



Miller v. California

Miller v. California, 413 U.S. 15 (1973), was a landmark decision of the U.S. Supreme Court modifying its definition of obscenity from that of "utterly without socially redeeming value" to that which lacks "serious literary, artistic, political, or scientific value".^[1] It is now referred to as the three-prong standard or the Miller test.^[2]

Background

In 1971, Marvin Miller, an owner/operator of a California mail-order business specializing in pornographic films and books, sent out a brochure advertising books and a film that graphically depicted sexual activity between men and women. The brochure used in the mailing contained graphic images from the books and the film. Five of the brochures were mailed to a restaurant in Newport Beach, California. The owner and his mother opened the envelope and seeing the brochures, called the police.^[3]

Miller was arrested and charged with violating California Penal Code 311.2(a) which says in part, "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 possesses, prepares, publishes, produces, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is for a first offense, guilty of a misdemeanor."^[4] California lawmakers wrote the statute based on two previous Supreme Court obscenity cases, *Memoirs v. Massachusetts*^[5] and *Roth v. United States*.^{[6][7]}

Miller was tried by jury in the Superior Court of Orange County. At the conclusion of the evidence phase, the judge instructed the jury to evaluate the evidence by the community standards of California, i.e., as defined by the statute.^[8] The jury returned a guilty verdict.

Miller appealed to the Appellate Division of the Superior Court, arguing that the jury instructions did not use the standard set in *Memoirs v. Massachusetts* which said that in order to be judged obscene, materials must be "utterly without redeeming social value."^[5] Miller argued that only a national standard for obscenity could be applied. The appellate division rejected the argument and affirmed the jury verdict. Miller then filed an

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Supreme Court of the United States

Argued January 18–19, 1972

Reargued November 7, 1972

Decided June 21, 1973

Full case name *Marvin Miller v. State of California*

Citations 413 U.S. 15 (<https://supreme.justia.com/us/413/15/case.html>) (*more*)
93 S. Ct. 2607; 37 L. Ed. 2d 419; 1973 U.S. LEXIS 149; 1 Media L. Rep. 144.1

Case history

Prior Summary affirmation of jury verdict by Appellate Department, Superior Court of California, County of Orange, was unpublished.

Holding

Obscene materials are defined as those that the average person, applying contemporary community standards, find, taken as a whole, appeal to the prurient interest; that depict or describe, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law; and that the work, taken as a whole,

appeal with the California Court of Appeal for the Third District, which declined to review. Miller applied to the Supreme Court for certiorari, which was granted. Oral arguments were heard in January 1972.^[1]

Previous Supreme Court decisions on obscenity

The U.S. Supreme Court granted certiorari to Miller because the California law was based on its two previous obscenity cases which the Court wanted to revisit. Chief Justice Warren Burger came to the Court in 1969 believing that the Court's obscenity jurisprudence was misguided and governments should be given more leeway to ban obscene materials. In consideration of *Miller* in May and June 1972, Burger pushed successfully for a looser definition of "obscenity" which would allow local prosecutions, while Justice William J. Brennan, Jr., who by now also believed the *Roth* and *Memoirs* tests should be abandoned, led the charge for protecting all "obscenity" unless distributed to minors or exposed offensively to consenting adults. Decision of the case was contentious, and *Miller* was put over for reargument for October term in 1972, and did not come down until June 1973, with Burger prevailing with a 5-4 vote.^{[1][9][10]}

Since the Court's decision in *Roth v. United States*,^[6] the Court had struggled to define what constituted constitutionally unprotected obscene material. Under the Comstock laws that prevailed before *Roth*, articulated most famously in the 1868 English case *Regina v Hicklin*, any material that tended to "deprave and corrupt those whose minds are open to such immoral influences" was deemed "obscene" and could be banned on that basis. Thus, works by Honoré de Balzac, Gustave Flaubert, James Joyce, and D. H. Lawrence were banned based on isolated passages and the effect they might have on children.^[1] *Roth* repudiated the "Hicklin test" and defined obscenity more strictly, as material whose "dominant theme taken as a whole appeals to the prurient interest" to the "average person, applying contemporary community standards". Only material now meeting this test could be banned as "obscene".^[11]

In *Memoirs v. Massachusetts*,^[5] a plurality of the Court further redefined the *Roth* test by holding unprotected only that which is "patently offensive" and "utterly without redeeming social value," but no opinion in that case could command a majority of the Court either, and the state of the law in the obscenity field remained confused. In *Jacobellis v. Ohio*, Justice Potter Stewart's concurring opinion said that the Court in earlier pornography cases "was faced with the task of trying to define what may be indefinable," and that criminal laws were constitutionally limited to "hard-core pornography," which he did not try to define: "perhaps I could never succeed in intelligibly doing so. But I know it when I see it."^[12] Other Justices had equally been unwilling to clearly define what pornography could be prohibited by the First Amendment.

Supreme Court decision

lacks serious literary, artistic, political, or scientific value.

Court membership

Chief Justice

Warren E. Burger

Associate Justices

William O. Douglas · William J. Brennan Jr.

Potter Stewart · Byron White

Thurgood Marshall · Harry Blackmun

Lewis F. Powell Jr. · William Rehnquist

Case opinions

Majority Burger, joined by White, Blackmun, Powell, Rehnquist

Dissent Douglas

Dissent Brennan, joined by Stewart, Marshall

Laws applied

U.S. Const. amend. I; Cal. Penal Code 311.2(a)

Miller had based his appeal in California on *Memoirs v. Massachusetts*.^[5] The Court rejected that argument. The question before the court was whether the sale and distribution of obscene material was protected under the First Amendment's guarantee of Freedom of Speech. The Court ruled that it was not. It indicated that "obscene material is not protected by the First Amendment," especially that of hardcore pornography, thereby reaffirming part of *Roth*.^{[13][14]}

However, the Court acknowledged "the inherent dangers of undertaking to regulate any form of expression," and said that "State statutes designed to regulate obscene materials must be carefully limited."^[15] The Court, in an attempt to set such limits, devised a set of three criteria which must be met for a work to be legitimately subject to state regulation:

1. whether the average person, applying contemporary "community standards," would find that the work, taken as a whole, appeals to the prurient interest;
2. whether the work depicts or describes, in an offensive way, sexual conduct or excretory functions, as specifically defined by applicable state law (the syllabus of the case mentions only sexual conduct, but excretory functions are explicitly mentioned on page 25 of the majority opinion); and
3. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.^[16]

This obscenity test overturns the definition of obscenity set out in the *Memoirs* decision, which held that "all ideas having even the slightest redeeming social importance ... have the full protection of the guaranties [of the First Amendment]" and that obscenity was that which was "utterly without redeeming social importance".^[5]

The *Miller* decision vacated the jury verdict and remanded the case back to the California Superior Court.

Definition of obscenity post-Miller

Miller provided states greater freedom in prosecuting alleged purveyors of "obscene" material because, for the first time since *Roth*, a majority of the Court agreed on a definition of "obscenity." Hundreds of "obscenity" prosecutions went forward after *Miller*, and the Supreme Court began denying review of these state actions after years of reviewing many "obscenity" convictions (over 60 appeared on the Court's docket for the 1971–72 term, pre-*Miller*).

A companion case to *Miller*, *Paris Adult Theatre I v. Slaton*, provided states with greater leeway to shut down adult movie houses. Controversy arose over *Miller*'s "community standards" analysis, with critics charging that *Miller* encouraged forum shopping to prosecute national producers of what some believe to be "obscenity" in locales where community standards differ substantially from the rest of the nation. For example, under the "community standards" prong of the *Miller* test, what might be considered "obscene" in Utah might not be considered "obscene" in Massachusetts, or the opposite might be true; in any event, prosecutors tend to bring charges in locales where they believe that they will prevail. Justice Brennan, author of the *Roth* opinion, argued in his dissent for *Paris Adult Theatre* that outright suppression of obscenity is too vague to enforce in line with the First and Fourteenth Amendments.^[17]

The standards established by *Miller* were elaborated upon in *Pope v. Illinois* in 1987.^[18] In the case, the jury instructions for the local court had been for the jurors to evaluate whether adult magazines had value according to a community standard, and the conviction was held by the Illinois appellate court.^[19] The Supreme Court overruled the appellate court decision, siding with the defendant. In the

majority opinion, the Supreme Court held that the first two prongs of the test were to be evaluated according to a "community standard," but not the third, which was to be held to the higher standard of a "reasonable person" evaluating the work for value.^{[18][20]}

In 1987, Oregon became the first state to strike down the criminalization of obscenity.^[21] In *State v. Henry*, the Oregon Supreme Court ruled in favor of Earl Henry, the owner of an adult bookstore, stating that the state obscenity statute violated the free speech provision of Oregon's state constitution.^[22]

In 1997, the Supreme Court ruled in *Reno v. American Civil Liberties Union* that the anti-indecency provisions of the Communications Decency Act were unconstitutional.^[23] The Act had criminalized the sending of "obscene or indecent" material to minors over the Internet.^[24] The court unanimously ruled that the provision violated the First Amendment due to its burden on free speech.

Effects of the decision

In the years since *Miller*, many localities have cracked down on adult theatres and bookstores, as well as nude dancing, through restrictive zoning ordinances and public nudity laws.^[25]

Additionally, in 1982's *New York v. Ferber* the Court declared child pornography as unprotected by the First Amendment, upholding the state of New York's ban on that material.^[26] In the 2002 *Ashcroft v. Free Speech Coalition* case, however, the Court held that sexually explicit material that only appears to depict minors, but actually does not, might be exempt from obscenity rulings.^[27]

In *American Booksellers Foundation for Free Expression v. Strickland*, plaintiffs American Booksellers Foundation for Free Expression, joined by various publishers, retailers, and web site operators, sued Ohio's Attorney General and Ohio county prosecutors in United States District Court for the Southern District of Ohio. Plaintiffs alleged that Ohio Revised Code §2907.01(E) and (J), which prohibited the dissemination or display of "materials harmful to juveniles", unconstitutionally violated both the First Amendment and the Commerce Clause of the Constitution. Plaintiffs specifically challenged the statute's definition of "harmful to juveniles", as well as the provisions governing Internet dissemination of those materials. The court held the statute unconstitutional because the statute's definition of "material harmful to minors" did not comply with *Miller*.^[28]

The "community standards" portion of the decision is of particular relevance with the rise of the Internet, as materials believed by some to be "obscene" can be accessed from anywhere in the nation, including places where there is a greater concern about "obscenity" than other areas of the nation. Enforcing and applying obscenity laws to the Internet have proven difficult. Both the Child Pornography Prevention Act (CPPA) and the Child Online Protection Act (COPA) have had sections struck down as unconstitutional in cases such as *Ashcroft v. Free Speech Coalition* and *Ashcroft v. ACLU*.^{[27][29]}

See also

- [List of United States Supreme Court cases, volume 413](#)
- [Sex-related court cases](#)

**WE WERE THIS CLOSE TO DOING
A MAROON FIVE COVER THAT WE
HADN'T EVEN PRACTICED**

We set up, tuned, and started playing. For the first couple of songs we had no audience. But as we started up on our third song, the door opened and Little Ed came out.

He nodded at us, lit a cigarette, and sat on the steps.

The song we were playing was "If You Love Your Dog So Much, Why Don't You Fuck Him."

He said nothing. He just watched us and took long, exhausted drags on his cigarette.

Pretty soon, more family members opened the door and joined him and watched us play.

We were locked in. We were sounding pretty good.

But I was feeling increasingly anxious about the song we were playing.

The chorus was:

*If you love your dog so much
Why don't you fuck him
I bet he would love it
At least you should suck his dick*

hitched-up eyebrows that were sort of like, *who is this man who is dancing with me. I've never met him before in my life. I've got my guard up but I think maybe I'm in love.*

I looked over at Ash a couple of times and her face was in the shadows, but it looked like she might have been smiling, too.

It turned out Corey passed out in the second-floor bathroom, woke up, threw up, and immediately went to his room and passed out on his bed, which was where we found him. We wiped the excess barf off of his mouth, and then I went into my room, and Ash followed me in there and sat next to me on my bed.

I had no idea what was going to happen next.

"Hey," she said.

"Hey," I said.

Outside someone not very good had taken over on bass and the band had acquired a trumpet and a harmonica.

"Sorry for hooking up with Corey," she said.

"I thought you didn't want to hook up with boys," I said.

She shrugged, kind of staring me down.

"It reminded me why I don't," she said.

"Oh yeah?"

"Yeah. It wasn't a good hookup."

The harmonica playing was completely for shit. The trumpet sounded okay but sleepy.

"What do you mean?"

"I mean, literally all it was was, he went down on me for like half an hour."

"Oh."

"But he wasn't good at it."

"Oh."

And by the time I got him to stop, he was so on edge that he got his hand on and couldn't get it back. So we just called it quits and went to sleep.

"Okay," I said.

I felt horrible for Corey. But I also felt pretty good that their hookup was such a disaster. It put Corey back on my level somehow, I mean. I was happy about it. I guess I was just kind of relieved.

The room was Quincy's old room. There were trophies and pictures of him everywhere. There was a painting he did of himself playing football.

"All boys need to know this. Never go down on a girl unless you actually like to go down on girls. If you're just doing it because you feel like you have to, and you have no idea what you're doing, it's just not gonna work out."

"Right, right."

"Your approach can't be, I'm going to jam my tongue in here until you come. If that's your attitude, you need to step back and figure some shit out."

The painting Quincy did of his team was one of those paintings where everybody's head and body are facing in completely different directions, and every eye is just a black circle in a brown circle in a white football-shaped circle.

"But why'd you hook up with him in the first place?" I said.

Ash shrugged again. She looked at me.

"Sometimes I get lonely," she said.

We stay up late just talking and browsing the internet and watching videos and talking again, laughing, dozing off. I wonder what it'd be like to have a whole life of this. I think it'd be pretty great. Not gonna lie.

And then one minute we're lying there and the next we're kissing, and it's not like this is anything particularly new, but it *feels* new. It feels like we've been forced apart for a century and this is our reunion, a mix of relief and desperation, both of us clinging to each other on his bed, and when Nick breaks away to kiss my neck I just stop thinking entirely.

How is it that this still makes me so . . . How have two years gone by and I still feel like this in his arms?

We kiss for a long time, like it's two years ago and we're on Nick's lounge sofa trying to watch a film. Impossible. I can't think about anything else when he's running his hands so gently through my hair, across

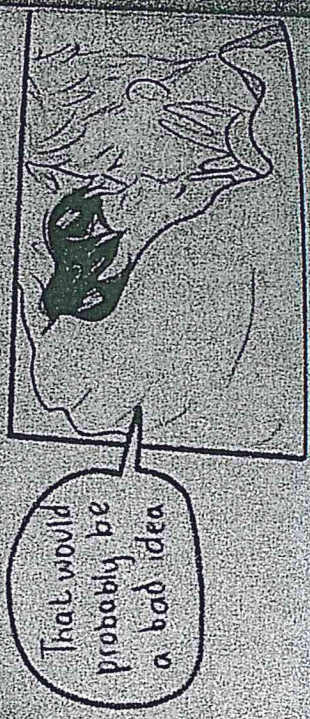
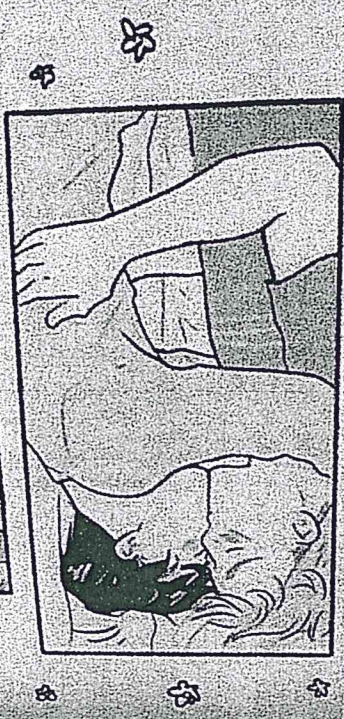
my back, over my hips. I ask if we should take our clothes off and he's saying yes before I've even finished my sentence, and then he's pulling my T-shirt off and laughing when I can't undo his shirt buttons, he's undoing my belt. I'm reaching into his bedside drawer for a condom, we're kissing again, we're rolling over— obviously you can see where this is going.

I don't know if it's because we're feeling especially emotional, or we're just tired, or these past couple of weeks have been too much, but this time reminds me so much of the first time we had sex.

We were both fucking, *terrified*, and the whole thing was kind of tumbler because we didn't know what we were doing. But it was good too, so good, because we were a mess of emotions and we were scared and excited and everything felt *new*.

So, this sort of feels like that.

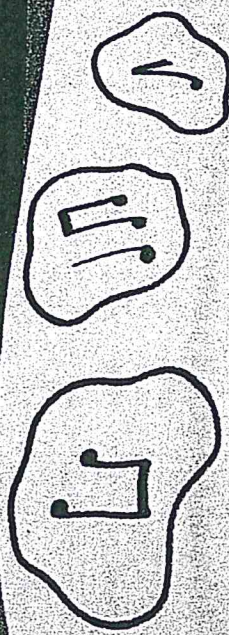
Nick touches me like he's scared that any minute



I could disintegrate forever. When we're finally undressed completely he just stops and stares like he's trying to memorize every second of this. When we're moving he keeps saying my name over and over until I find it too ridiculous and tell him to shut up, but he just grins and keeps on saying it anyway, whispering it against my skin just to make me laugh. I hold him so tight against me, as if that'll keep us here, keep him here with me.

I used to think I was pathetic for thinking sappy, romantic stuff like that. I don't anymore. I just keep thinking it. I keep wanting him here. I keep wanting him to stay.

Afterwards we lie there for a while, Nick's head on my chest and our legs entwined. I reach over to his bedside table and turn the radio on, noticing that it's gone three a.m.—how did that happen? I close my eyes because I think Nick might be asleep, but several



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"Yeah, Earl, I'm going to eat her pussy."

"Hch."

"Yeah."

"Do you even know *how* to eat pussy?"

"Uh, not really."

"Papa Gaines never sat you down, said, Son, one day you're gonna have to eat the pussy."

"No. But he did teach me how to eat a butthole."

When Earl is in full-on Gross-Out Mode, you have to play along or you'll feel stupid.

"God bless that man."

"Yup."

"I would teach you some pussy-eating technique, but it's a little complicated."

"That's a shame."

"I would need some diagrams and whatnot."

"Well, tonight maybe you can draw some up."

"Son, I don't have time for that. I got like twenty pussies over here that I need to eat."

"Is that right?"

"I'm on pussy deadline."

"You've got twenty vaginas, all lined up in a row."

"Aw, what the hell. What the *hell*. No one's talkin bout *vaginas*. Greg, what the hell is wrong with you. Man, that's nasty."

Earl likes to mix it up sometimes by pretending that you're

might also bring about the apocalypse. Also, it was becoming increasingly difficult for me to say words. Instead, I stood there and—there's no good way to put this—attempted not to cry.

“Naw, shut the fuck up. You care so fucking much bout what other people think, you gotta be secretive as shit, gotta go round sucking errybody's *dick* pretendin like you they friend cuz you care so much bout what they think, lemme fucking tell you: *Nobody gives a shit about you*. Nobody think shit about you. You ain't got no *friends*. You ain't got nobody who give a fucking shit about you.”

“Oka , kay.”

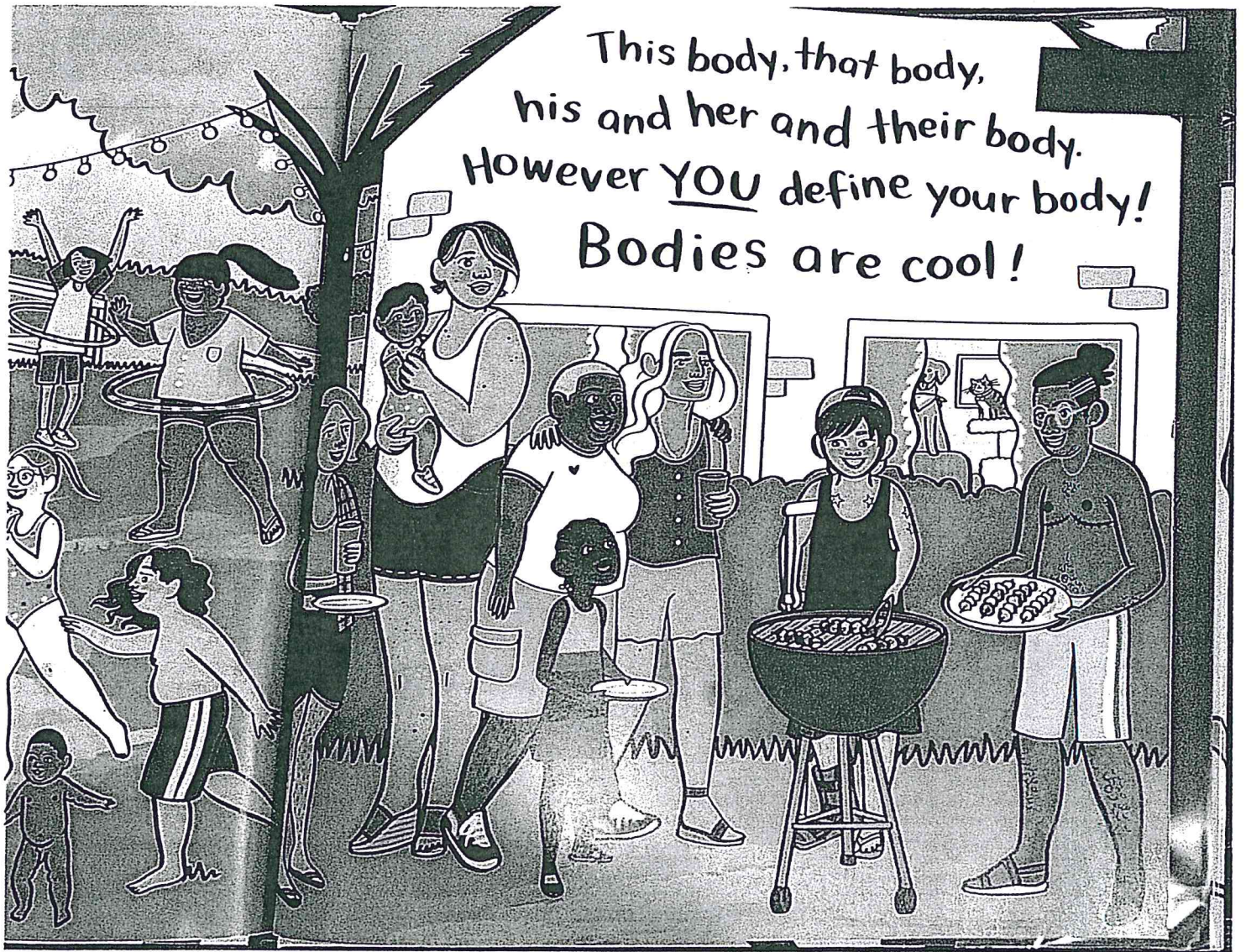
“Fuckin *nobody*. Errybody at school could give a *shit* about you, man. Errybody you all friendly with and shit could give a *shit*. You all worried bout what they think about you, man, they don't give a *fuck*. They don't give a fuck if you *live* or *die*, you pussy-ass bitch. They don't give a *fuck*. Look at me. They don't. Give. A *fuck*.”

“Oka ay, J Jesu , us.”

“Man, just shut the fuck up, because I can't be hearing no more of this. Yeah, I fucking told Rachel about the films, I fucking gave her some of them dumb-ass films to watch, because she like the only person that *do* give a fuck. Yeah. She don't have big-ass titties, so you don't fucking care, but that other bitch don't give a shit about you and, and fucking Rachel *do*, and you don't fucking give a *shit* cuz you're a dumb little bitch.”

“I d , d do.”

“Stop your fucking crying, bitch-ass.”



STUDENTS ARE BEING CONDITIONED AT
A VERY YOUNG AGE SO THEY WILL NOT BE
SHOCKED AS THEY GET OLDER. THE NEW NORMAL.
MOM-DAD-GRANDMOM-GRANDDAD IS
THIS YOUR NEW NORMAL?

Bodies Are Cool

