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
Forrest Maltzman, George Washington University

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.

[January —, 1973]

Memorandum from MR. CHIEF JUSTICE BURGER.

This is one of a group of "obscenity-pornography" cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases.

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called "adult" material. He was convicted, after a jury trial, of violating California Penal Code § 311.2 (a), a misdemeanor, by willfully and knowingly distributing obscene matter.[1] His conviction was specifically based on

[1] The California Penal Code reads in relevant part:

"§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state

"(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exihibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter, is guilty of a misdemeanor.

"§ 311. Definitions

"As used in this chapter:

"(a) 'Obscene matter' means 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

appx omitted, 5

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

From: The Chief Justice

Circulated: _____

Recirculated: JAN 10 1973

3rd 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.

[January —, 1973]

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 3, 6-10, 13-15

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

A—April 7, 1973

From: The Chief Justice

4th DRAFT

Circulated: _____

Recirculated APR 9 1973

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.

[April —, 1973]

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

This is one of a group of "obscenity-pornography" cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases on what Mr. Justice Harlan called "the intractable obscenity problem." *Interstate Circuits, Inc.* v. *Dallas,* 390 U. S. 676, 704.

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called "adult" material. After a jury trial he was convicted of violating California Penal Code § 311.2 (a), a misdemeanor, by willfully and knowingly distributing obscene matter.[1] Appellant's conviction was specifically

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4,5,7,10

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:

Recirculated: APR 11 1973

A—April 11, 1973

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.

[April —, 1973]

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 7-12, 14-15, 17

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:

Recirculated: MAY 8 1973

A—May 7, 1973

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 —, 1973]

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

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES 6, 7, 15

A—May 16, 1973

7th DRAFT

SUPREME COURT OF THE UNITED STATES

Recirculated: MAY 1[illegible]3

No. 70-73

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

[May —, 1973]

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

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

CHAMBERS OF
THE CHIEF JUSTICE

May 18, 1973

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

Dear Bill:

In response to your suggestion, I am quite willing to change footnote No. 8 on page 8 to read as follows:

> "8/
> Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. In United States v. O'Brien, 391 U.S. 367, 376-377 (1968), a case not dealing with obscenity, the Court held a State regulation of conduct which itself embodied both speech and non-speech elements to be 'sufficiently justified if . . . it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' See California v. LaRue, _____U.S.____(slip opinion, at 8-9) (71-36) (Dec. 5, 1972)."

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

B

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 2-3, 5-7, 9-12, 16, 18-19

To: Mr. J... ...g
Mr. ... ...n
Mr. ...
Mr. ...
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...

A—June 13, 1973

8th DRAFT

From: ...

SUPREME COURT OF THE UNITED STATES

Recirculated: JUN 1...

No. 70–73

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

[May —, 1973]

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

This is one of a group of "obscenity-pornography" cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases on what Mr. Justice Harlan called "the intractable obscenity problem." *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676, 704 (1968).

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[1] At the time of the commission of the alleged offense, which was prior to June 25, 1969, § 311.2 (a) and § 311 of the California Penal Code read in relevant part:

"§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state

"(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribu-

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 10-11

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

A—June 18, 1973

9th DRAFT

Circulated: _____

Recirculated: JUN 19 1973

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 21, 1973]

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

This is one of a group of "obscenity-pornography" cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases on what Mr. Justice Harlan called "the intractable obscenity problem." *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676, 704 (concurring and dissenting opinion) (1968).

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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.

[January —, 1973]

Memorandum of MR. JUSTICE DOUGLAS.

I

Today we allow California[1] to send a man to prison for distributing brochures that advertise books and a movie under freshly written standards defining obscenity which until today's decision were never the part of any law.

The Court has worked hard to define obscenity and concededly has failed. In *Roth* v. *United States,* 354 U. S. 476, it rules that "Obscene material is material which deals with sex in a manner appealing to prurient interest." *Id.,* at 487 Obscenity, it was said, was rejected by the First Amendment because it is "utterly without redeeming social value" *Id.,* at 484. The presence of a "prurient interest" was to be determined by "contemporary community standards" *Id.,* at 489. That test, it was said, could not be determined by one standard here and another standard there, *Jacobellis* v. *Ohio,* 378 U. S. 184,

[1] 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).

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.

[May —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

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3 6

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

6th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 70–73

Circulated:

Recirculated: 5-23

Marvin Miller, Appellant,
v.
State of California.

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

[May —, 1973]

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2

3, 12, 13, 14 and stylistic

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.

Circulated:

Recirculated: 6-14

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.

[June —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

I

Today we leave open the way for California [1] to send a man to prison for distributing brochures that advertise books and a movie under freshly written standards defining obscenity which until today's decision were never the part of any law.

The Court has worked hard to define obscenity and concededly has failed. In *Roth* v. *United States,* 354 U. S. 476, it ruled that "Obscene material is material which deals with sex in a manner appealing to prurient interest." *Id.,* at 487 Obscenity, it was said, was rejected by the First Amendment because it is "utterly without redeeming social value" *Id.,* at 484. The presence of a "prurient interest" was to be determined by "contemporary community standards." *Id.,* at 489. That test, it has been said, could not be determined by one standard here and another standard there, *Jacobellis* v. *Ohio,* 378 U. S.

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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: 3/16/73

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.

[March —, 1973]

Memorandum of MR. JUSTICE BRENNAN.

In *Paris Adult Theatre* v. *Slaton*, — U. S. — (1973), decided this date, we had no occasion to consider the extent of state power to regulate the distribution of sexually oriented material to juveniles or the offensive exposure of such material to unconsenting adults. In the case before us, petitioner was convicted of distributing obscene matter in violation of California Penal Code § 311.2, on the basis of evidence that he had caused to be mailed five unsolicited brochures advertising various books and a movie. We need not decide whether a statute might be drawn to impose, within the requirements of the First Amendment, criminal penalties for the precise conduct at issue here. For it is clear that the statute under which the prosecution was brought is unconstitutionally overbroad, and therefore invalid on its face.* "[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his

*Cal. Penal Code § 311.2 (a) provides that "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into the state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

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

From: Brennan, J.

Circulated: _____

Recirculated: 6/6/73

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.

[June —, 1973]

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

In my dissent in *Paris Adult Theatre* v. *Slaton*, — U. S. — (1973), decided this date, I noted that I had no occasion to consider the extent of state power to regulate the distribution of sexually oriented material to juveniles or the offensive exposure of such material to unconsenting adults. In the case before us, petitioner was convicted of distributing obscene matter in violation of California Penal Code § 311.2, on the basis of evidence that he had caused to be mailed unsolicited brochures advertising various books and a movie. I need not now decide whether a statute might be drawn to impose, within the requirements of the First Amendment, criminal penalties for the precise conduct at issue here. For it is clear that under my dissent in *Slaton*, the statute under which the prosecution was brought is unconstitutionally overbroad, and therefore invalid on its face.* "[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing

*Cal. Penal Code § 311.2 (a) provides that "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into the state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 9, 1973

Re: No. 70-73 - Miller v. California and companion cases

Dear Chief:

I have studied carefully your recirculations of May 8. I am close to joining you, but I have one primary reservation. I learned this morning that Lewis entertains the same reservation. He showed me today his letter to you of April 16, and I am free to state that I am substantially in accord with both points he raises in that letter.

My concern centers on the revised material on page 7 of the Miller opinion. This, of course, is the heart of the obscenity decisions. Despite the addition of the new footnote 7, I am somewhat concerned -- and Lewis entertains this concern -- with the descriptions in (1), (2), and (3) in the first full paragraph of that page. We know what you mean, but each of us wonders whether the meaning is absolutely clear. I believe our difficulty centers in the phrase "in its entire setting." This phrase would replace the familiar Roth requirement that the "work" be "taken as a whole." Courts and lawyers will be asking themselves (as, indeed both Lewis and I did) whether the opinion intends to change the rather fundamental requirement that the challenged work be judged as a whole rather than fragmented. Doubt as to our meaning would frustrate one of the purposes of our many months of effort: to clarify and resolve as many of the present ambiguities as possible. In addition, if the words "challenged material" in (3) were replaced by the single word "work," or something similar, I would feel better. I also suggest, mildly, that the last two words of (3) be expanded to include "scientific value or context."

If these changes could be made, I am with you. I realize that you may feel I am quibbling. I earnestly feel that these suggestions will aid in clarification, and I suspect that is what we are all striving for at this point.

Sincerely,

The Chief Justice

bc: Mr. Justice Powell ✓

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1973

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

Dear Chief:

This is to confirm that I join your recirculation of June 14.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

April 16, 1973

70-73

Miller v. California and other Obscenity Cases

Dear Chief:

Over the weekend, I reviewed preliminarily your revised drafts of opinions for the Court in the obscenity cases.

One point that attracted my attention and seems important is the change in the proposed test of "obscene" material. This occurs in Miller, the case in which the test is formulated. In the third draft of Miller, p. 5, the test includes the familiar Roth requirement:

> "That the 'dominant theme of the regulated material taken as a whole' appeals to the prurient interests," Roth, supra . . ."

The new drafts changed this language (see p. 6 drafts 4 and 5 of Miller) to read as follows:

> "Whether the 'average person applying contemporary community standards' would find (i) that the challenged material, viewed in its setting, appeals to the prurient interests, Roth, supra."

On the same page the third portion of the test is articulated in similar language as follows:

> "(3) that the challenged material, viewed in its setting, does not have serious literary, artistic, political or scientific content."

I recognize, of course, that no words in this esoteric area can be free from doubt as to their meaning. The Roth and Memoirs tests abundantly demonstrated the impossibility of assigning precise meaning to particular words. The great virtue of your new formulation is to relate the test, overall, to conduct. This, in itself, is a significant clarifying step.

Yet, I must say that I feel less sure as to the meaning of the language change from "taken as a whole" to "viewed in its setting." I am in full accord with the view made clear elsewhere in your opinion that an otherwise obscene product cannot be sanctified by including fragments of history, politics or meritorious literature. Yet, I still think juries should be required to view the work "as a whole," and not be left free to condemn a book or a movie on the basis of random selected descriptions or portrayals offensive to the particular jury. This random selection technique would conceivably have invalidated a substantial segment of what is widely regarded as serious and meritorious literary work.

There is also merit, I think, in changing the Roth formulation only where it must be changed to accord with your basic "conduct" orientation. I am in full accord with the elimination of the third element in Memoirs, requiring that the material be "utterly without redeeming social value." This qualification has been the principal defect in the Roth test, as expanded in Memoirs.

With these thoughts in mind, I wonder if you would be willing to revert to the substance of your original formulation, so that the basic guidelines (Miller, p. 6) would read substantially as follows:

> "(1) that the dominant theme of the challenged material, taken as a whole, appeals to the prurient interest, Roth, supra, 354 U.S. 489, (2) that the material portrays specifically defined physical conduct in a fundamentally offensive way, and (3) that the challenged material lacks serious literary, artistic, political or scientific content."

Apart from believing that this terminology is less likely to be misunderstood or abused, I would prefer to see us remain as close to Roth as we can. You accept Roth as the basic foundation for your opinion, namely, that the First Amendment does not protect obscene materials. It is Justice Brennan's opinion that now wishes to jettison Roth, abandoning a substantial

volume of constitutional doctrine. There is virtue in maintaining as much constancy as possible, and I think your opinion is strengthened by maintaining that posture and, perhaps, even contrasting it with the radical new departure by the dissenters.

I am not circulating this letter to the Conferenee, as I do not wish to add further uncertainty at this time. I think, however, that your original language presents a stronger opinion.

Sincerely,

The Chief Justice

LFP,Jr.:psf

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 18, 1973

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

Dear Chief:

I confirm, for the record, that I join your opinions in the above cases as they have now been changed.

Sincerely,

Lewis

The Chief Justice

cc: The Conference

lfp/ss

WO

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

CHAMBERS OF
USTICE LEWIS F. POWELL, JR.

June 16, 1973

No. 70-73 Miller v. California

Dear Chief:

I have reviewed the 8th draft of your opinion and I am still with you.

Sincerely,

L. Lewis

The Chief Justice

lfp/ss

cc: The Conference

May 18, 1973

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

Dear Chief:

I am sorry to be weighing in so late in the game with a modest suggestion for revision of a footnote in Miller v. California, but since I haven't bugged you at all to date, I will make my views known on footnote No. 8 on page 8. That footnote presently reads as follows:

> "Although we are not presented here with the problem of regulating public lewd physical conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress pictorial or three-dimensional representations of the same behavior. Such state regulation 'is sufficiently justified if . . . it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 376-377 (1968). See California v. LaRue, ___U.S.___ (slip opinion, at 8-9) (71-36) (Dec. 5, 1972).

I fully agree that states have greater power to regulate physical conduct than to suppress representations, but I think it is unnecessary and undesirable to reaffirm the limitations on that power which the Court stated in O'Brien.

O'Brien seems to me a typically jerry-built test made virtually out of whole cloth without any support in the Constitution and very little in precedent. Would you have any objection to the following changes in the footnote:

> At the end of the first sentence, insert the language "In United States v. O'Brien, 391 U.S. 367, 376-377 (1968), a case not dealing with obscenity, the Court held a State regulation of conduct which itself embodied both speech and non-speech elements to be '[return to quoted language from O'Brien in footnote; delete citation of O'brien at end of quote, but retain reference to California v. LaRue which is presently the last line of the footnote].'"

Sincerely,

WHR

The Chief Justice