

# The Burger Court Opinion Writing Database

*Ward v. Illinois*

431 U.S. 767 (1977)

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



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

CHAMBERS OF  
THE CHIEF JUSTICE

June 6, 1977

Re: 76-415 Ward v. Illinois

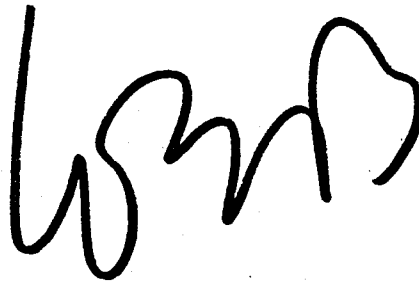
Dear Byron:

I join.

Regards,

Mr. Justice White

cc: The Conference



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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 3, 1977

No. 76-415 Ward v. Illinois

Dear John:

Please join me in the dissenting opinion you have  
prepared in the above.

Sincerely,

*Bill*

Mr. Justice Stevens

cc: The Conference

✓  
1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-415

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

From: Mr. Justice Brennan

Circulated: 6/6/77

Recirculated: \_\_\_\_\_

Wesley Ward, Appellant,  
v.  
State of Illinois. | On Appeal from the Supreme  
Court of Illinois.

[June —, 1977]

MR. JUSTICE BRENNAN, dissenting.

Petitioner was convicted of selling allegedly obscene publications in violation of the Illinois Obscenity Statute, Ill. Rev. Stat. 1969, c. 38, ¶ 11-20. The Illinois Supreme Court affirmed the conviction. Although I have joined my Brother STEVENS' dissent, I could also reverse the conviction on the ground I have previously relied upon, namely that that statute is "clearly overbroad and unconstitutional on its face." See *Ridens v. Illinois*, 413 U. S. 912, 914 (1973) (BRENNAN, J., dissenting), citing *Miller v. California*, 413 U. S. 15, 47 (1973) (BRENNAN, J., dissenting).

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

CHAMBERS OF  
JUSTICE POTTER STEWART

June 2, 1977

Re: No. 76-415, Ward v. Illinois

Dear John,

Please add my name to your dissenting  
opinion in this case.

Sincerely yours,

Mr. Justice Stevens

Copies to the Conference

P.S.  
✓

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

CHAMBERS OF  
JUSTICE POTTER STEWART

June 6, 1977

Re: No. 76-415, Ward v. Illinois

Dear Bill,

Please add my name to your dissenting  
opinion in this case.

Sincerely yours,

PS,  
11/3/77

Mr. Justice Brennan

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

From: Mr. Justice White

Circulated: 5-16-77

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-415

Wesley Ward, Appellant, | On Appeal from the Supreme  
v. | Court of Illinois.  
State of Illinois.

[May —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

The principal issue in this case is the validity of the Illinois obscenity statute, considered in light of *Miller v. California*, 413 U. S. 15 (1973). There, we reaffirmed numerous prior decisions declaring that "obscene material is unprotected by the First Amendment," *id.*, at 23; but acknowledging "the inherent dangers of undertaking to regulate any form of expression," *ibid.*, we recognized that official regulation must be limited to "works which depict or describe sexual conduct" and that such conduct "must be specifically defined by the applicable state law, as written or authoritatively construed." *Id.*, at 24. Basic guidelines for the trier of fact, along with more specific suggestions, were then offered:

"The basic guidelines for the trier of fact must be:  
(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, *supra*, at 230, quoting *Roth v. United States*, *supra*, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the 'utterly without redeem-

Wait for  
dictate

✓  
✓  
STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 4, 5, 6, 8

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

From: Mr. Justice White

Circulated: \_\_\_\_\_

Recirculated: 5-21-77

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-415

Wesley Ward, Appellant,  
v.  
State of Illinois. } On Appeal from the Supreme  
Court of Illinois.

[June —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

The principal issue in this case is the validity of the Illinois obscenity statute, considered in light of *Miller v. California*, 413 U. S. 15 (1973). There we reaffirmed numerous prior decisions declaring that "obscene material is unprotected by the First Amendment," *id.*, at 23; but acknowledging "the inherent dangers of undertaking to regulate any form of expression," *ibid.*, we recognized that official regulation must be limited to "works which depict or describe sexual conduct" and that such conduct "must be specifically defined by the applicable state law, as written or authoritatively construed." *Id.*, at 24. Basic guidelines for the trier of fact, along with more specific suggestions, were then offered:

"The basic guidelines for the trier of fact must be:  
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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 3, 1977

Re: No. 76-415 — Ward v. Illinois

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Dear John:

I do not plan changes of any moment in the above circulation. The last sentence of the paragraph ending at the top of page 5 will be slightly changed to read as follows: "If Ward cannot be convicted for selling these materials, it is for other reasons and not because the Illinois statute is vague and gave him no notice that the statute purports to ban the kind of materials he sold." I shall then add an additional sentence to the paragraph: "The statute is not vague as applied to Ward's conduct."

If the votes are in, perhaps we can decide on Tuesday whether the opinion is to come down on Thursday.

Sincerely yours,



Mr. Justice Stevens

Copies to the Conference

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5  
✓

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

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-415

From: Mr. Justice White

Circulated: \_\_\_\_\_

Recirculated: 6-6-77

Wesley Ward, Appellant,  
v.  
State of Illinois.

On Appeal from the Supreme  
Court of Illinois.

[June —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

The principal issue in this case is the validity of the Illinois obscenity statute, considered in light of *Miller v. California*, 413 U. S. 15 (1973). There we reaffirmed numerous prior decisions declaring that "obscene material is unprotected by the First Amendment," *id.*, at 23; but acknowledging "the inherent dangers of undertaking to regulate any form of expression," *ibid.*, we recognized that official regulation must be limited to "works which depict or describe sexual conduct" and that such conduct "must be specifically defined by the applicable state law, as written or authoritatively construed." *Id.*, at 24. Basic guidelines for the trier of fact, along with more specific suggestions, were then offered:

"The basic guidelines for the trier of fact must be:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, *supra*, at 230, quoting *Roth v. United States*, *supra*, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the 'utterly without redeem-

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 13, 1977

MEMORANDUM TO THE CONFERENCE

Re: Case held for Ward v. Illinois, No. 76-415

The only case held for Ward is Reinhard v. Eagle Books, Inc., No. 76-366. In Eagle Books a three-judge District Court declared the Illinois obscenity statute unconstitutional on the ground that it had not been construed to define obscenity with the specificity required by Miller v. California, 413 U.S. 15 (1973). In Ward we held to the contrary. Certiorari was granted in Ward because it conflicted with the decision in Eagle Books. Accordingly, I will vote to vacate and remand for further consideration in light of Ward. There is a sticky Younger problem lurking in Eagle Books--the District Court held that Younger did not bar an injunction at the behest of the corporate seller when only its employees, but not the corporation, were defendants in pending state criminal prosecutions. See Hicks v. Miranda, 422 U.S. 332, 348-349; Doran v. Salem Inn, Inc., 422 U.S. 922, 928-929. But I duck my head and remand.

me too

  
B.R.W.

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 6, 1977

Re: No. 76-415, Ward v. Illinois

Dear John:

Please join me.

Sincerely,

*JM.*

T. M.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 17, 1977

Re: No. 76-415 - Ward v. Illinois

Dear Byron:

Please join me.

Sincerely,

*H.A.B.*

Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 17, 1977

No. 76-415 Ward v. Illinois

Dear Byron:

Please join me.

Sincerely,

*Lewis*

Mr. Justice White

LFP/lab

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST


May 17, 1977

Re: No. 76-415 - Ward v. Illinois

Dear Byron:

Please join me.

Sincerely,

Handwritten signature of William H. Rehnquist, appearing as 'WHL' with a flourish below it.

Mr. Justice White

Copies to the Conference

✓  
PS  
Please forward me  
M

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

Draft # 3

From: Mr. Justice Stevens

76-415 Ward v. Illinois

Circulated: JUN 1 1977

Recirculated: \_\_\_\_\_

MR. JUSTICE STEVENS, dissenting.

The decision in this case confirms the statement in Miller v. California that "this is an area in which there are few eternal verities." 413 U.S. 15, 23. Today, the Court silently abandons one of the cornerstone of the Miller test it announced so forcefully just five years ago.

The Miller Court stated:

"Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." Id., at 27.

The specificity requirement is stressed elsewhere in the opinion.<sup>1/</sup> More than 50 cases were remanded for further consideration to give the defendants the "benefit" of this aspect of Miller. See 413 U.S. 902 et seq.; Marks v. United States, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_ n.12.

1/

"That conduct must be specifically defined by the applicable state law, as written or authoratively defined."

"The basic guidelines for the tries of fact must be: . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; . . . ". Id., at 25.



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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 3, 1977

Re: 76-415 - Ward v. Illinois

Dear Byron:

Thanks for your note. I do not plan any further changes in the dissent, and agree that the opinion can come down on Thursday.

Respectfully,

JP

Mr. Justice White

Copies to the Conference