10-1976

Marks v. United States

Lewis F. Powell Jr.

D

This obscenity case may not have been properly tried but taking it would not resolve an issue of any importance.

DISCUSS

PRELIMINARY MEMO

February 20, 1976 Conference
List 5, Sheet 2

No. 75-708

MARKS, et al.

v.

UNITED STATES

Cert to CA 6
(Weick, McCree, Engel)

Federal/criminal

Timely

Discuss. Question I may be c/w - there is a conflict CA 6's conclusion that these films would be obscene under Roth does not remove the problem, as that should be a jury question. The only problem - and it would make me inclined to deny - is whether the issue is important enough given the limited number of cases in which it will arise. Chris

Petrs raise several objections to their federal obscenity convictions, affirmed by CA 6: (1) the jury was instructed to apply the Miller test of obscenity, rather than the Roth-Memoirs test, to this pre-Miller conduct; (2) the appellate judges failed personally to view the material in question to determine whether it was obscene; and (3) the jury was instructed that it should apply the community standards of the Eastern District of Kentucky, not those of the Cincinnati metropolitan area. This case is straight-lined with No. 75-707, Sanders v. Georgia, apparently because both cases involve the film "Deep Throat."

1. FACTS: Petrs were indicted for conspiracy and for eight substantive counts of transporting obscene films interstate for the purposes of sale and distribution, in violation of 18 U.S.C. § 1465. The films involved were "Deep Throat," "Swing High," and six previews with similar titles. Their contents are described in detail in the CA 6 opinion, petn., p. A 3. All petrs were convicted of conspiracy and acquitted on one of the substantive counts; all but one (a company) were convicted of the seven other substantive counts.

The trial judge (Swinton, E.D. Ky.) instructed the jury to apply the Miller v. California, 413 U.S. 15 (1973), test of obscenity (the work taken as a whole lacks serious literary, artistic, political or scientific value), instead of the Roth-Memoirs test (the material is utterly without redeeming social value). The judge also instructed the jury to apply the community standards of the Eastern District of Kentucky; he did, however, permit evidence of what the community standards of the Cincinnati area were.

On appeal, CA 6 affirmed. The court did not view the films, but looked instead to the detailed search-warrant affidavits and other descriptions of the material. It concluded, insofar as is here relevant, that the judge properly limited the community area to the Eastern District of Kentucky, under Hamling v. United States, 418 U.S. 87 (1974). The court also rejected petrs' argument that the trial judge should have instructed the jury on only the Roth-Memoirs test, but the court's holding in this regard is not entirely clear. First, CA 6 noted that several circuits have held that the Roth-Memoirs instruction must be given in cases where pre-Miller offenses are charged, and declined to follow those cases; it took its lead from the fact that in Miller itself the Court remanded for retrial under the

new, Miller standard. CA 6 also noted that in Hamling this Court had referred to Miller as simply a "clarifying gloss" on a similar federal statute, 418 U.S., at 116, in order to reject the claim that the statute as applied before Miller was impermissibly vague. Second, the court concluded that the application of the Roth-Memoirs test would not have helped petrs, since these films were in fact obscene under either standard. Judge McCree dissented; he would have remanded for a new trial with a Roth-Memoirs standard.

2. CONTENTIONS: Petrs argue that the Miller charge denied them due process, citing the CA decisions that conflict with CA 6's decision in this case. United States v. Sherpix, Inc., 512 F.2d 1361 (CA DC 1975); United States v. Wasserman, 504 F.2d 1012 (CA 5 1974); United States v. Jacobs, 513 F.2d 564 (CA 9 1975). Those courts generally reasoned "that the Roth-Memoirs gloss on 'obscenity' did not give appellant adequate notice that his conduct would be judged by the expanded standard ultimately applied," 513 F.2d, at 565 (CA 9), because Miller had enlarged the coverage of the statute. See Bouie v. City of Columbia, 378 U.S. 347 (1964). The SG admits the conflict, but argues that there is no reason to resolve it here, since CA 6 concluded that even under Roth-Memoirs, the films were obscene. He also argues that the issue will fade away as Miller ages.

Petrs argue that CA 6 was constitutionally required to view the film, citing cases in which this Court has done so. See, e.g., Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962); Jenkins v. Georgia, 418 U.S. 153 (1974). The SG argues that this Court has never so held, although individual Justices have accepted the proposition, Jenkins, 418 U.S. at 162 (Brennan, J., concurring in the result). Petrs also claim a conflict on this point with Clicque v. United States, 514 F.2d 923 (CA 5 1975). Here CA 6 adequately informed itself as to the contents of the

films, and petrs had all the appellate review to which they were entitled. Clicque is not to the contrary, since the court there held only that a DC must make a determination that the material is obscene in accepting a guilty plea to an obscenity charge.

Finally, petrs argue that the judge should have instructed the jury to apply the community standards of the Cincinnati area, not the Eastern District of Kentucky. Many of the jurors worked in Cincinnati; none were familiar with the "standards" in the rural parts of the judicial district. The SG argues that the instruction was within the latitude given district judges by Hamling v. United States, 418 U.S. 87, 105-106 (1974).

3. DISCUSSION: On the first point, CA 6's alternative conclusion removes the conflict. If the films are actually obscene under the Roth-Memoirs test, then petrs were on adequate notice that their conduct violated the law. Their conviction by a federal jury charged under the Miller test might raise serious Seventh Amendment problems, however, since CA 6 appears to have rested its affirmance on the application of a rather different test. None of the CAs in the "conflicting" decisions took CA 6's tack. Only CA 5 declined to do so expressly: "[I]t would be inappropriate for this court to usurp the jury function of applying the Roth-Memoirs test to the materials at issue." 504 F.2d, at 1016 n. 11. Nor do the Miller remand, and the DWSFQ entered in Miller II, 418 U.S. 915 (1974), implicitly decide the issue, since the defendants in cases of that vintage were first convicted when the Roth-Memoirs test was being applied. Judge McCree suggested this point in his dissent, but petrs do not argue it at all here.

The SG seems to be correct with respect to the other points.

There is a response.

Rossiter CA 6 Op in petn.

2/2/76 DK

LFP/vsl
7/27/76

No. 75-708, Marks, et al, v. United States

This memorandum, dictated after a preliminary look at the briefs, is intended only as an "aid to memory" that will refresh my recollection when I return to a more careful study of the case prior to argument and decision. When an opinion is expressed or intimated, it is wholly tentative.

* * * * *

This is an obscenity case that presents the following three questions:

> 1. Whether in an obscenity prosecution that took place after Miller v. California, 413 U.S. 15, for conduct that occurred before that decision, the district court properly charged the jury under the standards announced in that decision.
>
> 2. Whether a court of appeals must view the materials in order to determine whether they are protected by the First Amendment.
>
> 3. Whether the jury was properly instructed to assess the materials in terms of the community standards of the judicial district from which the jurors were selected and in which the trial was held.

Petitioners were indicted, tried and convicted on several counts for violating 18 U.S.C. § 1465, for knowingly transporting in commerce obscene films, and also were convicted for conspiring to violate § 1465. But, as the SG's brief notes, petitioners were "caught in a period of transition." Their conduct took place prior to Miller, and their trial took place after that decision.

We granted certiorari to the Court of Appeals for the Sixth Circuit, as I recall it, to resolve a conflict among the circuits as to whether the Miller standards -- to the extent they differ from the Memoirs/Roth standards, apply retroactively. Although the Solicitor General opposed the granting of cert, and appeared to think at that time that the retroactivity issue was insubstantial, he now agrees with petitioners that CA6 erred in approving -- in effect -- such a retroactive application. CA6 (McRee, dissenting) held that the particular films in question (Deep Throat, etc.) were obscene under any standard. But, as pointed out in Judge McRee's dissent, the jury was instructed only under the Miller standard. It therefore was not possible for reviewing courts to be sure what the jury would have concluded had it been properly instructed.

But, the parties are in agreement in this Court that there was reversible error on the retroactivity issue.

The SG also agrees with petitioners that a court of appeals must view films (or other material alleged to be obscene) in order to determine whether they are protected by the First Amendment. Thus, on the second question, the parties are in agreement and no controversy remains.

The only remaining issue is whether the jury was properly instructed to apply the contemporary community standards of the judicial district in which the trial took place rather than charge the jury on the local community standards of the Cincinnati-Covington metropolitan area. The parties do disagree on this issue, and I am inclined to think the SG has the better of the argument.

There is language in Hamlin (418 U.S. at 105-06) that supports the view that ordinarily the judicial district in which the trial takes place constitutes the relevant community. Jurors are drawn from the district, and may be presumed to know as much about community standards as jurors drawn from some particular segment of the district. This may not always be the case, but I doubt whether this type of difference attains constitutional dimensions.

This case involved moving pictures being shown in local theaters in Covington, Kentucky, which is within the metropolitan area of Cincinnati.

* * * *

The SG's brief, agreeing with petitioners on what I thought was the principal issue in this case, considerably undermines its importance. Subject to further consideration, I think the case could be disposed of by a per curiam opinion.

The "community standards" issue is not free from difficulty, but I know of no really satisfactory solution. In a country as large and diverse as ours, there are relatively few national standards with respect to arguably obscene material that fairly could be applied everywhere. The standards of Times Square in New York would create a riot in the Ozark Mountains.

Conference 2-20-76

Court CA - 6 ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19... No. 75-708

Submitted ....., 19... Announced ....., 19...

STANLEY MARKS, ET AL., Petitioners

vs.

UNITED STATES

11/13/75 Cert. filed.

Stevens would grant because rules were changed: conduct was under one standard & trial under another standard.

Granted

(But relisted for reconsideration by White & Stevens)

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING	
STEVENS, J.		✓	~~✓~~											
Rehnquist, J.			✓											
Powell, J.			✓											
Blackmun, J.			✓											
Marshall, J.		✓												
White, J.			✓											
Stewart, J.		✓												
Brennan, J.		✓												
~~Douglas, J.~~														
Burger, Ch. J.														

Conference 2-27-76

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 75-708

Submitted ....., 19... *Announced* ....., 19...

Marks

vs.

United States Relist

White says case in transition

Grant.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
.....		✓											
Stevens, J.			✓										
Rehnquist, J.			✓										
Powell, J.			✓										
Blackmun, J.		✓											
Marshall, J.			✓										
White, J.		✓											
Stewart, J.		✓											
Brennan, J.													
Burger, Ch. J.			✓										

LFP/vsl
7/27/76

No. 75-708, Marks, et al, v. United States

This memorandum, dictated after a preliminary look at the briefs, is intended only as an "aid to memory" that will refresh my recollection when I return to a more careful study of the case prior to argument and decision. When an opinion is expressed or intimated, it is wholly tentative.

* * * * *

This is an obscenity case that presents the following three questions:

> 1. Whether in an obscenity prosecution that took place after Miller v. California, 413 U.S. 15, for conduct that occurred before that decision, the district court properly charged the jury under the standards announced in that decision.
>
> 2. Whether a court of appeals must view the materials in order to determine whether they are protected by the First Amendment.
>
> 3. Whether the jury was properly instructed to assess the materials in terms of the community standards of the judicial district from which the jurors were selected and in which the trial was held.

Petitioners were indicted, tried and convicted on several counts for violating 18 U.S.C. § 1465, for knowingly transporting in commerce obscene films, and also were convicted for conspiring to violate § 1465. But, as the SG's brief notes, petitioners were "caught in a period of transition." Their conduct took place prior to Miller, and their trial took place after that decision.

We granted certiorari to the Court of Appeals for the Sixth Circuit, as I recall it, to resolve a conflict among the circuits as to whether the Miller standards -- to the extent they differ from the Memoirs/Roth standards, apply retroactively. Although the Solicitor General opposed the granting of cert, and appeared to think at that time that the retroactivity issue was insubstantial, he now agrees with petitioners that CA6 erred in approving -- in effect -- such a retroactive application. CA6 (McRee, dissenting) held that the particular films in question (Deep Throat, etc.) were obscene under any standard. But, as pointed out in Judge McRee's dissent, the jury was instructed only under the Miller standard. It therefore was not possible for reviewing courts to be sure what the jury would have concluded had it been properly instructed.

But, the parties are in agreement in this Court that there was reversible error on the retroactivity issue.

The SG also agrees with petitioners that a court of appeals must view films (or other material alleged to be obscene) in order to determine whether they are protected by the First Amendment. Thus, on the second question, the parties are in agreement and no controversy remains.

The only remaining issue is whether the jury was properly instructed to apply the contemporary community standards of the judicial district in which the trial took place rather than charge the jury on the local community standards of the Cincinnati-Covington metropolitan area. The parties do disagree on this issue, and I am inclined to think the SG has the better of the argument.

There is language in Hamlin (418 U.S. at 105-06) that supports the view that ordinarily the judicial district in which the trial takes place constitutes the relevant community. Jurors are drawn from the district, and may be presumed to know as much about community standards as jurors drawn from some particular segment of the district. This may not always be the case, but I doubt whether this type of difference attains constitutional dimensions.

This case involved moving pictures being shown in local theaters in Covington, Kentucky, which is within the metropolitan area of Cincinnati.

* * * *

The SG's brief, agreeing with petitioners on what I thought was the principal issue in this case, considerably undermines its importance. Subject to further consideration, I think the case could be disposed of by a per curiam opinion.

The "community standards" issue is not free from difficulty, but I know of no really satisfactory solution. In a country as large and diverse as ours, there are relatively few national standards with respect to arguably obscene material that fairly could be applied everywhere. The standards of Times Square in New York would create a riot in the Ozark Mountains.

dm/ss 8/30/76

Dave - well written memo with which I largely agree.

BENCH MEMO

TO: Mr. Justice Powell DATE: August 30, 1976

FROM: Dave Martin DM

No. 75-708 Marks v. United States

The major issue here concerns a transition problem in moving from Roth/Memoirs to Miller v. California. The other two issues provide an opportunity to clarify a few lingerging questions after Miller - but it may not be necessary to reach both of them. The SG now agrees with petitioner on two of the three issues. Hence it might be possible to dispose of the case with a fairly brief per curiam taking care to avoid one minor hidden snare when dealing with the first issue. I recommend (1) holding that Miller does not apply retroactively to the detriment of the defendant, being careful to do so in a narrowly circumscribed fashion so as not toopen the floodgates to problems under Bouie v. City of Columbia; (2) making it clear that an appellate court must view the allegedly obscene materials when properly requested to do so; (3) approving the district court's instructions defining the community whose standards are to be applied.

I. Facts

Petitioners were convicted in the Eastern District of Kentucky of conspiracy to transport obscene materials (the films "Deep Throat and "Swing High" and seven preview clips) in interstate commerce, 18 U.S.C. § 371, and of the substantive

offense of transporting, id. § 1465. They had brought the films into Newport, Ky., a part of the Cincinnati metropolitan area, to show at Cinema X, a theatre owned by one of the petitioners. The conduct that founded the charge covered a period up through February 27, 1973, but the trial did not begin until the following October. In the interim this Court decided Miller v. California, 413 U.S. 15 (June 21, 1973), and its companion cases.

The trial court, over petitioners' objections, instructed the jury under Miller standards, defining the relevant community as the entire Eastern District of Kentucky. The jury found them guilty, and they were sentenced to 90 days in jail and heavy fines. A divided CA6 (Weick, Engel in the majority) approved,[1] swimming against the tide of cases from other circuits, which had all required instructions reflecting Roth/Memoirs standards for indictments relating to pre-Miller conduct (Roth v. United States, 354 U.S. 476, and Memoirs v. Mass., 383 U.S. 413 (plurality opinion)). In addition, CA6 held that the materials were obscene under any definition of obscenity - but CA6 never viewed the films. Apparently it relied on a detailed and exhaustive description of the films (at least of the sexual activities portrayed) contained in the affidavit of an FBI agent. JA 14. That affidavit was part of the record because it had formed the basis for the warrant commanding seizure of the films.

Judge McCree dissented. Petitioners were entitled, in his view, to Roth/Memoirs instructions. In addition, it is a

footnote to his dissent which reveals that CA6 never saw the films. He objects to the majority's speculation that the films were obscene under any standard, arguing that such speculation denies the right to trial by jury.

Petitioner raises three questions here, and the SG, although he opposed cert, has come around to agree with petitioner on the first two.

II. Issues

A. Jury instructions: Miller or Roth/Memoirs?

The first question is whether petitioners were entitled to instructions under Roth/Memoirs since all their conduct occurred prior to Miller. Naturally attention focuses on the third part of the test: under the view of the Memoirs plurality, building on certain language in Roth, material is constitutionally protected unless it "is utterly without redeeming social value," 383 U.S. at 418; under Miller the test is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value," 413 U.S. at 24.

Petitioners assert that Miller changed the law and expanded the statute's reach. Indeed, they point out, the third part of the test was explicitly adopted to ease the prosecutor's burden. 413 U.S. at 22. The effect of Miller is therefore indistinguishable from the impact of an ex post facto law, if it is applied to conduct completed before Miller came down. The ex post facto clause does not itself apply to judicial decisions, but

similar due process principles impose similar restrictions. Bouie v. City of Columbia, 378 U.S. 374.

The SG agrees with petitioners' argument on this point, but he does offer what he regards as the strongest statement of the opposing position - in a sense it spells out more carefully the rationale relied on by CA6. The Memoirs standard never commanded more than a three-Justice plurality on this Court. Moreover, ~~they~~ those standards were a significant departure from Roth. Hence, no one planning his future conduct could justifiably rely on the Memoirs restatement of the tests, but had to rely on Roth alone. Miller did not significantly depart from Roth; it merely clarified the tests. There has thus been no judicial broadening of the statute, and there is nothing on which ex post facto principles can operate.

But the SG, having stated the argument, doesn't buy it, and neither do I. Miller did emphasize that the Memoirs tests were accepted by only three Justices. This may have made it easier for five Justices in Miller to change the formulation, but it certainly cannot obscure the fact that the Memoirs tests were very much alive in the intervening years. They were operative because the other two Justices who made up the Memoirs majority did not believe that the First Amendment permitted suppression of obscene materials at all. (Their position is never mentioned by CA6). "[T]he holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . ." Gregg v. Georgia, at 12 n. 15 (Opinion of Stewart, Powell and Stevens).

It was apparently the Memoirs formulation that was applied in the series of per curiam decisions in obscenity cases initiated by Redrup v. New York, 386 U.S. 767. And the circuit courts that considered the issue before Miller held unanimously that jury instructions had to be based on the Memoirs tests. (The cases are collected in the SG's brief, at 30 n. 15). This consistent circuit court treatment, under United States v. Peltier, 422 U.S. 531, has to be accorded a good deal of weight in deciding whether a new constitutional decision actually changed the law. Peltier involved retroactivity for a decision (Almeida-Sanchez) that benefited defendants,but I see no reason why this portion of that decision should apply any differently to a decision like Miller which makes things harder for defendants. CA6 did not discuss this factor of circuit court treatment, and its conclusion that Miller did not really change the law suffers as a result.

Finally, there cannot be much argument that the change was significant, particularly after the trumpeting the new test got in the Miller opinion itself. 413 U.S. at 22 (the "utterly without redeeming social value" test places on the prosecutor "a burden virtually impossible to discharge under [redacted] our criminal standards of proof"). Clearly it was thought that some conduct which would have gone unpunished under Memoirs will now result in conviction.

Since Miller did therefore perform a "judicial enlargement of a criminal statute," Bouie v. City of Columbia, 378 U.S. 347, 353, both petitioner and SG have no trouble concluding that,

under Bouie, it cannot apply retroactively. I agree with the conclusion, but I do not think that Bouie applies quite so automatically. The judicial enlargement in Miller was by no means such a surprise or so "indefensible," 378 U.S., at 354, as what the South Carolina Supreme Court had done in Bouie. The Miller change really was not all that drastic. I am concerned that a hasty reversal citing Bouie will open the doors to Bouie challenges whenever a court changes the wording of the instructions that are to be given under a broadly phrased criminal statute or otherwise performs some minor alteration in the way a statute is construed. Too many such challenges might impede judicial flexibility in assuring that the language of a statute gets translated into instructions that really do communicate to the jury. The need for judicial flexibility was cited by Justice Harlan as one important reason why the ex post facto clause does not apply of its own force to judicial decisions. James v. United States, 366 U.S. 213, 247 n. 3 (Harlan, J., concurring and dissenting).

Under review in Bouie were convictions under South Carolina's criminal trespass statute which forbids entering on the land of another after notice forbidding entry. Petitioners there, Negroes who were taking part in a sit-in demonstration, had entered the restaurant section of a drugstore. There was no notice that the restaurant was closed to blacks, but shortly after their arrival they were asked to leave. When they refused, they were arrested. The S.C. S Ct upheld their convictions, construing the statute for the first time to apply to the act

of remaining on the premises after receiving notice to leave. This Court reversed, holding that an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language," 378 U.S. at 352, operated like an ex post facto law, and could not be tolerated.

Bouie was a narrow holding, mentioning at least three factors that made reversal appropriate: the changed interpretation was unforeseeable, it was indefensible,[2] and it ran counter to statutory language that seemed clear and precise. The last two factors cannot be said to apply to the new interpretation announced in Miller, so reversal here will mean a stricter application of Bouie to a law-changing decision.

The opinion here should therefore stress that stricter application is appropriate only because the statute at issue regulates speech, and the First Amendment demands a more exacting application. Bouie, by its own terms, reversed the South Carolina court because of the need for fair warning - and fair warning is especially important when a statute regulates speech. To put it another way, Bouie traces its heritage to vagueness cases, and traditional vagueness doctrine has demanded more exacting judicial scrutiny when a statute impinges on protected speech. See, e.g., Smith v. Goguen, 415 U.S. 566, 573. In this way the impact of this particular nonretroactivity holding can be confined to speech-related statutes.[3] Cf. Rabe v. Washington, 405 U.S. 313 (applying Bouie principles - without ever citing Bouie - to reverse a state obscenity conviction, stressing lack of fair notice of the state court's new construction of the statute).

What I have suggested is consistent with Hamling v. United States, 418 U.S. 87, even though certain language out of Hamling helped throw CA6 off the track. If Hamling had been a little more explicit, it might have obviated the problems that arose in this case.

The Hamling petitioners' conduct and trial both occurred before Miller. The charge to the jury set forth the Roth/Memoirs standards. This Court held that "any constitutional principle enunciated in Miller which would serve to benefit petitioners must be applied in their case." Id. at 102. (emphasis added). Yet it seems fairly clear that any benefits resulting from Memoirs also had to be retained. The Court examined the record and determined that the jury could constitutionally have found the materials obscene under the Memoirs test. Id. at 100. It did not finesse that inquiry on the grounds that Memoirs had no relevance - something it clearly might have done if Miller applied retroactively in all respects.[4]

Hamling did discuss the applicability of Bouie with regard to one element of the obscenity offense. Under Miller there must be an explicit enumeration of specific types of sexual conduct, the depiction of which will be considered obscene if all the other tests are also met. 413 U.S. at 24. That enumeration must appear in the statute or in authoritative judicial construction. And Miller, id. at 25, along with the companion case of United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 130 n. 7, established that construction for the federal obscenity statutes.

That construction had not been performed at the time the Hamling petitioners committed the acts for which they were charged. Consequently they argued that the federal obscenity statute was impermissibly vague, and that under Bouie the new construction could not be applied to them. The Court disagreed. Years before, Roth had held the statute acceptable against a vagueness challenge. The enumeration in Miller, unlike the South Carolina court's action in Bouie, "did not purport to make criminal . . . conduct which had not previously been thought criminal. That requirement instead added a 'clarifying gloss' to the prior construction and therefore made the meaning of the federal statute involved here 'more definite' in its application to federal obscenity prosecutions." 418 U.S., at 116. The petitioners in Hamling, the Court held, could not claim lack of fair notice.

CA6 in the instant case quoted this passage from Hamling and jumped to the conclusion that Bouie did not apply to any particulars of Miller, since Miller did nothing but add a clarifying gloss. But that conclusion is erroneous. Hamling held that Miller's enumeration of specific sexual conduct did not expand the class of acts which would be considered criminal, but, for the reasons discussed above, the same cannot reasonably be said of the third prong of the Miller test, shifting from "utterly without redeeming social value" to "lacks serious . . . value." That portion of Miller was more than gloss; it was an important change.

The final sub-question here is exactly what should be the consequences of remand: should the matter go back to a new jury under Roth/Memoirs standards, or is it enough for the appellate court to apply Roth/Memoirs itself?[5] Both petitioners and the SG agree that it should go to the jury. This is a bit hard to square with some of the things that happened in Hamling. Here we are talking about how to implement a transition-period defendant's right to have the benefits of Memoirs. In Hamling, the question was how to implement a similar defendant's right to the benefits of Miller. And in Hamling it was enough for the appellate court to apply Miller's benefits (namely, enumeration of specific forbidden depictions, and local community standards).

There is a certain symmetry to approving appellate application here too. But I would resist the charms of symmetry in this instance. There is evident in Hamling and Miller a certain reverence for jury determination with respect to the three key tests: prurient appeal, patent offensiveness, and "serious" or "redeeming" value. (The reverence is akin to that for jury determination of reasonableness in negligence actions. 418 U.S., at 104.) These three are clearly the central elements in the offense under the federal statute, and the accused's right to trial by jury ought to extend this far.

B. Must the appellate court view the materials?

The second question need not detain the Court long. Miller emphasized that First Amendment values derive important protection from "the ultimate power of appellate courts to conduct an

independent review of constitutional claims when necessary." 413 U.S. at 25. The Court has not spelled out just what circumstances make that independent review "necessary," but Jenkins v. Georgia, 418 U.S. 153, has some hard-line language about not abandoning the "factual" determinations to the unbridled discretion of the jury. Id., at 160-61. Justice Brennan, joined by Stewart and Marshall, reads Jenkins as leaving no doubt that appellate courts must always perform independent review. Id., at 163. Other Justices have occasionally voiced an equally strong view. See, e.g., Manual Enterprises v. Day, 370 U.S. 478, 488 (Harlan joined by Stewart); Jacobellis v. Ohio, 378 U.S. 184, 188 (Brennan joined by Goldberg).

I am not sure why the Court was so coy in Jenkins - why it refrained from saying that appellate courts must, whenever asked, look at the films. It seems to me the court could say so now. The SG has come out squarely in support of this position.[6] He is careful to note that this position does not impose a duty on this Court to take every case and view every pornographic movie. Review would, of course, remain discretionary as in any other cert case. SG brief at 40-41. But the general duty of appellate courts would be clear.

If the Court is not ready for such a pronouncement, a second option is available. The Court could hold that full independent appellate review was clearly "necessary" here, because CA6 arrogated to itself the task of deciding that the materials were obscene under a standard different from the one the jury employed. CA6 was, in other words, making a basic factual

determination on its own, and there is no excuse for doing that without viewing the films. Since Roth it has been abundantly clear that materials are to be judged "as a whole." CA6 could not make such a judgment on the basis of the agent's affidavit, even though this agent was one thorough guy. From his minutely detailed description, one can undoubtedly tell that the films are raunchy. But one cannot be sure that such an account, compiled ex parte by an arm of the prosecution, is a fair rendering of the material. And obviously such an affidavit is not likely to capture the essence of whatever social value there may be.

A final option is open. If the decision on the first issue results in sending the case back to the jury, then it is not absolutely necessary to pass on the second question at all. Simply send it back to the district court and hope that CA6 is more prudent next time.

The SG, however, recommends a slightly different sequence. He evidently would like for this decision to make it clear that the appellate court must view the materials. If that is the holding, he recommends remand to CA6 for a viewing first. If that court, applying Roth/Memoirs, determines that the materials are constitutionally protected, then acquittal is mandated. If it finds otherwise, then the case returns to the DC for a jury trial. SG brief at 40 n. 22.

If you want to use this case to make clear the appellate court's duty to view, then the SG's proposed sequence should probably be followed. If for any reason you would prefer not

to move beyond the strong hints evident in Jenkins (at least not in this case), then I would simply remand with instructions for a jury trial under Roth/Memoirs instructions.

C. Which community's standards?

The third issue is the only one on which the parties are at odds. The DC instructed that the jury was to apply the standards of the community comprising the judicial district, the Eastern District of Kentucky. He emphasized that the area extends to 67 counties of Eastern Kentucky, and is not limited to the environs of Newport. The relevant instruction is quoted at length in the SG's brief, at 9 n. 6.

Petitioners charge that this was error, since the jurors came from metropolitan Cincinnati and since half of them worked across the river in the city of Cincinnati itself. (The SG says there is no evidence of their workplaces in the record. SG brief at 42 n. 25). Moreover, it was in metropolitan Cincinnati that the films were shown. The instruction was prejudicial, petitioners say, because the judicial district embraces even remote rural areas of Appalachia, where standards are likely to be quite different, and the jurors could not really draw on their own experiences to know what the standards might be in distant regions.

The SG argues that the DC anticipated Hamling, and that after that case, instructions like those given here are clearly proper. Perhaps the standards of metropolitan Cincinnati were a set of standards that could have been applied, but they were not the only ones. Miller approved instructions based on the

entire state of California. If the Miller jurors could comprehend standards of such a large and diverse state, then the jurors here could properly apply district-wide standards.

The petitioners, in my view, may well have the better argument as a matter of logic. They have hit on what seems to me one of the real weaknesses in the Miller approach. As a matter of logic, if national standards are not to be applied to prosecutions under federal statutes (and Hamling settled that), then the standards should be those of the community where the film is shown and where the people arguably affected (in the broadest sense) reside. Here that is almost surely metropolitan Cincinnati. If the material is not patently offensive to those who drive by the theatre or read the ads in the paper (those, in other words, who know Deep Throat is running in the area), then it is hardly to justify suppressing it. It makes no difference if people a hundred miles away in the Appalachian hills might be offended; that community is not really "affected." More importantly, to assume that the 67 counties of Eastern Kentucky comprise a "community" with intelligible standards is to indulge in an abstraction as meaningless as "national" standards. And national standards have come in for some rugged criticism from the Court on this basis. Miller, 413 U.S., at 31-34; Hamling, 418 U.S., at 103-109.

This problem suggests to me that Miller should perhaps be rethought.[7] I doubt that the Court is interested in doing so; this case, in any event, provides a poor vehicle. Assuming

that Miller will be around a while, I feel certain that reversing on this point would be a mistake. And it would be inconsistent with the thrust of Hamling.

If this Court reverses because the instructions should have focused on metropolitan Cincinnati, then every obscenity conviction is likely to go through numerous rounds of appeals and retrials before the instructions finally arrive at a definition of the appropriate community that will pass muster. And there are bound to be numerous cases where the "logical" answer is not as clear as here. Suppose the theatre had been 20 miles outside of Newport, drawing a substantial audience from metro Cincinnati, but also a number of rural reprobates. At least two "communities" are involved. There is no totally adequate definition of community that can really apply in such a case.

Hamling, in the face of these difficulties, settled for a pragmatic approach that probably renders acceptable nearly any formulation short of national standards. And even a national standards instruction is likely to be harmless error under the Hamling test, 418 U.S., at 108 - as it was in Hamling itself.

With the facts of the case as they were in Hamling, Hamling seems to border on cynicism about how seriously any jury is going to take instructions on community standards. It seems to say that even though the judge instructed them to apply national standards, what the jurors really did was to draw on their own experience from their own local district:

> Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that "community" upon which the jurors would draw.

418 U.S., at 105-106.

But whether that particular application was cynical or not - or correct or not - the basic perception in Hamling about the purpose and probable effect of community standards instructions is surely accurate. Such instructions convey to the jury that material is not to be judged "on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." 418 U.S., at 107. Practically any instructions which state that community - rather than individual - standards are to be applied will produce this effect. If that is all that is hoped for from community standards instructions, then there is no point in encouraging protracted wrangles and intricate appellate review over the exact contours of a "community." It would not hurt if district courts could be sure a community standard instruction based on the judicial district will survive appellate review. Whatever anomalies persist (since most judicial districts do not in a functional sense constitute a community) will simply have to be tolerated.

Here the jurors received instructions which accomplish the basic purpose Hamling identified. Moreover, petitioners were permitted to introduce expert testimony that was based on Cincinnati's community standards, apparently invoking their right under Kaplan v. California, 413 U.S. 115, 121. Unless

Miller is to be rethought, the community standards instructions should be sustained. Such a result will surely be no surprise after Hamling.

D.M.

ss

FOOTNOTES

1. The following cases have reversed convictions based on pre-Miller conduct where the DC instructed under Miller; U.S. v. Wasserman, 504 F.2d 1012 (CA5 1974); U.S. v. Jacobs, 513 F.2d 564 (CA9 1974); U.S. v. Sherpix, Inc., 512 F.2d 1361 (CADC 1975).

Two earlier cases are also important: U.S. v. Thevis, 484 F.2d 1149 (CA5 1973), cert. denied, 418 U.S. 932; U.S. v. Palladino, 490 F.2d 499 (CA 1 1974). In both of these, both conduct and trial occurred before Miller, and the instructions derived from Memoirs. The CAs held that Miller did not void all Memoirs-based convictions, but that on appellate review, appellants were entitled to all the benefits of either test. U.S. v. Linetsky, 533 F.2d 192 (CA5 1976), and U.S. v. Thevis, __ F.2d ___ (CA5 1976), cert. pending, No. 75-1600, decided after the instant case, are to the same effect.

U.S. v. Hill, 500 F.2d 733 (CA5 1974) should also be noted. The trial court gave an instruction that seemed based on Miller, but CA5 found, on reviewing the instructions as a whole, that they really conveyed the "utterly without redeeming social value" standard to the jury. Thus the court did not feel itself obliged to decide whether Miller instructions for pre-Miller conduct would have been error.

U.S. v. Friedman, 528 F.2d 784 (CA10 1976), decided after the instant case, apparently represents the only other circuit that agrees with CA6. Cert is pending (No. 75-1663), and

Charlie's cert memo indicates that that case, despite a few wrinkles this one does not have, should meet the same fate as this.

2. The Bouie court did not emphasize this factor as much as it did the other two. In fact, the word "indefensible" comes in only as part of a quote from Hall, General Principles of Criminal Law. 378 U.S. at 354. But it was precisely this factor and this language upon which the District Court relied in the instant case in order to distinguish Bouie. Joint Appendix at A49.

3. It may be, in the end, that judicial constructions involving any subject matter should not be applied retroactively if they are even minimally detrimental to defendants. But Bouie did not hold that, and this case does not necessitate going so far. I'd prefer to think about that proposition a while.

4. Some judges, including both courts below, have expressed difficulty in understanding why Miller itself was remanded unless the holding of Miller was intended to apply with full retroactivity. App. to Petn at A14; JA at A49; United States v. Palladino, supra note 1 at 504 (Aldrich, J., dissenting). But remand makes good sense without full retroactivity if, as Hamling held, all Miller benefits must be applied even to defendants who transgressed before June of 1973. A careful reading of the remand instructions in Miller, 413 U.S., at 37, strongly suggests anyway that remand was limited to applying benefits. The instructions refer explicitly to the footnote in U.S. v. 12 200-ft Reels of Film where this Court telegraphs

its intention to construe the federal statute as applying only to the specific depictions listed in Miller at 25. This specificity requirement is foremost among the "benefits" of Miller.

5. CA6, of course, did purport to apply Roth/Memoirs at the appellate level already. But it did so without seeing the films. As explained in more detail below, I see no way that its action can be considered adequate appellate review in circumstances like these.

6. The SG attaches only one minor qualification, and it relates to an unusual set of facts in a case pending here (No. 75-985), held for Marks: U.S. v. American Theatre Corp., 526 F.2d 48 (CA8 1975). There defendants stipulated in the DC to the contents of the films, apparently in order to keep the jury from seeing them. On appeal they contended that the CA had to view the films themselves. The SG argues that a defendant whose pursues such a litigating strategy in the DC is stuck with the stipulation in the CA. Whichever way American Theatre comes out, it can be no more than a minor limitation on any rule requiring appellate court viewing at the instance of the defendant.

7. [A personal note]. This community standards problem is only one part of a larger vagueness problem that leaves me uneasy about Miller. Before working on this memo, I had never taken the time to reflect much on obscenity case law. I find myself persuaded by much of what Justice Brennan says in Paris Adult Theatres. If obscenity could be readily distinguished

from protected speech, then I would not be greatly troubled by efforts to suppress it. But it is no secret that the formulations are imprecise, and have been the subject of much struggle on the part of courts for years. Even under the rigid Memoirs standards, we still have juries and courts permitting a film an innocuous as Carnal Knowledge to be suppressed - until this Court steps in as it did in Jenkins. And all this imprecision is tolerated despite the presence of two factors which should counsel otherwise: the statutes regulate expression, and the sanction is a criminal one, possibly entailing years in jail.

The fact of criminal sancations despite imprecise standards is perhaps the most distressing feature. I would have much less trouble with abatement actions of some sort, or laws confining dirty movies and adult book stores to certain limited areas of town, in line with Young v. American Mini Theatres.

In any event, I have not pursued these thoughts to the point of any great coherence, because I don't sense any meaningful possibility that Miller will be overruled - certainly not using this case as a vehicle. But I hope some day we have the leisure to talk generally about this subject.

75-708 MARKS v. UNITED STATES Cert to CA 6 Obscenity Case Argued 11/2/76

Smith (Pltf)

Good argument - but adds nothing to brief.

Bork (SG)

1. Says Boire v. City of Columbia is controlling (but I would apply Boire narrowly - perhaps limit it to first amendment issues)

2. Courts of appeals are required as a statutory matter - not constitutional - to look at the materials. 28 USC 1291 requires CAs to review cases on appeal. The central issue here was whether materials were obscene

3. "Relevant community" - unless identified as the District - could be defined in widely varying ways: would be major issue in each case. Function of community standard test is to ~~argue~~ give jury some standard other than ~~the~~ personal views of jurors.

Books (cont.)

Agree that the Metropolitan Cincinnati area would have been an acceptable alternate standard.

Function of obscenity law is to protect sensibilities of public generally - not limited to protecting viewers from the demoralizing influence of obscenity.

No. 75-708, Marks v. United States — Conf. 11/5/76

Reverse 8-1

The Chief Justice: Reverse + Remand

1. Retroactivity. Agree with SG.

2. & 3. Involves

Douglas, J. (Stevens): Reverse + Remands

Brennan, J.: Reverse

* Would strike down entire statute

Stewart, J.: Reverse + Vacate Sentence on Bond issue

Miller is the law.

Agree with SG that it should not be applied retroactively.

Other two issues are unimp. We need not reach them.

Whether judges look at material depends on facts - no general rule. Depends upon facts & issues (See what Harlan wrote in Roth) If obscenity is issue judges have duty to look at it.

White, J.

Reverse + Remand for New Trial

Agree with Potter

Marshall, J.

Reverse + Remand

C/appeals should be required to view material.

Blackmun, J. Reverse + Remand

Community standards issue in frivolous

We have no business telling C/appeals what to look at!

Powell, J. Reverse + Remand

Agree with Stewart & White

(See my yellow notes)

I'm not clear whether we mentioned Qs 2 + 3

Rehnquist, J. Affirm

Would affirm on Bonic issue. No firm precedent in this Court. (Tentative view)

LFP/lab 12/13/76

MEMORANDUM

TO: Dave Martin DATE: December 13, 1976

FROM: L.F.P., Jr.

Marks

I have only one substantive question about the draft of the p.c. for the Court.

On page 7, the draft states that Miller brought about a "judicial enlargement of a criminal statute" analogous to that addressed in Bouie. The SG's brief, however, takes a different view. It observes (pp. 20, 21) that § 1465, under which petrs were charged, "is sweeping". It prohibits all transportation in commerce of obscenity defined broadly and generally. As the SG put it:

> "Miller announced a constitutional standard that limited the reach of any statute to a constitutionally defined group of 'obscene' materials."

The SG goes on to say that Bouie and Rabe involve cases of judicial expansion of statutory language. But "Miller did not expand the scope of a statute, but rather restricted it". The prior cases (Roth, Memoirs) also had restricted the application of obscenity statutes by applying constitutional limitations. Miller changed the

constitutional rule. (SG's brief pp. 21, 22).

The SG's analysis seems to me to be more precise, although it ends up where you do in the draft. Putting it simply, the effect of Roth was to narrow the reach of the federal statute; Memoirs further circumscribed its reach; and Miller, repudiating Memoirs and amplifying Roth, enlarged or broadened the ambit of the statute's prohibition. These gyrations were achieved, not by interpreting the statute (as in Bouie), but by defining the constitutional standard permissible in the application of obscenity statutes.

Unless there is some flaw in this line of analysis, I suggest that you make appropriate revisions in the draft.

Otherwise, I think we have a fine draft and excellent footnotes. I would be happy to have this go out over my name rather than a p.c., but I suppose we are limited by our assignment.

L.F.P., Jr.

LFP/lab 12/13/76

MEMORANDUM

TO: Dave Martin DATE: December 13, 1976

FROM: L.F.P., Jr.

Marks

I have only one substantive question about the draft of the p.c. for the Court.

On page 7, the draft states that Miller brought about a "judicial enlargement of a criminal statute" analogous to that addressed in Bouie. The SG's brief, however, takes a different view. It observes (pp. 20, 21) that § 1465, under which petrs were charged, "is sweeping". It prohibits all transportation in commerce of obscenity defined broadly and generally. As the SG put it:

> "Miller announced a constitutional standard that limited the reach of any statute to a constitutionally defined group of 'obscene' materials."

The SG goes on to say that Bouie and Rabe involve cases of judicial expansion of statutory language. But "Miller did not expand the scope of a statute, but rather restricted it". The prior cases (Roth, Memoirs) also had restricted the application of obscenity statutes by applying constitutional limitations. Miller changed the

constitutional rule. (SG's brief pp. 21, 22).

The SG's analysis seems to me to be more precise, although it ends up where you do in the draft. Putting it simply, the effect of Roth was to narrow the reach of the federal statute; Memoirs further circumscribed its reach; and Miller, repudiating Memoirs and amplifying Roth, enlarged or broadened the ambit of the statute's prohibition. These gyrations were achieved, not by interpreting the statute (as in Bouie), but by defining the constitutional standard permissible in the application of obscenity statutes.

Unless there is some flaw in this line of analysis, I suggest that you make appropriate revisions in the draft.

Otherwise, I think we have a fine draft and excellent footnotes. I would be happy to have this go out over my name rather than a p.c., but I suppose we are limited by our assignment.

L.F.P., Jr.

[c. 1976 NOV.]

75-708 Franks v U.S. (CJ6 obscenity case)

1. Retroactivity. Agree with SG that Miller should not be applied retroactively. The violations here occurred before Miller.

Ross/Memoirs test ("utterly w/out redeeming") is more lenient than Miller test ("lacks serious... value".

Bouie (a S.C. racial case) held that a judicial enlargement of a criminal statute should not be applied retroactively - but there were aggravating circumstances.

But Bouie should be narrowly applied - absent these racial purposes. We should limit its application (i.e. effect of judicial interpretation) to first amendment case except in extraordinary circumstances.

Then would be consistent with Hamlin

2. Duty of Judges to Review.

SG wants us to make clear that appellate ~~judges~~ courts must review the material. CA 6 merely relied on FBI affidavit - which was not a full discharge of its duty.

Rather than hold that appellate courts always must review, I'd hold that CA 6 erred here - especially where it applied a different standard than the jury.

Appellate court should review unless record otherwise portrays beyond ~~reasonable~~ doubt the obscene character of material.

3. Community standard

CA6 correctly applied & instructed Jury - ~~[redacted]~~ the Judicial District (Hamlin)

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–708

Stanley Marks et al., Petitioners
v.
United States.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1977]

PER CURIAM.

This case presents the question, not fully answered in *Hamling* v. *United States*, 418 U. S. 87 (1974), whether the standards announced in *Miller* v. *California*, 413 U. S. 15 (1973), are to be applied retroactively to the potential detriment of a defendant in a criminal case. We granted certiorari, 424 U. S. 942 (1976), to resolve a conflict in the circuits.[1]

[1] Two Courts of Appeals have found instructions derived from *Miller* appropriate in prosecutions based on conduct occurring before the *Miller* decision came down: *United States* v. *Marks*, 520 F. 2d 913 (CA6 1975) (the instant case); and *United States* v. *Friedman*, 528 F. 2d 784 (CA10 1976), petition for cert. pending, No. 75–1663. Three Courts of Appeals have reversed convictions where *Miller* instructions were given by the District Court: *United States* v. *Wasserman*, 504 F. 2d 1012 (CA5 1974); *United States* v. *Jacobs*, 513 F. 2d 564 (CA9 1974); *United States* v. *Sherpix, Inc.*, 168 U. S. App. D. C. 121, 512 F. 2d 1361 (1975).

In two earlier cases both conduct and trial occurred prior to *Miller*, and the jury instructions were derived from *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966) (plurality opinion). *United States* v. *Thevis* (*Thevis I*), 484 F. 2d 1149 (CA5 1973), cert denied, 418 U. S. 932 (1974); *United States* v. *Palladino*, 490 F. 2d 499 (CA1 1974). The Courts of Appeals there, foreshadowing to some extent our later decision in *Hamling* v. *United States*, *supra*, held that *Miller* did not void all *Memoirs*-based convictions, but that on review, appellants were entitled to all the benefits of both the *Miller* and *Memoirs* standards. See

I

Petitioners were charged with several counts of transporting obscene materials in interstate commerce, in violation of 18 U. S. C. § 1465, and with conspiracy to transport such materials, 18 U. S. C. § 371. The conduct that gave rise to the charges covered a period through February 27, 1973. Trial did not begin until the following October. In the interim, on June 21, 1973, this Court decided *Miller* v. *California, supra,* and its companion cases.[2] *Miller* announced new standards for "isolat[ing] 'hard core' pornography from expression protected by the First Amendment." 413 U. S., at 29.[3] That these new standards would also guide the

---

Hamling, 418 U. S., at 102. In later cases presenting similar facts, the Fifth Circuit has applied its holding in *Thevis I.* See, *e. g., United States* v. *Linetsky,* 533 F. 2d 192 (CA5 1976); *United States* v. *Thevis* (*Thevis II*), 526 F. 2d 989 (CA5 1976), petition for cert. pending, No. 75-1600. See also *United States* v. *Hill,* 500 F. 2d 733 (CA5 1974), cert. denied, 420 U. S. 952 (1975). And the Ninth Circuit, following *Hamling,* has reached the same result. *United States* v. *Cutting,* 538 F. 2d 835 (CA9 1976) (en banc).

[2] *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49 (1973); *Kaplan* v. *California,* 413 U. S. 115 (1973); *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123 (1973); *United States* v. *Orito,* 413 U. S. 139 (1973).

[3] *Miller* held:

"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 . . . ; (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." 413 U. S., at 24.

Under part (b) of the test, it is adequate if the statute, as written or as judicially construed, specifically defines the sexual conduct, depiction of which is forbidden. The Court in *Miller* offered examples of what a State might constitutionally choose to regulate:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation,

future interpretation of the federal obscenity laws was clear from *United States* v. *12 200-foot Reels of Film,* 413 U. S. 123, 129–130, and n. 7 (1973), decided the same day as *Miller.* See *Hamling* v. *United States,* 418 U. S., at 105, 113–114.

Petitioners argued in the District Court that they were entitled to jury instructions not under *Miller,* but under the more favorable formulation of *Memoirs* v. *Massachusetts,* 383 U. S. 413 (1966) (plurality opinion).[4] *Memoirs,* in their view, authoritatively stated the law in effect prior to *Miller,* by which petitioners charted their course of conduct. They focused in particular on the third part of the *Memoirs* test. Under it, expressive material is constitutionally protected unless it is "utterly without redeeming social value." 383 U. S., at 418. Under *Miller* the comparable test is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U. S., at 24. *Miller,* petitioners argue, casts a significantly wider net than *Memoirs.* To apply *Miller* retroactively, and thereby punish conduct innocent under *Memoirs,* violates the Due Process Clause of the Fifth Amendment—much as retroactive application of a new statute to penalize conduct innocent when performed would violate the Constitution's ban on *ex post facto* laws, Art. I, § 9, cl. 3; *id.,* § 10, cl. 1. The District Court overruled these objections and instructed the jury

---

excretory functions, and lewd exhibition of the genitals." 413 U. S., at 25.

[4] The plurality in *Memoirs* held that "three elements must coalesce" if material is to be found obscene and therefore outside the protection of the First Amendment:

"it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 U. S., at 418.

under the *Miller* standards. Petitioners were convicted,[5] and a divided Court of Appeals for the Sixth Circuit affirmed, 520 F. 2d 913 (1975). We now reverse.

II

The Ex Post Facto Clause is a limitation upon the powers of the legislature, see *Calder* v. *Bull*, 3 Dall. 385 (1798), and does not of its own force apply to the Judicial Branch of government. *Frank* v. *Mangum*, 237 U. S. 309, 344 (1915). But the principle on which the clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty. See *United States* v. *Harriss*, 347 U. S. 612, 617 (1954); *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939). As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment. In *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), a case involving the cognate provision of the Fourteenth Amendment, we reversed trespass convictions, finding that they rested on an unexpected construction of the state trespass statute by the State Supreme Court. We held:

> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.*, at 353–354.

Similarly, in *Rabe* v. *Washington*, 405 U. S. 313 (1972), we reversed a conviction under a state obscenity law because

[5] Petitioner American News Co., Inc., was convicted only on the conspiracy charge. The other four petitioners were convicted of conspiracy and also on seven of the eight substantive counts.

it rested on an unforeseeable judicial construction of the statute. We stressed that reversal was mandated because affected citizens lacked fair notice that the statute would be thus applied.

Relying on *Bouie,* petitioners assert that *Miller* and its companion cases unforeseeably expanded the reach of the federal obscenity statutes beyond what was punishable under *Memoirs.* The Court of Appeals rejected this argument. It noted—correctly—that the *Memoirs* standards never commanded the assent of more than three Justices at any one time, and it apparently concluded from this fact that *Memoirs* never became the law. By this line of reasoning, one must judge whether *Miller* expanded criminal liability by looking not to *Memoirs,* but to *Roth* v. *United States,* 354 U. S. 476 (1957), the last comparable plenary decision of this Court prior to *Miller* in which a majority united in a single opinion announcing the rationale behind the Court's holding.[6] Although certain language in *Roth* formed the basis for the plurality's formulation in *Memoirs, Roth's* test for distinguishing obscenity from protected speech was a fairly simple one to articulate: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.,* at 489. If indeed *Roth,* not *Memoirs,* stated the applicable law prior to *Miller,* there would be much to commend the apparent view of the Court of Appeals that *Miller* did not significantly change the law.

But we think the basic premise for this line of reasoning is faulty. When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of

[6] Shortly after *Memoirs,* in response to the divergence of opinion among Members of the Court, we began the practice of disposing of obscenity cases in brief *per curiam* decisions. *Redrup* v. *New York,* 386 U. S. 767 (1967), was the first. At least 31 cases were decided in this fashion. They are collected in *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 82–83, n. 8 (1973) (BRENNAN, J., dissenting).

five justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." *Gregg* v. *Georgia*, — U. S. —, — n. 15 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.). Three Justices joined in the controlling opinion in *Memoirs*. Two others, Mr. Justice Black and Mr. Justice Douglas, concurred on broader grounds in reversing the judgment below. 383 U. S., at 421, 424. They reiterated their well-known position that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity. MR. JUSTICE STEWART also concurred in the judgment, based on his view that only "hard-core pornography" may be suppressed. *Id.*, at 421. See *Ginzburg* v. *United States*, 383 U. S. 463, 499 (1966) (STEWART, J., dissenting). The view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards. Indeed, every Court of Appeals that considered the question between *Memoirs* and *Miller* so read our decisions.[7] Materials were deemed to be constitutionally protected unless the prosecution carried the burden of proving that they were "utterly without redeeming social value," and otherwise satisfied the stringent *Memoirs* requirements.

Memoirs therefore was the law. *Miller* did not simply clarify *Roth;* it marked a significant departure from *Memoirs*. And there can be little doubt that the third test announced in *Miller*—whether the work "lacks serious literary, artistic, political, or scientific value"—expanded criminal liability. The Court in *Miller* expressly observed that the "utterly without redeeming social value" test places on the prosecutor "a burden virtually impossible to discharge under our criminal standards of proof." 413 U. S., at 22. Clearly it was

---

[7] See, *e. g.*, *Books, Inc.* v. *United States*, 358 F. 2d 935 (CA1 1966), rev'd *per curiam*, 388 U. S. 449 (1967); *United States* v. *35 mm. Motion Picture Film*, 432 F. 2d 705 (CA2 1970), cert. dismissed *sub nom.*

thought that some conduct which would have gone unpunished under *Memoirs* would result in conviction under *Miller*.

This case is not strictly analogous to *Bouie*. The statutory language there was "narrow and precise," 378 U. S., at 352, and that fact was important to our holding that the expansive construction adopted by the State Supreme Court deprived the accused of fair warning. In contrast, the statute involved here always has used sweeping language to describe that which is forbidden.[8] But precisely because the statute is sweeping, its reach necessarily has been confined within the constitutional limits announced by this Court. *Memoirs* severely restricted its application. *Miller* also restricts its application beyond what the language might indicate, but *Miller* undeniably relaxes the *Memoirs* restrictions. The effect is the same as the new construction in *Bouie*. Peti-

---

United States v. *Unicorn Enterprises, Inc.*, 403 U. S. 925 (1971); *United States* v. *Ten Erotic Paintings*, 432 F. 2d 420 (CA4 1970); *United States* v. *Groner*, 479 F. 2d 577 (CA5 1973) (en banc) (the 7 dissenting judges and one judge concurring in the result—constituting a majority on this issue—found that *Memoirs* stated the governing standard), vacated and remanded for further consideration in light of *Miller*, 414 U. S. 969 (1973); *United States* v. *Pellegrino*, 467 F. 2d 41 (CA9 1972); *Southeastern Promotions Ltd.* v. *Oklahoma City*, 459 F. 2d 282 (CA10 1972); *Huffman* v. *United States*, 152 U. S. App. D. C 238, 470 F. 2d 386 (1971), conviction reversed on other grounds upon rehearing after *Miller*, 163 U. S. App. D. C. 417, 502 F. 2d 419 (1974). Cf. *Grove Press, Inc.* v. *City of Philadelphia*, 418 F. 2d 82 (CA3 1969); *Cinecom Theaters Midwest States, Inc.* v. *City of Fort Wayne*, 473 F. 2d 1297 (CA7 1973); *Luros* v. *United States*, 389 F. 2d 200 (CA8 1968).

[8] The statute provides in pertinent part:

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1465.

tioners, engaged in the business of marketing dicey films, had no fair warning that their products might be subjected to the new standards.[9]

We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values. See, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 40–41 (1976); *Smith* v. *Goguen*, 415 U. S. 566, 573 (1974). Section 1465 is such a statute. We therefore hold, in accordance with *Bouie*, that the Due Process Clause precludes the application to petitioners of the standards announced in *Miller* v. *California*, to the extent that those standards may impose criminal liability for conduct not punishable under *Memoirs*. Specifically, petitioners are entitled to jury in-

[9] In *Hamling* we rejected a challenge based on *Bouie* v. *City of Columbia*, *supra*, superficially similar to the challenge that is sustained here. 418 U. S., at 115–116. But the similarity is superficial only. There the petitioners focused on part (b) of the *Miller* test. They argued that their convictions could not stand because *Miller* requires that the categories of material punishable under the statute must be specifically enumerated in the statute or in authoritative judicial construction. No such limiting construction had been announced at the time they engaged in the conduct that led to their convictions. We held that this made out no claim under *Bouie*, for part (b) did not expand the reach of the statute. "[T]he enumeration of specific categories of material in *Miller* which might be found obscene did not purport to make criminal, for the purpose of 18 U. S. C. § 1461, conduct which had not previously been thought criminal." 418 U. S., at 116.

For the reasons noted in text, the same cannot be said of part (c) of the *Miller* test, shifting from "utterly without redeeming social value" to "lacks serious literary, artistic, political or scientific value." This was implicitly recognized by the Court in *Hamling* itself. There the trial took place before *Miller*, and the jury had been instructed in accordance with *Memoirs*. Its verdict necessarily meant that it found the materials to be utterly without redeeming social value. This Court examined the record and determined that the jury's verdict "was supported by the evidence and consistent with the *Memoirs* formulation of obscenity." 418 U. S., at 100. We did not avoid that inquiry on the grounds that *Memoirs* had no relevance, as we might have done if *Miller* applied retroactively in all respects.

structions requiring the jury to acquit unless it finds that the materials involved are "utterly without redeeming social value."[10] At the same time we reaffirm our holding in *Hamling* v. *United States*, 418 U. S., at 102, that "any constitutional principle enunciated in *Miller* which would serve to benefit petitioners must be applied in their case."[11]

Reversed and remanded.[12]

---

[10] The Court of Appeals stated, apparently without viewing the materials themselves, 520 F. 2d, at 932 n. 1 (McCree, J., dissenting), that in its view the materials here were obscene under either *Memoirs* or *Miller*. 520 F. 2d, at 922. Such a conclusion, absent other dependable means of knowing the character of the materials, is of dubious value. But even if we accept the court's conclusion, under these circumstances it is not an adequate substitute for the decision in the first instance of a properly instructed jury, as to this important element of the offense under 18 U. S. C. § 1465.

[11] The Court of Appeals apparently thought that our remand in *Miller* and the companion cases necessarily meant that *Miller* standards were fully retroactive. 520 F. 2d, at 920. But the passage from *Hamling* quoted in the text, which simply reaffirms a principle implicit in *Miller*, makes it clear that the remands carried no such implication. Our 1973 cases were remanded for the courts below to apply the "benefits" of *Miller*. See n. 3, *supra*.

[12] In view of our disposition of the case, we have no occasion to reach the other questions presented in the petition.

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

CHAMBERS OF
THE CHIEF JUSTICE

December 27, 1976

Re: 75-708 - Marks v. United States

Dear Lewis:

I am prepared to join your proposed per curiam but I suggest that for explicit clarification:

(1) The final sentence on page 8 read: "Specifically, since the petitioners are charged with conduct occurring prior to our decision in Miller v. California, they are entitled, etc., etc."

(2) Following the final sentence on page 9, add: "Accordingly, the case is remanded for further proceedings consistent with this opinion."

Regards,

WEB

There are fine with me, except that I would change "charged with" to "indicted for."
-Dave

Mr. Justice Powell

Copies to the Conference

Dear Chief -
I will be happy to make the changes suggested in your letter of Dec 27th.

December 27, 1976

No. 75-708 Marks v. United States

Dear Chief:

I will be happy to make the changes suggested in your letter of December 27.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

December 27, 1976

Re: 75-708 - Marks v. United States

Dear Lewis:

I am prepared to join your proposed per curiam but I suggest that for explicit clarification:

(1) The final sentence on page 8 read: "Specifically, since the petitioners are charged with conduct occurring prior to our decision in Miller v. California, they are entitled, etc., etc."

(2) Following the final sentence on page 9, add: "Accordingly, the case is remanded for further proceedings consistent with this opinion."

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

December 29, 1976

Re: 75-708 - Marks v. United States

Dear Lewis:

I joined your proposed per curiam but it seems to me this is an important case and deserves a signed opinion.

To show my bona fides, I would volunteer to sign it if you decline to do so!

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 29, 1976

Re: No. 75-708 - Marks v. United States

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

December 29, 1976

Re: 75-708 - Marks v. United States

Dear Lewis:

I joined your proposed per curiam but it seems to me this is an important case and deserves a signed opinion.

To show my bona fides, I would volunteer to sign it if you decline to do so!

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

DM
CA

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 4, 1977

Re: No. 75-708 - Marks v. United States

Dear Lewis:

I do not know what other writings will be forthcoming on this one but, for the moment at least, please join me. I, too, think that this should be a signed opinion.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 4, 1977

Re: No. 75-708 - Marks v. United States

Dear Lewis:

I do not know what other writings will be forthcoming on this one but, for the moment at least, please join me. I, too, think that this should be a signed opinion.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

pp. 8, 9

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–708

Stanley Marks et al., Petitioners
v.
United States.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1977]

PER CURIAM.

This case presents the question, not fully answered in *Hamling* v. *United States*, 418 U. S. 87 (1974), whether the standards announced in *Miller* v. *California*, 413 U. S. 15 (1973), are to be applied retroactively to the potential detriment of a defendant in a criminal case. We granted certiorari, 424 U. S. 942 (1976), to resolve a conflict in the circuits.[1]

[1] Two Courts of Appeals have found instructions derived from *Miller* appropriate in prosecutions based on conduct occurring before the *Miller* decision came down: *United States* v. *Marks*, 520 F. 2d 913 (CA6 1975) (the instant case); and *United States* v. *Friedman*, 528 F. 2d 784 (CA10 1976), petition for cert. pending, No. 75–1663. Three Courts of Appeals have reversed convictions where *Miller* instructions were given by the District Court: *United States* v. *Wasserman*, 504 F. 2d 1012 (CA5 1974); *United States* v. *Jacobs*, 513 F. 2d 564 (CA9 1974); *United States* v. *Sherpix, Inc.*, 168 U. S. App. D. C. 121, 512 F. 2d 1361 (1975).

In two earlier cases both conduct and trial occurred prior to *Miller*, and the jury instructions were derived from *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966) (plurality opinion). *United States* v. *Thevis* (*Thevis I*), 484 F. 2d 1149 (CA5 1973), cert denied, 418 U. S. 932 (1974); *United States* v. *Palladino*, 490 F. 2d 499 (CA1 1974). The Courts of Appeals there, foreshadowing to some extent our later decision in *Hamling* v. *United States*, *supra*, held that *Miller* did not void all *Memoirs*-based convictions, but that on review appellants were entitled to all the benefits of both the *Miller* and *Memoirs* standards. See

I

Petitioners were charged with several counts of transporting obscene materials in interstate commerce, in violation of 18 U. S. C. § 1465, and with conspiracy to transport such materials, 18 U. S. C. § 371. The conduct that gave rise to the charges covered a period through February 27, 1973. Trial did not begin until the following October. In the interim, on June 21, 1973, this Court decided *Miller* v. *California, supra,* and its companion cases.[2] *Miller* announced new standards for "isolat[ing] 'hard core' pornography from expression protected by the First Amendment." 413 U. S., at 29.[3] That these new standards would also guide the

Hamling, 418 U. S., at 102. In later cases presenting similar facts, the Fifth Circuit has applied its holding in *Thevis I.* See, *e. g., United States* v. *Linetsky,* 533 F. 2d 192 (CA5 1976); *United States* v. *Thevis* (*Thevis II*), 526 F. 2d 989 (CA5 1976), petition for cert. pending, No. 75–1600. See also *United States* v. *Hill,* 500 F. 2d 733 (CA5 1974), cert. denied, 420 U. S. 952 (1975). And the Ninth Circuit, following *Hamling,* has reached the same result. *United States* v. *Cutting,* 538 F. 2d 835 (CA9 1976) (en banc).

[2] *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49 (1973); *Kaplan* v. *California,* 413 U. S. 115 (1973); *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123 (1973); *United States* v. *Orito,* 413 U. S. 139 (1973).

[3] *Miller* held:

"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 . . . ; (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." 413 U. S., at 24.

Under part (b) of the test, it is adequate if the statute, as written or as judicially construed, specifically defines the sexual conduct, depiction of which is forbidden. The Court in *Miller* offered examples of what a State might constitutionally choose to regulate:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation,

future interpretation of the federal obscenity laws was clear from *United States* v. *12 200-foot Reels of Film,* 413 U. S. 123, 129–130, and n. 7 (1973), decided the same day as *Miller.* See *Hamling* v. *United States,* 418 U. S., at 105, 113–114.

Petitioners argued in the District Court that they were entitled to jury instructions not under *Miller,* but under the more favorable formulation of *Memoirs* v. *Massachusetts,* 383 U. S. 413 (1966) (plurality opinion).[4] *Memoirs,* in their view, authoritatively stated the law in effect prior to *Miller,* by which petitioners charted their course of conduct. They focused in particular on the third part of the *Memoirs* test. Under it, expressive material is constitutionally protected unless it is "utterly without redeeming social value." 383 U. S., at 418. Under *Miller* the comparable test is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U. S., at 24. *Miller,* petitioners argue, casts a significantly wider net than *Memoirs.* To apply *Miller* retroactively, and thereby punish conduct innocent under *Memoirs,* violates the Due Process Clause of the Fifth Amendment—much as retroactive application of a new statute to penalize conduct innocent when performed would violate the Constitution's ban on *ex post facto* laws, Art. I, § 9, cl. 3; *id.,* § 10, cl. 1. The District Court overruled these objections and instructed the jury

---

excretory functions, and lewd exhibition of the genitals." 413 U. S., at 25.

[4] The plurality in *Memoirs* held that "three elements must coalesce" if material is to be found obscene and therefore outside the protection of the First Amendment:

"it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 U. S., at 418.

under the *Miller* standards. Petitioners were convicted,[5] and a divided Court of Appeals for the Sixth Circuit affirmed. 520 F. 2d 913 (1975). We now reverse.

II

The Ex Post Facto Clause is a limitation upon the powers of the legislature, see *Calder* v. *Bull*, 3 Dall. 385 (1798), and does not of its own force apply to the Judicial Branch of government. *Frank* v. *Mangum*, 237 U. S. 309, 344 (1915). But the principle on which the clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty. See *United States* v. *Harriss*, 347 U. S. 612, 617 (1954); *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939). As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment. In *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), a case involving the cognate provision of the Fourteenth Amendment, the Court reversed trespass convictions, finding that they rested on an unexpected construction of the state trespass statute by the State Supreme Court:

> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.*, at 353–354.

Similarly, in *Rabe* v. *Washington*, 405 U. S. 313 (1972), we reversed a conviction under a state obscenity law because

---

[5] Petitioner American News Co., Inc., was convicted only on the conspiracy charge. The other four petitioners were convicted of conspiracy and also on seven of the eight substantive counts.

it rested on an unforeseeable judicial construction of the statute. We stressed that reversal was mandated because affected citizens lacked fair notice that the statute would be thus applied.

Relying on *Bouie,* petitioners assert that *Miller* and its companion cases unforeseeably expanded the reach of the federal obscenity statutes beyond what was punishable under *Memoirs.* The Court of Appeals rejected this argument. It noted—correctly—that the *Memoirs* standards never commanded the assent of more than three Justices at any one time, and it apparently concluded from this fact that *Memoirs* never became the law. By this line of reasoning, one must judge whether *Miller* expanded criminal liability by looking not to *Memoirs,* but to *Roth* v. *United States,* 354 U. S. 476 (1957), the last comparable plenary decision of this Court prior to *Miller* in which a majority united in a single opinion announcing the rationale behind the Court's holding.[6] Although certain language in *Roth* formed the basis for the plurality's formulation in *Memoirs, Roth's* test for distinguishing obscenity from protected speech was a fairly simple one to articulate: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.,* at 489. If indeed *Roth,* not *Memoirs,* stated the applicable law prior to *Miller,* there would be much to commend the apparent view of the Court of Appeals that *Miller* did not significantly change the law.

But we think the basic premise for this line of reasoning is faulty. When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of

[6] Shortly after *Memoirs,* in response to the divergence of opinion among Members of the Court, the Court began the practice of disposing of obscenity cases in brief *per curiam* decisions. *Redrup* v. *New York,* 386 U. S. 767 (1967), was the first. At least 31 cases were decided in this fashion. They are collected in *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 82–83, n. 8 (1973) (BRENNAN, J., dissenting).

five justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." *Gregg* v. *Georgia*, — U. S. —, — n. 15 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.). Three Justices joined in the controlling opinion in *Memoirs*. Two others, Mr. Justice Black and Mr. Justice Douglas, concurred on broader grounds in reversing the judgment below. 383 U. S., at 421, 424. They reiterated their well-known position that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity. MR. JUSTICE STEWART also concurred in the judgment, based on his view that only "hard-core pornography" may be suppressed. *Id.*, at 421. See *Ginzburg* v. *United States*, 383 U. S. 463, 499 (1966) (STEWART, J., dissenting). The view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards. Indeed, every Court of Appeals that considered the question between *Memoirs* and *Miller* so read our decisions.[7] Materials were deemed to be constitutionally protected unless the prosecution carried the burden of proving that they were "utterly without redeeming social value," and otherwise satisfied the stringent *Memoirs* requirements.

Memoirs therefore was the law. *Miller* did not simply clarify *Roth;* it marked a significant departure from *Memoirs*. And there can be little doubt that the third test announced in *Miller*—whether the work "lacks serious literary, artistic, political, or scientific value"—expanded criminal liability. The Court in *Miller* expressly observed that the "utterly without redeeming social value" test places on the prosecutor "a burden virtually impossible to discharge under our criminal standards of proof." 413 U. S., at 22. Clearly it was

---

[7] See, *e. g., Books, Inc.* v. *United States*, 358 F. 2d 935 (CA1 1966), rev'd *per curiam*, 388 U. S. 449 (1967); *United States* v. *35 mm. Motion Picture Film*, 432 F. 2d 705 (CA2 1970), cert. dismissed *sub nom.*

thought that some conduct which would have gone unpunished under *Memoirs* would result in conviction under *Miller*.

This case is not strictly analogous to *Bouie*. The statutory language there was "narrow and precise," 378 U. S., at 352, and that fact was important to our holding that the expansive construction adopted by the State Supreme Court deprived the accused of fair warning. In contrast, the statute involved here always has used sweeping language to describe that which is forbidden.[8] But precisely because the statute is sweeping, its reach necessarily has been confined within the constitutional limits announced by this Court. *Memoirs* severely restricted its application. *Miller* also restricts its application beyond what the language might indicate, but *Miller* undeniably relaxes the *Memoirs* restrictions. The effect is the same as the new construction in *Bouie*. Peti-

---

United States v. *Unicorn Enterprises, Inc.*, 403 U. S. 925 (1971); *United States* v. *Ten Erotic Paintings*, 432 F. 2d 420 (CA4 1970); *United States* v. *Groner*, 479 F. 2d 577 (CA5 1973) (en banc) (the 7 dissenting judges and one judge concurring in the result—constituting a majority on this issue—found that *Memoirs* stated the governing standard), vacated and remanded for further consideration in light of *Miller*, 414 U. S. 969 (1973); *United States* v. *Pellegrino*, 467 F. 2d 41 (CA9 1972); *Southeastern Promotions Ltd.* v. *Oklahoma City*, 459 F. 2d 282 (CA10 1972); *Huffman* v. *United States*, 152 U. S. App. D. C 238, 470 F. 2d 386 (1971), conviction reversed on other grounds upon rehearing after *Miller*, 163 U. S. App. D. C. 417, 502 F. 2d 419 (1974). Cf. *Grove Press, Inc.* v. *City of Philadelphia*, 418 F. 2d 82 (CA3 1969); *Cinecom Theaters Midwest States, Inc.* v. *City of Fort Wayne*, 473 F. 2d 1297 (CA7 1973); *Luros* v. *United States*, 389 F. 2d 200 (CA8 1968).

[8] The statute provides in pertinent part:

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1465.

tioners, engaged in the business of marketing dicey films, had no fair warning that their products might be subjected to the new standards.[9]

We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values. See, *e. g., Buckley* v. *Valeo,* 424 U. S. 1, 40–41 (1976); *Smith* v. *Goguen,* 415 U. S. 566, 573 (1974). Section 1465 is such a statute. We therefore hold, in accordance with *Bouie,* that the Due Process Clause precludes the application to petitioners of the standards announced in *Miller* v. *California,* to the extent that those standards may impose criminal liability for conduct not punishable under *Memoirs.* Specifically, since the petitioners were indicted for

[9] In *Hamling* we rejected a challenge based on *Bouie* v. *City of Columbia, supra,* superficially similar to the challenge that is sustained here. 418 U. S., at 115–116. But the similarity is superficial only. There the petitioners focused on part (b) of the *Miller* test. They argued that their convictions could not stand because *Miller* requires that the categories of material punishable under the statute must be specifically enumerated in the statute or in authoritative judicial construction. No such limiting construction had been announced at the time they engaged in the conduct that led to their convictions. We held that this made out no claim under *Bouie,* for part (b) did not expand the reach of the statute. "[T]he enumeration of specific categories of material in *Miller* which might be found obscene did not purport to make criminal, for the purpose of 18 U. S. C. § 1461, conduct which had not previously been thought criminal." 418 U. S., at 116.

For the reasons noted in text, the same cannot be said of part (c) of the *Miller* test, shifting from "utterly without redeeming social value" to "lacks serious literary, artistic, political or scientific value." This was implicitly recognized by the Court in *Hamling* itself. There the trial took place before *Miller,* and the jury had been instructed in accordance with *Memoirs.* Its verdict necessarily meant that it found the materials to be utterly without redeeming social value. This Court examined the record and determined that the jury's verdict "was supported by the evidence and consistent with the *Memoirs* formulation of obscenity." 418 U. S., at 100. We did not avoid that inquiry on the grounds that *Memoirs* had no relevance, as we might have done if *Miller* applied retroactively in all respects.

conduct occurring prior to our decision in *Miller*, they are entitled to jury instructions requiring the jury to acquit unless it finds that the materials involved are "utterly without redeeming social value."[10] At the same time we reaffirm our holding in *Hamling* v. *United States*, 418 U. S., at 102, that "any constitutional principle enunciated in *Miller* which would serve to benefit petitioners must be applied in their case."[11]

Accordingly, the case is remanded for further proceedings consistent with this opinion.[12]

---

[10] The Court of Appeals stated, apparently without viewing the materials themselves, 520 F. 2d, at 932 n. 1 (McCree, J., dissenting), that in its view the materials here were obscene under either *Memoirs* or *Miller*. 520 F. 2d, at 922. Such a conclusion, absent other dependable means of knowing the character of the materials, is of dubious value. But even if we accept the court's conclusion, under these circumstances it is not an adequate substitute for the decision in the first instance of a properly instructed jury, as to this important element of the offense under 18 U. S. C. § 1465.

[11] The Court of Appeals apparently thought that our remand in *Miller* and the companion cases necessarily meant that *Miller* standards were fully retroactive. 520 F. 2d, at 920. But the passage from *Hamling* quoted in the text, which simply reaffirms a principle implicit in *Miller*, makes it clear that the remands carried no such implication. Our 1973 cases were remanded for the courts below to apply the "benefits" of *Miller*. See n. 3, *supra*.

[12] In view of our disposition of the case, we have no occasion to reach the other questions presented in the petition.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

Answered
Circulated
1/15

January 14, 1977

Re: No. 75-708 - Marks v. United States

Dear Lewis:

I voted to affirm the judgment of the Court of Appeals at Conference, but think you have written up more persuasively than I thought could be done the arguments for reversal. I can subscribe to what I understand are the two basic premises of your opinion: (1) the Due Process Clause of the Fifth Amendment prohibits the conviction of a defendant through an unforeseeable judicial expansion of a statute defining criminal liability; (2) notwithstanding the fact that 18 U.S.C. § 1465 prohibiting the transportation of obscene materials has not been amended, its broad language was necessarily confined by the decisions of this Court determining what is, and what is not, obscenity. Although the formulation of that test in Memoirs never attracted a majority of the Court, a process of vote counting makes clear that after that decision and before Miller this Court would not affirm a conviction which did not satisfy the test stated by the Memoirs plurality.

My only difficulty with your opinion is the related problem which we wrestled with last Term in the per curiam which I wrote in Rose v. Locke, 423 U.S. 48. Frequently a criminal statute will be sufficiently general in its

language so as to support any one of several reasonable constructions. When the court of last resort of a particular state comes to construe a particular section or clause of a statute for the first time, it should not be unconstitutional for it to prefer the broadest, rather than the narrowest, of the reasonable constructions.

Nothing you say in your opinion expressly militates against this proposition, but I would like to have it pointed out in some way that the opinion casts no doubt upon it. If you are amenable to such a comment, you are doubtless in a better position than I am to decide what it should be and where it should go. I will then be happy to join you. If you decide not to, I will presumably be relegated to the role of a voice crying in the wilderness.

Since the Chief, Byron, and Harry have already joined you, I am sending copies of this letter to them.

Sincerely,

WJB

Mr. Justice Powell

Copies to The Chief Justice
Mr. Justice White
Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 26, 1977

Re: No. 75-708 - Marks v. United States

Dear Lewis:

Your suggested additional footnote in the above case is all right with me.

Sincerely,

Mr. Justice Powell

Copies to: The Chief Justice
Mr. Justice Blackmun

January 26, 1977

No. 75-708 Marks v. United States

Dear Bill:

Thank you for yours of January 14, which I have neglected.

Although I perceive no incompatibility or tension between Rose v. Locke, 423 U.S. 48 and what I have written in this case, I am willing - if my "joiners" concur - to add a footnote as indicated on the enclosed xerox of page 7 of my opinion.

If this is agreeable, and unless I hear objection from others who have joined the opinion, I will add this footnote and recirculate later this week.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Chief Justice
Mr. Justice White
Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 26, 1977

No. 75-708 Marks v. United States

Dear Bill:

Thank you for yours of January 14, which I have neglected.

Although I perceive no incompatibility or tension between Rose v. Locke, 423 U.S. 48 and what I have written in this case, I am willing - if my "joiners" concur - to add a footnote as indicated on the enclosed xerox of page 7 of my opinion.

If this is agreeable, and unless I hear objection from others who have joined the opinion, I will add this footnote and recirculate later this week.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Chief Justice
Mr. Justice White
Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 27, 1977

Re: No. 75-708, Marks v. U.S.

Dear Bill:

I agree.

Sincerely,

TM

T.M

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 27, 1977

Re: No. 75-708 - Marks v. United States

Dear Lewis:

The addition of the footnote has my approval.

Sincerely,

H.A.B.

Mr. Justice Powell

cc: The Chief Justice
Mr. Justice White
Mr. Justice Rehnquist

DM

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 28, 1977

Re: No. 75-708 - Marks v. United States

Dear Lewis:

Thank you for your letter of January 26th, responding to my earlier letter suggesting the addition of a footnote. I quite agree that there is no incompatibility or tension between Rose v. Locke and your present circulating draft; my reason for wanting some mention of the former case is that Bill Brennan's dissent there which took a very expansive view of the opinion he had written for the Court in Bouie, claimed that we were doing an injustice to the latter opinion. Since your present draft relies very much on Bouie, and rightly so, I thought it desirable to include a reference to Rose v. Locke as indicating that there are some outer limits to the Bouie doctrine.

The proposed footnote on page 7 of the circulating draft which you attached to your letter of January 26th is agreeable to me. I think it would seem less "out of the blue" if a phrase could be added summarizing the holding of Rose v. Locke, but if you prefer to leave the footnote just the way you have drafted it, I will join in any event. My preference would be to add the following language so the footnote you have drafted would read this way:

change made for 3d draft and sent to printer 1/31/77 -DM

"For this reason, the instant case is different from Rose v. Locke, 423 U.S. 48 (1976), where the broad reading of the statute at issue did not upset a previously established narrower construction."

Sincerely,

Mr. Justice Powell

Copies to: The Chief Justice
Mr. Justice White
Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 28, 1977

Re: No. 75-708 - Marks v. United States

Dear Lewis:

Please join me.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

for GC

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–708

Stanley Marks et al., Petitioners *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1977]

PER CURIAM.

This case presents the question, not fully answered in *Hamling* v. *United States,* 418 U. S. 87 (1974), whether the standards announced in *Miller* v. *California,* 413 U. S. 15 (1973), are to be applied retroactively to the potential detriment of a defendant in a criminal case. We granted certiorari, 424 U. S. 942 (1976), to resolve a conflict in the circuits.[1]

[1] Two Courts of Appeals have found instructions derived from *Miller* appropriate in prosecutions based on conduct occurring before the *Miller* decision came down: *United States* v. *Marks,* 520 F. 2d 913 (CA6 1975) (the instant case); and *United States* v. *Friedman,* 528 F. 2d 784 (CA10 1976), petition for cert. pending, No. 75–1663. Three Courts of Appeals have reversed convictions where *Miller* instructions were given by the District Court: *United States* v. *Wasserman,* 504 F. 2d 1012 (CA5 1974); *United States* v. *Jacobs,* 513 F. 2d 564 (CA9 1974); *United States* v. *Sherpix, Inc.,* 168 U. S. App. D. C. 121, 512 F. 2d 1361 (1975).

In two earlier cases both conduct and trial occurred prior to *Miller,* and the jury instructions were derived from *Memoirs* v. *Massachusetts,* 383 U. S. 413 (1966) (plurality opinion). *United States* v. *Thevis* (*Thevis I*), 484 F. 2d 1149 (CA5 1973), cert denied, 418 U. S. 932 (1974); *United States* v. *Palladino,* 490 F. 2d 499 (CA1 1974). The Courts of Appeals there, foreshadowing to some extent our later decision in *Hamling* v. *United States, supra,* held that *Miller* did not void all *Memoirs*-based convictions, but that on review, appellants were entitled to all the benefits of both the *Miller* and *Memoirs* standards. See

I

Petitioners were charged with several counts of transporting obscene materials in interstate commerce, in violation of 18 U. S. C. § 1465, and with conspiracy to transport such materials, 18 U. S. C. § 371. The conduct that founded the charges covered a period through February 27, 1973. Trial did not begin until the following October. In the interim, on June 21, 1973, this Court decided *Miller* v. *California, supra,* and its companion cases.[2] *Miller* announced new standards for "isolat[ing] 'hard core' pornography from expression protected by the First Amendment." 413 U. S., at 29.[3] That these new standards would also guide the

Hamling, 418 U. S., at 102. In later cases presenting similar facts, the Fifth Circuit has applied its holding in *Thevis I*. See, *e. g.*, *United States* v. *Linetsky*, 533 F. 2d 192 (CA5 1976); *United States* v. *Thevis* (*Thevis II*), 526 F. 2d 989 (CA5 1976), petition for cert. pending, No. 75–1600. See also *United States* v. *Hill*, 500 F. 2d 733 (CA5 1974), cert. denied, 420 U. S. 952 (1975). And the Ninth Circuit, following *Hamling*, has reached the same result. *United States* v. *Cutting*, 538 F. 2d 835 (CA9 1976) (en banc).

[2] *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973); *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123 (1973); *United States* v. *Orito*, 413 U. S. 139 (1973).

[3] *Miller* held:

"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 . . . ; (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." 413 U. S., at 24.

Under part (b) of the test, it is adequate if the statute, as written or as judicially construed, specifically defines the sexual conduct, depiction of which is forbidden. The Court in *Miller* offered examples of what a State might constitutionally choose to regulate:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation,

future interpretation of the federal obscenity laws was clear from *United States* v. *12 200-foot Reeds of Film*, 413 U. S. 123, 129–130, and n. 7 (1973), decided the same day as *Miller*. See *Hamling* v. *United States*, 418 U. S., at 105, 113–114.

Petitioners argued in the District Court that they were entitled to jury instructions not under *Miller*, but under the more favorable formulation of *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966) (plurality opinion).[4] *Memoirs*, in their view, authoritatively stated the law in effect prior to *Miller*, by which petitioners charted their course of conduct. They focused in particular on the third part of the *Memoirs* test. Under it, expressive material is constitutionally protected unless it is "utterly without redeeming social value." 383 U. S., at 418. Under *Miller* the comparable test is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U. S., at 24. *Miller*, petitioners argue, casts a significantly wider net than *Memoirs*. To apply *Miller* retroactively, and thereby punish conduct innocent under *Memoirs*, violates the Due Process Clause of the Fifth Amendment—much as retroactive application of a new statute to penalize conduct innocent when performed would violate the Constitution's ban on *ex post facto* laws, Art. I, § 9, cl. 3; *id.*, § 10, cl. 1. The District Court overruled these objections and instructed the jury

---

excretory functions, and lewd exhibition of the genitals." 413 U. S., at 25.

[4] The plurality in *Memoirs* held that "three elements must coalesce" if material is to be found obscene and therefore outside the protection of the First Amendment:

"it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 U. S., at 418.

under the *Miller* standards. Petitioners were convicted,[5] and a divided Court of Appeals for the Sixth Circuit affirmed. 520 F. 2d 913 (1975). We now reverse.

II

The Ex Post Facto Clause is a limitation upon the powers of the legislature, see *Calder* v. *Bull,* 3 Dall. 385 (1798), and does not of its own force apply to the Judicial Branch of government. *Frank* v. *Mangum,* 237 U. S. 309, 344 (1915). But the principle on which the clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty. See *United States* v. *Harriss,* 347 U. S. 612, 617 (1954); *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453 (1939). As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment. In *Bouie* v. *City of Columbia,* 378 U. S. 347 (1964), a case involving the cognate provision of the Fourteenth Amendment, we reversed trespass convictions, finding that they rested on an unexpected construction of the state trespass statute by the State Supreme Court. We held:

> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.,* at 353–354.

Similarly, in *Rabe* v. *Washington,* 405 U. S. 313 (1972), we reversed a conviction under a state obscenity law because

---

[5] Petitioner American News Co., Inc., was convicted only on the conspiracy charge. The other four petitioners were convicted of conspiracy and also on seven of the eight substantive counts.

it rested on an unforeseeable judicial construction of the statute. We stressed that reversal was mandated because affected citizens lacked fair notice that the statute would be thus applied.

Relying on *Bouie,* petitioners assert that *Miller* and its companion cases unforeseeably expanded the reach of the federal obscenity statutes beyond what was punishable under *Memoirs.* The Court of Appeals rejected this argument. It noted—correctly—that the *Memoirs* standards never commanded the assent of more than three Justices at any one time, and it apparently concluded from this fact that *Memoirs* never became the law. By this line of reasoning, one must judge whether *Miller* expanded criminal liability by looking not to *Memoirs,* but to *Roth* v. *United States,* 354 U. S. 476 (1957), the last plenary decision of this Court prior to *Miller* in which a majority united in a single opinion announcing the rationale behind the Court's holding.[6] Although certain language in *Roth* formed the basis for plurality's formulation in *Memoirs, Roth's* test for distinguishing obscenity from protected speech was a fairly simple one to articulate: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.,* at 489. If indeed *Roth,* not *Memoirs,* stated the applicable law prior to *Miller,* there would be much to commend the apparent view of the Court of Appeals that *Miller* did not significantly change the law.

But we think the basic premise for this line of reasoning is faulty. When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of

[6] Shortly after *Memoirs,* in response to the divergence of opinion among Members of the Court, we began the practice of disposing of obscenity cases in brief *per curiam* decisions. *Redrup* v. *New York,* 386 U. S. 767 (1967), was the first. At least 31 cases were decided in this fashion. They are collected in *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 82–83, n. 8 (1973) (BRENNAN, J., dissenting).

five justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." *Gregg* v. *Georgia*, — U. S. —, — n. 15 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.). Three Justices joined in the controlling opinion in *Memoirs*. Two others, Mr. Justice Black and Mr. Justice Douglas, concurred on broader grounds in reversing the judgment below. 383 U. S., at 421, 424. They reiterated their well-known position that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity. MR. JUSTICE STEWART also concurred in the judgment, based on his view that only "hard-core pornography" may be suppressed. *Id.*, at 421. See *Ginzburg* v. *United States*, 383 U. S. 463, 499 (1966) (STEWART, J., dissenting). The view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards. Indeed, every Court of Appeals that considered the question between *Memoirs* and *Miller* so read our decisions.[7] Thus, materials were deemed to be constitutionally protected unless the prosecution carried the burden of proving that they were "utterly without redeeming social value," and otherwise satisfied the stringent *Memoirs* requirements.

Memoirs therefore was the law. *Miller* did not simply clarify *Roth;* it marked a significant departure from *Memoirs*. And there can be little doubt that the third test announced in *Miller*—whether the work "lacks serious literary, artistic, political, or scientific value"—expanded criminal liability. The Court in *Miller* expressly observed that the "utterly without redeeming social value" test places on the prosecutor "a burden virtually impossible to discharge under our criminal standards of proof." 413 U. S., at 22. Clearly it was

---

[7]. See, *e. g.*, *Books, Inc.* v. *United States*, 358 F. 2d 935 (CA1 1966), rev'd *per curiam*, 388 U. S. 449 (1967); *United States* v. *35 mm. Motion Picture Film*, 432 F. 2d 705 (CA2 1970), cert. dismissed *sub nom.*

thought that some conduct which would have gone unpunished under *Memoirs* would result in conviction under *Miller*.

United States v. *Unicorn Enterprises, Inc.*, 403 U. S. 925 (1971); *United States* v. *Ten Erotic Paintings*, 432 F. 2d 420 (CA4 1970); *United States* v. *Groner*, 479 F. 2d 577 (CA5 1973) (en banc) (the 7 dissenting judges and one judge concurring in the result—constituting a majority on this issue—found that *Memoirs* stated the governing standard), vacated and remanded for further consideration in light of *Miller*, 414 U. S. 969 (1973); *United States* v. *Pellegrino*, 467 F. 2d 41 (CA9 1972); *Southeastern Promotions Ltd.* v. *Oklahoma City*, 459 F. 2d 282 (CA10 1972); *Huffman* v. *United States*, 152 U. S. App. D. C 238, 470 F. 2d 386 (1971), conviction reversed on other grounds upon rehearing after *Miller*, 163 U. S. App. D. C. 417, 502 F. 2d 419 (1974). Cf. *Grove Press, Inc.* v. *City of Philadelphia*, 418 F. 2d 82 (CA3 1969); *Cinecom Theaters Midwest States, Inc.* v. *City of Fort Wayne*, 473 F. 2d 1297 (CA7 1973); *Luros* v. *United States*, 389 F. 2d 200 (CA8 1968).

where is for call?

[8] In *Hamling* we rejected a challenge based on *Bouie* v. *City of Columbia, supra*, superficially similar to the challenge that is sustained here. 418 U. S., at 115–116. But the similarity is superficial only. There the petitioners focused on part (b) of the *Miller* test. They argued that their convictions could not stand because *Miller* requires that the categories of material punishable under the statute must be specifically enumerated in the statute or in authoritative judicial construction. No such limiting construction had been announced at the time they engaged in the conduct that led to their convictions. We held that this made out no claim under *Bouie*, for part (b) did not expand the reach of the statute. "[T]he enumeration of specific categories of material in *Miller* which might be found obscene did not purport to make criminal, for the purpose of 18 U. S. C. § 1461, conduct which had not previously been thought criminal." 418 U. S., at 116.

For the reasons noted in text, the same cannot be said of part (c) of the *Miller* test, shifting from "utterly without redeeming social value" to "lacks serious literary, artistic, political or scientific value." This was implicitly recognized by the Court in *Hamling* itself. There the trial took place before *Miller*, and the jury had been instructed in accordance with *Memoirs*. Its verdict necessarily meant that it found the materials to be utterly without redeeming social value. This Court examined the record and determined that the jury's verdict "was supported by the evidence and consistent with the *Memoirs* formulation of obscenity."

This case is not strictly analogous to *Bouie*. The statutory language there was "narrow and precise," 378 U. S., at 352, and that fact was important to our holding that the expansive construction adopted by the State Supreme Court deprived the accused of fair warning. In contrast, the statute involved here always has used sweeping language to describe that which is forbidden.[9] But precisely because the statute is sweeping, its reach necessarily has been confiined within the constitutional limits announced by this Court. *Memoirs* severely restricted its application. *Miller* also restricts its application beyond what the language might indicate, but it cannot be denied that *Miller* relaxes the *Memoirs* restrictions. The effect is the same as the new construction in *Bouie*. Petitioners, engaged in the business of marketing dicey films, had no fair warning that their products might be subjected to the new standards.

We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values. See, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 40–41 (1976); *Smith* v. *Goguen*, 415 U. S. 566, 573 (1974). Section 1465 is such a statute. We therefore hold, in accordance with *Bouie*, that the Due Process Clause precludes the application to petitioners of the standards announced in *Miller* v. *California*, to the extent that those standards may impose criminal liability for conduct not punishable under

---

418 U. S., at 100. We did not avoid that inquiry on the grounds that *Memoirs* had no relevance, as we might have done if *Miller* applied retroactively in all respects.

[9] The statute provides in pertinent part:

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1465.

Memoirs. Specifically, petitioners are entitled to jury instructions requiring the jury to acquit unless it finds that the materials involved are "utterly without redeeming social value."[10] At the same time we reaffirm our holding in *Hamling* v. *United States*, 418 U. S., at 102, that "any constitutional principle enunciated in *Miller* which would serve to benefit petitioners must be applied in their case."[11]

Reversed and remanded.[12]

---

[10] The Court of Appeals stated, apparently without viewing the materials themselves, 520 F. 2d, at 932 n. 1 (McCree, J., dissenting), that in its view the materials here were obscene under either *Memoirs* or *Miller*. 520 F. 2d, at 922. Such a conclusion, absent other dependable means of knowing the character of the materials, is of dubious value. But even if we accept the court's conclusion, under these circumstances it is not an adequate substitute for the decision in the first instance of a properly instructed jury, as to this important element of the offense under 18 U. S. C. § 1465.

[11] The Court of Appeals apparently thought that our remand in *Miller* and the companion cases necessarily meant that *Miller* standards were fully retroactive. 520 F. 2d, at 920. But the passage from *Hamling* quoted in the text, which simply reaffirms a principle implicit in *Miller*, makes it clear that the remands carried no such implication. Our 1973 cases were remanded for the courts below to apply the "benefits" of *Miller*. See n. 3, *supra*.

[12] In view of our disposition of the case, we have no occasion to reach the other two questions presented in the petition.

Do we need to tell the reader what the issues are?

7, 8

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–708

Stanley Marks et al., Petitioners *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1977]

PER CURIAM.

This case presents the question, not fully answered in *Hamling* v. *United States*, 418 U. S. 87 (1974), whether the standards announced in *Miller* v. *California*, 413 U. S. 15 (1973), are to be applied retroactively to the potential detriment of a defendant in a criminal case. We granted certiorari, 424 U. S. 942 (1976), to resolve a conflict in the circuits.[1]

[1] Two Courts of Appeals have found instructions derived from *Miller* appropriate in prosecutions based on conduct occurring before the *Miller* decision came down: *United States* v. *Marks*, 520 F. 2d 913 (CA6 1975) (the instant case); and *United States* v. *Friedman*, 528 F. 2d 784 (CA10 1976), petition for cert. pending, No. 75–1663. Three Courts of Appeals have reversed convictions where *Miller* instructions were given by the District Court: *United States* v. *Wasserman*, 504 F. 2d 1012 (CA5 1974); *United States* v. *Jacobs*, 513 F. 2d 564 (CA9 1974); *United States* v. *Sherpix, Inc.*, 168 U. S. App. D. C. 121, 512 F. 2d 1361 (1975).

In two earlier cases both conduct and trial occurred prior to *Miller*, and the jury instructions were derived from *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966) (plurality opinion). *United States* v. *Thevis* (*Thevis I*), 484 F. 2d 1149 (CA5 1973), cert denied, 418 U. S. 932 (1974); *United States* v. *Palladino*, 490 F. 2d 499 (CA1 1974). The Courts of Appeals there, foreshadowing to some extent our later decision in *Hamling* v. *United States*, *supra*, held that *Miller* did not void all *Memoirs*-based convictions, but that on review appellants were entitled to all the benefits of both the *Miller* and *Memoirs* standards. See

I

Petitioners were charged with several counts of transporting obscene materials in interstate commerce, in violation of 18 U. S. C. § 1465, and with conspiracy to transport such materials, 18 U. S. C. § 371. The conduct that gave rise to the charges covered a period through February 27, 1973. Trial did not begin until the following October. In the interim, on June 21, 1973, this Court decided *Miller* v. *California, supra,* and its companion cases.[2] *Miller* announced new standards for "isolat[ing] 'hard core' pornography from expression protected by the First Amendment." 413 U. S., at 29.[3] That these new standards would also guide the

---

Hamling, 418 U. S., at 102. In later cases presenting similar facts, the Fifth Circuit has applied its holding in *Thevis I.* See, *e. g., United States* v. *Linetsky,* 533 F. 2d 192 (CA5 1976); *United States* v. *Thevis* (*Thevis II*), 526 F. 2d 989 (CA5 1976), petition for cert. pending, No. 75-1600. See also *United States* v. *Hill,* 500 F. 2d 733 (CA5 1974), cert. denied, 420 U. S. 952 (1975). And the Ninth Circuit, following *Hamling,* has reached the same result. *United States* v. *Cutting,* 538 F. 2d 835 (CA9 1976) (en banc), cert. denied, 45 U. S. L. W. 3464 (Jan. 10, 1977).

[2] *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49 (1973); *Kaplan* v. *California,* 413 U. S. 115 (1973); *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123 (1973); *United States* v. *Orito,* 413 U. S. 139 (1973).

[3] *Miller* held:

"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 . . . ; (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." 413 U. S., at 24.

Under part (b) of the test, it is adequate if the statute, as written or as judicially construed, specifically defines the sexual conduct, depiction of which is forbidden. The Court in *Miller* offered examples of what a State might constitutionally choose to regulate:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation,

future interpretation of the federal obscenity laws was clear from *United States* v. *12 200-foot Reels of Film*, 413 U. S. 123, 129–130, and n. 7 (1973), decided the same day as *Miller*. See *Hamling* v. *United States*, 418 U. S., at 105, 113–114.

Petitioners argued in the District Court that they were entitled to jury instructions not under *Miller*, but under the more favorable formulation of *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966) (plurality opinion).[4] *Memoirs*, in their view, authoritatively stated the law in effect prior to *Miller*, by which petitioners charted their course of conduct. They focused in particular on the third part of the *Memoirs* test. Under it, expressive material is constitutionally protected unless it is "utterly without redeeming social value." 383 U. S., at 418. Under *Miller* the comparable test is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U. S., at 24. *Miller*, petitioners argue, casts a significantly wider net than *Memoirs*. To apply *Miller* retroactively, and thereby punish conduct innocent under *Memoirs*, violates the Due Process Clause of the Fifth Amendment—much as retroactive application of a new statute to penalize conduct innocent when performed would violate the Constitution's ban on *ex post facto* laws, Art. I, § 9, cl. 3; *id.*, § 10, cl. 1. The District Court overruled these objections and instructed the jury

---

excretory functions, and lewd exhibition of the genitals." 413 U. S., at 25.

[4] The plurality in *Memoirs* held that "three elements must coalesce" if material is to be found obscene and therefore outside the protection of the First Amendment:

"it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 U. S., at 418.

under the *Miller* standards. Petitioners were convicted,[5] and a divided Court of Appeals for the Sixth Circuit affirmed. 520 F. 2d 913 (1975). We now reverse.

II

The Ex Post Facto Clause is a limitation upon the powers of the legislature, see *Calder* v. *Bull*, 3 Dall. 385 (1798), and does not of its own force apply to the Judicial Branch of government. *Frank* v. *Mangum*, 237 U. S. 309, 344 (1915). But the principle on which the clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty. See *United States* v. *Harriss*, 347 U. S. 612, 617 (1954); *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939). As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment. In *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), a case involving the cognate provision of the Fourteenth Amendment, the Court reversed trespass convictions, finding that they rested on an unexpected construction of the state trespass statute by the State Supreme Court:

> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.*, at 353–354.

Similarly, in *Rabe* v. *Washington*, 405 U. S. 313 (1972), we reversed a conviction under a state obscenity law because

---

[5] Petitioner American News Co., Inc., was convicted only on the conspiracy charge. The other four petitioners were convicted of conspiracy and also on seven of the eight substantive counts.

it rested on an unforeseeable judicial construction of the statute. We stressed that reversal was mandated because affected citizens lacked fair notice that the statute would be thus applied.

Relying on *Bouie*, petitioners assert that *Miller* and its companion cases unforeseeably expanded the reach of the federal obscenity statutes beyond what was punishable under *Memoirs*. The Court of Appeals rejected this argument. It noted—correctly—that the *Memoirs* standards never commanded the assent of more than three Justices at any one time, and it apparently concluded from this fact that *Memoirs* never became the law. By this line of reasoning, one must judge whether *Miller* expanded criminal liability by looking not to *Memoirs*, but to *Roth* v. *United States*, 354 U. S. 476 (1957), the last comparable plenary decision of this Court prior to *Miller* in which a majority united in a single opinion announcing the rationale behind the Court's holding.[6] Although certain language in *Roth* formed the basis for the plurality's formulation in *Memoirs*, *Roth's* test for distinguishing obscenity from protected speech was a fairly simple one to articulate: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.*, at 489. If indeed *Roth*, not *Memoirs*, stated the applicable law prior to *Miller*, there would be much to commend the apparent view of the Court of Appeals that *Miller* did not significantly change the law.

But we think the basic premise for this line of reasoning is faulty. When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of

[6] Shortly after *Memoirs*, in response to the divergence of opinion among Members of the Court, the Court began the practice of disposing of obscenity cases in brief *per curiam* decisions. *Redrup* v. *New York*, 386 U. S. 767 (1967), was the first. At least 31 cases were decided in this fashion. They are collected in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 82–83, n. 8 (1973) (BRENNAN, J., dissenting).

five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." *Gregg* v. *Georgia*, — U. S. —, — n. 15 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.). Three Justices joined in the controlling opinion in *Memoirs*. Two others, Mr. Justice Black and Mr. Justice Douglas, concurred on broader grounds in reversing the judgment below. 383 U. S., at 421, 424. They reiterated their well-known position that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity. MR. JUSTICE STEWART also concurred in the judgment, based on his view that only "hard-core pornography" may be suppressed. *Id.*, at 421. See *Ginzburg* v. *United States*, 383 U. S. 463, 499 (1966) (STEWART, J., dissenting). The view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards. Indeed, every Court of Appeals that considered the question between *Memoirs* and *Miller* so read our decisions.[7] Materials were deemed to be constitutionally protected unless the prosecution carried the burden of proving that they were "utterly without redeeming social value," and otherwise satisfied the stringent *Memoirs* requirements.

Memoirs therefore was the law. *Miller* did not simply clarify *Roth;* it marked a significant departure from *Memoirs*. And there can be little doubt that the third test announced in *Miller*—whether the work "lacks serious literary, artistic, political, or scientific value"—expanded criminal liability. The Court in *Miller* expressly observed that the "utterly without redeeming social value" test places on the prosecutor "a burden virtually impossible to discharge under our criminal standards of proof." 413 U. S., at 22. Clearly it was

---

[7] See, *e. g.*, *Books, Inc.* v. *United States*, 358 F. 2d 935 (CA1 1966), rev'd *per curiam*, 388 U. S. 449 (1967); *United States* v. *35 mm. Motion Picture Film*, 432 F. 2d 705 (CA2 1970), cert. dismissed *sub nom.*

thought that some conduct which would have gone unpunished under *Memoirs* would result in conviction under *Miller*.

This case is not strictly analogous to *Bouie*. The statutory language there was "narrow and precise," 378 U. S., at 352, and that fact was important to our holding that the expansive construction adopted by the State Supreme Court deprived the accused of fair warning. In contrast, the statute involved here always has used sweeping language to describe that which is forbidden.[8] But precisely because the statute is sweeping, its reach necessarily has been confined within the constitutional limits announced by this Court. *Memoirs* severely restricted its application. *Miller* also restricts its application beyond what the language might indicate, but *Miller* undeniably relaxes the *Memoirs* restrictions.[9] The

---

United States v. *Unicorn Enterprises, Inc.*, 403 U. S. 925 (1971); *United States* v. *Ten Erotic Paintings*, 432 F. 2d 420 (CA4 1970); *United States* v. *Groner*, 479 F. 2d 577 (CA5 1973) (en banc) (the 7 dissenting judges and one judge concurring in the result—constituting a majority on this issue—found that *Memoirs* stated the governing standard), vacated and remanded for further consideration in light of *Miller*, 414 U. S. 969 (1973); *United States* v. *Pellegrino*, 467 F. 2d 41 (CA9 1972); *Southeastern Promotions Ltd.* v. *Oklahoma City*, 459 F. 2d 282 (CA10 1972); *Huffman* v. *United States*, 152 U. S. App. D. C 238, 470 F. 2d 386 (1971), conviction reversed on other grounds upon rehearing after *Miller*, 163 U. S. App. D. C. 417, 502 F. 2d 419 (1974). Cf. *Grove Press, Inc.* v. *City of Philadelphia*, 418 F. 2d 82 (CA3 1969); *Cinecom Theaters Midwest States, Inc.* v. *City of Fort Wayne*, 473 F. 2d 1297 (CA7 1973); *Luros* v. *United States*, 389 F. 2d 200 (CA8 1968).

[8] The statute provides in pertinent part:

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1465.

[9] For this reason, the instant case is different from *Rose* v. *Locke*,

effect is the same as the new construction in *Bouie*. Petitioners, engaged in the business of marketing dicey films, had no fair warning that their products might be subjected to the new standards.[10]

We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values. See, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 40–41 (1976); *Smith* v. *Goguen*, 415 U. S. 566, 573 (1974). Section 1465 is such a statute. We therefore hold, in accordance with *Bouie*, that the Due Process Clause precludes the application to petitioners of the standards announced in

---

423 U. S. 48 (1976), where the broad reading of the statute at issue did not upset a previously established narrower construction.

[10] In *Hamling* we rejected a challenge based on *Bouie* v. *City of Columbia*, *supra*, superficially similar to the challenge that is sustained here. 418 U. S., at 115–116. But the similarity is superficial only. There the petitioners focused on part (b) of the *Miller* test. See n. 3, *supra*. They argued that their convictions could not stand because *Miller* requires that the categories of material punishable under the statute must be specifically enumerated in the statute or in authoritative judicial construction. No such limiting construction had been announced at the time they engaged in the conduct that led to their convictions. We held that this made out no claim under *Bouie*, for part (b) did not expand the reach of the statute. "[T]he enumeration of specific categories of material in *Miller* which might be found obscene did not purport to make criminal, for the purpose of 18 U. S. C. § 1461, conduct which had not previously been thought criminal." 418 U. S., at 116.

For the reasons noted in text, the same cannot be said of part (c) of the *Miller* test, shifting from "utterly without redeeming social value" to "lacks serious literary, artistic, political or scientific value." This was implicitly recognized by the Court in *Hamling* itself. There the trial took place before *Miller*, and the jury had been instructed in accordance with *Memoirs*. Its verdict necessarily meant that it found the materials to be utterly without redeeming social value. This Court examined the record and determined that the jury's verdict "was supported by the evidence and consistent with the *Memoirs* formulation of obscenity." 418 U. S., at 100. We did not avoid that inquiry on the grounds that *Memoirs* had no relevance, as we might have done if *Miller* applied retroactively in all respects.

Miller v. *California,* to the extent that those standards may impose criminal liability for conduct not punishable under *Memoirs.* Specifically, since the petitioners were indicted for conduct occurring prior to our decision in *Miller,* they are entitled to jury instructions requiring the jury to acquit unless it finds that the materials involved are "utterly without redeeming social value." [11] At the same time we affirm our holding in *Hamling* v. *United States,* 418 U. S., at 102, that "any constitutional principle enunciated in *Miller* which would serve to benefit petitioners must be applied in their case." [12]

Accordingly, the case is remanded for further proceedings consistent with this opinion.[13]

---

[11] The Court of Appeals stated, apparently without viewing the materials themselves, 520 F. 2d, at 932 n. 1 (McCree, J., dissenting), that in its view the materials here were obscene under either *Memoirs* or *Miller.* 520 F. 2d, at 922. Such a conclusion, absent other dependable means of knowing the character of the materials, is of dubious value. But even if we accept the court's conclusion, under these circumstances it is not an adequate substitute for the decision in the first instance of a properly instructed jury, as to this important element of the offense under 18 U. S. C. § 1465.

[12] The Court of Appeals apparently thought that our remand in *Miller* and the companion cases necessarily meant that *Miller* standards were fully retroactive. 520 F. 2d, at 920. But the passage from *Hamling* quoted in the text, which simply reaffirms a principle implicit in *Miller,* makes it clear that the remands carried no such implication. Our 1973 cases were remanded for the courts below to apply the "benefits" of *Miller.* See n. 3, *supra.*

[13] In view of our disposition of the case, we have no occasion to reach the other questions presented in the petition.

75-708 Marks v. United States

The petitioners, operators of a movie theater in Newport, Kentucky, were charged with transporting obscene materials in interstate commence in violation of a federal statute. The alleged violation occurred in early 1973, before our decision in Miller v. California. In Miller, we announced new standards by which to decide whether allegedly obscene materials are protected by the First Amendment.

The instructions to the jury in this case were based on Miller, rather than the prior law. Since the conduct at issue occurred before Miller, we think it was error to apply the Miller standards retroactively.

We would not impose criminal liability for conduct not punishable under the earlier standards. We therefore reverse the convictions, and remand the case.

* * * *

Mr. Justice Brennan filed an opinion concurring in part and dissenting in part, in which Mr. Justice Stewart and Mr. Justice Marshall joined. Mr. Justice Stevens also has filed an opinion concurring in part and dissenting in part.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MARKS ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR TH SIXTH CIRCUIT

No. 75–708. Argued November 1–2, 1976—Decided March 1, 1977

Petitioners were charged with transporting obscene materials in violation of a federal statute. The conduct that gave rise to the charge occurred before *Miller* v. *California*, 413 U. S. 15, was decided, announcing new standards for "isolating 'hard core' pornography from expression protected by the First Amendment," *id.*, at 29. *Held:* The Due Process Clause of the Fifth Amendment precludes retroactive application to petitioners of the *Miller* standards, to the extent that those standards may impose criminal liability for conduct not punishable under the standards announced in *Memoirs* v. *Massachusetts*, 383 U. S. 413. *Bouie* v. *City of Columbia*, 378 U. S. 347. Specifically, petitioners are entitled to jury instructions requiring the jury to acquit unless it finds that the materials involved are "utterly without redeeming social value." At the same time, any constitutional principle announced in *Miller* that would serve to benefit petitioners must be applied in their case. *Hamling* v. *United States*, 418 U. S. 87, 102. Pp. 2–9.

520 F. 2d 913, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which STEWART and MARSHALL, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 15, 1977

Cases held for No. 75-708, Marks v. United States

MEMORANDUM TO THE CONFERENCE:

No. 75-1663, Friedman v. United States. Petr was convicted of transporting an obscene book in interstate commerce, 18 U.S.C. § 1465. He initially was brought to trial before Miller v. California was decided. The jury was instructed under Memoirs v. Massachusetts, and it found him guilty. Before CA10 decided his appeal, the Miller decision was announced. CA10 vacated the first conviction, remanding to the District Court for reconsideration in light of Miller. It did not review the conviction; it simply vacated. 488 F.2d 1141. Petr was retried and this time, over objection, the District Court gave instructions based solely on Miller. Petr appealed his conviction and CA10 affirmed, noting that petr had been found guilty under both sets of standards and stating that it thought the book was "filth" under any standard.

The instructions at the second trial were erroneous under Marks. The first conviction cannot be used in support of the judgment since the vacation and remand for a new trial rendered the first conviction void. And the appellate court's determination that the book was obscene is not sufficient in these circumstances to sustain the conviction. Marks, slip op. at 9, n. 11. I will vote to GRANT, VACATE and REMAND for reconsideration in light of Marks.

* * * *

No. 75-985, American Theatre Corp. v. United States. Petrs were convicted of transporting obscene materials by common carrier in interstate commerce, 18 U.S.C. § 1462.

Apparently their conduct occurred after Miller, and there is no complaint about the Miller-based jury instructions. Petrs complain instead about CA8's failure to view the materials - two films - and make its own judgment whether or not they were obscene. CA8 decided that the materials were obscene based only on a stipulation of counsel listing the sexual activities portrayed in the films. Citing CA6's practice in Marks, CA8 stated expressly that it had not viewed the films. Petn App. at A3, n. 2.

In Marks we did not reach the question as to an appellate court's duty to view allegedly obscene materials, although the opinion may be viewed as impliedly critical of CA6 on this score. Slip op. at 9, n. 11. Miller emphasized "the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." 413 U.S., at 25. Jenkins v. Georgia, 418 U.S. 153, 160, reaffirmed that position. But our cases do not establish guidelines for determining when appellate viewing is "necessary." If the Court wishes to address this issue, this case may present a reasonably good opportunity. But there is the possibility that the SG will argue that a defendant who relied on a stipulation in the trial court cannot demand that an appellate court view the materials. See the SG's brief in Marks, at 39, n. 21.

On balance, I am inclined to Deny on this issue.

The other questions presented challenge the sufficiency of the evidence and the constitutionality of the statute that permits the court to tax costs to the defendant. 28 U.S.C. § 1918(b). These are not certworthy. DENY.

L.F.P.

L.F.P., Jr.

ss

March 15, 1977

Cases held for No. 75-708, Marks v. United States

MEMORANDUM TO THE CONFERENCE:

No. 75-1663, Friedman v. United States. Petr was convicted of transporting an obscene book in interstate commerce, 18 U.S.C. § 1465. He initially was brought to trial before Miller v. California was decided. The jury was instructed under Memoirs v. Massachusetts, and it found him guilty. Before CA10 decided his appeal, the Miller decision was announced. CA10 vacated the first conviction, remanding to the District Court for reconsideration in light of Miller. It did not review the conviction; it simply vacated. 488 F.2d 1141. Petr was retried and this time, over objection, the District Court gave instructions based solely on Miller. Petr appealed his conviction and CA10 affirmed, noting that petr had been found guilty under both sets of standards and stating that it thought the book was "filth" under any standard.

The instructions at the second trial were erroneous under Marks. The first conviction cannot be used in support of the judgment since the vacation and remand for a new trial rendered the first conviction void. And the appellate court's determination that the book was obscene is not sufficient in these circumstances to sustain the conviction. Marks, slip op. at 9, n. 11. I will vote to GRANT, VACATE and REMAND for reconsideration in light of Marks.

* * * *

No. 75-985, American Theatre Corp. v. United States. Petrs were convicted of transporting obscene materials by common carrier in interstate commerce, 18 U.S.C. § 1462.

Apparently their conduct occurred after Miller, and there is no complaint about the Miller-based jury instructions. Petrs complain instead about CA8's failure to view the materials - two films - and make its own judgment whether or not they were obscene. CA8 decided that the materials were obscene based only on a stipulation of counsel listing the sexual activities portrayed in the films. Citing CA6's practice in Marks, CA8 stated expressly that it had not viewed the films. Petn App. at A3, n. 2.

In Marks we did not reach the question as to an appellate court's duty to view allegedly obscene materials, although the opinion may be viewed as impliedly critical of CA6 on this score. Slip op. at 9, n. 11. Miller emphasized "the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." 413 U.S., at 25. Jenkins v. Georgia, 418 U.S. 153, 160, reaffirmed that position. But our cases do not establish guidelines for determining when appellate viewing is "necessary." If the Court wishes to address this issue, this case may present a reasonably good opportunity. But there is the possibility that the SG will argue that a defendant who relied on a stipulation in the trial court cannot demand that an appellate court view the materials. See the SG's brief in Marks, at 39, n. 21.

On balance, I am inclined to Deny on this issue.

The other questions presented challenge the sufficiency of the evidence and the constitutionality of the statute that permits the court to tax costs to the defendant. 28 U.S.C. § 1918(b). These are not certworthy. DENY.

L.F.P., Jr.

ss

n.d.

thought that some conduct which would have gone unpunished under *Memoirs* would result in conviction under *Miller*.

This case is not strictly analogous to *Bouie*. The statutory language there was "narrow and precise," 378 U. S., at 352, and that fact was important to our holding that the expansive construction adopted by the State Supreme Court deprived the accused of fair warning. In contrast, the statute involved here always has used sweeping language to describe that which is forbidden.[8] But precisely because the statute is sweeping, its reach necessarily has been confined within the constitutional limits announced by this Court. *Memoirs* severely restricted its application. *Miller* also restricts its application beyond what the language might indicate, but *Miller* undeniably relaxes the *Memoirs* restrictions.* The effect is the same as the new construction in *Bouie*. Peti-

---

United States v. *Unicorn Enterprises, Inc.*, 403 U. S. 925 (1971); *United States* v. *Ten Erotic Paintings*, 432 F. 2d 420 (CA4 1970); *United States* v. *Groner*, 479 F. 2d 577 (CA5 1973) (en banc) (the 7 dissenting judges and one judge concurring in the result—constituting a majority on this issue—found that *Memoirs* stated the governing standard), vacated and remanded for further consideration in light of *Miller*, 414 U. S. 969 (1973); *United States* v. *Pellegrino*, 467 F. 2d 41 (CA9 1972); *Southeastern Promotions Ltd.* v. *Oklahoma City*, 459 F. 2d 282 (CA10 1972); *Huffman* v. *United States*, 152 U. S. App. D. C 238, 470 F. 2d 386 (1971), conviction reversed on other grounds upon rehearing after *Miller*, 163 U. S. App. D. C. 417, 502 F. 2d 419 (1974). Cf. *Grove Press, Inc.* v. *City of Philadelphia*, 418 F. 2d 82 (CA3 1969); *Cinecom Theaters Midwest States, Inc.* v. *City of Fort Wayne*, 473 F. 2d 1297 (CA7 1973); *Luros* v. *United States*, 389 F. 2d 200 (CA8 1968).

[8] The statute provides in pertinent part:

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1465.

*For this reason, the instant case is far different from Rose v. Locke, 423 U.S. 48 (1976).

[n.d.]

Note to Dave:

I would make a change along the foregoing lines because changes in the personnel of the Court weaken the "five Justices" argument. The point is that the view of the Memoirs plurality was the holding of the Court and followed as such.

* Add a footnote, keyed to the first sentence above, citing as "for example" two or three of the cases cited in footnote 15 on page 30 of the SG's brief.

[n.d.]

DRAFT SYLLABUS
(Based on Draft
No. 3 of the
Opinion)

MARKS v. UNITED STATES

MARKS et al. v. UNITED STATES

Certiorari to the United States Court of Appeals for the Sixth Circuit

No. 75-708. Argued November 1-2, 1976--Decided

The Due Process Clause of the Fifth Amendment held to preclude retroactive application to petitioners in prosecution charging them with transporting obscene materials in violation of a federal statute, of standards announced in Miller v. California, 413 U.S. 15, for "isolating 'hard core' pornography from expression protected by the First Amendment," id., at 29, to the extent that those standards may impose criminal liability for conduct not punishable under the standards announced in Memoirs v. Massachusetts, 383 U.S. 413. Bouie v. City of Columbia, 378 U. S. 347. Thus, petitioners, who were indicted for conduct occurring prior to the decision in Miller, are entitled to jury instructions requiring the jury to acquit unless it finds that the materials involved are "utterly without redeeming social value."

520 F. 2d 913, reversed and remanded.

Petitioners were charged with transporting obscene materials in violation of a federal statute. The conduct which gave rise to the charge occurred before Miller v. California, 413 U.S. 15, was decided, announcing new standards for "isolating 'hard core' pornography from expression protected by the First Amendment," id., at 29. Held, the Due Process Clause of the Fifth Amendment precludes retroactive application to petitioners of the Miller standards, to the extent that those standards may impose criminal liability for conduct not punishable under the standards announced in Memoirs v. Massachusetts, 383 U.S. 413. Bouie v. City of Columbia, 378 U.S. 347. Specifically, petitioners are entitled to jury instructions requiring the jury to acquit unless it finds that the materials involved are "utterly without redeeming social value." At the same time, any constitutional principle announced in Miller that would serve to benefit petitioners must be applied in their case. Hamling v. United States, 418 U.S. 87, 102.

520 F. 2d 913, reversed and remanded.

Powell, J., delivered the opinion of the Court, in which Burger, C.J., White, Blackmun, and Rehnquist, JJ., joined. Brennan, J., filed an opinion concurring in part and dissenting in part, in which Stewart and Marshall, JJ., joined. Stevens, J., filed an opinion concurring in part and dissenting in part.

2 copies to Mr. Pottzel 1/28/77

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
						11/15/76		
Join ● L7P 12/22/76	Concurring in part & dissenting in part		Join L7P 12/29/76	Join WJB 1/27/77	Join L7P 1/4/77	Remand P.C. 1st draft 12/21/76	Join L7P 1/28/77	1st draft Concurring in part & dissenting in part 2/4/77
	1st draft 1/27/77 2nd draft 2/23/77				~~footnote~~ footnote approved 1/27/77	2nd draft 1/12/77 3rd draft 2/1/77		
				75-708 Marks v. United States				