10-1972

Kaplan v. California

Lewis F. Powell Jr.

Court App. Dept., Super. Ct. of Calif., Los Angeles Co.

Argued ....., 19...

Submitted ....., 19...

Voted on ....., 19...

Assigned ....., 19...

Announced ....., 19...

No. 71-1422

MURRAY KAPLAN, Petitioner

vs.

CALIFORNIA

5/1/72 Cert. filed.

Grant

This & two other cases (71-1051 and 71-1315) are to be set early next term + argued before Miller.

Held for Miller

	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	
Rehnquist, J.		✓	✓											
Powell, J.		✓	✓											
Blackmun, J.			✓											
Marshall, J.		✓				Held								
White, J.		✓				Held								
Stewart, J.		✓				Held								
Brennan, J.		✓				Held								
Douglas, J.		✓												
Burger, Ch. J.						Held								

No. 71-1422 KAPLAN v. CALIFORNIA Argued 10/19/72

I will await conference discussion. Am inclined ~~to~~ affirm.

Fleishman

~~To~~ Facts not disputed.
Adult book shop - some 250 in LA

"An adult has an absolute right to read anything he wants to read". Thus, a book seller has a derivative right to sell. Unless a book seller may lawfully sell, the right to read will be frustrated.

But J. Stewart cited Reidel.

Fleishman admits results would be different from Reidel, but argues he is proposing a new theory.

Right to read obscenity is a "fundamental right". Thus, State must have a "compelling interest" to regulate.

There are personal rights - such as marital - more fundamental.

Analogizes to Baird & Griswold

Fleishman would apply same principle - absolute personal right - to photographs and movies

Fleishman (cont)

He accepts Roth + Reidel but argues that Kaplan has "standing" to assert right of citizen to read. He then admits that her principal submission (main issue) turns initially on a "standing" issue.

(How did Stanley get into Court?)

x x x x

In any event, this book is not obscene. No more than T-topic of Cancer.

McConnell (Ast A/G Calif)

Calif. Ct has rejected Fleishman's article (in another case).

Facts: Public was complaining about Her store — those were therefore unconsenting adults.

LA doesn't have enough police to over-see the 250 stores — even to assure they are not used as conduits to the young.

McConnell (cont)

Good point

Problem with pornography is inevitable re-distribution — books are not consumed (like whiskey) & not re-cycled. In the end, they are re-circulated in various ways & become available to minors.

J. Stewart says we are applying a national const. & therefore standards must be national. (Possible answer: ~~st~~ standards, in terms of defining obscenity, (e.g. Roth test) should be uniform, but the application of these standards must be applied by judges & juries locally: thus what may appear to ~~prurient~~ prurient interest ~~exist~~ may be different in N.Y. & N.M.

6/20/72 - JHW

I would Deny

This gross obscenity case (although possibly held for Miller)

DISCUSS

No. 71-1422 OT 1971
Kaplan v. California
Cert to Appellate Dept. of the Suppiror Ct. for Los Angeles

On May 14, 1969 petr sold a book ~~xxxxxx~~ entitled Suite 69 to Los Angeles Police ~~Xxxxx~~ Sargenat Don Shaidell. Shaaidell had entered an Adult bookstore run by petr in the ~~xxxxxx xx~~ city of Los Angeles. The officer had entered the store as a result of citizen complaints. The officer asked petr if he had any sexy books. Petr said he did and showed the officer a picture saying, "Look at this. You can see right inside her cunt." Petr then told the officer that ~~x~~ all the books inside the store were sexy. He then read to the officer ~~xxxx~~ a passage from the book Suite 69 which the officer ~~xxxxx~~ bought. The portion of the book which petr read describes ~~xx~~ vividly an act of oral copulation between two females.

At trial, the state introduced an expert witness who testified that the book Suite 69 taken as a whole predominantly appealed to the prurient interest of the average person in the state of Cal. and that it went substantially beyond customary limits of candor in California. Petr also called a witness, an attorney, who testified that the book neither appealed to the prurient interest and had value in teaching the reader about sex and in addition had considerable entertainment value.

The jury found the book obscene under an appeal to the prurient interest standard and petr was convicted undef a Cal. statute making it a misdemeanor to distribute obscene materials, obscene (basically) being defined under the definition as laid down by this court in Roth.

The Cal. appellate court affirmed the conviction noting that the material was obscene under a community standard and affirmed the jury determination that the book was obscene and appealed primarily to the prurient interest.

Petr's chief contention is that the book is not obscene and that the state has deprived him of his First and Fourteenth Amendment rights in convicting him for the distribution of materials which are not obscene. The book itself is one that depicts graphically every known sexual act. I leafed through the book and found no page where some form of genital act was not being performed.

I gather all these cases are being held for MILLER.

HOLD FOR MILLER JHW

p 6

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

From: The Chief Justice

1st DRAFT

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SUPREME COURT OF THE UNITED STATES

No. 71–1422

Murray Kaplan, Petitioner, v. State of California. | On Writ of Certiorari to the Appellate Department of the Superior Court of California for the County of Los Angeles.

[January —, 1973]

Memorandum from MR. CHIEF JUSTICE BURGER.

We granted certiorari to the Appellate Department of the Superior Court of California for the County of Los Angeles to review the petitioner's conviction for violation of California statutes regarding obscenity.

Petitioner was the proprietor of one of the approximately 250 "adult" bookstores in the City of Los Angeles, California.[1] On May 14, 1969, an undercover police officer entered the store and began to peruse several books and magazines. Petitioner advised the officer that "the Peek-A-Boo Bookstore is not a library." The officer then asked petitioner if he had "any sexy books." Petitioner replied that "all of our books are sexy" and exhibited a lewd photograph. At petitioner's recommendation, and after petitioner had read a sample paragraph, the officer purchased the book Suite 69. On the

[1] These stores purport to bar minors from the premises. In this case there is no evidence that petitioner sold materials to juveniles or evidence that he thrust it on the general public. Cf. *Miller* v. *California*, No. 70–73.

Reviewed 1/18/73

This opinion would vacate & remand solely to consider Const. of Calif. statute in light of new standards.

I have reviewed this again 1/29/73 and am inclined to join. Suite 69 presents no issue of "free speech" for me unless one adopts the Black view that there are no limits whatever on expression

See Suggestions 5 6

basis of this sale, petitioner was convicted by a jury of violating California Penal Code § 311.2,[2] a misdemeanor.

The book, Suite 69, has a plain cover and contains no pictures. It is made up entirely of repetitive descriptions of physical, sexual contact, "clinincally" explicit and offensive to the point of being nauseous. There is no plot or theme. Every conceivable variety of physical contact, homosexual and heterosexual, is described. Whether one samples every fifth, 10th, or 20th page,

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[2] The California Penal Code § 311.2, at the time of the commission of the offense, read in relevant part:

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

California Penal Code § 311, at the time of the commission of the alleged offense, provided as follows:

"As used in this chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, *i. e.*, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

beginning at any point or page at random, the content is unvarying.

Both sides presented testimony, by persons accepted as "experts," as to the content and nature of the book. The book itself was received in evidence. The State offered no "expert" evidence that the book was "utterly without socially redeeming value," nor any evidence of "national standards."

On appeal, the Appellate Department of the California Superior Court for the County of Los Angeles affirmed. Relying on the dissenting opinions in *Jacobellis* v. *Ohio*, 378 U. S. 184, 199, 203, and JUSTICE WHITE'S dissent in *Memoirs* v. *Massachusetts*, 383 U. S. 413, 462, it concluded that a "national" standard of obscenity was not required. It rejected petitioner's contention that the State had to establish "expert" evidence that the book lacked "redeeming social value." Again citing *Memoirs, supra*, 383 U. S., at 420, it stated that petitioner's own emphasis on the book's obscene aspects could support a jury finding that it lacked redeeming social value. Finally, the Appellate Department considered petitioner's argument that the book was not "obscene" as a matter of constitutional law. Pointing out that petitioner was arguing, in part, that all books were constitutionally protected, it rejected that thesis. On "independent review," it concluded "Suite 69 appeals to the prurient interest in sex and is beyond the customary limits of candor within the State of California." It held that the book was not protected by the First Amendment.

In this Court, petitioner makes various contentions in support of reversal: that there was no proper affirmative evidence, based on "national" standards, that the book was "utterly without redeeming social importance"; that the book is not in fact or law obscene; that the printed form of expression is entitled to absolute protection under

the First Amendment; that even if the book is obscene, petitioner has a correlative right to "supply" to "consenting adults" whatever material a reader may possess in his home under *Stanley* v. *Georgia*, 394 U. S. 557, 565–566 (1969); and, finally, that there is no "valid government interest" in regulating obscenity.

This case squarely presents the issue of whether mere words alone can be "obscene" in the sense of being unprotected by the First Amendment.[3] When the Court declared that obscenity and pornography are not forms of expression protected by the First Amendment, no distinction was made as to the medium of the expression. See *Roth* v. *United States*, 354 U. S. 476, 481–485 (1956). Obscenity can, of course, manifest itself in conduct, in the graphic representation of conduct, or in the written and oral description of conduct. The Court has consistently applied similar obscenity tests to moving pictures, to photographs, and to words in books. See *Lee Arts Theater* v. *Virginia*, 392 U. S. 636, 637; *Teitel*

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[3] This Court, since *Roth* v. *United States*, 354 U. S. 476 (1956), has only once held books to be obscene. *Mishkin* v. *New York*, 383 U. S. 502. Those books were very similar in content to Suite 69, and most, if not all, were illustrated. See 383 U. S., at 505, 514–515. Prior to *Roth*, this Court affirmed, by an equally divided Court, a conviction for sale of an unillustrated book. *Doubleday & Co., Inc.* v. *New York*, 335 U. S. 848. This Court has diligently scrutinized judgments involving books for possible violation of First Amendment rights, and has regularly reversed decisions below on that basis. See *Childs* v. *Oregon*, 401 U. S. 1006; *Walken* v. *Ohio*, 398 U. S. 434; *Keney* v. *New York*, 388 U. S. 440; *Friedman* v. *New York*, 388 U. S. 441; *Sheperd* v. *New York*, 388 U. S. 444; *Avansino* v. *New York*, 388 U. S. 446; *Corinth Publications, Inc.* v. *Wesberry*, 388 U. S. 448; *Books, Inc.* v. *United States*, 388 U. S. 449; *Redrup* v. *New York*, 386 U. S. 767; *Memoirs* v. *Massachusetts*, 383 U. S. 413; *Tralins* v. *Gerstein*, 378 U. S. 576; *Grove Press, Inc.* v. *Gerstein*, 378 U. S. 577. *Quantity of Copies of Books* v. *Kansas*, 378 U. S. 205.

Film Corp. v. *Cusack,* 390 U. S. 139, 142 (concurring opinions); *Freedman* v. *Maryland,* 380 U. S. 51, 55, 58–60; *Jacobellis* v. *Ohio,* 378 U. S. 184, 187–188; *Times Film Corp.* v. *Chicago,* 365 U. S. 43, 49–50; *Joseph Burstyen, Inc.* v. *Wilson,* 343 U. S. 495, 503; Cf. *Kingsley International Pictures Corp.* v. *Regents,* 360 U. S. 684, 689–690.

Because of a profound commitment to protecting communication of ideas, any restraint on expression by way of the printed word or in speech stimulates a traditional and emotional response, unlike the response to obscene pictures of flagrant human conduct. A book seems to have a different and preferred place in our hierarchy of values, and so it should be. But this generalization, like so many, is qualified by the book's content. As with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide with the ~~clear~~ long settled position of this Court that obscenity is not protected by the Constitution. *Miller* v. *California, infra,* at ——. *Roth* v. *United States, supra,* at 481–485.

For good or evil, a book has a continuing life. It is passed hand to hand, and we can take note of the tendency of widely circulated books to reach the impressionable young and have a continuing impact.[4] Suite 69 is a depraved work, geared to a sick readership. Its content is such that a State could reasonably regard it as capable of distorting and debasing the values of youthful people. States need not wait until behavioral scientists or educators can document the legislative assumptions with empirical data before enacting controls of commerce in obscene materials unprotected by the First Amendment. See *Miller* v. *California, infra,* at —— (No. 70–73).

[4] See *Paris Adult Theatre I* v. *Slaton, infra,* at ——, n. 5; Report of the Presidential Commission on Obscenity (1970 ed.), at 401 (Hill-Link Minority Report).

Prior to trial, petitioner moved to dismiss the complaint on the basis that sale of sexually oriented material to consenting adults only is constitutionally permissible. In connection with this motion only, the prosecution stipulated that it did not claim that petitioner either disseminated any material to minors or thrust it upon the general public. The trial court denied the motion. Petitioner also moved prior to trial to dismiss part of the complaint on the basis that Suite 69 is constitutionally protected as a matter of law. This motion also was denied. My proposed opinion in *Paris Adult Theatre I* v. *Slaton,* No. 71–1051, reaffirms that sale of obscene materials to anyone, including consenting adults, is subject to state regulations. See also *United States* v. *Orito,* No. 70–69, *infra; Twelve 200-ft. reels,* No. 70–2, *infra; United States* v. *Thirty-Seven Photographs,* 402 U. S. 363, 376–377, 378–379 (concurring opinion). *United States* v. *Reidel,* 402 U. S. 351, 355. The denials of petitioners' motion to dismiss were, therefore, not error.

At trial an expert witness, a police officer in the vice squad, testified that the book Suite 69, taken as a whole, predominantly appealed to the prurient interest of the average person in the State of California, applying contemporary standards, and that the book went "substantially beyond customary limits of candor in the State of California." The witness explained specifically how the book did so, that it was a purveyor of sex for sex sake. No "expert" testimony was offered that the book was "utterly without redeeming social importance." Petitioner called as a witness an attorney, specializing in pornography cases, who had served as a researcher for the Commission on Obscenity and Pornography. He testified that, in his opinion, Suite 69 neither appealed to prurient interest nor went beyond customary limits of candor in the State of California. He also opined that the book had "redeeming social value"; in that a reader

could learn about sex, and because the book had entertainment value.

My proposed opinion in *Miller* v. *California*, No. 70–73, concluded that "the contemporary community standards of the State of California" were adequate to establish whether materials, as a matter of fact, appeal predominantly to the prurient interest or describe sexual conduct in a fundamentally offensive way. In *Miller*, I also rejected the "utterly without redeeming social value" test of *Memoirs* v. *Massachusetts*, 383 U. S. 413, 418, and rejected any special need for "expert" state testimony when the allegedly obscene materials themselves are placed in evidence. See JUSTICE WHITE's dissent in *Memoirs, supra*, 383 U. S. 413, at 461–462. The evidence introduced below was sufficient, as a matter of constitutional law, to support petitioner's conviction.

Miller, infra, and this case involve the same provisions of the California obscenity statute, California Penal Code § 311 and § 311.2 (a). It is open to question whether this statute meets the tests in *Miller*, particularly the need to define the proscribed materials with sufficient specificity as to the conduct depicted. Such specificity is required to give adequate notice and to avoid "freezing" of First Amendment rights. See *Miller, infra*, at —. I would vacate the judgment of the Appellate Department of the Superior Court, Los Angeles, California, and remand this case to that court for the sole purpose of reconsidering the constitutionality of the California obscenity statute in light of the new standards established in *Miller*.

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 20, 1973

Dear Bill:

In 71-1422, Kaplan v. California would you kindly add at the end of your memo:

Mr. Justice Douglas would vacate and remand for dismissal of the criminal complaint under which petitioner was found guilty because "obscenity" as defined by the California Courts and by this Court is too vague to satisfy the requirements of Due Process. See Miller v. California, ante ___ (dissenting opinion).

WO
William O. Douglas

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 7, 1973

Dear Chief:

In 71-1422, Kaplan v. California would you kindly add at the end of your memo:

"Mr. Justice Douglas would vacate and remand for dismissal of the criminal complaint under which petitioner was found guilty because "obscenity" as defined by the California Courts and by this Court is too vague to satisfy the requirements of Due Process. See Miller v. California, ante ___ (dissenting opinion).

William O. Douglas

The Chief Justice

cc: The Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
memo								
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