I will have a more or less final draft of my proposed disposition of the "Obscenity Group".

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

April 9, 1973

Re: A - No. 70-73 - Miller v. California
B - No. 71-1051 - Paris Adult Theatre I v. Slaton
C - No. 71-1422 - Kaplan v. California
D - No. 70-2 - U. S. v. 12/200-ft. Reels Super 8 mm Film
E - No. 70-69 - U. S. v. Orito
F - No. 71-1315 - Alexander v. Virginia

MEMORANDUM TO THE CONFERENCE:

The Chief Justice is attending the D. C. Circuit Judicial Conference, but he was anxious to have you receive a new draft of the opinions in the above cases.

Please note that the opinions are cast as "court opinions" in form, although the votes are not all in. The Chief Justice did this to conform with the form of opinions citculated by Mr. Justice Brennan.

Mary Burns

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 2-6

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

D—April 7, 1973

From:

2nd DRAFT

Circulated:

Recirculated: APR 9 1973

SUPREME COURT OF THE UNITED STATES

No. 70-2

United States, Appellant, v. 12 200-Ft. Reels of Super 8mm. Film et al.	On Appeal from the United States District Court for the Central District of California.

[March —, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We noted probable jurisdiction to review the decision of a District Court holding that 19 U. S. C. § 1305 (a) was unconstitutional on its face and dismissing a forfeiture action brought under that statute. The statute provides in pertinent part:

> "All persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral . . . . No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter pro-

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

CHAMBERS OF
THE CHIEF JUSTICE

April 16, 1973

Re: Obscenity Cases

MEMORANDUM TO THE CONFERENCE:

An inquiry from one Chamber prompts me to respond with this memo to all.

In the current circulation I have proposed

> "(1) that the challenged material, viewed in its setting, appeals to the prurient interest, Roth supra, 354 U. S., at 498,..."

I do not regard this as a significant change except in one respect. In a substantial number of cases, prosecutors present their case in chief with only the "hard core" material. For my part I have never really understood that "taken as a whole" precluded this process and, on the contrary, permitted the prosecution to follow that practice, thus requiring the Defendant to put in "the whole." In my view the case in chief of the prosecution should be the "challenged material in its setting", i.e., the entire book, play, picture or film.

Regards,

WEB

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 7

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

D—May 7, 1973

3rd DRAFT

From: The Chief Justice

Circulated: _____

Recirculated: MAY 8 1973

SUPREME COURT OF THE UNITED STATES

No. 70-2

United States, Appellant, *v.* 12 200-Ft. Reels of Super 8mm. Film et al.	On Appeal from the United States District Court for the Central District of California.

[May —, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We noted probable jurisdiction to review a summary decision of the United States District Court for the Central District of California holding that 19 U. S. C. § 1305 (a) was "unconstitutional on its face" and dismissing a forfeiture action brought under that statute. The statute provides in pertinent part:

> "All persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral . . . . No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be

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

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1973

Re: No. 70-73 - Miller v. California
No. 71-1051 - Paris Adult Theatre I v. Slaton
No. 71-1422 - Kaplan v. California
No. 70-2 - U.S. v. 12 200-Ft. Reels of Super 8 mm. Film
No. 70-69 - U.S. v. Orito
No. 71-1315 - Alexander v. Virginia

Dear Bill:

I have made a preliminary study of your June 6 circulation of dissent and it will involve a few, although only slight, changes in my opinions probably confined to Miller v. California. A very few words will make more clear the difference between the Memoirs test and the Miller test. I may be able to do this by simply moving part of one footnote into the text at the appropriate place.

I will also express disagreement with your view that all the states except Oregon and Hawaii must now revamp their obscenity statutes. Those statutes which have not been construed by state courts to cover specific conduct can be construed on remand in light of our opinions. Any state is, of course, free to recodify but I can't agree that any of them must do so.

Subject to Print Shop problems, this will be around soon.

Regards,

Mr. Justice Brennan

Copies to the Conference

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1, 2

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

D—June 14, 1973

5th DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 70–2

Recirculated: JUN 19 1973

United States, Appellant, *v.* 12 200-Ft. Reels of Super 8mm. Film et al.	On Appeal from the United States District Court for the Central District of California.

[May —, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We noted probable jurisdiction to review a summary decision of the United States District Court for the Central District of California holding that 19 U. S. C. § 1305 (a) was "unconstitutional on its face" and dismissing a forfeiture action brought under that statute.[1] The statute provides in pertinent part:

> "All persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral . . . . No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner,

[1] The United States brought this direct appeal under 28 U. S. C. § 1252. See *Clark* v. *Gabriel*, 393 U. S. 256, 258 (1968).

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

CHAMBERS OF
THE CHIEF JUSTICE

June 21, 1973

70-73 in

Re: Holds for the Obscenity Cases

MEMORANDUM TO THE CONFERENCE:

For my part, none of the sixty (60) "holds" for the obscenity cases need be discussed at Conference except:

No. 72-1053 - Michigan v. Bloss - p. 10

No. 70-41 - Meyer v. Austin - p. 10

No. 70-43 - Miller v. United States - p. 11

Regards,

WEB

WR

70-27

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

CHAMBERS OF
THE CHIEF JUSTICE

{This not going out until Mon or Tues.}

Harry

Here are the "five". I particularly call attention to the modification of the Roth language. I've never quite known what "taken as a whole" meant in this context. The crucial thing is the "hard core" stuff so I make it "viewed in its setting". I'll be back from CA-DC Mon P.M. WEB

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas

No. 70-2

Circulated: 1-15-73

Recirculated: _____

United States, Appellant, *v.* 12 200-Ft. Reels of Super 8mm. Film et al.	On Appeal from the United States District Court for the Central District of California.

[January —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

My difficulty with the case is that I know of no constitutional way by which a book, tract, paper, postcard, or film may be made contraband because of its contents. The Constitution never purported to give the Federal Government censorship or oversight over literature or artistic productions, save as they might be governed by the Patent and Copyright Clause of Art. I, § 8, cl. 8, of the Constitution.[1] To be sure, the Colonies had enacted statutes which limited the freedom of speech, see *Roth* v. *United States,* 354 U. S. 476, 482–484 nn. 10–13, and in the early 19th century the States punished obscene libel as a common law crime. *Knowles* v. *State,* 3 Conn. 103 (1808) (signs depicting "monster"); *Commonwealth* v. *Holmes,* 17 Mass. 336 (1821) (John Cleland's Memoirs of a Woman of Pleasure); *State* v. *Appling,* 25 Mo. 315 (1857) (utterance of words "too vulgar to be inserted in this opinion"); *Commonwealth* v. *Sharpless,* 2 Pa. 91 (1815) ("lewd, wicked, scandalous, infamous, and indecent posture with a woman").

To construe this history, as this Court does today in *Miller* v. *California, ante,* at 19–20, as qualifying the

[1] Even the copyright power is limited by the freedoms secured by the First Amendment. *Lee* v. *Runge,* 404 U. S. 887, 892–893 (DOUGLAS, J., dissenting); Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 U. C. L. A. L. Rev. 1180 (1970).

1,8

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
From: Douglas, J.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–2

Circulated:

Recirculated: 5-16-73

United States, Appellant, *v.* 12 200-Ft. Reels of Super 8mm. Film et al.	On Appeal from the United States District Court for the Central District of California.

[January —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

I know of no constitutional way by which a book, tract, paper, postcard, or film may be made contraband because of its contents. The Constitution never purported to give the Federal Government censorship or oversight over literature or artistic productions, save as they might be governed by the Patent and Copyright Clause of Art. I, § 8, cl. 8, of the Constitution.[1] To be sure, the Colonies had enacted statutes which limited the freedom of speech, see *Roth* v. *United States,* 354 U. S. 476, 482–484 nn. 10–13, and in the early 19th century the States punished obscene libel as a common law crime. *Knowles* v. *State,* 3 Conn. 103 (1808) (signs depicting "monster"); *Commonwealth* v. *Holmes,* 17 Mass. 336 (1821) (John Cleland's Memoirs of a Woman of Pleasure); *State* v. *Appling,* 25 Mo. 315 (1857) (utterance of words "too vulgar to be inserted in this opinion"); *Commonwealth* v. *Sharpless,* 2 Pa. 91 (1815) ("lewd, wicked, scandalous, infamous, and indecent posture with a woman").

To construe this history, as this Court does today in *Miller* v. *California, ante,* at 19–20, as qualifying the

[1] Even the copyright power is limited by the freedoms secured by the First Amendment. *Lee* v. *Runge,* 404 U. S. 887, 892–893 (DOUGLAS, J., dissenting); Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 U. C. L. A. L. Rev. 1180 (1970).

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 18, 1973

70-2

MEMORANDUM TO THE CONFERENCE

RE: Obscenity Cases

The Chief Justice has circulated Memoranda in

No. 70-2 United States v. 200 Ft. Reels
No. 70-69 United States v. Orito
No. 70-73 Miller v. California
No. 71-1051 Paris Adult Theatre v. Slaton

I assume he will in due course be circulating a Memorandum in the remaining three cases:

No. 71-1134 Roaden v. Kentucky
No. 71-1315 Alexander v. Virginia
No. 71-1422 Kaplan v. California

In light of the views I expressed in my Memorandum in Paris Adult Theatre, I would, of course, disagree with the Chief Justice in Orito, 200 Ft. Reels and Miller. I shall, after the memorandum in the three remaining cases is circulated, attempt a revision of my Memorandum in Paris Adult Theatre to answer the proposals of the Chief Justice in all of the cases. I contemplate that I'll not be able to complete this for some time.

W. J. B. Jr.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 16, 1973

MEMORANDUM TO THE CONFERENCE

RE: Obscenity Cases

Herewith, in the form of eight separate opinions, my contribution to our resolution of the obscenity cases. You will understand, I know, my optimism in drafting these opinions in such a way that they could serve, with few modifications, as opinions for the Court. While I remain convinced that the basic approach is sound, and am also convinced that I am at rest, I would, of course, welcome any suggestions.

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

1st DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 3/16/73

Recirculated: _____

No. 70–2

United States, Appellant, *v.* 12 200-Ft. Reels of Super 8mm. Film et al.	On Appeal from the United States District Court for the Central District of California.

[March —, 1973]

Memorandum of MR. JUSTICE BRENNAN.

We noted probable jurisdiction to consider the constitutionality of 19 U. S. C. § 1305 (a) which prohibits all persons from "importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral." Pursuant to that provision, customs authorities at Los Angeles seized certain movie films, color slides, photographs, and other materials, which appellee sought to import into the United States. A complaint was filed in the United States District Court for the Central District of California for forfeiture of these items as obscene. Relying on the decision in *United States* v. *37 Photographs,* 309 F. Supp. 36 (CD Cal. 1969), which held the statute unconstitutional on its face, the District Court dismissed the complaint. Although we subsequently reversed the decision in *United States* v. *37 Photographs,* 402 U. S. 351 (1971), the reasoning that led us to uphold the statute is no longer viable, in view of our decision today in *Paris Adult Theatre* v. *Slaton,* — U. S. — (1973). Whatever the extent of the Federal Government's power

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 5, 1973

70-B

RE: "Held" Obscenity Cases

Dear Potter and Thurgood:

Although my general practice is not to persist in expressing a view with which a Court disagrees, I intend to make an exception in the obscenity area. This will be so as to future cases as well as to cases now pending. I have therefore canvassed the pending cases and shall ask the Chief Justice to note my dispositions as per the enclosure. Before doing so, however, I thought I'd ask if either or both of you wish to join me.

Sincerely,

Bill

Mr. Justice Stewart

Mr. Justice Marshall

WB

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

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 70-2

Recirculated: 6/6/73

United States, Appellant, v. 12 200-Ft. Reels of Super 8mm. Film et al.	On Appeal from the United States District Court for the Central District of California.

[March — 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

We noted probable jurisdiction to consider the constitutionality of 19 U. S. C. § 1305 (a) which prohibits all persons from "importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral." Pursuant to that provision, customs authorities at Los Angeles seized certain movie films, color slides, photographs, and other materials, which appellee sought to import into the United States. A complaint was filed in the United States District Court for the Central District of California for forfeiture of these items as obscene. Relying on the decision in *United States* v. *37 Photographs*, 309 F. Supp. 36 (CD Cal. 1969), which held the statute unconstitutional on its face, the District Court dismissed the complaint. Although we subsequently reversed the decision in *United States* v. *37 Photographs*, 402 U. S. 351 (1971), the reasoning that led us to uphold the statute is no longer viable, under the view expressed in my dissent today in *Paris Adult Theatre* v. *Slaton*, —

WO

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 7, 1973

MEMORANDUM TO THE CONFERENCE

In 70-73

RE: "Held" Obscenity Cases

I discovered a few more obscenity "Holds" and have amended the attached to include them. These should replace the list circulated with my note of June 6. I have checked this list with Mike Rodak and it conforms to the Clerk's records.

W.J.B. Jr.

WJB

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 13, 1972

Re: Obscenity Cases

Dear Chief,

Responding to your memorandum of this date, I am as of now in general agreement with Bill Brennan's circulation of last Term on the general problem (with certain qualifications), and with your circulations of last Term in Orito and 12 Reels. I would prefer, however, not to definitely make a commitment in advance of seeing what is finally written. Indeed, it is my understanding that at least two members of the Court do not agree with either you or Bill.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 19, 1973

Re: Obscenity Cases

Dear Bill,

As I have previously told you, I agree with your views in these cases. Accordingly, I join your eight separate circulations of March 16.

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 5, 1973

Re: "Held" Obscenity Cases

70-73

Dear Bill,

I intend also to continue to express my views in pending and future cases in this area. Nobody in my office has canvassed the pending cases, but I confidently and cheerfully rely upon you and your staff for your characteristic accuracy and thoroughness. Accordingly, I request that you add my name to yours in noting the proposed disposition of the pending cases.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copy to Mr. Justice Marshall

WE

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 16, 1972

Dear Chief:

The following, in brief outline, are my views on the obscenity cases now under consideration:

First and most fundamentally, I would adhere to the view of Roth that obscenity is not within the protection of the First Amendment. Nothing occurring since that case has convinced me that we have any better reason for invalidating state obscenity laws than we did then, whatever our personal opinions may be as to the advisability or effectiveness of such state statutes or local ordinances. I should also say that I would consider it fundamentally inconsistent with this view to hold in Reels and Orito that the Constitution protects the importation of obscenity for private use or its transportation in interstate commerce. Rather than take that course in those cases, I would prefer Bill Brennan's position, which itself seems a rather uncomfortable half-way house.

Second, of course, is the definition of obscenity. I am content with the Roth definition without the Fanny Hill gloss, which has never had five votes. But it is time that the Court acknowledged and defined the boundaries of the rather narrow category of materials that the States and the Federal Government are permitted to proscribe. As the Roth test has been administered, there are excluded from First Amendment protections in the case of photographs and movies only purported representations of ultimate sexual acts, normal or perverted, together with genital-oriented photographs of men and women; and, in the case of written material, the kind of repetitive fantasy represented by Suite 69. Although this would eliminate much of the vagueness of the Roth test, I doubt that under this or any

other approach short of Bill Douglas's we could avoid making ultimate judgments in a substantial number of obscenity cases.

Third, it seems to me that in the last analysis there must be a limiting national standard imposed by the First Amendment. The general definition of obscenity stated in Roth and the limits of its approach as indicated above are unmistakable strictures imposed by the Federal Constitution on what materials the States may exorcise. Other than these outer limits, however, I see no requirement that the States structure obscenity proceedings or the witnesses and evidence in such cases so as to recognize national standards of prurient appeal, candor or social value.

Fourth, I have never thought that Marcus and Books have posed unmanageable problems for the States in the case of written materials. Insofar as magazines and books are concerned, I would not modify those cases. The applicability of those decisions to movies has not been adjudicated. Seizing the film may well take it out of circulation completely pending adversary hearing and judicial determination of obscenity vel non. On the other hand, not seizing it invites delay and the disappearance of the film when its run has been completed. I see no reason why the distributor or exhibitor could not be noticed for an evidentiary hearing within a short time, say five days, indicating that unless he brings the film it will be seized and that a continuance will not be had without the film or a copy of it being held for use as evidence. In any event, the States could move to the prior licensing arrangement recognized by Freedman v. Maryland.

Finally, in years gone by there have been suggestions that federal constitutional interests would be wholly vindicated if the statutes embraced the Roth standards and juries were instructed in like terms. A majority of the Court, however, has never agreed that there were no limits on what a properly instructed jury could constitutionally ban. I could not embrace that approach now. Neither would I think it advisable in sustaining state obscenity laws to indicate that legislative efforts to protect consenting adults are either necessary or advisable.

Sincerely,

Byron

The Chief Justice

Copies to Conference

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

1st DRAFT

From: White, J.

Circulated: 4-26-73

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 70–2, 70–69, 70–73, AND 71–1051

United States, Appellant, 70–2 *v.* 12 200-Ft. Reels of Super 8mm. Film et al.	On Appeal from the United States District Court for the Central District of California.
United States, Appellant, 70–69 *v.* George Joseph Orito.	On Appeal from the United States District Court for the Eastern District of Wisconsin.
Marvin Miller, Appellant, 70–73 *v.* State of California.	On Appeal from the Appellate Department, Superior Court of California, County of Orange.
Paris Adult Theatre I et al., Petitioners, 71–1051 *v.* Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, et al.	On Writ of Certiorari to the Supreme Court of Georgia.

[February —, 1973]

MR. JUSTICE WHITE, concurring.

I join the opinions and judgments of the Court in these cases and append these few words to emphasize that in administering the holding in *Roth,* and whether applying a two- or three-pronged test, the First Amendment has been construed to permit the States to ban the distribution and sale of only a very narrow category of materials. Since *Roth,* the Court has regularly reversed convictions for distributing obscenity except where the material at issue contained explicit representations of sexual acts,

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

2nd DRAFT

From: White, J.

Circulated: _____

Recirculated: 2-22-73

SUPREME COURT OF THE UNITED STATES

Nos. 70–2, 70–69, 70–73, AND 71–1051

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[February —, 1973]

MR. JUSTICE WHITE, concurring.

I join the opinions and judgments of the Court in these cases and append these few words to emphasize that in administering the holding in *Roth,* and whether applying a two- or three-pronged test, the First Amendment has been construed to permit the States to ban the distribution and sale of only a very narrow category of materials. As the *Roth* test has come to be interpreted and applied, convictions for distributing obscenity are regularly reversed except where the material at issue contains ex-

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 16, 1973

Re: Obscenity Cases

Dear Chief:

Having reviewed the recent circulations in these cases, including yours, I am still with you in No. 70-2, 12 200-Ft Reels, based on your second draft of April 9; No. 70-69, Orito, based on your second draft of April 9; No. 70-73, Miller v. California, based on your fifth draft of April 11; and No. 71-1051, Paris Adult Theatre I v. Slaton, based on your fourth draft of April 11.

I also join your opinion in No. 71-1422, Kaplan v. California, based on your second draft of April 9, as well as your suggested per curiam in No. 71-1315, Alexander v. Virginia, circulated on April 9.

In view of the changes you have made in your present circulations, I am inclined to withdraw my concurring opinion circulated in some of the above cases.

Sincerely,

BR

The Chief Justice

Copies to Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 21, 1973

In 70-73

Dear Chief:

Except as noted below, I agree with your recommended dispositions of the cases held for the obscenity cases. This includes Florida v. M & W Theatres, Inc., No. 70-10, listed on page four of your memorandum. Because that case squarely presented the question of the applicability of Younger where state civil proceedings are pending, I had hoped we could note it. Bill Brennan, however, tells me that it is very, very dead and that mootness should be considered by the lower court in accordance with your formula.

I assume, because you recommend granting it, that Miller v. United States, No. 70-43, a federal case, will be discussed, as will the other federal cases. I would be content to vacate all of them, including Miller, and let the lower courts do the job in the first instance. Alternatively, couldn't Miller be held over and summarily disposed of by a per curiam next fall, the other federal cases then being vacated and remanded?

Sincerely,

The Chief Justice

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WP

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 20, 1973

Re: Obscenity Cases

Dear Bill:

I agree with all eight of your obscenity proposals. I am ready to join each of them.

Sincerely,

T.M.

Mr. Justice Brennan

cc: Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 20, 1972

Dear Chief:

As you know from my remarks at the last Obscenity Conference, Byron White's letter of November 16 expresses approximately my own views. I add only these comments:

1. I, too, would adhere to Roth and continue to hold that obscenity does not have First Amendment protection. I would also adhere to the position I took with Byron in Reidel and in 37 Photographs and, in particular, in Part II of the latter. This means, I think, that I could not go along with your circulation of last spring in Orito and in Reels.

2. The gloss that Memoirs would place on Roth--a gloss that, as Byron points out, has never commanded five votes--encountered difficulty in practice, it seems to me, primarily in the use of the word "utterly." This enabled the commercial exploiter to spread a little social concern among his filth and then to claim a minimum of social value. That, he would argue, entitled him to First Amendment protection under the "utterly" umbrella.

3. Bill Brennan's suggested new approach has a distinct appeal. It would, or should, relieve the courts of much of the pornography burden. I suspect that its appeal for me is primarily because it seems to provide a ready and easy solution. Yet, I am not certain that the Constitution requires that commercial exploiters of pornography may rot an unwilling community.

4. I agree with Byron that there must be a "limiting national standard." The First Amendment, after all, is national in character. I also agree with what I understand him to say that this does not require, however, that there also be national standards of prurient appeal and of candor and of social value. All of us surely recognize that in practice, when an issue of this kind goes to a jury, the jury will apply only what it knows, that is, a local standard.

5. Finally, I agree with Byron that rather than expand Stanley to the Orito and Reels situations, I would prefer the new Brennan approach.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 15, 1973

MEMORANDUM TO THE CONFERENCE:

Re: Obscenity Cases

I have advised the Chief Justice that, subject to some suggested changes in phraseology, I am prepared to join his opinions in the following cases:

No. 70-73	-	Miller v. California
No. 71-1051	-	Paris Adult Theatre I v. Slaton
No. 71-1422	-	Kaplan v. California
No. 70-2	-	United States v. 12 200-Ft. Reels
No. 70-69	-	United States v. Orito
No. 71-1315	-	Alexander v. Virginia

The Chief advises me that these changes will be made. I therefore circulate this memorandum to avoid further delay pending receipt of new drafts from the printer.

Sincerely,

H. A. B.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 18, 1973

Re: Obscenity Cases

Dear Chief:

I have in mind John Harlan's reference to the "intractable obscenity problem." Nevertheless, I now join your recirculations of May 17 in the following cases:

No. 70-73 - Miller v. California
No. 71-1051 - Paris Adult Theatre I v. Slaton

I also join your circulations of May 8 (with any necessary cross reference corrections) in the following cases:

No. 71-1422 - Kaplan v. California
No. 70-2 - U.S. v. 12 200-foot Reels
No. 70-69 - U.S. v. Orito
No. 71-1315 - Alexander v. Virginia

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 14, 1972

Re: Obscenity Cases

Dear Chief:

Responding to your memorandum of November 13, I confirm my statement at the Conference to the effect that I am generally in agreement with your approach on the basic problem. I may have some suggestions to make, but these would be within the framework - I think - of your general approach.

As to Orito and 12 Reels, I was inclined to accept the analysis in the memorandum which you circulated last spring. Recent discussions in our Conference, however, have caused me to give further consideration to these two cases. Orito, involving the Government's admittedly broad power "at the border," is not as difficult for me as 12 Reels. The latter is not easy to distinguish from Stanley. Yet, if we go beyond the "home" under the Stanley doctrine it is difficult - as Bill Brennan has argued eloquently - to know where to stop.

I consider the overriding problem to be a disposition of the Miller type case in which at least five members of the Court can join. Almost any such disposition would, I think, be preferable to the present intolerable confusion and uncertainty - with the Bar and the public not knowing where the Court stands. Accordingly, and while I must await circulations of draft opinions before making a final decision, I am inclined to support your general approach to the problem.

Sincerely,

The Chief Justice

cc: The Conference
LFP, Jr.:pls

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 27, 1972

Re: Obscenity Cases

Dear Chief:

Herewith are my very rough and tentative ideas in response to the recent circulations by Byron and Harry on this subject:

1. I agree with Byron and Harry as to Orito and Reels.

2. I agree that we should retain Roth without the Fanny Hill gloss. While it may be desirable and possible, as Byron suggests, that the Court define the boundaries of that type of material which may be proscribed, I would have some difficulty being quite as specific or categorical as he seems to be in his November 16th memorandum. I would think that if the opinion gets this specific, it should do so by way of example, rather than in an attempt by dicta to exhaust all possible candidates for this class.

3. I agree with Byron and Harry that while of course the standard laid down by the Fourteenth and First Amendments is a national one, the very definition embraced in Roth of "community" standards suggests that there is a role to be played by local jurors in applying the standards of the community as embodied in the Roth test. Certainly we should not lay down any constitutional standard which would encourage expert witnesses on both sides -- "opposing

bands of oath helpers" as I believe Wigmore called them -- to dominate the trial of an obscenity case.

4. I would not go as far as Byron indicates he would in requiring a prior adversary hearing in connection with obscenity seizures. I would treat Marcus and Books as dealing with seizures for the purpose of suppression, rather than for evidence, and permit seizures for the latter purpose of one copy of the material in question to be carried out under normal Fourth Amendment procedures. In the case of movies, where the single copy is all that the proprietor has, this obviously raises the question of on whom the burden should fall when, even though the seizure is only of the amount necessary to permit prosecution, it is also sufficient to prevent at least temporarily the further distribution of the product. I do not believe the Constitution prevents it from being put on the distributor, if the state so chooses.

5. While we will undoubtedly be making ultimate constitutional judgments under the constitutional standards outlined, as we would in applying Bill Brennan's alternative approach, much of this will be done in the exercise of our discretionary certiorari jurisdiction. Once the reasonably clear standards have been enunciated -- if that is possible in this area -- I would make the test of granting or denying certiorari, so far as my own vote is concerned, depend on whether or not the lower court seems to have conscientiously tried to apply the standards enunciated by this Court, rather than whether I agree with the result reached by the lower court.

Sincerely,

WWW

The Chief Justice

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 15, 1973

Re: Obscenity Cases

Dear Chief:

I am substantially in accord with the proposed analysis contained in your circulations in these cases. I take it that in Orito and Reels the judgments in each case would be reversed if your view prevails, since as I understand it it was assumed for purpose of decision by both District Courts that the matter in question was obscene.

Sincerely,

WHR

The Chief Justice

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 19, 1973

Re: Nos. 70-2, 70-69, 70-73, 71-1051, 71-1315 and 71-1422 - U.S. v. 12,200-ft. Reels, etc.

Dear Chief:

Please join me in your opinions for these cases.

Sincerely,

WHR

The Chief Justice

Copies to the Conference