OBSCENITY, MORALITY, AND THE FIRST AMENDMENT: THE FIRST LGBT RIGHTS CASES BEFORE THE SUPREME COURT

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The Supreme Court decided its first two cases involving LGBT litigants in 1958 and 1962, respectively. Surprisingly, commentators have paid little attention to these early cases despite the fact that the Court in both instances sided with the publishers of gay magazines in the face of the government's claim that the publications were obscene. This Article fills this gap in the literature by exploring how the challengers prevailed before the Supreme Court at a time when the vast majority of Americans strongly disapproved of same-sex sexual relationships and conduct. The Article contends that the best way of understanding the cases is to view them as part of the push by mid-twentieth century courts to "demoralize" the law of obscenity, that is to reject, minimize, or ignore the government's contention that obscenity laws were needed to promote and protect public morality. The Article also explores the historical importance of the first LGBT rights victories before the Supreme Court, explaining how they contributed in important ways to the formation and strengthening of LGBT identities and communities during the early days of the LGBT rights movement. Finally, the Article analogizes between the demoralization of obscenity law under the First Amendment and the demoralization of substantive due process and equal protection law in matters of sexual orientation that resulted from the Court's later cases involving sodomy and marriage laws. In doing so, the Article explains how and why the demoralization of free speech law preceded the demoralization of other areas of constitutional law.

INTRODUCTION

The first case involving the rights of lesbians and gay men to reach the Supreme Court resulted from the Post Office's refusal to distribute one of the first gay magazines to appear in the United States. The Court in 1958, in *One, Inc. v. Olesen*, summarily reversed a ruling by the U.S. Court of Appeals for the Ninth Circuit that had upheld the Post Office's constitutional authority to deem the publication obscene and therefore "nonmailable" under the federal obscenity statute.[1] Four years later, the Court, in *Manual Enterprises, Inc.*

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v. Day, held that the Post Office could not refuse to distribute, on obscenity grounds, three so-called physique magazines, containing pictures of partially naked male models, aimed at gay readers.[2]

By making it clear that the First Amendment did not allow the government to suppress lesbian and gay publications, the Court in these two early cases provided crucial protection to those advocating on behalf of the rights of sexual minorities. Despite their historical importance, however, commentators have paid little attention to the first LGBT rights cases (as we would categorize them today) to reach the Supreme Court.[3] This Article fills this gap in the literature by exploring how it was that the challengers in the two cases, at a time when the vast majority of Americans strongly disapproved of same-sex sexual relationships and conduct, were able to prevail before the Supreme Court. The Article contends that the best way of understanding the rulings is to view them as part of a growing trend among mid-twentieth century American courts to "demoralize" the law of obscenity. By "demoralization," I mean a phenomenon whereby courts rejected, minimized, or ignored the government's contention that obscenity laws were needed to promote and protect public morality.[4]

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of copies of *ONE* magazine. Susan Lyons, a librarian at the Rutgers University School of Law, provided great assistance in helping track down some key sources. Thank you as well to Erez Aloni, Dale Carpenter, Donna Dennis, Carlos Gonzalez, and Doug NeJaime for providing me with helpful comments and suggestions. All errors are, of course, my own.

1 One, Inc. v. Olesen, 355 U.S. 371 (1958). For a brief history of that statute, see *infra* notes 30–34 and accompanying text.

2 Manual Enters., Inc. v. Day, 370 U.S. 478 (1962).

3 Jonathan Rauch has noted the relative obscurity of the Supreme Court's ruling in *One*. Jonathan Rauch, *The unknown Supreme Court decision that changed everything for gays,* VOLOKH CONSPIRACY (Feb. 5, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/05/the-unknown-supreme-court-decision-that-changed-everything-for-gays/ [http://perma.cc/7KB7-Z5G3]. Joyce Murdoch and Deb Price dedicate a chapter to each of the two cases in their book on LGBT rights cases before the Supreme Court. JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT 27–50, 65–88 (2001). Bill Eskridge also mentions the two cases in his comprehensive review of early LGBT rights cases. William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703, 804, 806 (1997) [hereinafter Eskridge, *Privacy Jurisprudence*] (discussing *One* and *Manual Enterprises*); William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 890–91 (1997) [hereinafter Eskridge, *Challenging the Apartheid of the Closet*] (discussing *Manual Enterprises*). Eskridge also discusses the cases in William N. Eskridge. Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2162–64 (2002) [hereinafter Eskridge, *Identity-Based Social Movements*].

4 Christopher Wolfe has provided a helpful definition of public morality:

The demoralization of obscenity law, which took place alongside its constitutionalization under the First Amendment, occurred several decades before the Supreme Court's rulings interpreting the Equal Protection and Due Process clauses in ways that prevent the government from relying on moral considerations to defend the constitutionality of laws and regulations that negatively affect lesbians, gay men, and bisexuals.[5] Indeed, long before the Supreme Court grappled with the question of the proper role that moral judgments and values could play in justifying the differential treatment of sexual minorities under the Equal Protection Clause, as well as restrictions imposed on their sexual liberty under the Due Process Clause, courts were grappling with the intersection of public morality and freedom of speech in the context of obscenity law. As would later happen in equality and due process cases, sexual minorities benefited from judicial rulings that were skeptical of morality-based rationales for the setting of policies that impacted on constitutional rights.

Part I of the Article traces the development of obscenity law in the United States from the early nineteenth century though the 1950s, with an emphasis on the use of public morality as a regulatory justification.[6] While that justification played a foundational role in the early courts' understanding of why the state had the authority to proscribe obscene materials, its importance began to gradually wane with the passage of time. Indeed, by the time the Supreme Court fully constitutionalized the law of obscenity in the late 1950s, considerations of morality played a much-reduced role in this area.[7]

Part II explores the factual backgrounds of *One* and *Manual Enterprises*, as well as the legal arguments raised by both the publishers of the gay magazines and by the federal government on the question of what constituted constitutionally proscribable obscenity.[8] It then explains how the demoralization of obscenity law contributed in crucial ways to the

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> Public morality . . . concerns laws and public actions focused on the moral conduct and especially the stable patterns of conduct (character) of individual citizens. The question of what role the political community should take in promoting norms of morality for citizens is at the heart of public morality. The focal cases of public morality are those involving laws that limit certain forms of conduct of consenting adults, on the grounds that they are morally wrong.

Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 65 (2000).

5 *See infra* Part IV.

6 *See infra* notes 10–57 and accompanying text.

7 *See infra* notes 99–161 and accompanying text.

8 *See infra* notes 175–251, 261–315, and accompanying texts.

Court's decision to side with the publishers in both instances.[9]

Part III explores the social and legal importance of the first LGBT rights victories before the Supreme Court. The fact that the government, after the two rulings, could no longer justify its regulation of gay publications on the notion that homosexuality was immoral, and that it therefore could not constitutionally censor publications on the ground that they promoted same-sex sexual relationships and conduct, meant that those who wanted to publish materials aimed at lesbians and gay men could now do so with considerably less fear of government censorship and harassment. As I explain in Part III, the growing availability of same-sex political and erotic materials during the 1960s contributed in important ways to the formation and strengthening of LGBT identities and communities.

The last section of the article, Part IV, steps back and looks more broadly at questions of public morality and the constitutional rights of sexual minorities. It begins by exploring the similarities between how the Supreme Court handled the question of public morality in its two gay obscenity cases and how that question was addressed by the first federal appellate court to entertain a First Amendment lawsuit brought by an LGBT student group against a public university. It then provides a brief account of how due process and equal protection law, in matters related to sexuality, have gone through a similar process of demoralization. It finishes with some thoughts on the question of why demoralization under the First Amendment preceded the demoralization under the Due Process and Equal Protection clauses.

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9 *See infra* notes 252–260, 316–328, and accompanying texts. I recognize that there is a possible alternative narrative to the one I provide in this Article, one that explains the Court's rulings in *One* and *Manual Enterprises* not through changes in judicial understandings of obscenity law as such, but as early examples of the Court's growing, and more general, skepticism of government efforts to restrict speech. Although such skepticism may have contributed to the outcomes in the two cases, I do not believe we can conclude with certainty that it played a crucial role. It is important to remember that *One* and *Manual Enterprises* were decided several years before the Court embarked on its aggressive defense of free speech rights in cases such as *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that the First Amendment does "not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.") (footnote omitted), and *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that the First Amendment requires that public officials show that defamatory falsehood was made with actual malice before they are able to recover damages). The fact that the Court did not introduce its more robust defense of free speech rights until several years after *One* and *Manual Enterprises* leads me to conclude that the outcomes in those two cases are more persuasively explained through the kind of detailed exploration of changing judicial understandings of obscenity law that I provide in this Article, understandings that largely *preceded* the Court's two gay obscenity rulings.

I. Obscenity and Morality in the Courts from the Early 19th Century until the 1950s

During approximately the first one hundred and twenty years of obscenity prosecutions in the United States (that is, roughly between the 1810s until the 1930s), courts frequently, and without much controversy or disagreement, pointed to the promotion of public morality as the main objective behind obscenity laws. As the twentieth century progressed, however, courts began to focus on considerations beyond public morality such as the social value of the materials in question. The Supreme Court, in the late 1950s, at around the same time that it decided its first two cases implicating the interests of lesbians and gay men, issued two opinions (*Roth v. United States*[10] and *Kingsley International Pictures, Corp. v. Regents of the University of the State of New York*[11]) that significantly contributed to the judicial demoralization of obscenity law.

A. The Primacy of Public Morals in Early Obscenity Cases

The first reported obscenity conviction in the United States took place in Philadelphia in 1815. The defendants in *Commonwealth v. Sharpless* were charged under the common law crime of public indecency (Pennsylvania at the time did not have an obscenity statute) for allowing members of the public, after paying a fee, to enter "a certain house" in order to observe a painting "representing a man in an obscene, impudent and indecent posture with a woman."[12] In upholding the convictions, Chief Justice Tilghman of the Pennsylvania Supreme Court explained that in England actions "were always indictable" if they "tend[ed] to corrupt the public morals."[13] Tilghman further explained that "[w]hat tended to corrupt society, was held to be a breach of the peace and punishable by indictment. The courts are guardians of the public morals . . . . Hence, it follows, that an offence may be punishable, if in its nature and by its example, it tends to the corruption of morals."[14]

The defendants in *Sharpless* had argued that they could not be charged with public indecency because the viewing of the painting had taken place in a private home.[15] How-

10 354 U.S. 476 (1957).

11 360 U.S. 684 (1959).

12 Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 92 (Pa. 1815) (emphases omitted).

13 *Id.* at 101.

14 *Id.* at 102.

15 *Id.* at 94.

ever, Tilghman rejected this effort to immunize conduct based on a distinction between the private sphere of the home and public morals. The Chief Justice reasoned that "[i]f the privacy of the room was a protection, all the youth of the city might be corrupted, by taking them, one by one, into a chamber, and there inflaming their passions by the exhibition of lascivious pictures."[16]

A concurring opinion by Justice Yeates also focused intently on the moral harm caused by the obscene painting in question. Yeates explained:

> that although every immoral act, such as lying, . . . is not indictable, yet where the offence charged is destructive of morality in general; where it does or may affect every member of the community, it is punishable at common law. The destruction of morality renders the power of the government invalid, for government is no more than public order; it weakens the bands by which society is kept together. The corruption of the public mind, in general, and debauching the manners of youth, in particular, by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences, and in such instances, courts of justice are, or ought to be, the schools of morals.[17]

It is clear, then, that the Pennsylvania Supreme Court in *Sharpless* saw the regulation of obscene materials as essential to the protection of public morals. According to the court, the very ability of society to survive depended on the government's authority to proscribe materials that corrupted public morals. The court, in effect, assumed that obscene materials promoted immorality and that, as such, they constituted a threat to society.[18]

The same concern about morals was behind the first reported obscenity prosecution in the United States for the publishing of a book.[19] The book in question was *Memoirs of a*

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16 *Id.*

17 *Id.* at 103.

18 It is important to note, given the focus of this Article, that Lord Patrick Devlin essentially made the same argument a century and a half later in arguing against the decriminalization of consensual same-sex sexual conduct. *See infra* notes 383–385 and accompanying text. As I explain in Part IV, Devlin contended that sodomy laws were needed to protect society from the threat of disintegration that he claimed exists when individuals are permitted to engage in conduct that the wider society believes is immoral. *See infra* notes 383–385 and accompanying text.

19 Commonwealth v. Holmes, 17 Mass. 336 (1821).

Woman of Pleasure, more commonly known as *Fanny Hill*, which, in telling the story of a young girl who worked at a London brothel in the eighteenth century, provides readers with extensive and detailed accounts of its characters' sexual experiences.[20] The indictment of the book's publisher, upheld by the Massachusetts Supreme Judicial Court in 1821, alleged that the defendant by

> being a scandalous and evil-disposed person, and contriving, devising and intending, *the morals as well of youth as of other good citizens of said commonwealth to debauch and corrupt*, and to raise and create in their minds inordinate and lustful desires . . . knowingly, unlawfully, wickedly, maliciously, and scandalously, did utter, publish and deliver . . . a certain lewd, wicked, scandalous, infamous and obscene printed book . . . .[21]

The understanding of the state's power to regulate obscenity as arising from its authority to protect public morals was further strengthened by the 1868 ruling by the Court of Queen's Bench in *Regina v. Hicklin*.[22] That case dealt with the application of the Obscene Publications Act, enacted by Parliament a few years earlier, to a pamphlet, *The Confessional Unmasked*, which was highly critical of the Catholic Church and contended that its tradition of confessions was an excuse to encourage sexual degradation.[23]

Chief Justice Cockburn, in upholding the pamphlet's seizure in *Hicklin*, adopted a definition of obscenity that greatly influenced American judges for decades to come.[24] Cockburn explained that the "test of obscenity is . . . whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[25]

The element of the *Hicklin* test that eventually received the most attention, and led to the greatest controversy, was its use of the most vulnerable members of society, such as children, as the appropriate subjects for determining which materials were obscene. But

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20 JOHN CLELAND, MEMOIRS OF A WOMAN OF PLEASURE (1748).

21 *Holmes*, 17 Mass. at 336 (emphasis added).

22 R. v. Hicklin, [1868] 3 Q.B. 360.

23 For a description of the pamphlet, see TERRENCE J. MURPHY, CENSORSHIP: GOVERNMENT AND OBSCENITY 41 (1963).

24 *See infra* notes 35–40 and accompanying text.

25 *Hicklin*, 3 Q.B. at 371.

more importantly for our purposes is the aspect of the test that was entirely taken for granted and was assumed for decades to be entirely appropriate, namely the question of whether the publication in question had "*immoral* influences" on its readers.

Indeed, the defendant in *Hicklin* argued strenuously that his intent had been to warn the English public of what he took to be the dangers of embracing Catholicism, rather than to promote certain conduct, immoral or otherwise.[26] But according to Cockburn, that was a distinction without legal relevance. If the book in question had "the immediate tendency of demoralizing the public mind," the Chief Justice reasoned, then it did not matter that the intent behind the publication was to attain an unrelated objective such as to warn readers about the supposed perils of Catholicism.[27]

It would be too simplistic to claim that courts in cases such as *Sharpless*, *Memoirs of a Woman of Pleasure*, and *Hicklin* concerned themselves with protecting public morality as an abstract principle. Instead, their primary concern was with the *effects*, both on society and on individuals, of obscene materials (as shown by their concern with the materials' purported debauching and corrupting influences).[28] What was fundamental about the reasoning of these early courts, and what distinguishes it from that of those a few decades into the twentieth century, was that they largely assumed that obscene materials represented a threat to society because they morally corrupted individuals who read or observed them.

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26 *Id.* at 370–71.

27 *Id.* at 372. Cockburn added:

> I quite concur in thinking that the motive of the parties who published this work, however mistaken, was an honest one, yet I cannot suppose but what they had that intention which constitutes the criminality of the act, at any rate that they knew perfectly well that this work must have the tendency which, in point of law, makes it an obscene publication, namely, *the tendency to corrupt the minds and morals of those into whose hands it might come.*

Id. at 372–73 (emphasis added). In a concurring opinion, Justice Blackburn explained that although there was nothing wrong with Protestants criticizing the religious views of Catholics, and vice-versa,

> it never can be said that in order to enforce your views, you may do something *contrary to public morality*; that you are at liberty to publish obscene publications, and distribute them amongst every one—schoolboys and everyone else—*when the inevitable effect must be to injure public morality*, on the ground that you have an innocent object in view, that is to say, that of attacking the Roman Catholic religion, which you have a right to do.

Id. at 377 (Blackburn, J., concurring) (emphases added).

28 *See supra* notes 13, 14, 22, 25, and accompanying texts.

In contrast, an important aspect of the process of judicial demoralization of obscenity law that started around the 1930s entailed the growing unwillingness of courts to *assume* that sexually explicit materials constituted a threat to society.[29]

In 1873, Congress became heavily involved in regulating obscene materials by enacting the so-called Comstock Act.[30] The legislation was largely the result of the lobbying efforts of Anthony Comstock, then an agent of the Young Men's Christian Association of New York and the future Secretary of the New York Society for the Suppression of Vice and obscenity investigator for the U.S. Post Office.[31] The Comstock Act made it a federal crime to use the mails to distribute "obscene, lewd, or lascivious" publications of any kind.[32] In addition to criminalizing the distribution of obscene materials via the mails, the Act authorized the Post Office to refuse to mail obscene materials.[33] (The government relied on this provision, decades later, to refuse to distribute some gay publications via the mails, leading the Supreme Court to decide its first two LGBT rights cases.)[34]

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29 *See infra* notes 66–98 and accompanying text.

30 The first federal obscenity legislation was a provision added to the Tariff Act of 1842 prohibiting the importation of obscene prints. DONNA DENNIS, LICENTIOUS GOTHAM: EROTIC PUBLISHING AND ITS PROSECUTION IN NINETEENTH-CENTURY NEW YORK 255 (2009). During the Civil War, there was a marked increase in the use of the mails to distribute sexual publications. *Id.* at 254. This led Congress, in 1865, to enact the first statute prohibiting the use of the mails to distribute obscene publications. The Comstock Act of 1873 went significantly beyond the 1865 statute by, inter alia, including within its scope publications and devices related to contraception and abortion, as well as any "article or thing intended or adapted for any indecent or immoral use or nature." *Id.* at 266. The statute also increased the penalties, calling for a maximum imprisonment of ten years, while authorizing U.S. Marshals to seize and destroy obscene materials. *Id.* at 267–68. The 1865 statute had called for a maximum prison term of one year. MURPHY, *supra* note 23, at 75.

31 DENNIS, *supra* note 30, at 253, 263–68.

32 DENNIS, *supra* note 30, at 266.

33 Congress in 1876 amended the statute to make it clear that "[e]very obscene [publication] . . . is declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any Post Office or by any letter carrier." MURPHY, *supra* note 23, at 204. The Supreme Court in 1877 upheld a statute authorizing the Post Office to refuse to distribute materials related to lotteries. Ex Parte Jackson, 96 U.S. 727, 736–37 (1877). In doing so, the Court analogized between the statute at issue in *Jackson* and the Comstock Act. *Id.* at 736. Following *Jackson*, it was widely assumed that the Post Office had the constitutional authority to refuse to distribute obscene materials. *See, e.g.*, United States v. Bennett, 24 F. Cas. 1093, 1095 (C.C.S.D.N.Y. 1879) (No. 14571). For an in-depth exploration of how Congress through the decades required the Post Office to screen different categories of materials in order to determine whether they were mailable, see DOROTHY GANFIELD FOWLER, UNMAILABLE: CONGRESS AND THE POST OFFICE (1977).

34 *See infra* Part III.

In 1879, the *Hicklin* test was adopted by a federal appellate court in *United States v. Bennett*.[35] In doing so, the court upheld the defendant's conviction for violating the Comstock Act after he mailed a pamphlet promoting the view that individuals had the right to engage in sex outside of marriage.[36] The court also followed *Hicklin*'s holding that the defendant's intent was irrelevant as long as the publication had the tendency to corrupt public morals.[37]

It was not just the lower courts that embraced the *Hicklin* test; the Supreme Court did the same in 1896.[38] In addition, the Court a year later, in an obscenity prosecution brought under the Comstock Act against the owner of a newspaper that had published an advertisement seeming to offer the services of prostitutes, upheld the judge's instructions to the jury which explained that "if the publications were such as were calculated to deprave the morals, they were within the statute."[39] The Court explained that "[t]here could have been no possible misapprehension on [the jury's] part as to what was meant. There was no question as to depraving the morals in any other direction than that of impure sexual relations."[40] It is clear, therefore, that courts throughout the nineteenth century uniformly understood the primary objective behind the legal regulation of obscenity to be the protection of public morality.

The same focus on morality continued well into the twentieth century. For example, in 1928, the publisher Donald Friede was charged with having violated New York's

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35 *Bennett*, 24 F. Cas. at 1104.

36 *Id.* at 1103–04. The pamphlet, titled *Cupid's Yokes*, was written by Ezra Heywood, a proponent of so-called free love, pacifism, and labor rights. For a discussion of Heywood's political activism, his views on marriage and free love, and the *Bennett* case, see DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 32–38 (1997).

37 *Bennett*, 24 F. Cas. at 1105. For other examples of American courts adopting the *Hicklin* test, see United States v. Clarke, 38 F. 732, 733–34 (E.D. Mo. 1889); People v. Muller, 2 N.Y. 408, 411 (1884); *see also* Knowles v. United States, 170 F. 409, 411–12 (8th Cir. 1909) (holding that the federal obscenity statute was not intended to restrict "a free press, but to protect society against practices that are clearly immoral and corrupting").

38 Rosen v. United States, 161 U.S. 29, 43 (1896) (noting that the trial judge's instruction on the definition of obscenity, which was the same as announced by the *Hicklin* court, "was quite as liberal as the defendant had any right to demand").

39 Dunlop v. United States, 165 U.S. 486, 501 (1897).

40 *Id. See also* Swearingen v. United States, 161 U.S. 446, 451 (1896) ("The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity . . . .").

obscenity statute by publishing the lesbian novel *The Well of Loneliness*.[41] That novel, which had been deemed obscene in England, tells the story of a woman who, from a young age, struggles with her lesbianism only to eventually understand and accept her sexual orientation.[42]

In rejecting the defendant's motion to have the criminal charge dismissed, the magistrate judge reasoned that "the novel is not only anti-social and offensive to public morals and decency," but also written in a way that "attract[ed] and focus[ed] attention upon perverted ideas and unnatural vices and [was] strongly calculated to corrupt and debase those members of the community who would be susceptible to its immoral influence."[43] The magistrate was particularly concerned about the novel's moral impact on those who might find same-sex sexual conduct appealing. In response to the publisher's argument that the *Hicklin* test inappropriately relied on the susceptibilities of society's "dullest-witted and most fallible members" to determine what was obscene, the judge noted that this particular novel, which was literary and well-written, was problematic precisely because it aimed to corrupt (what the court believed to be) a higher and better class of people.[44]

The magistrate in *People v. Friede* added two other important points. First, it refused to rely on the novel's literary value to preclude the obscenity prosecution given that the novel undermined public morality. As the judge explained, "the book's literary merits are not challenged, and the court may not conjecture as to the loss that its condemnation may entail to our general literature, when it is plainly subversive of public morals and public

41 RADCLYFFE HALL, THE WELL OF LONELINESS (1928); People v. Friede, 133 Misc. 611 (N.Y. Magis. Ct. 1929).

42 PAUL S. BOYER, PURITY IN PRINT: THE VICE-SOCIETY MOVEMENT AND BOOK CENSORSHIP IN AMERICA 130–31 (1968). For a discussion of the effort to censor *The Well of Loneliness* in both England and the United States, see Kim Emery, *Well Meaning: Pragmatism, Lesbianism, and the U.S. Obscenity Trial*, *in* PALATABLE POISON: CRITICAL PERSPECTIVES ON *THE WELL OF LONELINESS* 355–71 (Laura Doan and Jay Prosser eds., 2001); Nancy J. Knauer, *Homosexuality as Contagion: From* The Well of Loneliness *to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 441–50 (2000).

43 *Friede*, 133 Misc. at 613.

44 As the court explained,

> [T]hose who are subject to perverted influences and in whom that abnormality may be called into activity and who might be aroused to lustful and lecherous practices, are not limited to the young and immature, the moron, the mentally weak, or the intellectually impoverished, but may be found among those of mature age and of high intellectual development and professional attainment.

Id. at 614.

decency, which the statute is designed to safeguard."[45]

Second, the magistrate embraced the notion of "thematic obscenity," that is the idea that a publication was obscene if it presented intimate relationships outside of heterosexual marriage as morally acceptable, even in the absence of explicit depictions of sexual acts.[46] Indeed, the judge was particularly troubled by the fact that the novel portrayed "unnatural and depraved" (i.e., same-sex) relationships as ones that were to be "idealized and extolled"; rather than criticizing these relationships, the book presented the characters "who indulge in these vices . . . in attractive terms, and it is maintained throughout that they be accepted on the same plane as persons normally constituted, and that their perverse and inverted love is as worthy as the affection between normal beings and should be considered just as sacred by society."[47] According to the magistrate, the portrayal of same-sex relationships in positive (or, presumably, even neutral) ways violated the state's obscenity statute. Under this view, the book was obscene independent of the degree of explicitness of its descriptions of sexual conduct.

Although a three-judge panel eventually refused to deem the book obscene,[48] obscenity foes in New York City, at around the same time, succeeded in closing down a series of plays with lesbian and gay themes.[49] And in 1927, the New York legislature enacted a law authorizing the police to padlock for a year any theater that contributed "to the corruption of youth or others" by showing plays that depicted or dealt with "sex degeneracy or perversion."[50] That statute was prompted by the Broadway production of a play called *The Captive*, a work that explored the attraction of a married woman for anoth-

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45 *Id.* at 615. *See also* People v. Seltzer, 203 N.Y.S. 809, 814 (Sup. Ct. N.Y. 1924) ("History warns us that in the wake of a moral deterioration comes physical deterioration and national destruction. Hence our interest in the strict enforcement of all laws to prevent the publication and distribution of corrupt literature.").

46 Laurence Tribe seems to have been one of the first commentators to use the phrase "thematic obscenity." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 665–66 (1st. ed. 1978).

47 *Friede*, 133 Misc. at 613.

48 Knauer, *supra* note 42, at 450 (citing "'Well of Loneliness' Cleared in Court Here," N.Y. TIMES, April 20, 1929, at 20.) The 2–1 decision by the Court of Special Sessions was not reported. Knauer, *supra* note 42, at 450

49 JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970 19 (1983).

50 Robin Bernstein, "Staging Lesbian and Gay New York" *in* THE CAMBRIDGE COMPANION TO THE LITERATURE OF NEW YORK 202, 203 (Cyrus R.K. Patell & Bryan Waterman, eds., 2010) (internal quotations omitted). Seven years after the enactment of New York's theater padlock law, Hollywood studios adopted a motion picture code prohibiting any depiction of homosexuality in films. D'EMILIO, *supra* note 49, at 19.

er woman.[51] An appellate court, in refusing to grant the holder of the rights to the play an injunction seeking to force the owner of the theater to continue the production after the district attorney threatened to bring obscenity charges, concluded that "[i]t cannot be said dogmatically that the morals of youth, or even of adults, would not be affected by presenting a theme of the character here exhibited with the action and dialogue which accompany it."[52]

A few years later, the New York Court of Appeals embraced the notion of thematic obscenity in *People v. Wendling*.[53] In that case, fifteen defendants were convicted of obscenity for their roles in the production of a play called *Frankie and Johnnie*, the story of a young man involved in gambling and prostitution.[54] The state high court overturned the convictions because they were based on the play's vulgarity and profanity, which the court deemed to be insufficient to support the obscenity charges.[55] On the particular question of prostitution, the court explained that the mere fact that actors played the roles of prostitutes and their clients was not enough because the play did "not counsel or invite to vice or voluptuousness. It [did] not deride virtue."[56] The crucial question, according to the court, was whether the play presented prostitution in a positive light such that its encouragement or promotion would undermine public morals.[57]

In short, for more than a century after the first obscenity prosecution in the United States, there was wide consensus among courts that the state's authority to regulate obscenity was grounded in its power to protect public morality. Although, as the ultimately unsuccessful prosecutions in *Friede* and *Wendling* show, courts sometimes disagreed with the judgment of prosecutors and jurors that particular works were obscene, there was little disagreement that the primary objective of obscenity statutes was to prevent the promotion of immorality. Eventually, that consensus began to break down, a phenomenon driven initially by increasing judicial agitation against the *Hicklin* test.

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51 For an extensive exploration of *The Captive*, and the government's efforts to close down its performance on Broadway, see KAEIR CURTIN, "WE CAN ALWAYS CALL THEM BULGARIANS": THE EMERGENCE OF LESBIANS AND GAY MEN ON THE AMERICAN STAGE 43–64, 91–102 (1987).

52 Liveright v. Waldorf Theaters Corp., 221 N.Y.S. 194, 196 (App. Div. 1927).

53 180 N.E. 169 (N.Y. 1932).

54 *Id.* at 169.

55 *Id.* at 170.

56 *Id. See also* People v. Viking Press, 147 Misc. 813, 816 (N.Y. Magis. Ct. 1933) ("This is not a book where vice and lewdness are treated as virtues or which would tend to incite lustful desires in the normal mind.").

57 *Wendling*, 180 N.E. at 170.

B. The Demise of *Hicklin* and the Search for Provable Effects

The first judicial opinion that questioned the advisability of the *Hicklin* definition of obscenity was penned by Judge Learned Hand in 1913.[58] The defendant in *United States v. Kennerley* had been indicted for using the mails to distribute a book, called *Hagar Revelly*, about a young woman who, after being seduced and impregnated by her employer, considers the possibility of becoming a prostitute before accepting the man's offer to become his mistress.[59] In rejecting the defendant's demurrer petition, Hand acknowledged that the book was obscene under *Hicklin* because two of its pages "might tend to corrupt the morals of those into whose hands it might come and whose minds were open to such immoral influences."[60] Despite ruling for the government, Hand proceeded to criticize the *Hicklin* test that precedents required him to apply: "I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words, 'obscene, lewd, or lascivious.'"[61] Hand added that,

> [i]f the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members.[62]

It is important to note that despite Hand's clear discomfort with the *Hicklin* test, he did not suggest that anything other than moral values be used to determine whether a particular publication was obscene. In other words, there was nothing in Hand's ruling that questioned the wide judicial consensus that obscenity regulations were needed to prevent the dissemination of materials promoting immorality. What Hand's opinion accomplished was to make three other important points about the determination of what constituted obscenity: First, that the moral values that served as the guideposts of obscenity law were not stat-

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58 United States v. Kennerley, 209 F. 119 (S.D.N.Y. 1913).

59 DANIEL CARSON GOODMAN, HAGAR REVELLY (1913).

60 *Kennerley*, 209 F. at 120.

61 *Id.*

62 *Id.* at 121. The jury eventually acquitted Kennerley of the obscenity charge. BOYER, *supra* note 42, at 48.

ic, but instead changed with the times;[63] second, that juries were best equipped to determine what was obscene because they could best apply contemporary understandings of morality and decency;[64] and third, that in doing so, juries should bring to bear prevailing community standards rather than the susceptibilities of society's most vulnerable members.[65]

Although Learned Hand, as a district court judge, could do little to modify the legal definition of obscenity, the same was not true of appellate courts. For example, the New York Court of Appeals, in its 1922 ruling in *Halsey v. New York Society for Suppression of Vice*,[66] narrowed the definition of obscenity under New York law in a case arising from a bookseller's sale of Théophile Gautier's *Mademoiselle de Maupin*, a nineteenth century novel that satirized traditional morality and extolled a vibrant sensuality through detailed descriptions of sexual intimacy.[67]

The bookseller had originally been charged under the state obscenity statute as a result of a prosecution instigated by John Sumner, the secretary of the New York Society for the Suppression of Vice.[68] After the defendant was acquitted, he sued the Society seeking damages for the tort of malicious prosecution.[69] By the time the civil lawsuit reached New York's highest court, the issue was whether the Society had had probable cause to believe that the book was obscene under state law.[70]

In refusing to overturn the jury's verdict finding no probable cause, the Court of Appeals departed from earlier obscenity rulings in several important ways. First, it held that the determination of whether a book was obscene should be made by considering the work as a whole rather than by focusing on a few isolated pages.[71] Second, because the publica-

63 *Kennerley*, 209 F. at 121.

64 *Id.*

65 *Id.*

66 136 N.E. 219 (N.Y. 1922).

67 THÉOPHILE GAUTIER, MADEMOISELLE DE MAUPIN (1835).

68 *Halsey*, 136 N.E. at 219.

69 *Id.*

70 *Id.*

71 *Id.* at 220 ("No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar selection from Aristophanes or Chaucer or Boccaccio, or even from the Bible. The book, however, must be considered broadly,

tion had to be assessed as a whole, the literary value of the book, as reflected in the views of critics and reviewers, was relevant to the determination of whether it was obscene.[72] And, finally, like Judge Hand in *Kennerley*, the court reasoned that jurors, as representatives of the community, were best able to determine whether a publication was obscene.[73]

The *Halsey* opinion was important not only for what it contained, but also for what it lacked. There was little discussion in *Halsey* of the purpose of obscenity law, and therefore little discussion of the role of obscenity regulations in protecting public morality. In fact, *Halsey* was representative of a new trend in the case law, one that culminated in the Supreme Court's 1957 opinion in *Roth v. United States*,[74] that emphasized issues such as the literary (or social or scientific) value of the materials in question rather than the moral justifications behind obscenity regulations.

This shift in the case law was also reflected in two decisions by the U.S. Court of Appeals for the Second Circuit issued in the early 1930s. The first case, *United States v. Dennett*, involved the federal government's prosecution of the feminist and birth control advocate Mary Dennett under the Comstock Act for using the mails to distribute a sex education pamphlet.[75] Dennett wrote the pamphlet in order to inform young people, including her sons, of how sexual organs functioned and of the pleasures of sexual intimacy.[76] In overturning Dennett's conviction, Judge Augustus Hand emphasized the pamphlet's educational objective.[77] Although it was the case that "any article dealing with the sex side of life and explaining the functions of the sex organs is capable in some circumstances of arousing lust[,]" that possibility was not enough to render the material obscene, especially since the alternative was to leave the young uninformed about the mechanics and consequences of

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as a whole.").

72 *Id.*

73 *Id.* ("Far better than we is a jury drawn from those of varied experiences, engaged in various occupations, in close touch with the currents of public feeling, fitted to say whether the defendant had reasonable ground to believe that a book such as this was obscene or indecent.").

74 354 U.S. 476 (1957).

75 39 F.2d 564 (2d Cir. 1930).

76 BOYER, *supra* note 42, at 239–40.

77 *Dennett*, 39 F.2d at 568 ("The tract may fairly be said to be calculated to aid parents in the instruction of their children in sex matters.").

sexual intimacy.[78] The importance of educating young people about the basic facts of life outweighed whatever tendency the pamphlet might have to sexually arouse some readers.

Four years later, Judge Hand again wrote for the Second Circuit when he rejected the federal government's effort to ban the importation of James Joyce's novel *Ulysses* on the ground that it was obscene.[79] As in *Dennett*, Hand focused on the primary purpose of the writings. Although *Ulysses* contained sexually explicit scenes, they were "relevant to the purpose of depicting the thoughts of the characters and are introduced to give meaning to the whole, rather than to promote lust or portray filth for its own sake."[80] According to Hand, the scenes describing sexual acts and desires were part of a larger effort to convey the full life of the characters rather than to promote or incite lust.[81]

As a doctrinal matter, the Second Circuit's ruling in *Ulysses* is important because it explicitly refused to follow the *Hicklin* test.[82] If all that was required before a book was deemed obscene was that it contain a handful of passages that might sexually arouse the most susceptible of readers, then "much of the great works of literature" were legally obscene, a result that Congress could not have intended.[83] The appropriate test in deciding whether a book was obscene, Hand explained, was "its dominant effect."[84] Hand added that, in applying that test, it was necessary to determine whether "the objectionable parts" were relevant to the book's "theme," as well as "the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient . . . ."[85]

One of the consequences of rulings like *Ulysses* was that they shifted the legal fo-

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78 *Id.* ("The statute we have to construe was never thought to bar from the mails everything which might stimulate sex impulses. If so, much chaste poetry and fiction, as well as many useful medical works would be under the ban.").

79 United States v. One Book Entitled Ulysses, 72 F.2d 705 (2d Cir. 1934).

80 *Id.* at 707.

81 *Id.* at 706–07. For a detailed account of the campaign to prevent the sale of *Ulysses* in the United States, see generally KEVIN BIRMINGHAM, THE MOST DANGEROUS BOOK: THE BATTLE FOR JAMES JOYCE'S *ULYSSES* (2014).

82 *One Book Entitled Ulysses*, 72 F.2d at 708.

83 *Id.*

84 *Id.*

85 *Id.*

cus from conclusions based on the (im)morality of the material as determined by the (in) decency of its language, drawings, or photographs to an assessment of whether "the likelihood that the work will so much arouse the salacity of the reader to whom it is sent . . . outweigh[s] any literary, scientific or other merits it may have in that reader's hands."[86]

Dennett and *Ulysses* represent a crucial shift in the judicial understanding of obscenity in the United States. The federal appellate court in both instances was unwilling to assume, as earlier courts had done, that sexually explicit materials harmed society because they morally corrupted their readers or observers. Instead, the court reasoned that the educational value of the pamphlet in *Dennett* and the literary value of the novel in *Ulysses* greatly outweighed whatever speculative harms might result from the fact that they would engender sexual urges and desires in some readers.

Those who advocated in favor of narrow understandings of obscenity statutes soon began demanding evidence of effects beyond the readers' internal mental processes. In particular, they began demanding that obscenity regulations be justified through empirical evidence showing a link between sexually explicit materials and specific social harms such as juvenile delinquency.[87] From this perspective, the fact that certain words or pictures might arouse sexual desires, which had been the main focus of attention in the older cases, was not enough; there had to be some causal link between the materials in question and negative social consequences.

This demand for evidence of cause and effect is reflected in two opinions issued by the Second Circuit in *United States v. Roth*, the case eventually used by the Supreme Court to delineate the constitutional limitations of obscenity laws. The trial judge had sentenced Roth to five years in prison after a jury convicted him of mailing obscene books, pamphlets, and photographs.[88] Roth appealed his conviction by challenging the constitutionality of the federal obscenity statute.[89] In writing for the appellate court, Judge Charles Clark reasoned

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86 United States v. Levine, 83 F.2d 156, 158 (2d Cir. 1936).

87 This demand is reflected in an appendix to an amicus brief filed with the Supreme Court in *Roth* by Morris Ernst, a First Amendment lawyer and prolific author on free speech issues. *See, e.g.*, MORRIS L. ERNST, THE FIRST FREEDOM (1946); MORRIS L. ERNST, TO THE PURE . . . A STUDY OF OBSCENITY AND THE CENSOR (1928). The appendix is titled "Memorandum on the Lack of Causal Connection Between Exposure to Printed and Visual Materials and Participation in Anti-Social Conduct or Behavior." Brief for Morris L. Ernst as Amicus Curiae at 42, Roth v. United States, 354 U.S. 476 (1957) (No. 582).

88 United States v. Roth, 237 F.2d 796, 797 (2d Cir. 1956).

89 *Id.*

that since courts had been upholding convictions under the statute for decades, only the Supreme Court could render it unconstitutional.[90] But Clark also noted that judges had to be careful before striking down the statute given "our own lack of knowledge of the social bearing of this problem [of selling obscenity], or consequences of such an act; and we are hardly justified in rejecting out of hand the strongly held views of those with competence in the premises as to the very direct connection of this traffic with the development of juvenile delinquency."[91]

It turned out, as Judge Jerome Frank explained in a concurring opinion, that there was little empirical evidence showing a link between the consumption of obscenity and juvenile delinquency.[92] Nonetheless, what is important for our purposes is the extent to which Judge Clark's opinion, despite its deferential posture toward the government, deemed the prevention of provable social harms, rather than a generalized need to protect public morals, to be the statute's principal objective.

While Clark was willing to side with the government as long as there was a reasonable disagreement among experts about the effects of obscenity on delinquency, Judge Frank's concurrence took the position that, under the Supreme Court's free speech cases, the statute should not be presumed to be constitutional and that therefore the government had the burden of showing that the distribution of obscene materials constituted a clear and present danger.[93] As Frank explained,

> [t]he troublesome aspect of the federal obscenity statute . . . is that (a) no one can now show that, with any reasonable probability obscene publications tend to have any effects on the behavior of normal, average adults, and (b) that under that statute, as judicially interpreted, punishment is apparently inflicted for provoking, in such adults, undesirable sexual thoughts, feelings, or desires—not overt dangerous or anti-social conduct, either actual or probable.[94]

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90 *Id.*

91 *Id.* at 799 (footnotes omitted).

92 *Id.* at 812–16 (Frank, J., concurring). For an argument that there was sufficient empirical evidence showing a link between obscenity and delinquency, see HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY 136–74 (1969).

93 *Roth*, 237 F.2d at 802 (Frank, J., concurring) (citing Dennis v. United States, 341 U.S. 494 (1951)).

94 *Id.* at 802.

In Judge Frank's view, the Constitution demanded a search for evidence of actual harm. Under this approach, the fact that materials might create lust in the minds of their readers was not enough to justify, under the First Amendment, legislation that prohibited the distribution of books and magazines. The government could not, consistently with the Free Speech Clause, paternalistically try to prevent individuals from having certain thoughts unless those thoughts led to *behaviors* that caused social harm. As Frank asked rhetorically, "[i]f the government possesses the power to censor publications which arouse sexual thoughts, regardless of whether those thoughts tend probably to transform themselves into anti-social behavior, why may not the government censor political and religious publications regardless of any causal relation to probable dangerous deeds?"[95]

For Frank, the problem with the prevailing obscenity test, even as it had been modified by cases such as *Ulysses*, was that it focused exclusively on the apparent internal responses of those who read or saw the materials in question to try to determine whether they promoted sexual desires and feelings. But the inducement of lustful desires was not enough to justify censorship in the absence of "some moderately substantial reliable data showing that reading or seeing those publications probably conduces to seriously harmful sexual conduct on the part of normal adult human beings . . . . [W]e have no such data."[96]

Judge Frank's concurring opinion in *Roth*, and to a lesser extent Judge Clark's ruling on behalf of the court, reflected a new perspective in obscenity law, one that focused on the need to establish a causal connection between obscenity and social harm, a requirement that arose explicitly from the First Amendment.[97] But Frank agreed with Clark that only the Supreme Court could strike down the federal obscenity statute.[98]

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95 *Id.* at 805.

96 *Id.* at 811–12.

97 After officials in Philadelphia in 1948 charged a number of booksellers and publishers with violating the state obscenity statute by making books—such as William Faulkner's *Sanctuary*—available to the public, trial judge Curtis Bok dismissed the charges because of the lack of evidence showing a link between the reading of the materials and the commission of crimes. Bok held that the statute could constitutionally be applied "only where there is a reasonable and demonstrable cause to believe that a crime or misdemeanor has been committed . . . as the perceptible result of the publication and distribution of the writing in question." Commonwealth v. Gordon, 66 Pa. D & C. 101, 156 (1948), *aff'd sub nom.* Commonwealth v. Feigenbaum, 70 A.2d 389 (Pa. Super. Ct. 1950). Judge Bok's ruling demanding a causal link between obscenity and the commission of crimes received considerable attention. *See, e.g.*, CLOR, *supra* note 92, at 111–13; ROBERT W. HANEY, COMSTOCKERY IN AMERICA: PATTERNS OF CENSORSHIP AND CONTROL 32 (1960); NORMAN ST. JOHN-STEVAS, OBSCENITY AND THE LAW 168–70 (1956).

98 *Roth*, 237 F.2d at 804 (Frank, J., concurring).

It is for that reason that those who believed that the statute was unconstitutional were delighted when the Court, a few months later, granted certiorari in *Roth* in order to determine the provision's constitutionality.

C. The Supreme Court Weighs in on the Question of Obscenity

After deciding three obscenity cases at the end of the nineteenth century, the Supreme Court barely paid attention to the issue in the decades that followed.[99] The Court returned to questions related to obscenity in 1948 with two rulings. In the first, it struck down, on vagueness grounds, a New York statute that deemed publications to be obscene if they consisted principally of "deeds of bloodshed, lust, or crime."[100] But the Court, in the second ruling, by an evenly divided vote and without issuing an opinion, affirmed an obscenity conviction under another New York statute based on the publication of a collection of interrelated short stories written by Edmund Wilson, a highly regarded literary critic, containing graphic sexual descriptions.[101] Nine years later, the Supreme Court granted certiorari in *Roth v. United States*, as well as in *Alberts v. California*, a consolidated case that arose from an obscenity conviction under California law, with the objective of determining the constitutionality of obscenity laws.[102]

It is important to note that the Supreme Court's ruling in *Roth* marked the beginning of an intense constitutionalization of obscenity law in the United States. It was rare, prior to *Roth*, for courts in obscenity cases to grapple directly with the regulatory limitations

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99 Dunlop v. United States, 165 U.S. 486 (1897); Swearingen v. United States, 161 U.S. 446 (1896); Rosen v. United States, 161 U.S. 29 (1896). The Court in United States v. Limehouse, 285 U.S. 424, 426 (1932), addressed the meaning of the word "filthy" in the federal obscenity statute without grappling with the law's constitutionality.

100 Winters v. New York, 333 U.S. 507, 508 (1948).

101 EDMUND WILSON, MEMOIRS OF HECATE COUNTY (1946); Doubleday & Co. v. New York, 335 U.S. 848 (1948). Justice Frankfurter, who was a friend of Wilson's, recused himself from the case. MURPHY, *supra* note 23, at 19. For a description of the authorities' confiscations of Wilson's book in New York and Massachusetts, see RICHARD F. HIXSON, PORNOGRAPHY AND THE JUSTICES: THE SUPREME COURT AND THE INTRACTABLE OBSCENITY PROBLEM 16–17 (1996).

102 Roth v. United States, 354 U.S. 476, 479 (1957) ("The constitutionality of a criminal obscenity statute is the question in each of these cases."). Roth operated a mail order business in New York City selling magazines, books, and pamphlets. MURPHY, *supra* note 23, at 21. In the previous thirty years, the government had charged him with obscenity ten times and convicted him seven times. MURPHY, *supra* note 23, at 21. Alberts, who operated a mail-order business, was charged with selling and advertising obscene books. *Roth*, 354 U.S. at 481.

imposed on the state by the Free Speech and Free Press clauses,[103] even when defendants who confronted obscenity prosecutions raised constitutional claims.[104] Although, as we have seen, courts had for decades been struggling with the proper definition of obscenity, they had done so generally without accounting for constitutional principles of free speech. Indeed, there are no references to the First Amendment even in speech-friendly rulings, such as Judge Learned Hand's in *Kennerley* and Judge Augustus Hand's in *Ulysses*.[105] It is not until later opinions, such as Judge Frank's concurring opinion in *Roth*, that judges began to weave extended discussions of constitutional doctrine into their obscenity analysis. This phenomenon likely reflected a growing unwillingness on the part of some judges to accept as a given the government's contention that sexually oriented materials intrinsically corrupted their readers or observers.

The *Roth* and *Alberts* appeals arrived before the Supreme Court squarely as constitutional cases, with the former addressing the constitutionality of the federal government's regulation of obscenity, and the latter doing the same for a state law.[106] Not surprisingly, there was much disagreement among the parties on the appropriate constitutional analysis of obscenity laws. The federal government in *Roth* followed the traditional approach by claiming that the "public interest served by the [obscenity statute was] the preservation of public morality . . . ."[107] The government's brief argued that "[t]he interest in the preser-

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103 GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, THE FIRST AMENDMENT 215 (4th ed. 2012) ("Throughout this era, it was generally assumed that the first amendment posed no barrier to the suppression of obscenity."). It bears noting that the Supreme Court did not recognize that the First Amendment was applicable to the states, through the operation of the Fourteenth Amendment, until *Gitlow v. New York*, 268 U.S. 652 (1925), and even then the Court did so implicitly without any discussion or reasoning.

104 *See* DENNIS, *supra* note 30, at 295 (noting that "sex radicals" in the late nineteenth century "boldly asserted that federal obscenity legislation infringed on the First Amendment guarantee of freedom of speech and freedom of the press").

105 United States v. One Book Entitled Ulysses, 72 F.2d 705 (2d Cir. 1934); United States v. Kennerley, 209 F. 119 (S.D.N.Y. 1913).

106 *Roth*, 354 U.S. at 479. Unlike most other cases in the lower courts prior to *Roth* and *Alberts*, the issue of whether the materials in question were actually obscene was not before the Court. *Id.* at 481 n.8 ("No issue is presented in either case concerning the obscenity of the material involved."). One of the questions raised in *Roth* was whether the federal government, as the defendant claimed, had a more constitutionally circumscribed authority to regulate obscenity than did the states. *See* Brief for Petitioner at 8–24, Roth v. United States, 354 U.S. 476 (1957) (No. 582). In the end, only Justice Harlan adopted this view. *See Roth*, 354 U.S. at 503–07 (Harlan, J., dissenting).

107 Brief for the United States at 8, Roth v. United States, 354 U.S. 476 (1957) (No. 582).

vation of public morality has long been recognized by this Court, and long regarded as an adequate basis for legislation. Legislation has ranged from controlling lotteries, preventing gambling, or keeping children off the streets, to preventing trains from running on Sundays. In each instance, the interest in public morality has justified the restraint."[108]

The government further claimed that "public morality is an indivisible whole" and that it was therefore not possible to distinguish the state's interest in promoting sexual morality from its interests in other forms of morality.[109] The brief warned the Court that "[i]t is the moral force behind the laws, not the pieces of paper [in which they are written], which in fact is the constitutional framework of organized society. The breaking down of the respect for morality weakens the 'morale' and the entire fabric of respect for law."[110]

At the same time, perhaps bowing to the growing agitation by some lower courts for evidence that obscenity caused social harms, the federal government argued that it was reasonable to assume that the distribution of obscene materials via the mails would lead to "criminal or perverted sexual conduct," even if it was not possible to establish precisely how much of such conduct was directly caused by the publications.[111] Since obscene materials corrupted the morals of the average person, their distribution contributed to the breaking down of moral restraints, which in turn led to increases in "prohibited conduct" over time.[112] The government urged the Court to apply the clear and present danger test, which it claimed only required that it be likely that the cumulative effect of obscenity distribution would corrupt morals and therefore create a risk of "bad conduct."[113]

For its part, the state of California, in defending the constitutionality of its statute in *Alberts*, the case consolidated with *Roth*, claimed that the state's police "power may be exerted to preserve the public morals by regulating and preventing such acts, practices and occupations as are in themselves immoral or indecent or have a tendency to promote

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108 *Id.* at 8–9.

109 *Id.* at 10.

110 *Id.*

111 *Id.* at 9.

112 *Id.*

113 Brief for the United States at 8, Roth v. United States, 354 U.S. 476 (1957) (No. 582).

immorality and indecency."[114] According to California, there were certain "element[s]" of society "whose lack of restraint would, by subverting the common morality, weaken the foundations of an approved social order," thus making it necessary for the legislature to enact laws with the purpose of defending that order.[115]

In contrast, the defendants in both cases insisted that the First Amendment imposed a significant burden of proof on the government that could not be met through generalized or speculative concerns about the need to protect public morality. According to Roth, the federal obscenity statute did not satisfy the clear and present danger test because "there is no reliable evidence that obscene publications or pictures have any appreciable effect on the conduct of human beings."[116] For his part, Alberts reasoned that while California had the authority to protect public morals by discouraging harmful conduct, the First Amendment barred the state from trying to discourage certain "ideas, thoughts and desires."[117] What was at issue in the regulation of obscenity, Alberts claimed, was the government's effort "to maintain the *status quo* in sex attitudes . . . . The attempt is to coerce unanimity of opinion by authority who assumedly [sic] has divined the 'truth' concerning sex morality and attitudes."[118]

Despite the arguments raised by the parties, the Supreme Court refused to address the question of whether the protection of public morality was a sufficient justification for obscenity regulations or whether, alternatively, the government had to show proof of a causal connection between the reading or viewing of allegedly obscene materials and anti-social conduct.[119] Instead, the Court in *Roth*, speaking through Justice Brennan, made three other points. First, it held that obscene materials were simply not constitutionally protected

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114 Brief for the Appellee at 11, Alberts v. California, 354 U.S. 476 (1957) (No. 61) (citation omitted).

115 *Id.* at 12.

116 Brief for Petitioner at 8, Roth v. United States, 354 U.S. 476 (1957) (No. 582).

117 Brief for the Appellant at 15, Alberts v. California, 354 U.S. 476 (1957) (No. 61).

118 *Id.* at 19.

119 As I explain, the Court's analysis in *Roth* implicitly rejected the government's contention that public morality justified the proscription of obscenity. *See infra* notes 130, 134, and accompanying texts. The Court was more explicit in rejecting the defendants' contention that the government had to establish a causal link between obscenity and social harm. After holding that obscene materials did not deserve any protection under the First Amendment, see *infra* notes 120–121, the Court found it unnecessary to address the defendants' argument "that the constitutional guaranties are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of antisocial conduct, or will probably induce its recipients to such conduct." *Roth*, 354 U.S. at 486 (footnotes omitted).

by the First Amendment.[120] It reached that conclusion after a rather cursory review of the historical record, finding evidence that at the time the Amendment was adopted, it was generally understood that the government had the authority to regulate obscenity.[121] Second, what was constitutionally relevant was whether the materials subject to government regulation had some social value.[122] According to Brennan, "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[123]

Third, the Court emphasized that sex did not equal obscenity. The mere portrayal or depiction of sexual acts was not enough to render materials obscene, and therefore constitutionally unprotected.[124] Focusing once again on the question of the publications' social value, Brennan explained that sex is one of the great mysteries of life and, as such, "one of the vital problems of human interest and public concern."[125] As a result, it was crucial to distinguish between the artistic, literary, and scientific (i.e., valuable) portrayals of sex from depictions that treated it "in a manner appealing to prurient interest."[126] Only publications with dominant themes that appealed to prurient interests were obscene, and it was therefore only they that were constitutionally unprotected.

By focusing so intently on issues related to the artistic, literary, and scientific value of sexually explicit materials, the Court in *Roth* refused to assume, as courts had done consistently in prior decades, that society was inevitably harmed by the distribution of materials that incited sexual desires. Rather than understanding such materials as ones that uniformly represented threats to society because of their purported immorality, the Court in *Roth* took

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120 *Roth*, 354 U.S. at 483.

121 *Id.* at 482–83. For the view that the *Roth* Court's historical analysis was superficial, see Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 9 (1960) ("[T]he Court's use of history was so casual as to be alarming . . . ."); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 75 (1974) ("It is difficult to fathom how the Court supposed that the development of obscenity law in the United States, which postdates the adoption of the Bill of Rights, clarifies the purposes of the first amendment. Colonial legislatures in America appear to have been either unprovoked by or indifferent to obscenity.") (footnotes omitted).

122 *Roth*, 354 U.S. at 484.

123 *Id.*

124 *Id.* at 487.

125 *Id.*

126 *Id.* at 487, 488.

the position that sexually explicit materials sometimes had social value.

The *Roth* Court did give a nod to the government's interest in promoting morality by quoting from a famous passage in *Chaplinsky v. New Hampshire*—its case holding that "fighting words" are constitutionally unprotected[127]—distinguishing between protected and unprotected speech:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in *order and morality* . . . .[128]

Commentators sometimes point to this passage to support the view that the Court in *Roth* viewed the promotion of public morality as constituting a legitimate purpose behind obscenity law.[129] But I find more relevant the fact that, other than the quotation from *Chaplinsky,* the Court in *Roth* failed to mention, much less grapple with, the question of state objectives (whether moral or otherwise) behind obscenity regulations.[130] I believe *Roth* therefore represented another step toward the judicial demoralization of obscenity law.

It is true that the obscenity test adopted by the Court required that the determination of

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127 Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

128 *Id.* at 485 (quoting from *Chaplinsky*, 315 U.S. at 571–72) (the emphasis added by the Court in *Roth* has been removed except for "*order and morality*").

129 *See* Michael P. Allen, *The Underappreciated First Amendment Importance of* Lawrence v. Texas, 65 WASH. & LEE L. REV. 1045, 1060 (2008) (arguing, after noting the *Chaplinsky* quotation in *Roth*, that the *Roth* Court relied on moral considerations to render obscenity constitutionally unprotected); *see also* Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN ST. L. REV. 139, 147 (2012) (concluding that the Court in *Roth* and *Alberts* "at least implicitly upheld the moral position of [obscenity] statutes").

130 *See* Matthew Benjamin, *Possessing Pollution*, 31 N.Y.U. REV. L. & SOC. CHANGE 733, 744 (2007) ("[T]he *Roth* Court simply placed obscenity beyond the coverage of the First Amendment, and thus avoided an uncomfortable evaluation of the ostensible state interests underlying federal obscenity law."); Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 397 (1963) ("To the majority of the Supreme Court in *Roth v. United States*, the purpose of the legislation was apparently irrelevant.") (footnotes omitted); *id.* at 399 ("In *Roth*, the Court . . . does not examine the nature of the public interest in regulation, and the relation to this interest of the means used, to determine the weight to be given to authority.").

whether particular materials appealed to the prurient interests of readers be made according to "contemporary community standards."[131] It is often assumed that the Court, by referencing such standards, invited lower courts and juries to incorporate notions of morality into the obscenity analysis. In actuality, however, courts had for some time been pushing for the "community standards" test as an alternative to the *Hicklin* test; the former was increasingly appealing precisely because it was *narrower*.[132] It was less likely that materials would be found obscene if the assessment was based on broad community standards, rather than on the sensitivities of society's most vulnerable members.[133] When *Roth* is viewed in its proper historical context, therefore, it represented not a move toward the incorporation of public morality into obscenity law, but a move away from it.

Admittedly, *Roth*'s contribution to the demoralization of obscenity law was more implicit than explicit. The Court could have adopted the defendants' (and Judge Frank's) contention that the First Amendment did not allow the state to ban publications solely on the basis of public morality, requiring instead the showing of a causal link between the materials and harmful behaviors. If the Court had so held, it would have explicitly rejected the need to promote public morality as a justification for obscenity regulations.

What the Court did instead was to focus on the purported social value of the materials in question, a focus that indirectly helped to move obscenity law further away from the sphere of morality. The crucial analytical point after *Roth* was not whether the state had legitimate interests (moral or otherwise) for adopting obscenity regula-

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131 *Roth*, 354 U.S. at 489.

132 As the Court in *Roth* explained, "[t]he early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons [citing to *Hicklin*]. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the *average person, applying contemporary community standards*, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 488–89. (emphasis added) (footnotes omitted); *see also* William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standard*, 45 MINN. L. REV. 5, 114 (1960) (noting that in using the phrase "contemporary community standards," the *Roth* Court "was rejecting the Victorian standards embodied in the *Hicklin* test"). The first American judge who called for the application of community standards, as an alternative to the *Hicklin* test, was Learned Hand in 1913. *See supra* notes 62–65 and accompanying text.

133 *Roth*, 354 U.S. at 489 ("The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity."). Although the Court in *Roth* did not specify whether the community standards in question were national or state/local, the Court later explicitly adopted the latter view. Miller v. California, 413 U.S. 15, 32–33 (1973).

tions, but instead whether the materials in question had some social value.[134] The Court's focus, in other words, was not on the government's interests behind the regulations but on the nature and content of the materials themselves. Whatever difficulties inhered in distinguishing between publications that had some social value from those that did not—difficulties clearly reflected in the rash of fractured Supreme Court obscenity cases that followed *Roth*[135] and in Justice Stewart's famous claim that, while it might not be possible to come up with an articulable definition of obscenity, he knew pornography when he saw it[136]—the judicial review of obscenity regulations after *Roth* was significantly removed from the considerations of public morality that had dominated the legal analysis in decades past.[137]

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134 Louis Henkin, in discussing the Court's opinion in *Roth* in 1963, noted that "[s]ince the constitutional language does not protect obscenity, and was not intended to protect obscenity, there is no need [under the Court's reasoning] to ask what is the purpose of obscenity legislation or whether it has any purpose at all." Henkin, *supra* note 130, at 397. Henkin was critical of the Court's failure to treat obscenity laws as morals legislation, which for Henkin meant they were unconstitutional under the Due Process Clause. Henkin, *supra* note 130, at 402–11.

135 *See, e.g.*, Ginzburg v. United States, 383 U.S. 463 (1966) (four different opinions); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966) (five different opinions); Jacobellis v. Ohio, 378 U.S. 184 (1964) (six different opinions).

136 *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring).

137 It bears noting that the impact of *Roth* in matters related to homosexuality was almost immediate. A few weeks before the Court issued its ruling, authorities in San Francisco arrested and charged Lawrence Ferlinghetti, the owner of the City Lights bookstore and the publisher of Allen Ginsberg's *Howl and other Poems*, with violating the state's obscenity law. RONALD K.L. COLLINS & DAVID M. SKOVER, MANIA: THE STORY OF THE OUTRAGED & OUTRAGEOUS LIVES THAT LAUNCHED A CULTURAL REVOLUTION 246–48 (2013). The government's objection to *Howl* was based largely on the poem's raw and frank depiction of sex, including that between men. *Id.* at 254–55.

Three months later, a bench trial was held in which the defense called several expert witnesses to testify about the poem's literary merits. *Id.* at 288–89. In his ruling following the trial, Judge Clayton Horn noted that the Court in *Roth* had explicitly rejected the notion that descriptions of sexual acts were always obscene. People v. Ferlinghetti (Mun. Court, S.F., Cal., Oct. 3, 1957), *available at* http://mason.gmu.edu/~kthomps4/363-s02/horn-howl.htm [http://perma.cc/ZQ8M-QVY6]. (Excerpts from Judge Horn's ruling are also available in *HOWL* ON TRIAL: THE BATTLE FOR FREE EXPRESSION 197–99 (Bill Morgan and Nancy J. Peters eds., 2006)). Even more importantly, the crucial question for the judge, following the reasoning of *Roth*, was whether the material "has the slightest redeeming social importance." *Id.* Since the judge concluded that the poems did have such value, he found the defendant not guilty. *Id.*

D. The Court Rejects Thematic Obscenity

In addition to *Roth*, the Supreme Court decided two other obscenity cases in 1957. A few months before *Roth*, the Court in *Butler v. Michigan* closed the book on whatever remained of the original *Hicklin* test by holding that the government could not deem as obscene materials available to adults on the basis that they might have deleterious effects on minors.[138] The Court explained, rather colorfully, that the notion that the state could promote the general welfare by keeping from adults materials that were "not too rugged" for them "in order to shield juvenile innocence" was "to burn the house to roast the pig."[139] However, the Court sided with the government in *Kingsley Books v. Brown*, issued on the same day as *Roth*, by rejecting the contention that a civil statute allowing for the seizure and destruction of materials deemed obscene outside of criminal proceedings constituted a form of constitutionally impermissible prior restraint.[140] *Roth* and *Kingsley Books* constituted the last two important rulings by the Court in favor of the government in obscenity cases for almost a decade.[141]

In early 1958, the Court overturned two obscenity convictions in one-sentence rulings that cited only to *Roth*. One of those cases involved two nudist magazines.[142] The other appeal involved the gay publication *ONE*. We will explore the details of the latter case in the next section.

The following year, the Court issued two additional obscenity rulings. In *Smith v. California*, the justices held that it was unconstitutional to impose strict criminal liability on a seller of books without establishing that he knew, or had reason to believe, that the mate-

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138 Butler v. Michigan, 352 U.S. 380 (1957).

139 *Id.* at 383.

140 Kingsley Books v. Brown, 354 U.S. 436, 443–44 (1957).

141 For cases between 1958 and 1965 in which the Court sided with litigants challenging obscenity convictions, *see, e.g.*, Jacobellis v. Ohio, 378 U.S. 184 (1964); Smith v. California, 361 U.S. 147 (1959); Kingsley Int'l Pictures, Corp. v. Regents of the Univ. of the State of N.Y., 360 U.S. 684 (1959); One, Inc. v. Olesen, 355 U.S. 371 (1958); Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958). In 1966, the Court sided with the government in two cases. *See* Ginzburg v. United States, 383 U.S. 463, 470 (1966) (upholding obscenity conviction on the basis of the defendant's pandering in the production, sale, and publicity of materials that were not themselves obscene); Mishkin v. New York, 383 U.S. 502, 508 (1966) (state statute that required that publications constitute hard-core pornography in order to be deemed obscene satisfied the Constitution).

142 Sunshine Book Co. v. Summerfield, 249 F.2d 114 (D.C. Cir. 1957), *rev'd*, 355 U.S. 372 (1958).

rials in question were obscene.[143] But it was the Court's second obscenity case from 1959, *Kingsley International Pictures Corporation v. Regents of the University of the State of New York*, which is particularly important for our purposes.[144]

At issue in *Kingsley Pictures* was a New York statute granting the state, acting through the Board of Regents ("the Regents") of the state university, the authority to deny licenses to movies portraying "acts of sexual immorality, perversion or lewdness . . . as desirable, acceptable or proper patterns of behavior."[145] The Regents had relied on that statutory authority to deny a license for the public showing of the movie *Lady Chatterley's Lover*.[146] The movie, based on the 1928 novel by D.H. Lawrence, told the story of a young woman who, after her husband is paralyzed while fighting in World War I, has a deeply satisfying relationship with a man whom she plans to marry after divorcing her husband.[147]

The Regents' denial of the license had been upheld by the New York Court of Appeals in a ruling that represented one of the last judicial manifestations of the traditional understanding of obscenity regulations, one that viewed them as arising directly from the government's authority to protect society through the promotion of morality.[148] As the New York court saw it, the purpose of the statutory language in question was to prevent the showing of movies that, while not characterized by "rank obscenity," nonetheless depicted "sexually immoral acts" as acceptable forms of behavior.[149]

The Court of Appeals was deeply troubled by the fact that the movie exalted an adulterous relationship and presented it as a morally acceptable one. It was one thing to portray such a relationship as a morally compromised one; it was quite another, as *Lady Chatterley's Lover* did, to celebrate a relationship that was "in derogation of the restraints of mar-

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143 *Smith*, 361 U.S. at 154–55. Prosecutors in Los Angeles had charged Smith with sixteen counts of obscenity under state law. The jury, however, found him guilty of only one count, based on the sale of a lesbian pulp fiction novel called *Sweeter than Life*. Whitney Strub, *The Clearly Obscene and the Queerly Obscene: Heteronormativity and Obscenity in Cold War Los Angeles*, 60 AM. Q. 373, 381 (2008).

144 360 U.S. 684 (1959).

145 *Id.* at 685 (footnote omitted).

146 *Id.*

147 *See* D.H. LAWRENCE, LADY CHATTERLEY'S LOVER (1928).

148 Kingsley Int'l Pictures, Corp. v. Regents of the Univ. of the State of N.Y., 151 N.E.2d 197 (N.Y. 1958).

149 *Id.* at 197.

riage."[150]

For the state court, it was beyond dispute that the people of New York, like most right-thinking citizens throughout the country, considered adultery to be "immoral and illegal . . . . The determination by the Board of Regents . . . that this picture is utterly immoral in its theme, and that it presented adultery as proper behavior, was entirely correct as measured by the standards of our community."[151] To the contention, raised by the movie's distributor, that the film should not be banned in the absence of evidence that it presented a clear and present danger to society, the court responded by claiming that such a showing was unnecessary because the debasing of "fundamental sexual morality" inherently undermined society by corrupting public morals.[152] The New York court believed that it could bypass the clear and present danger standard altogether because, as with "rank pornography," materials that were "clearly approbatory" of sexual immorality could be banned because of their "corrosive effect" on public morality.[153] The court was confident that there was nothing in the First Amendment that required "this State and this nation [to] sacrifice themselves to the ravages of moral corruption. Our Constitution is a document for government, not a tool for anarchy or a license for corruption."[154]

The New York court emphasized that society had the right to protect itself against the promotion of immoral conduct: "[T]he Constitutional right freely to express one's thoughts has never been thought to divest society of its right and duty to preserve fundamental public sexual morality."[155] The court saw the New York statute, and its own constitutional approval of it, as a last remaining bulwark protecting society from anarchy. As the court explained,

> [w]e are disturbed by the increasing marks of moral laxity. Sex crimes occur daily. Advertising appeals more and more to the sexual appetite. Sexual immorality and obscenity appear in books, pamphlets, voice re-

150 *Id.* at 199.

151 *Id.*

152 *Id.* at 200.

153 *Id.* at 201 (emphasis omitted).

154 Kingsley Int'l Pictures, Corp. v. Regents of the Univ. of the State of N.Y., 151 N.E. 2d 197, 201 (N.Y. 1958).

155 *Id.* at 202. At around this same time, Lord Patrick Devlin was making the same argument in defending the need to criminalize consensual same-sex sexual conduct. *See infra* notes 383–385 and accompanying text.

> cordings, motion pictures, photographs, prints, and in every other form which the imagination of those bent upon immorality and filth can devise. Sadly enough, we could go on. But this much is sufficient to demonstrate that our public morality, possibly more than ever before, needs every protection which government can give. We are unable to look upon moral disintegration as a mere change in custom.[156]

The New York Court of Appeals' objection to the movie was clearly based on the idea of thematic obscenity, the notion that some materials are obscene because of their immoral sexual themes, independently of their depictions of sexual acts.[157] If the Supreme Court in *Kingsley Pictures* had followed the state court's embrace of thematic obscenity, it would have provided the government with the constitutional authority to regulate materials with same-sex sexual themes, given that prevailing social mores clearly deemed same-sex sexual relationships and conduct, like adultery, to be morally unacceptable. Instead, the Supreme Court rejected out of hand the notion that a movie could be constitutionally banned because it encouraged individuals to enter into sexual relationships that society considered to be immoral. In writing for the Court, Justice Stewart reasoned that refusing to license a movie because of its approbatory treatment of adultery was essentially to refuse the license because of its advocacy of an idea, something the government could not do without violating the First Amendment's core purpose.[158] Stewart explained that the proposition that the government could deny a license to a movie on the need to protect public morals

> misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.[159]

While *Roth*'s contribution to the demoralization of obscenity law was implicit—by focusing on the social value of the materials in question rather than on the state's interest in promoting public morality—*Kingsley Pictures*' contribution was direct: The Court ex-

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156 *Kingsley Pictures*, 151 N.E. 2d at 204–05.

157 *See supra* notes 46–47, 53–57, and accompanying texts.

158 Kingsley Int'l Pictures, Corp. v. Regents of the Univ. of the State of N.Y., 360 U.S. 684, 688 (1959).

159 *Id.* at 689.

plicitly held that the state could not constitutionally regulate the distribution of materials on the ground that they promoted sexual immorality.[160] As two leading commentators on obscenity law noted in 1960, "[t]he main thrust of the opinion in *Kingsley Pictures* is a strong declaration of the constitutional right to advocate unconventional ideas and behavior 'immoral' by current standards, and to do so in effective and dramatic ways."[161]

It bears noting that the holding in *Kingsley Pictures* was limited to materials that, while positively portraying sexual relationships outside of marriage, did not contain extensive and explicit depictions of sexual activities. When it came to materials containing such depictions, the Court continued to grapple with the state's constitutional authority to proscribe obscenity for years to come.

In the 1960s, some members of the Court called for a narrowing of the definition of obscenity.[162] In addition, the Court in 1969 unanimously held in *Stanley v. Georgia* that the possession of obscene materials in the home could not be criminalized.[163] In doing so, the Court rejected the state's contention that it had the authority to "protect the individual's mind from the effects of obscenity."[164] As the justices explained, "[w]e are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment."[165] The Court added

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160 *Id.* Although this point seems not to have been recognized before, there is a crucial conceptual overlap between the type of demoralization of obscenity law evident in *Kingsley Pictures* and the demoralization of substantive due process law, as it relates to issues of sexuality, which resulted from *Lawrence v. Texas*. 539 U.S. 558 (2003). *See infra* notes 418–420 and accompanying text.

161 Lockhart & McClure, *supra* note 132, at 100. In response to *Kingsley Pictures*, a bill was introduced in the Senate to amend the Constitution in order to recognize "the right of each State to decide on the basis of its own public policy questions of decency and morality, and to enact legislation with respect thereto . . . ." Lockhard & McClure, *supra* note 132, at 43.

162 *See* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 418 (1966) (plurality opinion by Justice Brennan, joined by Chief Justice Warren and Justice Fortas) (concluding that, in order for materials to be deemed obscene, the government must show that they (1) appeal to "a prurient interest in sex," (2) are "patently offensive," and (3) are "utterly without redeeming social value"); Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (concluding that "under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography").

163 394 U.S. 557, 566–67 (1969).

164 *Id.* at 565.

165 *Id.* at 565–66.

that "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."[166]

Although the Court, a few years later, broadened the definition of obscenity in *Miller v. California* by inter alia making it clear that the government did not have to prove that the materials in question were "*utterly* without redeeming social value," it did so without explicitly contending that the state had the authority to promote public morality.[167] And, when the Court in *Paris Adult Theater v. Slaton* held that *Stanley* was limited to the possession of obscenity in the privacy of the home, and therefore did not apply to the showing of obscene films in movie theaters, it sent mixed signals on the sufficiency of public morality as a justification for obscenity regulations.[168] On the one hand, the Court emphasized the government's interest in prohibiting the commercial exploitation of materials that have "a tendency to injure the community as a whole . . . or to jeopardize [the ability] to maintain a decent society."[169] On the other hand, the Court described the government's authority to make these judgments as "a morally neutral" one.[170] The Court also elaborated on morally neutral interests behind the regulation of adult theaters, including "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."[171]

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166 *Id.* at 566.

167 413 U.S. 15, 24 (1973) (emphasis added).

168 413 U.S. 49, 65 (1973).

169 *Id.* at 69 (internal citation omitted).

170 *Id.*

171 *Id.* at 58. The Court continued to deemphasize notions of morality in other obscenity-related cases. In assessing the constitutionality of zoning restrictions aimed at regulating the location of adult bookstores and other sexually oriented businesses, the Court focused not on morality, but on the so-called secondary effects of those businesses, such as their being linked to higher incidences of crime. *See, e.g.*, City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47 (1986); Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 71 (1976). And in assessing the constitutionality of a public indecency statute in the context of nude dancing in *Barnes v. Glen Theater, Inc.*, Justice David Souter, who provided the fifth vote to uphold the statute, did so based "not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments[.]" 501 U.S. 560, 582 (1991) (Souter, J., concurring). A few years later, a plurality of the Court upheld the application of a similar law to nude dancing establishments by focusing entirely on the government's interest in combating secondary effects without mentioning morality. City of Erie v. Pap's A.M., 529 U.S. 277, 291 (2000). Suzanne Goldberg has argued that "the Court has almost never relied exclusively and overtly on morality to justify government action. Indeed, since the middle of the twentieth century, the Court has never relied exclusively on an explicit morals-

It was by no means the case, therefore, that the Supreme Court, by the time it decided its first two LGBT rights cases (or in the years that followed), had settled once and for all the question of whether public morality constituted a proper basis for the regulation of obscenity. What is clear is that around the time the Court decided those two cases, it was contributing in crucial ways to the ongoing judicial demoralization of obscenity law. It did this by either paying little attention to the sufficiency of the government's interest in morality (*Roth*) or by holding, in the context of materials that lacked explicit depictions of sexual acts but were deemed by the government to promote sexually immoral relationships, that the interest was insufficient to trump free speech considerations (*Kingsley Pictures*).

II. The First Two Times that Sexual Orientation Issues Came Before the Supreme Court

Only three years after *Brown v. Board of Education*,[172] the first case that directly implicated the interests of lesbians and gay men came before the Supreme Court.[173] Unlike questions related to discrimination against African Americans and the constitutional viability of de jure racial segregation, which the justices had been addressing for years,[174] the Court had had no exposure to, or expressed any interest in, issues related to sexual orientation. As we have seen, however, the justices were developing a growing interest in the constitutionality of obscenity regulations. It was from that perspective that the Court approached the first two LGBT rights cases to reach it.

A. One, Inc. v. Olesen

1. The Factual Background.

The national mobilization caused by World War II helped to create the conditions that allowed for the emergence of the homophile movement (as the ear-

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based justification in a majority opinion that is still good law." Suzanne Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1236 (2004).

172 347 U.S. 483 (1954).

173 One, Inc. v. Olesen, 355 U.S. 371 (1958).

174 *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950) (holding that black students could not be denied admission to a state law school and rejecting effort to create a "separate but equal" law school); Shelley v. Kramer, 334 U.S. 1 (1948) (holding that racially restrictive covenants are not constitutionally enforceable); Buchanan v. Warley, 245 U.S. 60 (1917) (holding that racially restrictive zoning ordinances are unconstitutional).

ly LGBT rights movement called itself).[175] The war, for the first time, brought together millions of men and women in single-sex environments, leading some to realize that they were not alone in experiencing same-sex attraction.[176] After the war, many of these individuals chose not to return to their places of origin, and instead relocated to large urban areas where others with similar sexual and romantic interests lived.[177]

The publication of Alfred Kinsey's books on the sexual practices of Americans also contributed to the formation of the homophile movement. The empirical findings in *Sexual Behavior in the American Male* and in *Sexual Behavior in the American Female*, based on interviews with more than 10,000 individuals, suggested that there was much greater diversity in the sexual practices and experiences of Americans than might first appear given the conservative sexual mores prevalent at the time. Kinsey found that not only were his subjects engaging in large amounts of premarital and extramarital heterosexual intercourse, but a surprisingly large percentage of them reported same-sex sexual attraction and experiences.[178] The Kinsey books, which were bestsellers and received an immense amount of media attention, contributed to the growing sense by many lesbians and gay men that they were not alone and that they belonged to a distinct group of individuals who shared sexual and romantic interests in others of the same sex.[179]

The post-war years were also characterized by repression of sexual non-conformity. This repression was perhaps most clearly reflected in the so-called lavender scare of the 1950s in which the federal government moved to purge from its ranks those whom it suspected were gay or lesbian, viewing them, as it did suspected communists, as threats to national security and well-being.[180] The government witch-hunt aimed at sexual minorities began in earnest in 1950 when a committee of the U.S. Senate issued a report titled *Em-*

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175 D'EMILIO, *supra* note 49, at 23–31.

176 For a comprehensive study of the lives of lesbians and gay men during World War II, see generally ALLAN BÉRUBÉ, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO (1990).

177 D'EMILIO, *supra* note 49, at 31–33.

178 ALFRED C. KINSEY, WARDELL B. POMEROY, CLYDE E. MARTIN & PAUL H. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 164, 233, 286, 416, 446–501 (1953); ALFRED C. KINSEY, WARDELL B. POMERY & CLYDE E. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 301, 392, 499, 610–66 (1948).

179 D'EMILIO, *supra* note 49, at 37.

180 For a comprehensive study of the federal government's effort to identify, harass, and dismiss lesbian and gay employees during the 1950s, see generally DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PROSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT (2004).

ployment of Homosexuals and other Sex Perverts in Government that called on agencies of the federal government to investigate the presence of lesbians and gay men among their work forces.[181] This was followed three years later by an executive order issued by President Eisenhower listing "sexual perversion" as an automatic reason for firing federal employees.[182] In the sixteen months following the order's issuance, the dismissal rate on "perversion grounds" averaged about forty a month.[183] At around the same time, the military intensified its efforts to search for lesbians and gay men in the armed services in order to expel them.[184]

The repression of sexual nonconformity was also reflected in the targeting of gay men, ostensibly to protect young boys, through sexual psychopath laws;[185] in the growing number of arrests of men for soliciting other men to have sex;[186] and in the repeated police raids across the country of lesbian and gay bars.[187]

Although the repression caused much suffering, it also encouraged a band of brave activists to come together to do what they could to protect their communities and themselves from government coercion and discrimination. The first homophile organization, the Mattachine Society, was formed in Los Angeles in 1951 by a handful of men, most of whom were former members of the Communist Party.[188]

Infighting and a penchant for secrecy characterized the early years of the Mattachine

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181 D'EMILIO, *supra* note 49, at 42.

182 D'EMILIO, *supra* note 49, at 44.

183 D'EMILIO, *supra* note 49, at 44.

184 D'EMILIO, *supra* note 49, at 44–46.

185 D'EMILIO, *supra* note 49, at 17. For an exploration of the sex-crime panic that swept through the United States in the late 1940s and early 1950s, see George Chauncey, "The Postwar Sex Crime Panic," *in* TRUE STORIES FROM THE AMERICAN PAST 160 (William Graebner ed., 1993). Chauncey explains that the coverage by the local and national press during the postwar period "transformed the dominant public image of the homosexual into that of a dangerous psychopath . . . . [T]he press paid special attention to the murders of little boys and used them to try to persuade the public that all gay men were dangerous . . . ." *Id.* at 171.

186 D'EMILIO, *supra* note 49, at 49–50.

187 D'EMILIO, *supra* note 49, at 50.

188 On the ideology and early work of the Mattachine Society, see D'EMILIO, *supra* note 49, at 58–69.

Society.[189] This led a group of dissatisfied members, both men and women, to create a new organization with the goal of publishing a magazine that would advocate for equality more openly.[190] The purpose of the magazine, as expressed in the articles of incorporation of the nonprofit entity that published it, was to "deal[] primarily with homosexuality from the scientific, historical and critical point of view, and to aid in the social integration and rehabilitation of the sexual variant."[191] The founders called their magazine *ONE* (letters capitalized), based on the nineteenth-century Scottish writer Thomas Carlyle's declaration that "a mystic bond of brotherhood makes all men one."[192] (After a few months, the editors changed the publication's name to *ONE: The Homosexual Magazine.*)[193]

ONE was the second homosexual magazine in the United States, appearing six years after a Los Angeles woman, whose pseudonym was Lisa Ben (an anagram for "lesbian"), self-published nine issues of a publication (more of a newsletter than a magazine) called *Vice Versa.*[194] The first issue of *ONE*, published in January 1953, included an account by Dale Jennings, a founder of both the Mattachine Society and *ONE*, of his arrest and trial in Los Angeles for allegedly soliciting a male undercover vice squad police officer to commit a sexual act.[195] Early issues also included poetry, fiction, and news stories about gay people.[196] In addition, several of the articles decried the treatment of lesbians and gay men by

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189 *See* D'EMILIO, *supra* note 49, at 63–68, 74–91.

190 On the founding of *ONE*, see CRAIG M. LOFTIN, MASKED VOICES: GAY MEN AND LESBIANS IN COLD WAR AMERICA 20–21 (2012) [hereinafter, LOFTIN, MASKED VOICES]; C. TODD WHITE, PRE-GAY L.A.: A SOCIAL HISTORY OF THE MOVEMENT FOR HOMOSEXUAL RIGHTS 28–40 (2009).

191 WHITE, *supra* note 190, at 42–43 (quoting from the articles of incorporation). The articles are set forth in their entirety in Articles of Incorporation, ONE, INCORPORATED, filed with the California Secretary of State, Feb. 7, 1953, *available at* http://www.tangentgroup.org/history/ONE%20Inc/ONEIncarticles.html [http://perma.cc/92LA-T5EA] (last visited Nov. 28, 2014).

192 RODGER STREITMATTER, UNSPEAKABLE: THE RISE OF THE GAY AND LESBIAN PRESS IN AMERICA 19 (1995).

193 LILLIAN FADERMAN & STUART TIMMONS, GAY L.A.: A HISTORY OF SEXUAL OUTLAWS, POWER POLITICS, AND LIPSTICK LESBIANS 116 (2006). Later, editors changed the name again, this time to *ONE: The Homosexual Viewpoint. Id.*

194 On Bern and her publication of *Vice Versa*, see STREITMATTER, *supra* note 192, at 1–16.

195 Dale Jennings, *To Be Accused is to be Guilty*, ONE, Jan. 1953, at 13 (cited by STREITMATTER, *supra* note 192, at 353 n.26) [This article was published in the May 1953 issue of ONE, see *infra* note 197, but Streitmatter mistakenly cites it as January 1953 and attributes it to "Dale Jennings"—EDS.].

196 STREITMATTER, *supra* note 192, at 26–27.

police authorities and called for an end to the entrapment tactics of vice squads.[197]

At first, newsstand operators refused to carry the magazine, but after sales in gay bars in Los Angeles proved that there was a market for it, some newsstands agreed to carry the publication.[198] As for those who subscribed, most paid extra to have the magazine sent to them first class, in sealed envelopes without a return address.[199]

By July 1953, the magazine's paid circulation had reached 2,000, with a readership that was considerably larger given that copies were frequently circulated among friends.[200] Letters to the editors indicated that the magazine was being read across the country.[201] (The fear of being identified as gay or lesbian meant that the letters were often published without accompanying names, sometimes with the only identifying information being "m" for men and "f" for women, in addition to the name of the town and state where the writer lived.)[202] Despite the rather quick growth in *ONE's* circulation, the magazine remained a shoestring operation.[203] Only one staff member, the business manager, was put on a salary, and even he was paid only when there was enough money left over after covering production and mailing costs, which was not very often.[204] Most staff writers used pen names, both to hide

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197 *See, e.g.*, George Henry Mortenson, *To Be Accused is to be Guilty*, ONE, May 1953, at 12–13; Lyn Pedersen, *Miami Hurricane*, ONE, Nov. 1954, at 4–8; *Miami Junks the Constitution*, ONE, Jan. 1954, at 16–21. An article published in *ONE* in 1953 was highly critical of President Eisenhower's executive order aimed at ridding the federal government of lesbian and gay employees. R. Noone, *You are a Public Enemy*, ONE, May 1953, at 5–7.

198 STREITMATTER, *supra* note 192, at 28–29; WHITE, *supra* note 190, at 42. On the early efforts to distribute *ONE*, see LOFTIN, MASKED VOICES, *supra* note 190, at 45–50.

199 MURDOCH & PRICE, *supra* note 3, at 27; WHITE, *supra* note 190, at 70.

200 D'EMILIO, *supra* note 49, at 73.

201 D'EMILIO, *supra* note 49, at 73. According to the December 1954 issue of *ONE*, the magazine had a total of 1,265 domestic subscribers and 108 international ones. *See How Many Subscribers?*, ONE, Dec. 1954, at 28. There were subscribers in all 48 states (and the District of Columbia) except for Idaho, North Dakota, and South Dakota. *Id.* The three states with the most subscribers were California (276), New York, (233), and Illinois (90). *Id.*

202 For examples of letters to the editors whose authors were identified by either "m" or "f" depending on their gender, see "Letters," ONE, Nov. 1954, at 24–25. For the contents of a large sample of the readers' letters to *ONE*, see CRAIG M. LOFTIN, LETTERS TO *ONE*: GAY AND LESBIAN VOICES FROM THE 1950S AND 1960S (2012) [hereinafter, LOFTIN, LETTERS TO *ONE*].

203 D'EMILIO, *supra* note 49, at 109.

204 STREITMATTER, *supra* note 192, at 29.

their identities and to make it seem as if the group of contributors was larger than it truly was.[205]

Although staff members did not know it at the time, three months after the magazine was first published, FBI agents in Los Angeles began reading it in search for obscene or subversive material.[206] In July 1953, the FBI opened a formal investigation of the magazine, which included mailing each issue to FBI headquarters in Washington for further review.[207] A few weeks later, local postal authorities seized copies of *ONE*'s August 1953, issue pending review by postal officials in Washington to determine whether it was mailable under the federal obscenity statute.[208] That particular issue, with a cover titled "Homosexual Marriage?," included an essay discussing whether lesbians and gay men should seek the right to marry, and if they did so, how that would affect their lives.[209] Only after officials in Washington determined that the issue was mailable did the Post Office distribute the copies, three weeks after it seized them.[210]

The magazine's perseverance in the face of threatened censorship led its editors to proclaim on the next issue's cover that "[w]e have been pronounced respectable. The Post Office found that *ONE* is obscene in no way .... Never before has a government agency of this size admitted that homosexuals not only have legal rights but might have respectable motives as well."[211] At the same time, the editors expressed anger at the fact that authorities continued to harass and intimidate lesbians and gay men across the country:

> As we sit around quietly like nice little ladies and gentlemen gradually educating the public and the courts at our leisure, thousands of homosexuals

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205 MURDOCH & PRICE, *supra* note 3, at 28.

206 STREITMATTER, *supra* note 192, at 31.

207 STREITMATTER, *supra* note 192, at 31. For a detailed account of the FBI's investigation of *ONE* and its editors in 1953, see Douglas M. Charles, *From Subversion to Obscenity: The FBI's Investigations of the Early Homophile Movement in the United States, 1953–1958*, 19 JR. HIST. SEXUALITY 262, 270–75 (2010). The FBI renewed its interest in *ONE* several years later after it published an essay suggesting that there were gay men working for the agency. STREITMATTER, *supra* note 192, at 276–80 (discussing David L. Freedman, *How Much Do We Know About the Homosexual Male?*, ONE, Nov. 1955, at 4–6)).

208 STREITMATTER, *supra* note 192, at 32.

209 E.B. Saunders, *Marriage License or Just License?*, ONE, Aug. 1953, at 10–12.

210 MURDOCH & PRICE, *supra* note 3, at 29.

211 Cover Statement, ONE, Oct.1953.

> are being unjustly arrested, blackmailed, fined, jailed, intimidated, beaten, ruined, and murdered. *ONE*'s victory might seem big and historic as you read of it in the comfort of your home (locked in the bathroom? hidden under a stack of other magazines? sealed first class?). But the deviate hearing of our late August issue through jail bars will not be overly impressed.[212]

The brush with government censors led the magazine's editors to ask Eric Julber, their unpaid attorney who had graduated from law school only a few years before, to read everything scheduled for publication to make sure there were no violations of obscenity laws.[213] In the months that followed, Julber recommended that certain passages from Walt Whitman's poetry be removed from an article exploring whether the poet was gay.[214]

In response to complaints from some readers that the magazine was too tame,[215] the editors also asked Julber to write an essay, published in the October, 1954, issue—the same issue that postal officials later seized after deeming it obscene, leading to the litigation that ended before the Supreme Court—detailing how the magazine determined what it could publish in order to steer clear of obscenity laws.[216] Julber explained to readers that "it has long been the law that the Government can exclude from the mails any matter it deems contrary to public welfare or morals."[217] Julber opined that *ONE* did not run afoul of the federal obscenity statute as long as the published material was limited to "the discussion of the social, economic, personal and legal problems of homosexuals, for the purpose of better understanding of and by society . . . ."[218] But the magazine had to stay away from materials that "appealed to the lusts or salacity or sexual appetites . . . of *ONE*'s readers. . . *ONE*, in other words can appeal to the heads, but not the sexual desires, of its readers."[219]

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212 *Id.*

213 MURDOCH AND PRICE, *supra* note 3, at 29, 31.

214 *The Law of Mailable Material*, ONE, Oct. 1954, at 4, 5. The article on Whitman appeared in the July 1954 issue. David Russell and Dalvan McIntire, *In Paths Untrodden: A Study of Walt Whitman*, ONE, July 1954, at 4.

215 MURDOCH AND PRICE, *supra* note 3, at 31.

216 *The Law of Mailable Material*, *supra* note 214, at 4.

217 *The Law of Mailable Material*, *supra* note 214, at 4.

218 *The Law of Mailable Material*, *supra* note 214, at 6.

219 *The Law of Mailable Material*, *supra* note 214, at 6. Julber analogized to the recent pronouncement by the Church of England that while homosexual acts were sinful, "homosexuality itself was 'morally neutral.'"

Julber then proceeded to provide examples of the kinds of contributions that could not be published:

> (1) Lonely hearts ads, seeking pen pals or meetings. (2) "Cheesecake" art or photos . . . . (3) Descriptions of the sexual acts or the preliminaries thereto . . . . (4) Descriptions of experiences which become too explicit. I.e., permissible: "John was my friend for a year." Not permissible: "That night we made mad love." (5) Descriptions of homosexuality as a practice which the author encourages in others, or waxes too enthusiastic about. (6) Fiction with too much physical contact between the characters. I.e., characters cannot rub knees, feel thighs, hold hands, soap backs, or undress before one another.[220]

The attorney made two additional points. First, that the same material that would pass censorship muster if it referred to different-sex sexual relationships would be deemed obscene if written about same-sex ones.[221] The obscenity threshold, in other words, was considerably lower for same-sex than for different-sex sexual content. Second, that the publication rules could be relaxed somewhat when they referred to "homosexuality among women," as had been done in a recent issue of *ONE* that was dedicated entirely to women's lives, because of society's less harsh attitudes toward lesbianism than male homosexuality.[222]

Ironically, postal authorities refused to mail the approximately six hundred copies of the issue—sardonically titled "You can't print that!"—containing Julber's explanations of *ONE*'s obscenity prevention policies.[223] In justifying its conclusion that the issue was "non-

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The Law of Mailable Material, *supra* note 214, at 6.

220 *The Law of Mailable Material*, *supra* note 214, at 6.

221 *The Law of Mailable Material*, *supra* note 214, at 6.

222 *The Law of Mailable Material*, *supra* note 214, at 6. The February 1954 issue of *ONE* was titled "The Feminine Viewpoint" and its contents included poems, short stories, and a photo of a bare-chested woman looking away from the camera. *See* ONE, Feb. 1954.

223 It has been suggested that the Post Office renewed its investigation of *ONE* as a result of a letter written by Senator Alexander Wiley (R-WI) to the U.S. Postmaster complaining that the magazine should not be distributed via the mails because it "was devoted to the advancement of sexual perversion." Charles, *supra* note 207, at 276. Wiley also claimed that the gay magazine's "'lewd' and 'obscene' contents were inconsistent with President Eisenhower's anti-homosexual internal security program." Eskridge, *Privacy Jurisprudence*, *supra* note 33, at 759–60. On the number of copies of the magazine seized by the Post Office, see Brief for

mailable" under the federal obscenity statute because it was obscene, postal authorities emphasized three of its contents: a short story, a poem, and an advertisement.[224] The short story was titled "Sappho Remembered" and written by the novelist and playwright James Barr using the pseudonym "Jane Dahr."[225] (Although the editors wanted the magazine to appeal to both lesbians and gay men, they were not receiving many submissions by women, therefore creating the need for men to sometimes write under female pseudonyms.)[226] The short story was about a "helplessly young" woman of twenty who turns down her boyfriend's proposal of marriage in order to stay with the older women whom she loves.[227] The story contained several references to physical contact between the two women, including the pressing of knees together while sitting in the back of a car and the caressing, by the older woman, of the younger woman's "child-like temple."[228]

The poem, written by a Canadian professor and titled "Lord Samuel and Lord Montagu," poked fun at a recent article by a British lord complaining "that the vices of Sodom and Gomorrah [are] rife among us."[229] The poem told of another British lord who was imprisoned for a year for having sex with "Scouts" and "airmen" and of a member of Parliament who was fined for "importuning."[230] The poem added that "some peers are seers

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the Respondent in Opposition to Writ of Certiorari at 2, One, Inc., v. Olesen, 355 U.S. 371 (1958) (No. 290).

224 MURDOCH AND PRICE, *supra* note 3, at 32–33.

225 Jane Dahr, *Sappho Remembered*, ONE, Oct. 1954, at 12. Barr is identified as the author of the story in MURDOCH AND PRICE, *supra* note 3, at 32. A photograph of Barr, who had written a gay novel called *Quartrefoil*, published in 1950, appeared in the magazine's April 1954, issue. *See* ONE, Apr. 1954, at 12. According to Craig Loftin, "[t]his marked the first time an openly gay man volunteered his photograph to appear in a nationally distributed publication . . . ." LOFTIN, MASKED VOICES, *supra* note 190, at 28.

226 FADERMAN & TIMMONS, *supra* note 193, at 133.

227 The older woman had been expelled from university after she had an intimate relationship with her sorority roommate: "Vividly she remembered their sorority room at the university, the faces of their House mother and the Dean of Women as the door had burst open upon them, that nightmare of an inquisition in the office downstairs with Leah [her roommate] hysterically screaming accusations at her, her parents' faces as they had come to take her home." Dahr, *supra* note 225, at 14.

228 Dahr, *supra* note 225, at 13. The short story is reproduced in its entirety in ALBERT B. GERBER, SEX, PORNOGRAPHY, AND JUSTICE 136–39 (1965).

229 Brother Grundy, "Lord Samuel and Lord Montagu," ONE, Oct. 1954, at 18. The author, who wrote under a pseudonym, is identified as a Canadian professor in MURDOCH & PRICE, *supra* note 3, at 33.

230 Grundy, *supra* note 229, at 18.

but some are queers—/And some boys WILL be girls."[231] It then ended with references to the dangers lurking for men who search for sex in London's public bathrooms:

> And if you wish to Pick a Dilly
> When you're strolling out at night,
> Just make sure it's not a "Lily"
> Or a male transvestite.
>
> For there's blackmail in the woodpile
> And there's blackmail by the fence,
> But to black male and to white male
> It's: AVOID THE PUBLIC "GENTS"![232]

In addition to the short story and the poem, postal officials claimed that the *ONE* issue was not mailable because of an advertisement placed by the gay Swiss magazine *Der Kreis* ("The Circle"), a publication that the government contended was itself obscene.[233]

2. The Lawsuit.

Several months after the Post Office seized their issue, *ONE*'s editors authorized Julber to file a lawsuit in federal court challenging the government's action. (Julber asked the American Civil Liberties Union for assistance, but the organization turned down the request because the magazine was a gay one.)[234] After both sides filed motions for summary judgment, the trial court ruled in the government's favor.[235] According to the court,

> "Sappo [sic] Remembered" and other stories are obviously calculated to stimulate the lust of the homosexual reader. The Poem "Lord Samuel and Lord Montagu" in particular, is filthy and obscene. Many of the advertisements contained in the publication, including the advertisement for the

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231 Grundy, *supra* note 229, at 18.

232 Grundy, *supra* note 229, at 19. The poem is reproduced in its entirety in GERBER, *supra* note 228, at 140–41.

233 MURDOCH & PRICE, *supra* note 3, at 33.

234 FADERMAN & TIMMONS, *supra* note 193, at 119; MURDOCH & PRICE, *supra* note 3, at 31.

235 Civil Order on Motions for Summary Judgment at 1, One, Inc. v. Olesen, (S.D. Cal Mar. 1, 1956) (No. 18764).

> Swiss publication "The Circle[,]" lead to the obtaining of obscene material.[236]

The court added that "[t]he suggestion advanced that homosexuals should be recognized as a segment of our people and be accorded special privilege as a class is rejected."[237]

A year later, the U.S. Court of Appeals for the Ninth Circuit affirmed the trial court's ruling. The appellate court began by explaining that whether material was obscene under the statute could only be determined "by some discussion of the moral sense of the public."[238] Recognizing that "morals are not static," the judges reasoned that it was necessary to define the statutory terms "in the light of today's moral dictionary."[239]According to the court, the story "Sapho Remembered" was obscene because its main character, after struggling between lesbianism and "a normal married life," chose the former.[240] In the court's view, the story was "nothing more than cheap pornography calculated to promote lesbianism."[241] Similarly, the poem about the same-sex sexual interests of some members of the British aristocracy, and the searching for sexual partners in London's public bathrooms, "pertains to sexual matters of such a vulgar and indecent nature that it tends to arouse a feeling of disgust and revulsion. It is dirty, vulgar and offensive to the moral senses."[242] Finally, the Court of Appeals concluded that the advertisement for *The Circle* rendered the issue of *ONE* nonmailable because its examination of the Swiss publication "clearly reveals that it contains obscene and filthy matter which is offensive to the moral senses, morally depraving and debasing, and that it is designed for persons having lecherous and salacious proclivities."[243]

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236 *Id.*

237 *Id.* It is not clear why the trial judge included this sentence in his ruling—there is no indication, for example, that Julber asked the court to recognize lesbians and gay men as a particular type of class for purposes of equal protection analysis.

238 One, Inc. v. Olesen, 241 F.2d 772, 775 (9th Cir. 1957), *rev'd,* by One, Inc. v. Olesen, 355 U.S. 371 (1958).

239 *Id.* at 775.

240 *Id.* at 777.

241 *Id.*

242 *Id.* (citation omitted).

243 *Id.* at 778. The court concluded that *The Circle* contained two stories that, like "Sapho Remembered," were "obscene, lewd and lascivious. They are offensive to the moral senses, morally depraving and debasing. Such literature cannot be classed as historical, scientific and educational for any class of persons. Cheap

In discussing the poem, the court elaborated on the doctrinal point that in establishing what was offensive to morals, the correct approach was to use the standards of the community at large, rather than those of "a small segment of the population [whose] own social or moral standards are far below those of the general community. Social standards are fixed by and for the great majority and not by or for a hardened or weakened minority."[244] Whether the views of the broader community or those of the targeted audience constituted the appropriate standard against which to assess the materials mattered because it was much less likely that buyers of *ONE* considered it to be obscene.[245]

There are two other doctrinal points that bear emphasis in analyzing the Court of Appeals' ruling. First, the court embraced the traditional approach to obscenity by using public morality as its polestar in determining whether the magazine issue was mailable. Although the court acknowledged that moral standards changed with the times, it nonetheless saw public morality as setting the standards of decency against which the materials in question had to be assessed.

Second, the Court of Appeals in effect embraced the concept of thematic obscenity. Although it deemed the magazine as one that peddled "cheap pornography,"[246] the issue in question contained no explicit descriptions of sexual acts. This strongly suggests that the finding of obscenity was based on the magazine's portrayal of homosexuality in a positive light, comparable to heterosexuality. The Court of Appeals essentially concluded that any portrayal of same-sex sexual relationships and attraction that presented them as acceptable

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pornography is a more appropriate classification." One, Inc. v. Olesen, 241 F.2d 772, 778 (9th Cir. 1957), *rev'd,* by One, Inc. v. Olesen, 355 U.S. 371 (1958).

244 One, Inc. v. Olesen, 241 F.2d 772, 777 (9th Cir. 1957), *rev'd,* by One, Inc. v. Olesen, 355 U.S. 371 (1958).

245 The court of appeals quoted with approval the following language from a ruling involving the application of the federal statute prohibiting the importation of obscene materials:

> It is of course true that the ears of some may be so accustomed to words which are ordinarily regarded as obscene that they take no offense at them, but the law is not tempered to the hardened minority of society. The statute forbidding the importation of obscene books is not designed to fit the normal concept of morality of society's dregs, nor of the different concepts of morality throughout the world, nor for all time past and future, but is designed to fit the normal American concept in the age in which we live.

Id. (quoting Besig v. United States, 208 F.2d 142, 145 (9th Cir. 1953)).

246 One, Inc. v. Olesen, 241 F.2d at 777.

and worthy of social respect was intrinsically salacious and indecent.

ONE responded to the Court of Appeals' decision with an angry and pugnacious editorial explaining that the magazine saw itself as fighting for the free speech rights of all Americans and that, in some ways, the Post Office had done it a favor by raising the issue of its rights under the First Amendment: "Events may prove that in no other way could the rights of homosexual American citizens be adequately and finally tested, and the legal and social problems of the homosexual be thoroughly and publicly aired."[247] The editorial also complained that lesbians and gay men were permitted very few outlets of expression and that whenever someone wrote realistically about "homosexual attachment—the spectre of Obscenity stands ready with fangs bared."[248] The editorial ended with a promise: "ONE intends to fight to . . . insure for homosexuals the right to speak for themselves, to publish and disseminate literature wherein the homosexual may answer the prejudice and false charges against him with facts and forthright statements. In simple words, ONE rightfully demands the 'Freedom of the Press.'"[249]

Julber, in his petition for certiorari to the Supreme Court, argued that the magazine's primary purpose was not to advocate on behalf of homosexuality, but was instead to discuss the "problems, social, economic, and personal, which confront those persons possessed of that particular neurosis, or complexion [i.e., homosexuality]."[250] Neither the issue in question, nor any of the magazine's other issues, Julber told to the Supreme Court, contained "any *advocacy* of homosexuality as a way of life."[251]

Although Julber's effort to distinguish between general discussions of homosexuality and advocacy of homosexuality was an understandable strategic choice given the times, the claim that *ONE* was not an advocacy magazine was not particularly persuasive. The taboo against any mention of homosexuality other than to decry its existence was so strong, and the stigma that attached to being lesbian or gay was so pervasive, that a magazine dedicated to bringing greater visibility to the needs and interests of lesbians and gay men could not be understood as anything other than a vehicle to express the view, radical for its time,

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247 *Editorial*, ONE, Feb. 1957, at 4. Ann Carll Reid, who authored the editorial, was the pseudonym for Irma "Corky" Wolff, the magazine's managing editor. MURDOCH & PRICE, *supra* note 3, at 29.

248 *Editorial*, *supra* note 247.

249 *Editorial*, *supra* note 247.

250 Petition for Writ of Certiorari at 8, One, Inc. v. Olesen, 355 U.S. 371 (1958) (No. 290).

251 *Id.*

that society should tolerate individuals with a same-sex sexual orientation. In this sense, the Court of Appeals' understanding of the purpose of *ONE*—as a magazine that took the position that there was nothing wrong with being lesbian or gay—was a more accurate one than Julber's account of the magazine's objectives.

The crucial issue, then, was not whether the magazine sought to send the message that homosexuality was an acceptable form of human sexuality (it clearly did); instead, the crucial issue was whether the Court of Appeals was correct that such content rendered the publication obscene under federal law.

3. The Supreme Court's Ruling and the Further Demoralization of Obscenity Law.

The Supreme Court granted the certiorari petition, but rather than asking for briefs and scheduling oral arguments, it instead summarily reversed the Court of Appeals in a one-sentence, unanimous, and per curiam opinion that cited to *Roth*.[252] It was not surprising that the Supreme Court, in reversing the lower court's ruling, cited *Roth*, its most important obscenity decision to date, issued several months after the federal appellate decision in *One* and several weeks before Julber filed his certiorari petition. Clearly, the Supreme Court did not believe that the October, 1954, issue of the gay magazine was obscene under *Roth*. The question that remains unanswered—and will likely never be definitively answered given its summary reversal in *One*—is precisely *why* the Court so believed.

Despite the unavoidable uncertainty that accompanies one-sentence rulings, it is possible, in looking at *One* and *Roth* together, to reach reasonable conclusions about the Court's prevailing views on obscenity as they applied to a gay publication. First, the Court likely concluded, after presumably engaging in an independent analysis of the magazine's content, that it did not sufficiently appeal to prurient interests to qualify as obscene under *Roth*. Even assuming that Julber was correct that the titillation threshold was significantly lower for gay publications than for heterosexual ones—that is, that it took significantly less for lesbian and gay content to be sufficiently sexually explicit in order to be deemed obscene—the Court, it is reasonable to believe, concluded that the magazine lacked the minimum degree of *explicit* sexual content required to support a finding that its primary objective was to appeal to the prurient interests of its readers.

At the same time, however, the magazine did have *some* sexual content. The issue in

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252 One, Inc. v. Olesen, 355 U.S. 371 (1958).

question, after all, included a story about a romantic relationship between two women; a sardonic poem about the same-sex interests of some British peers and the visit to public bathrooms by men looking for sex with other men; and an advertisement by a Swiss magazine that, in addition to publishing political and sociological articles, contained erotic pictures.[253] But, as we have seen, the Court made clear in *Roth* that "sex and obscenity are not synonymous."[254] What distinguished permissible from impermissible depictions and references to sex under *Roth* was the material's social value.[255] The second reasonable conclusion that we can reach when interposing the two cases, therefore, is that, in the Court's view, the gay magazine's content had sufficient social value to render it nonobscene.

It is in many ways astounding that the Court, *in 1958*, was willing to recognize that a magazine dedicated to the needs and interests of lesbians and gay men had sufficient social value—despite containing some sexual content—to reverse the lower court's finding of obscenity. In thinking about what the Court did in *One*, it is essential to keep in mind the social consensus, prevalent at the time, that same-sex sexual relationships and conduct were pathological and immoral. As two leading commentators on obscenity law noted at the time, "[i]t could scarcely be said that *One, The Homosexual Magazine* enjoys any substantial degree of public acceptance in the nation or that it comports with contemporary standards of the average or majority of the national community[.]"[256]

The outcome in *One* strongly suggests that the Court believed that, for purposes of determining the scope of First Amendment protections, the judicial assessment of the social value of publications deemed by the government to be obscene had to be conducted independently of majoritarian judgments about the morality of the sexual relationships and conduct depicted therein. Indeed, *One* reflects the extent to which the Supreme Court by the late 1950s had embraced the idea that majoritarian moral objections to particular kinds of sexual relationships and acts had little to do with the determination of whether particular materials were legally obscene. If the Court in *One* had accepted the federal appellate court's reasoning that whether the sexual relationships in question were immoral under

253 One commentator, in writing about *Der Kreis*, notes that "[n]o other magazine in the paranoid forties and fifties offered the same blend of ideas, art, and politics—and skin." THOMAS WAUGH, HARD TO IMAGINE: GAY MALE EROTICISM IN PHOTOGRAPHY AND FILM FROM THEIR BEGINNINGS TO STONEWALL 405 (1996). For an in-depth study of *Der Kreis*, which was published under different names between 1932 and 1967, see HUBERT KENNEDY, THE IDEAL GAY MAN: THE STORY OF *DER KREIS* (2000).

254 354 U.S. 476, 487 (1957).

255 *See supra* notes 122–123 and accompanying text.

256 Lockhart & McClure, *supra* note 132, at 113.

contemporary social standards was a crucial factor in assessing whether the materials were legally obscene, it would not, in all likelihood, have protected the gay magazine under the First Amendment.

One constituted the second time in less than a year (the first being *Roth*) in which the Court was invited to link the government's authority to regulate obscenity to the preservation of public morals. The fact that the Court declined to do so shows that, rather than viewing the promotion of public morality as the sine qua non of obscenity regulation—as contended by the government in *Roth*[257] and by the Court of Appeals in *One*[258]—the Supreme Court instead understood the need to protect society through the promotion of public morality as an insufficient basis upon which to support a finding of obscenity. In this sense, the justices' summary reversal in *One* foreshadowed their holding the following year in *Kingsley Pictures* that the government could not constitutionally prevent the distribution of materials on the ground that they promoted sexual immorality.[259]

As we will see in Part IV, the Court several decades later, as society became more tolerant of sexual minorities, also held that the promotion of majoritarian morality constituted an insufficient ground upon which to justify the regulation of same-sex sexuality, as well as laws that classify on the basis of sexual orientation.[260] What is remarkable about the demoralization of obscenity law that is reflected in the Court's ruling in *One* is that it took place many years before the nation was engulfed in political, legal, and cultural debates about the proper place in society of lesbians, gay men, and bisexuals. That demoralization had everything to do with changing judicial understandings of obscenity law and little or nothing to do with judicial (or social) views of same-sex sexual relationships and conduct.

After *One*, it became clear that the government could not censor a publication dedicated to exploring the place of sexual minorities in society, even if most Americans deemed same-sex sexual relationships and conduct to be morally reprehensible. What was not so clear was whether the First Amendment provided protection to publications that had significant same-sex erotic content. It was that question which the Court addressed in the second LGBT rights case to reach it.

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257 *See supra* notes 107–113 and accompanying text.

258 *See supra* notes 238–246 and accompanying text.

259 *See supra* notes 156–160 and accompanying text.

260 *See infra* notes 419–433 and accompanying text.

B. Manual Enterprises, Inc. v. Day

1. The Factual Background.

Physique magazines, featuring photographs of muscular men and emphasizing the importance of physical fitness, first appeared in this country at the end of the nineteenth century.[261] The historian David Johnson notes that the "magazines were an outgrowth of the turn-of-the-century physical culture movement, which many historians have seen as the result of a crisis in masculinity in a rapidly urbanizing and industrializing America."[262] By the 1930s, a growing number of gay men were buying and sharing the magazines, a phenomenon that made their publishers uneasy.[263] When those publishers a few years later refused to carry advertisements for the selling of "photographs of barely clad men, often in erotic but ambiguous scenarios such as wrestling matches," gay entrepreneurs began publishing their own physique magazines specifically aimed at gay audiences.[264]

One of those entrepreneurs was Henry Lynn Womack. Before going into the publishing business, Womack, who had a Ph.D. in philosophy, taught at George Washington University and at Mary Washington College.[265] In 1952, he left academia after he bought two printing companies in Washington, D.C.[266] At around this time, Womack, who had been married twice and had a daughter, acknowledged to himself that he was gay.[267]

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261 For an exploration of the emergence of a physique culture in magazines and photographs in the late nineteenth century and its expansion into the twentieth century, see WAUGH, *supra* note 253, at 176–191.

262 David K. Johnson, *Physique Pioneers: The Politics of 1960s Gay Consumer Culture*, 43 JOURNAL SOC. HIST. 867, 871 (2010); *see also* MICHELLE GIBSON, JONATHAN ALEXANDER, AND DEBORAH T. MEEN, FINDING OUT: AN INTRODUCTION TO LGBT STUDIES 238–39 (2d ed. 2013) ("These magazines, and the fitness craze of which they were a part, met the demands of a culture in which more and more working men were employed in fairly sedentary office jobs and in which technological advances . . . were reducing the physical requirements of maintaining a home.").

263 Johnson, *supra* note 262, at 871.

264 Strub, *supra* note 143, at 378. For an exploration of the development of gay physique magazines, see F. VALENTINE HOOVEN, III, BEEFCAKE: THE MUSCLE MAGAZINES OF AMERICA 1950–1970 (1995).

265 Rodger Streitmatter & John C. Watson, *Herman Lynn Womack: Pornographer as First Amendment Pioneer*, 28 JOURNALISM HIST. 56, 57 (2002).

266 James Lardner, "A Pornographer's Rise," WASH. POST, Jan. 12, 1978, A1, A24.

267 *Id.*

Womack was one of the first entrepreneurs in the country to recognize the money-making potential of selling gay erotica.[268] Under the corporate heading of Manual Enterprises, Inc., Womack quickly built a large male erotica business by publishing magazines with titles such as *MANual* and *Manorama*.[269] Although the publications billed themselves as traditional physique magazines, it was readily apparent that they aimed for readers who appreciated male physical beauty rather than physical fitness as such.[270] The magazines contained little text other than the models' hobbies and the photographers' names.[271] In addition, the magazines included ads placed by photographers of male erotica informing readers how to purchase additional images from them.[272]

Womack also operated a separate business, known as Continental Artists, which sold pictures of naked men directly to consumers.[273] As described by a federal district court, "[t]he subjects of the photographs were represented in lascivious and suggestive poses, with the camera obviously being focused so as to emphasize the private organs."[274] In early 1960, Womack was arrested and charged under the federal obscenity statute for mailing obscene photographs. A few months later, he was convicted on twenty-nine counts and was sentenced to serve concurrent sentences of between one and three years in prison.[275]

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268 Streitmatter & Watson, *supra* note 265, at 58. Another important early entrepreneur in gay erotica was Bob Mizer, who in 1945 founded the Athletic Model Guild in Los Angeles, and in 1951 started publishing a magazine called *Physique Pictorial*. Strub, *supra* note 143, at 378; *see also* FADERMAN & TIMMONS, *supra* note 193, at 74 ("By advertising his glossy beefcake prints in a magazine that he established, *Physique Pictorial*, Mizer helped to create a huge underground gay market and to sell the promise of a gay male paradise in Los Angeles.").

269 Streitmatter & Watson, *supra* note 265, at 58.

270 In 1958, Womack wrote a letter—using the stationary of one his magazines—to a photographer who had submitted pictures for publication explaining that "[t]here is a great difference between 'young' and 'Sexy.' Westley [one of the models] if he has been photographed properly, has . . . potential sex appeal . . . ." Letter from Henry Lynn Womack to Mercury Photographic Service, Sept. 10, 1958, in Transcript of Record at 89, Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) (No. 123). Womack added that, "[i]n 1958, physique fans want their 'truck driver types' already cleaned up, showered, and ready for bed." *Id.* The government relied on this letter to contend that Womack intended for his publications to be purchased by gay men. Brief for the Respondent at 10, Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) (No. 123).

271 Brief for the Respondent at 5, Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) (No. 123).

272 *Id.* at 7.

273 *Id.* at 48.

274 United States v. Womack, 211 F. Supp. 578, 580 (D.C. 1962).

275 Streitmatter & Watson, *supra* note 265, at 59. Although Womack's conviction was upheld on appeal, see

Womack was not the only publisher of gay physique magazines who was the victim of government prosecutions. As Johnson notes, "[a]lmost all of the publishers and photographers connected with physique magazines were arrested by the police and tried in court at some point in their careers."[276] It was also not uncommon for purchasers of the magazines to be arrested for possessing obscene materials.[277]

In Womack's case, the government was not satisfied with the criminal convictions. Four days after he was found guilty, the Post Office refused to mail 405 copies of Womack's magazines (255 copies of *MANual*, 75 of *Trim*, and 75 of *Grecian Guild Pictorial*), claiming they were non-mailable under the federal obscenity statute.[278] A few weeks later, a hearing was held before the Post Office's judicial officer to determine whether the magazine issues were mailable.

Although Womack claimed that his publications were aimed at readers interested in

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Womack v. United States, 294 F.2d 204 (D.C. Cir. 1961), *cert. denied*, 365 U.S. 859 (1961), he persuaded the trial judge that he had mental problems, which allowed him to serve his sentence in a hospital rather than in a prison. Lardner, *supra* note 266, at 24. Womack was released from the hospital after eighteen months. Lardner, *supra* note 266, at 24.

276 Johnson, *supra* note 262, at 876. For a description of the prosecution in Los Angeles of Bob Mizer for his publication of *Physique Pictorials*, see Strub, *supra* note 143, at 379.

277 Johnson, *supra* note 262, at 876.

278 MURDOCH & PRICE, *supra* note 3, at 66. The government, in its brief to the Supreme Court in *Manual Enterprises, Inc.* v. *Day*, described the photos in Womack's magazines as follows:

> Many of the photographs were of nude male models, usually posed with some object in front of their genitals; a number were of nude or partially nude males with emphasis on their bare buttocks. Although none of the pictures directly exposed the model's genitals, some showed his pubic hair and others suggested what appeared to be a semi-erect penis; others showed male models reclining with their legs (and sometimes their arms as well) spread wide apart. Many of the pictures showed models wearing only loin cloths, "V gowns", or posing straps; some showed the model apparently removing his clothing. Two of the magazines had pictures of pairs of models posed together suggestively.
>
> Each of the magazines contained photographs of models with swords or other long pointed objects. The magazines also contained photographs of virtually nude models wearing only shoes, boots, helmets or leather jackets. There were also pictures of models posed with chains or of one model beating another while a third held his face in his hands as if weeping.

Brief for the Respondent at 5–7, Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) (No. 123) (citations omitted). A handful of the photographs at issue in *Manual Enterprises* are reproduced in GERBER, *supra* note 228, at 164–67.

bodybuilding, the government set out to establish that their purpose was instead to sexually arouse gay men. To prove this point, the government called on a psychiatrist with expertise in treating "homosexual patients."[279] The doctor testified at some length about how the magazines' photographs, many of which showed models wearing G-strings, loincloths, and V-gowns, sexually aroused gay men.[280] The witness expressed concern that not only were the magazines of interest to men who "claimed they are homosexuals," but also to 17 and 18-year olds "who we might classify as borderline sexual cases where they haven't had intercourse with women," and who "have always tried to fight back homosexual tendencies."[281] This group of young men was particularly vulnerable to the lust-inducing effects of the photographs because the images "could very well push them into homosexuality."[282] The doctor then analogized between the psychological harm suffered by vulnerable young men who viewed Womack's magazines and the damage caused to young girls when men exposed themselves to them.[283] In both instances, the result was a reduced interest in marriage and "normal" relationships.[284]

The government's expert also opined, after noting that many of the magazines' photographs had themes associated with warriors and gladiators, that homosexual men frequently attempted to compensate for their sense of weakness and inferiority.[285] These men, the expert explained,

> are afraid that they cannot satisfy a woman[, which] makes them turn to their own sex and compensating for their inferiority they have to have fantasies with men of power, men with a whip, men with a sword, gladiators and they identify themselves with these nude pictures and this gives them sexual excitement. And the harm does [sic] is that they remain at this level. They remain as homosexuals, they don't have a chinaman's [sic] chance of becoming cured as long as they are constantly stimulated by this type

279 Transcript of Record, Manual Enterprises at 5, Inc. v. Day, 370 U.S. 478 (1962) (No. 123).

280 *Id.* at 5–9.

281 *Id.* at 10.

282 *Id.*

283 *Id.* at 11.

284 *Id.*

285 Transcript of Record at 15, Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) (No. 123).

of picture.[286]

The government called a second expert, a clinical psychologist, who testified that the magazines had no literary, scientific, or educational value and that they would lead male adolescents to "react primarily with instinctual arousal, sexual arousal which would take the form of fantasies, immoral and sexual thoughts," masturbation, and sexual behavior with other males.[287] For his part, attorney Stanley Dietz—the lawyer who had represented Womack in the criminal case and was now representing his company in the matter of the magazines' mailability—called on a psychiatrist who testified that photographs were irrelevant in "the development of homosexuality."[288] The psychiatrist then proceeded to explain, in a way that exemplified the deep misunderstandings of sexual orientation held by even those who seemed sympathetic to lesbians and gay men, that "[w]hat creates the homosexual is an abnormal relationship of the child to the parent and unbalance there in this relationship and emotional imbalance which has nothing to do with pictures."[289] The psychiatrist also opined "that the average normal person would not be interested in this type of publication."[290] A second witness called by Dietz insisted that the magazines highlighted muscular and well-developed physiques from a bodybuilding perspective and were not sexual in nature.[291]

The judicial officer ruled that the publications were not mailable because they were obscene. He rejected Dietz's legal contention that the correct standard was whether the photographs appealed to the prurient interests of the average person in society.[292] Instead, the officer concluded that the relevant question was whether they appealed to the prurient interests of the average *reader* of the magazines, which in this case was "the male homosexual."[293] The officer added that the magazines created the additional danger "that the average male adolescent who might be attracted to each of the issues" would be lured "into

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286 *Id.* at 15–16.

287 *Id.* at 35.

288 *Id.* at 41.

289 *Id.*

290 *Id.* at 83.

291 Transcript of Record at 47–48, Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) (No. 123).

292 *Id.* at 86.

293 *Id.*

the abnormal paths of the homosexual."[294]

2. The Lawsuit.

After the judicial officer issued his ruling, Dietz filed a lawsuit in federal court asking for an injunction ordering the Post Office to distribute the magazines.[295] The district court denied the injunction, and issued a summary judgment for the government.[296] That ruling was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit.[297] The appellate court pointed to the fact that expert testimony during the hearing supported the conclusion that male "homosexuals" would be sexually aroused by the photographs.[298] In addition, the court was of the view that the magazines were not intended for a body-building audience given "the obvious lack of relationship of the 'posing straps,' heavy boots, helmets, swords, and chains to any interest in body-building."[299] Finally, the court held that since the average reader in the community would not be interested in these magazines, "[t]he proper test . . . is the reaction of the average member of the class for which the magazines were intended, homosexuals. The testimony of record was clearly to the effect that these magazines would arouse prurient interest in the average homosexual."[300]

The Supreme Court granted certiorari, but unlike in *One*, it asked that briefs be submitted and scheduled the case for oral argument. Attorney Dietz's Supreme Court brief on behalf of Manual Enterprises is historically important because it constituted the first time that an advocate provided the Court with extensive information about matters of sexuality in a case that the Court agreed to hear.[301] Dietz took issue with the notion that the mag-

294 *Id.*

295 *Id.* at 66–69.

296 *Id.* at 78.

297 Manual Enterprises, Inc. v. Day, 289 F.2d 455 (D.C. Cir. 1961).

298 *Id.* at 456.

299 *Id.*

300 *Id.*

301 A few months earlier, Frank Kameny, a pioneering gay rights activist who sued the federal government after he was fired from his civil service job because he was gay, filed a petition for certiorari following the lower courts' dismissal of his lawsuit. In a pro se brief accompanying the petition, Kameny disputed the Civil Service Commission's contention that gay people were less well adjusted than heterosexuals. For a discussion of Kameny's lawsuit and the arguments he raised in his pro se brief, see Eskridge, *Identity-Based Social Movements*, *supra* note 3, at 2168–69.

azines appealed to the prurient interests of "homosexuals" because it was inaccurate to use that term, or the term "heterosexuals," to classify individuals.[302] The lawyer explained that while there were same-sex and different-sex sexual activities, those activities did not translate into distinct classes of individuals.[303] Dietz provided the Court with extensive excerpts from Alfred Kinsey's *Sexual Behavior in the Human Male* and *Sexual Behavior in the Human Female* to support the proposition that "'homosexual' is not a characteristic of a small, isolated, group of people, but is a type of sexual activity or propensity which directly affects and accurs [sic] in the lives of vast proportions of our population."[304]

Since Kinsey showed that not everyone who engaged in same-sex sexual conduct was a "homosexual," the government's contention that Womack's magazines appealed to the prurient interests of "homosexuals," Dietz claimed, was vague and nonsensical.[305] But even if the government was correct that buyers of Womack's magazines were gay men, the Post Office's refusal to mail them would still be constitutionally problematic because it would mean that only heterosexuals had the right to read materials of their choice, leaving sexual minorities, Dietz complained, to "read the same literature or be denied the right to view a magazine which interests them. To interpret our Constitution and this Court's definition of obscenity, in the manner that the Post Office Department has done, reduces a large segment of our society to second class citizenship."[306]

Dietz also directly challenged the government's contention that there was something dangerous and nefarious about homosexuality: "[P]ersons with homosexual inclinations are not *ipso facto*[] criminals or detrimental to civilization, nor are they necessarily afflicted by disease, nor do they comprise a small proportion of the population which can be isolated and contained, nor is homosexuality as such intrinsically evil."[307] At the end of the day, the government's refusal to mail Womack's publications represented "nothing more than an attempt to enforce the prejudices of the predominant social and economic majority

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302 Brief of Appellant at 16, Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) (No. 123).

303 *Id.*

304 *Id.*

305 *Id.* at 18 ("If, in defining the term homosexual, there would be included any individual who has some latent homosexual tendencies within him, then, all persons would be classified homosexuals, since all persons have to some degree latent homosexual tendencies within them.").

306 *Id.* at 23.

307 *Id.* at 22–23.

over a minority group in our population."[308] Indeed, the photographs in question were no different from the female pin-up photos showing naked women that were sold throughout the country by the thousands every year.[309] To deem the former obscene, but not the latter, was "an illogical attempt to equate mores, morals and law."[310]

The government in its brief argued that the purpose behind the federal obscenity statute was to make sure that the mails were not used as "a vehicle for the cheap dissemination of materials which, either through immediate stimulation or a gradual erosion of accepted moral standards, induce unlawful and immoral sexual conduct."[311] From the government's perspective, it was essential that the obscenity determination be based on whether the magazines appealed to the prurient interests of their readers, as opposed to the average members of the community, because "pornography is likely to have a greater impact upon adolescents and sexual deviants."[312]

According to the government, it was entirely appropriate to treat sexual materials aimed at gay men differently because they were more likely "to induce overt sexual activity than such material directed to the normal sexual impulses."[313]Furthermore, since same-sex sexual acts were illegal, sexual publications "directed to a sexually abnormal audience is even more likely to induce unlawful conduct than pornographic material appealing to normal persons."[314] The government added that "it seems scarcely open to question that society has a legitimate interest (already expressed in the laws of the States) in preventing overt homosexual activities while refusing to condemn comparable activities when indulged in

308 Brief of Appellant at 23, Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) (No. 123).

309 *Id.* at 27–28. Dietz told the justices during the oral argument that the photographs in Womack's magazines were "no worse than what we so-called normal people call pin-up photographs, which I think even this Court would take judicial knowledge, is generally, commonly accepted. You see photographs of such beauties, female beauties, as Marilyn Monroe, nude on calendars, on walls all over the country . . . . Their [homosexuals'] pin-up is certainly no worse . . . than our pin-up." 2 OBSCENITY: THE COMPLETE ORAL ARGUMENTS BEFORE THE SUPREME COURT IN THE MAJOR OBSCENITY CASES, at 92–93 (Leon Friedman ed., Chelsea House rev. ed. 1983).

310 Brief of Appellant at 25, Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962).

311 Brief for the Respondent at 14 Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962). *See also id.* at 23 ("The primary evil aimed at by obscenity censorship is the danger that through stimulating sexual desire obscene literature will lead to sexual conduct that is illegal or otherwise inconsistent with current moral standards.") (footnote omitted).

312 *Id.* at 15.

313 *Id.* at 27 (citation omitted).

314 *Id.*

on a heterosexual basis."[315]

3. The Supreme Court's Ruling and the Further Demoralization of Obscenity Law.

As it had done in *One,* the Supreme Court concluded that the materials at issue in *Manual Enterprises* were not obscene.[316] Justice Harlan, in announcing the Court's judgment, and in writing for himself and Justice Stewart, refused to address the average reader vs. average member of the community issue that received so much attention from the lawyers and the court below.[317] Instead, Justice Harlan ruled that the photographs in question were not obscene because they did not satisfy an element of obscenity that was as essential as the appeal to prurient interests element adopted in *Roth*, namely that the materials be "so offensive on their face as to affront current community standards of decency."[318] This requirement meant that the government had the burden of showing that the materials were "patently offensive."[319]

Harlan explained that the government had to satisfy the patently offensive standard because otherwise it would be able to censor "many worth-while works in literature, science, or art" on the ground that their dominant theme appealed to the prurient interests of readers or observers.[320] To conclude that the statute required nothing more than the inciting of "impure desires relating to sex" would run afoul of the First Amendment because it would render obscene large swaths of materials that, while appealing to prurient interests, were not patently offensive.[321]

Although Harlan spoke only for himself and Justice Stewart—Justice Brennan, in an opinion joined by Chief Justice Warren and Justice Douglas, would have reversed on the

315 *Id.* at 44–45.

316 Manual Enterprises, Inc. v. Day, 370 U.S. 478, 490 (1962) (plurality opinion).

317 *Id.* at 482. The Court eventually accepted the contention that when materials were aimed at "a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group." Mishkin v. New York, 383 U.S. 502, 508 (1966).

318 *Manual Enterprises*, 370 U.S. at 482.

319 *Id.* at 486.

320 *Id.* at 487.

321 *Id.*

ground that the Post Office lacked the statutory authority to refuse to mail materials on obscenity grounds[322]—a majority of the justices eventually incorporated the patently offensive standard into the Court's definition of obscenity.[323] If only for that reason, *Manual Enterprises* became an important component of the Court's obscenity jurisprudence.

But what is most important for our purposes is to note that although Justice Harlan effectively accepted the government's morality-based view of gay men as "sexual deviates" to be distinguished from "sexually normal individuals,"[324] he nonetheless concluded that Womack's magazines were not obscene. In doing so, Harlan explicitly rejected the government's position that erotic pictures of partially naked men aimed at a gay audience were obscene because they violated moral community standards in ways that female pin-up photos did not. As Harlan explained,

> [o]ur own independent examination of the magazines leads us to conclude that the most that can be said of them is that they are dismally unpleasant, uncouth, and tawdry. But this is not enough to make them 'obscene.' Divorced from their 'prurient interest' appeal to the unfortunate persons whose patronage they were aimed at capturing (a separate issue), these portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates.[325]

Harlan made clear that, in determining whether gay materials were obscene, it was not enough to conclude, as he did, that gay men were "sexual deviates" and "unfortunate."[326] There needed to be a separate inquiry that, putting aside the deviancy of those who purchased the materials, looked into whether the publications were patently offensive. That inquiry had nothing to do with moral or other judgments about gay men and same-sex sexual acts. Instead, the inquiry required an exclusive focus on the materials themselves in order to ask whether they were patently offensive. In establishing whether the magazines'

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322 *Id.* at 519 (Brennan, J., concurring). Two justices did not participate in the decision: Frankfurter due to illness and Whitaker due to his resignation from the Court. Friedman, *supra* note 309, at 141. For his part, Justice Black concurred without writing an opinion. *Manual Enterprises*, 370 U.S. at 495 (Black, J., concurring). Only Justice Clark dissented. *Id.* at 519 (Clark, J., dissenting).

323 Miller v. California, 413 U.S. 15, 24 (1973).

324 *Manual Enterprises*, 370 U.S. at 481.

325 *Id.* at 489–90.

326 *Id.* at 481, 490.

photographs met that standard, courts had to stick to their four corners, so to speak. As Harlan explained, "[i]t is only material whose indecency is *self-demonstrating*" and that can "be deemed so offensive on [its] *face*" that can constitutionally be considered obscene.[327] In short, Harlan's analysis in *Manual Enterprises* is notable because it separated questions of moral and social judgments about homosexuality from the issue of whether gay erotic materials were patently offensive and therefore obscene.

What is striking about Justice Harlan's ruling in *Manual Enterprises* is the extent to which he separated society's, and his own, moral condemnation of gay men (as reflected in his characterization of them as "sexual deviates" and as "unfortunate") from the legal question of what constituted obscenity.[328] As had occurred in *One*, the differentiation between questions of morality and questions of obscenity law was crucial in accounting for the LGBT rights victory before the Supreme Court.

III. The Impact of the First Two LGBT Rights Victories Before the Supreme Court

It is helpful, in considering the legal and social impact of *One* and *Manual Enterprises*, to contemplate what would have happened if the results in the two cases had been different. A victory by the government in *One* would have permitted Post Office officials to refuse to distribute homophile publications that, through fictional and nonfictional accounts of the lives of lesbian and gay individuals, suggested that homosexuality was an acceptable alternative to heterosexuality. Such a victory would have also made it much easier for local law enforcement officials to charge the publishers of gay books and magazines with violating state obscenity laws. It is not at all clear, for example, that the romantic novels that were part of the emerging lesbian pulp fiction of the late 1950s—with their positive, and increasingly erotic, portrayals of female same-sex sexual relationships—would have reached interested readers had the Court in *One* affirmed the government's victory in the lower courts.[329] Similarly, a victory by the Post Office in *Manual Enterprises* would have

327 *Id.* at 487, 482 (emphases added).

328 *Id.* at 481, 490. *See also id.* at 495 ("[N]othing in this opinion of course remotely implies approval of the type of magazines published by these petitioners, still less of the sordid motives which prompted their publication. All we decide is that on this record these particular magazines are not subject to repression under § 1461.").

329 *See* Eskridge, *Privacy Jurisprudence*, *supra* note 3, at 807 ("[T]he 1950s lesbian romances were the first positive expression of same-sex desire most women could find before 1969."). John D'Emilio points to the growth in lesbian pulp fiction as an example of the explosion of published materials with lesbian and gay themes that took place during the 1960s. *See* D'EMILIO, *supra* note 49, at 135–36.

legitimized the government's efforts to censor erotic magazines aimed at gay audiences, even if the images contained therein included no outright nudity, much less depictions of actual sex.

The fact that the government after the two cases could no longer justify its regulation of lesbian and gay publications based on the notion that same-sex sexual relationships and conduct were immoral, and that it therefore could not censor them on the ground that they promoted sexual immorality, provided those who wanted to publish materials aimed at sexual minorities with constitutional protection from government censorship and harassment. The continued publication of *One*, as well as other homophile magazines such as the *Mattachine Review* (published by the Mattachine Society) and the *Ladder* (published by the Daughters of Bilitis), allowed for the perpetuation and expansion of a phenomenon that had never before taken place in American history: lesbians and gay men sharing their views in print about both their sexuality and place in society.[330]

This public discourse helped to forge links of community and identity among those with same-sex sexual orientations. As the historian John D'Emilio notes, the homophile magazines "played a part in creating a common vocabulary. In evolving a shared language to articulate their experiences, gay men and women came a step closer to emerging as a self-conscious minority."[331] If the Supreme Court had ruled for the government in *One*, the homophile magazines would have had a much more difficult time raising the political and group consciousness of sexual minorities.[332]

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330 For discussions of the Mattachine Society and the *Mattachine Review*, *see* D'EMILIO, *supra* note 49, at 74–91; STREITMATTER, *supra* note 192, at 20–22, 38–39, 42, 44–46. For discussions of the Daughters of Bilitis and the *Ladder*, see D'EMILIO, *supra* note 49, at 101–07; STREITMATTER, *supra* note 192, at 22–23, 30–31, 39–42, 43–44.

331 D'EMILIO, *supra* note 49, at 114. *See also* MARC STEIN, RETHINKING THE GAY AND LESBIAN MOVEMENT 59 (2012) ("The magazines were particularly effective in sharing information that was otherwise difficult to obtain, promoting a sense of community among their readers, and exposing the oppressive conditions of gay and lesbian life."). Rodger Streitmatter argues that the early homophile publications played a similar role in community building as did early African American, women's suffrage, and women liberation journals. STREITMATTER, *supra* note 192, at 49–50. Streitmatter adds that "[a]s readers [of the homophile magazines] engaged in an ongoing dialogue with each other, they started to identify their common aspirations. Aided by the discourse in the magazines[,] . . . gay men and lesbians from coast to coast began to consider their potential as a unified political force." STREITMATTER, *supra* note 192, at 49.

332 Don Slater, one of the founding members of *ONE*, explained the editors' view of their victory before the Supreme Court as follows:

> By winning this decision ONE Magazine has made not only history but law as well and

At the same time, magazines like *ONE* helped to render lesbians and gay men more visible, and to do so on terms set by them rather than by a hostile society. Although the mainstream press in the late 1950s and 1960s was paying increasing attention to lesbians and gay men, it did so almost exclusively through articles written with contemptuous themes and in derisive tones. In 1966, for example, *Time* magazine published an article vilifying homosexuality, warning that "[i]t deserves no encouragement, no glamorization, no rationalization, no fake status as minority martyrdom, no sophistry about simple differences in taste—and, above all, no pretense that it is anything but a pernicious sickness."[333] Similarly, an article published by the *New York Times* three years earlier claimed that "[t]he absence of any legal ties, plus the basic emotional instability that is inherent in many homosexuals, cause [them] to founder on the jealousies and personality clashes that a heterosexual union would survive."[334]

The homophile publications, which could no longer be constitutionally censored after the Court's ruling in *One*, allowed lesbians and gay men to present and describe their lives and aspirations in ways that directly contradicted such outlandish claims. As the journalism professor Rodger Streitmatter notes, the magazines "created a national venue for homosexuals, forming an arena in which lesbians and gay men could, for the first time, speak above a whisper about issues fundamental to their lives."[335] Indeed, the magazines contained some of the first manifestations of lesbian and gay *pride*, that is the notion that despite society's harsh disapproval, the lives and relationships of lesbians and gay men were worthy of acknowledgment, recognition, and celebration.[336]

> has changed the future for all U.S. homosexuals. . . . ONE Magazine no longer asks for the right to be heard; it now exercises that right. It further requires that homosexuals be treated as a proper part of society free to discuss and educate and propagandize their beliefs with no greater limitations than for any other group.

Don Slater, *Victory! Supreme Court Upholds Homosexual Rights*, ONE, Feb. 1958, at 17.

333 *The Homosexual in America*, TIME, Jan. 21, 1966, at 41 (quoted in STREITMATTER, *supra* note 192, at 70).

334 Robert C. Doty, *Growth of Overt Homosexuality in City Provokes Wide Concern*, N.Y. TIMES, Dec. 17, 1963, at 1, 33. The article also claimed that "[t]he homosexual has a range of gay periodicals that is a kind of distorted mirror image of the straight publishing world." *Id.*

335 STREITMATTER, *supra* note 192, at 18. *See also* D'EMILIO, *supra* note 49, at 113 ("Above all, homophile publications allowed lesbians and homosexuals to find their own voices. In letters and articles contributors touched upon every aspect of their lives and expressed every imaginable point of view.").

336 Craig Loftin has concluded that the letters to the editors sent to *ONE* evinced "if not gay pride itself, then at least an immediate precursor to the more politically formalized gay pride that would flourish later." LOFTIN, LETTERS TO *ONE*, *supra* note 202, at 11.

In considering the implications of *Manual Enterprises*, it is important to keep four considerations in mind. First, the types of physique magazines at issue in the case reached, and therefore impacted, a much greater number of readers than did homophile publications such as *ONE*. The monthly circulation of Womack's publications alone was 40,000,[337] while the combined circulation of all gay physique magazines was in the hundreds of thousands.[338] In contrast, the circulation of *ONE* never reached above 5,000.[339]

Second, the physique magazines, like homophile magazines, played important roles in forming gay identities and communities. As David Johnson notes, "[c]ountless men who came of age in cold war America vividly remember their first encounter with physique magazines as part of their journey to self-identification as homosexual."[340] By unashamedly celebrating the beauty of the male body, the magazines helped gay men feel less conflicted about their sexual orientation.[341] As another commentator notes, "[p]hysique magazines told homosexuals they were not alone, that they had a distinct shared culture."[342]

Third, the Court's ruling in *Manual Enterprises* contributed to the publication of new types of magazines that combined political/social commentary *and* erotic content. These new magazines, which proved to be highly popular among many gay men, promoted and

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337 During the oral argument in *Manual Enterprises*, Dietz told the court that the circulation of Womack's physique magazines was "[f]orty thousand or more a month." Friedman, *supra* note 309, at 95.

338 D'EMILIO, *supra* note 49, at 136 ("[B]y 1965 total monthly sales of physique magazines topped 750,000.").

339 MICHAEL BRONSKI, A QUEER HISTORY OF THE UNITED STATES 180 (2011) (noting that *ONE*'s highest circulation was 5,000 in 1960).

340 Johnson, *supra* note 262, at 870.

341 One of the particular ways in which the magazines did this was by showing pictures of men looking at and enjoying physique magazines. By doing so, "publishers encouraged their readers to identify with the models and see their homoerotic interests as natural." Johnson, *supra* note 262, at 884.

342 Jackie Hatton, *The Pornography Empire of H. Lynn Womack: Gay Political Discourse and Popular Culture 1955-1970*, 7 THRESHOLDS: VIEWING CULTURE 8, 16 (1993). Hatton adds that physique magazines such as those published by Womack "played a crucial role in facilitating the creation of homosexual bonds that ultimately forged the gay community, and constructing a visible culture seemingly out of thin air." *Id.* at 26; *see also* BRONSKI, *supra* note 339, at 189 ("The power of the physique magazines was in their reclamation of the sexualized male body as fundamental to homosexual community."); WAUGH, *supra* note 253, at 217 ("[T]he consumption of [gay] erotica was without question political: however furtive, however unconscious, however masturbatory, using pictures was an act of belonging to a community composed of producers, models, and, most important, other consumers.").

reinforced the notion that the sexual was political.[343]

Lastly, the Court's ruling in *Manual Enterprises* was, to my knowledge, *the first time* that *any court* in the United States had ever suggested that there was an equivalence of sorts between heterosexuality and homosexuality. The Supreme Court, after all, held that gay physique magazines were not obscene because they were no different from female pin-up magazines. As a result, the former were not patently offensive.[344] In so concluding, the Court rejected the government's contention that erotica aimed at gay men was, due to that fact alone, more problematic than erotica directed at heterosexuals. The Court's analogy between gay and straight erotica provided same-sex sexuality with a modicum of judicially approved legitimacy, grounded in considerations of (rough) equivalence with different-sex sexuality, that it had never enjoyed before.

It is important to point out that obscenity prosecutions based on the publication

343 One of these new publications was *Drum*, a magazine first published by the Janus Society, a Philadelphia homophile organization, in 1964. STREITMATTER, *supra* note 192, at 60. Like *ONE*, *Drum* published news and advocacy articles aimed at a gay audience. STREITMATTER, *supra* note 192 at 60. And, like Womack's publications, it also contained male erotica. STREITMATTER, *supra* note 192, at 60. This combination, as Rodger Streitmatter and John Watson note, proved to be

> a smashing success. Within two years, *Drum*'s monthly circulation had soared to more than 10,000, tripling the circulation of all other [homophile] magazines combined . . . . After [t]his success, virtually every editor who founded a publication aimed at gay readers incorporated homoerotic images into his editorial mix. Indeed, the plethora of partially nude men who became *de rigueur* in the gay press by the late 1960s clearly played a central role in the genre's explosion by the end of the decade—150 publications with a combined circulation of more than 250,000.

Streitmatter & Watson, *supra* note 265, at 63. The response by some of the more traditional homophile organizations, such as the Mattachine Society, to *Drum* and other magazines that combined politics with erotica was highly critical. But, as Johnson notes, "[t]his stance failed to acknowledge the increasingly explicit political content of the physique editorials and the huge gay following they commanded. By combining commercial, sexual, and political interests, *Drum* represented not a threat to the movement, but its future." Johnson, *supra* note 262, at 883.

Another publication that combined political coverage, social activism, and homoerotic images was the *Los Angeles Advocate*, which later, as the *Advocate*, became a national, bi-weekly publication. STREITMATTER, *supra* note 192, at 87–88, 96–97. "Beginning in July 1968 every issue of the *Advocate* featured a front-page photo of a man with either his chest or buttocks exposed. It was more than coincidence that during the second half of 1968 the newspaper also tripled its size, jumping from sixteen pages in June to forty-eight by December." STREITMATTER, *supra* note 192, at 97 (endnote omitted).

344 *See supra* note 325 and accompanying text.

or distribution of gay materials did not cease altogether as a result of the Supreme Court's rulings in *One* and *Manual Enterprises*. In 1963, for example, the United States Court of Appeals for the Seventh Circuit upheld the conviction of a husband and wife for conspiring to use the mails to distribute gay sexual materials.[345] The couple had created a pen pal club, known as the Adonis Male Club, which allowed its male members to exchange photographs of nude men.[346]

Several years later, federal prosecutors in Minneapolis brought obscenity charges against two men for using the mails to distribute the first physique magazines that included photos of full frontal male nudity.[347] After a bench trial, however, the judge found the two men not guilty. Like Justice Harlan in *Manual Enterprises*, the judge agreed with the government that the magazines were aimed at a "deviant group."[348] But that was not enough to render the publications obscene. As the judge explained, "[t]he rights of minorities expressed individually in sexual groups or otherwise must be respected. With increasing research and study, we will in the future come to a better understanding of ourselves, sexual deviants, and others."[349]

By the late 1960s, magazines like *ONE*, which had seemed so radical a decade earlier, came to be perceived by many individuals active in the LGBT community as conservative

345 United States v. Zuideveld, 316 F.2d 873 (7th Cir. 1963). The husband edited two physique magazines, *VIM* and *Gym*, published in Chicago. *Id.* at 875; *see also* People v. G.I. Distributors, Inc., 228 N.E.2d 787, 789 (N.Y. 1967) (upholding obscenity conviction for publication of a magazine containing photographs "of two or more young men, and in nearly all, in various stages of undress or nudity, engaged in attitudes of embracing, wrestling, spanking, beating, or enforced disrobing of one of the young men"). In the early 1970s, Womack was arrested several more times for using the mails to distribute obscene materials. Lardner, *supra* note 266, at 24. One of those arrests led to a conviction on several counts and to a sentence of two and a half years in prison, though the sentence was eventually reduced to six months. Lardner, *supra* note 266, at 24.

346 *Zuideveld*, 316 F.2d at 879 ("Many of these photographs were of individual members themselves in which they were shown in nude erotic poses, sometimes referred to in the record as homosexual action pictures.").

347 Johnson, *supra* note 262, at 879.

348 Johnson, *supra* note 262, at 881 (quoting United States v. Spinar, No. 4-67 CR 15 (D. Minn. July 26, 1967)).

349 Johnson, *supra* note 262, at 881. A few years later, the United States Court of Appeals for the Eighth Circuit reversed the obscenity conviction of the same two men arising from a prosecution in North Dakota. Spinar v. United States, 440 F.2d 1241 (8th Cir. 1971). The court noted that "[t]he subject matter depicted are nude or nearly-nude males, all with their genitalia fully exposed. Most of the pictures show a single male; some portray more than one male. There is no sexual activity shown although in some of the pictures the male organ appears not to be in a state of complete repose." *Id.* at 1242.

and timid.[350] As a result, lesbian and gay publications that were more politically confrontational grew in size and influence.[351] Similarly, on the erotic side, there was growing demand for more sexually explicit publications. As Bill Eskridge notes, "[t]he seminude figures allowed in *Manual Enterprises* gave way in the early 1960s to nude models, at first posing alone and then (mid-1960s) in pairs, and then (late 1960s) to depictions of men having sex with men, and women with women."[352]

But the fact that the magazines at issue in the two Supreme Court cases were eventually supplanted by more politically forceful and sexually explicit publications only magnifies the importance of the two judicial victories. Those victories helped to create the necessary legal conditions that contributed to the blossoming of lesbian and gay publications during the 1960s.[353] Those publications, in turn, played a crucial role in the formation and strengthening of lesbian and gay cultures and identities. As D'Emilio explains, the two Supreme Court cases, by "remov[ing] legal barriers to the presentation of homoeroticism in print and in visual media[, led to] a bewildering variety of images and viewpoints about homosexuality . . . . This barrage of information made it easier for people to come to a self-definition as homosexual or lesbian, strengthened the institutions of the subculture, and gave activists more opportunity for action."[354]

Of course, the United States by the end of the 1960s was, politically and culturally, a very different country than it had been when the two LGBT rights cases reached the Supreme Court only a few years before. It is difficult to imagine that postal officials, or

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350 LOFTIN, MASKED VOICES, *supra* note 190, at 17; STREITMATTER, *supra* note 192, at 53.

351 STREITMATTER, *supra* note 192, at 53–54.

352 Eskridge, *Challenging the Apartheid of the Closet*, *supra* note 3, at 891; *see also* Hatton, *supra* note 342, at 26 ("As gay liberation brought homosexual culture out of the closet, the more ambiguously gay and less explicit physique magazines . . . were superseded by more openly gay publications.") (endnote omitted).

353 As D'Emilio notes,

> [d]uring the 1960s a noticeable shift took place in both the sheer quantity of discourse about homosexuality and lesbianism and the social interpretation of the phenomenon. . . . In pornography, literature, and the mass media, portrayals of gay life multiplied. And with the growing volume of material came new angles of vision. A significant minority of opinion began to view lesbians and homosexuals not as isolated, aberrant individuals but as members of a group.

D'EMILIO, *supra* note 49, at 129.

354 D'EMILIO, *supra* note 49, at 5.

any other government officers, would have paid much attention, at around the time of the Stonewall riots and other manifestations of the sexual and political revolutions that were convulsing the nation by the decade's end, to gay publications that were, in hindsight, rather tame. But whether any given publication is considered tame or radical (or somewhere in between) depends on prevailing social norms. What is ultimately most fascinating, and important as a legal matter, about *One* and *Manual Enterprises* is that the Court was able to assess the extent to which the publications at issue were obscene *independently* of the pervasive moral condemnation of same-sex relationships and conduct that prevailed throughout society at the time. That separation between law and public morality contributed in crucial ways to the first two LGBT rights victories before the Supreme Court. The separation also foreshadowed the Court's unwillingness to take majoritarian morality into account in determining the constitutional rights of LGBT individuals in its later, and much more famous, cases involving sodomy and marriage laws.[355]

IV. Early and Late Demoralization

In addition to contributing to the formation and strengthening of LGBT communities and identities, the Supreme Court's first two forays into issues related to sexual orientation also constituted the first instances in which it grappled with a question that it would repeatedly return to later: what role should the promotion of public morality, as a purported state interest, play in defending laws and regulations that impacted LGBT individuals from constitutional challenges? Although none of the later cases cited to *One* or *Manual Enterprises*, those two cases showed that the Court, very early on, was willing and able to separate majoritarian judgments about the relationships and intimacies of LGBT individuals from questions of constitutional rights.

This last part of the Article examines how courts since *One* and *Manual Enterprises* have grappled with questions of public morality and the constitutional rights of sexual minorities. The first section explores the similarities between how the Supreme Court handled the question of public morality in its two gay obscenity cases and how that question was addressed by the first federal appellate court to entertain a First Amendment lawsuit brought by an LGBT student group against a public university.

I then provide a brief account of how the Supreme Court later "demoralized" due process and equal protection law in sexual orientation cases. I cannot here offer an exhaustive

355 United States v. Windsor, 133 S.Ct. 2675 (2013) (striking down section 3 of the Defense of Marriage Act); Lawrence v. Texas, 539 U.S. 558 (2003) (striking down Texas's sodomy law).

treatment of the intersection of law and morality in substantive due process and equality cases involving LGBT rights claims. Instead, my objective is to provide an overview of the Court's recent refusal, in such cases, to accept the promotion of public morality as a justification for either the regulation of same-sex sexual intimacy or the differential treatment of lesbians and gay men. I finish with some thoughts on why demoralization under the First Amendment preceded the demoralization under the Due Process and Equal Protection clauses.

A. The First Amendment and LGBT Students

In the late 1960s and early 1970s, LGBT students on college campuses began to agitate for greater freedoms, including the right to form organizations aimed at promoting the political and social interests of sexual minorities. Although officials at some universities, in a sign of the changing times, agreed to recognize and support these new student groups, others refused to do so.[356] These administrators defended their positions on several different grounds. One common argument was that the groups would promote conduct (i.e., sodomy) that was criminal under state law.[357] Another claim was that official recognition would constitute an endorsement of the groups' views.[358] A third contention, of particular interest to us here, was that the universities had a responsibility to promote the values of the broader community, and that the recognition of LGBT student groups would derogate from those values.[359] Several of these groups, when faced with the refusal by some public universities to grant them official status or to permit them to hold events on campus, filed

356 In 1967, Columbia became the first university to recognize an LGBT student organization. D'EMILIO, *supra* note 49, at 209. In the years that followed, similar groups were recognized by Cornell, New York University, and Stanford. D'EMILIO, *supra* note 49, at 210.

357 *See, e.g.*, Gay Lib v. University of Mo., 558 F.2d 848, 853 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978) (noting that defendants claimed that "recognition of Gay Lib would likely result in imminent violations of Missouri sodomy laws"); Gay Activists Alliance v. Bd. of Regents of the Univ. of Okla., 638 P.2d 1116, 1121 (Ok. 1981) ("The Regents also based their refusal for recognition on the assertion that the behavior endorsed by and sought to be promoted by the GAA violates Oklahoma law.").

358 *See, e.g.*, Gay Alliance of Students v. Matthews, 544 F.2d 162, 165 (4th Cir. 1976); *Gay Activists Alliance*, 638 P.2d at 1122.

359 *See, e.g.*, *Gay Activists Alliance*, 638 P.2d at 1121 ("The Regents based their refusal for recognition on the assertion that such refusal was justified by a duty to insure that the purposes of recognized organizations reflect public policy as it is established by prevailing university community standards."); Student Coalition for Gay Rights v. Austin Peay St. Univ., 477 F. Supp. 1267, 1269 (M.D. Tenn. 1979) (noting that the President of University refused to recognize the LGBT student group in part because "[s]exual activity with another of the same sex . . . is contrary to the Judeo-Christian ethic which undergirds our community, our State, and our nation").

lawsuits claiming violations of their members' rights to free speech and association under the First Amendment.

The first reported ruling recognizing the free speech and associational rights of LGBT students was issued in 1972 after the University of Georgia refused to permit its gay student group to hold a conference and a dance on campus.[360] In the years that followed, courts consistently ruled in favor of the free speech and associational rights of LGBT students.[361]

The leading case in this area is *Gay Students Organization of the University of New Hampshire v. Bonner*.[362] That ruling, issued by the U.S. Court of Appeals for the First Circuit in 1974, is particularly interesting for our purposes because it dealt directly with the question of public morality and how it impacted on the First Amendment rights of sexual minorities. The court recognized:

> [T]he tension between deeply felt, conflicting values or moral judgments, and the traditional legal method of extracting and applying principles from decided [First Amendment] cases. . . . [T]he campus group sought to be regulated stands for sexual values in direct conflict with the deeply imbued moral standards of much of the community whose taxes support the university.
>
> The underlying question, usually not articulated, is whether . . . group activity promoting values so far beyond the pale of the wider community's values is also beyond the boundaries of the First Amendment, at least to the extent that university facilities may not be used by the group to flaunt its credo.[363]

After noting that the case reflected a clash of moral values, the court proceeded to rule

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360 Wood v. Davison, 351 F. Supp. 543 (N.D. Ga. 1972).

361 Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652, 658–63 (1st Cir. 1974); *Matthews*, 544 F.2d at 165–67; Gay and Lesbian Students Association v. Gohn, 850 F.2d 361, 367–68 (8th Cir. 1988); *Gay Lib*, 558 F.2d at 852–57; *Gay Activists Alliance*, 638 P.2d at 1122–23; Gay Student Servs. v. Texas A & M Univ., 737 F.2d 1317, 1324–33 (5th Cir. 1984), *cert. denied*, 471 U.S. 1001 (1985); Student Services for Lesbians/Gays and Friends v. Texas Tech Univ., 635 F. Supp. 776, 781–82 (N.D. Tex. 1986); *Student Coalition for Gay Rights*, 477 F.Supp. at 1273–74.

362 *Bonner*, 509 F.2d at 652.

363 *Id.* at 657–58.

that free speech principles required it to side with the LGBT student group in its challenge to the university's refusal to allow it to hold social events on campus. Otherwise, the government would be able to rely on moral values to suppress the speech and associational rights of a large variety of student groups whose views were inconsistent with broader social values.[364] The court here distinguished between the university's authority to proscribe harmful conduct or the inciting of illegal activity, on the one hand, and the suppression of expression and association on the other. As far as the latter was concerned, the court was unable "to devise a tolerable standard exempting this case . . . from general First Amendment precedents."[365]

The *Bonner* court's separation of the plaintiffs' free speech rights from society's moral disapproval of homosexuality was entirely consistent with how the Supreme Court decided the two gay obscenity cases from more than a decade earlier. Indeed, it is interesting to note that, like Justice Harlan in *Manual Enterprises*,[366] the *Bonner* court signaled its disapproval of sexual minorities. According to the First Circuit, the LGBT student group promoted "values . . . *far beyond the pale* of the wider community's values."[367] But like Justice Harlan, the *Bonner* court felt compelled to separate moral judgments about same-sex relationships and conduct from the determination of sexual minorities' rights under the First Amendment.

Not only did the *Bonner* court find public morality to be an impermissible basis for restricting the speech and associational rights of LGBT students, but it also concluded that the moral claims were themselves evidence that their group was being targeted because of its views. The university claimed that (1) it had an "obligation and right to prevent activities which the people of New Hampshire find shocking and offensive"; (2) it had an "obligation to prevent activity which affronts the citizens of the University and the town . . ."; and (3) the "ban on social functions [by the LGBT student group] reflects the distaste with which homosexual organizations are regarded in the State."[368] For the court, the uni-

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364 *Id.* at 658 ("Assuming that 'community-wide values' could be confidently identified, and that a university could limit the associational activity of groups challenging those values, such an approach would apply also . . . to those attracted to pre-marital sex, atheism, the consumption of alcoholic beverages, esoteric heterosexual activity, violence on television, or dirty books.").

365 *Id.*

366 *See supra* notes 324–326 and accompanying text.

367 *Bonner*, 509 F.2d at 658 (emphasis added).

368 *Id.* at 661.

versity's own contentions were proof that the student group was being treated differently because of its message, a content-based restriction that violated the First Amendment.[369]

By the 1980s, most judges ruling in cases involving the First Amendment rights of sexual minorities seemed to be of the view that public morality constituted an improper justification for restricting the free speech rights of LGBT individuals.[370] For example, when the U.S. Court of Appeals for the Tenth Circuit in 1984 struck down, on free speech grounds, an Oklahoma statute prohibiting teachers from engaging in advocacy in matters related to homosexuality, it was left to a dissenting judge to claim that the statute was constitutional because it was proper for the legislature to have concluded that same-sex sexual acts were "immoral and corruptible in [their] nature . . . ."[371] But the majority, like the court in *Bonner*, did not allow considerations of public morality to trump the free speech rights of sexual minorities.[372] Rather than focusing on notions of public morality, the court emphasized the statute's wide prohibition of advocacy that fell far short of incitement of illegal conduct.[373]

The courts' approach to the intersection of morality and the First Amendment in LGBT cases stood in marked contrast to how they understood the role of morality in the context of substantive due process. Indeed, the proper role that public morality should play in determining the scope of the state's authority to regulate same-sex sexual *conduct* (as opposed to gay-related speech) was still very much in dispute in the 1980s.

B. Sodomy, Morality, and the Criminal Law

The proscription against sodomy had its roots in the moral teachings of Christianity. Even after the English Reformation Parliament of 1533 transformed the religious prohibition against sodomy into a secular crime, sodomy continued to be viewed as morally problematic largely because it entailed the use of sexual capacities in nonreproductive

369 *Id.* ("We do not see how these statements can be interpreted to avoid the conclusion that the regulation imposed was based in large measure, if not exclusively, on the content of the [group's] expression.").

370 *See, e.g.*, Nat'l Gay Task Force v. Bd. of Ed., 729 F.2d 1270, 1274 (10th Cir. 1984); *see also* Gay Activists Alliance v. Univ. of Oklahoma, 638 P.2d 1116, 1122 (Ok. 1981) (noting, in case involving the First Amendment rights of LGBT students, that a university's promotion of its students' interests "cannot be influenced by personal tastes").

371 *Nat'l Gay Task Force*, 729 F.2d at 1276 (Barrett, J., dissenting).

372 *See id.* at 1274.

373 *Id.*

ways.[374] Such views followed the English colonists to America, as reflected in the repeated denunciations by Puritan leaders of sodomitical acts as contrary to God's will.[375]

Colonial and early American sodomy statutes were not aimed at same-sex sexual conduct as such, but instead reflected society's strong moral disapproval of nonprocreative sex.[376] Same-sex sexual conduct was only one subset of sexual acts that religious and political leaders viewed as morally problematic because they did not lead to procreation. Early sodomy statutes, therefore, covered not only sex between two men, but also anal intercourse between a man and a woman, a child, or an animal.[377] Starting in the late nineteenth century the statutes were expanded (either through amendments or judicial interpretations) to include oral sex.[378] In the twentieth century, however, the scope of the statutes was, as a practical matter, narrowed as officials began to limit their enforcement to cases involving consensual sex between same-sex sexual partners.[379] Indeed, sodomy statutes came to be viewed by many as a proper way for society to express its disapproval of same-sex relationships and conduct.[380]

In 1957, a committee of the British Parliament issued a report (the Wolfenden Report), recommending the decriminalization of "homosexual offenses" while questioning whether the moral disapproval of same-sex sexual conduct justified the criminalization of consensual gay sex. In doing so, the Wolfenden Report reasoned that "[u]nless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[381] The report added that "to emphasise the personal and private nature

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374 Amici Curiae Brief of Professors of History at 6, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

375 *Id.*

376 *Id.*

377 CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION 207 (2010).

378 *Id.*

379 *Id.*

380 *See supra* notes 405–408 and accompanying text (discussing the arguments raised by Georgia in defending its sodomy law in *Bowers v. Hardwick*).

381 DEPARTMENTAL COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, REPORT TO THE SECRETARY OF STATE FOR THE HOME DEPARTMENT ("THE WOLFENDEN REPORT") ¶ 61 (1957).

of moral or immoral conduct is to emphasise the personal and private responsibility of the individual for his own actions."[382]

The publication of the Wolfenden Report led to a famous debate on the role that majoritarian morality should play in the criminal law between two prominent British legal figures: Patrick Devlin, a conservative judge who sat on Britain's High Court, and H.L.A. Hart, one of the leading legal philosophers of the twentieth century. Devlin took the position that it was appropriate for the criminal law to discourage the breach of public morality, quite independently of the need to protect individuals from more specific injuries, such as harm to body or property. As Devlin explained, "[w]hat makes a society of any sort is [a] community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals."[383] A failure by society to defend its morals through the criminal law would lead to its disintegration: "There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions."[384] As a result, for Devlin, the fact that public morality condemned homosexuality was enough to justify its criminalization.[385]

It bears noting that Lord Devlin's views regarding the need to use the law to protect society through the promotion of public morality in the context of homosexuality were essentially the same as those expressed by American courts throughout the nineteenth century, and into the twentieth century, in obscenity cases. As we saw in Part I.A, those courts grounded the government's authority to proscribe obscenity on the appropriateness of using state authority to promote public morality.[386]

In responding to Devlin, Hart recognized that behind laws against murder and theft are widely shared views that those acts are immoral. However, this did not mean that the law should seek to criminalize everything that majoritarian morality holds to be wrong. Hart disputed Devlin's contention that the law's refusal to reflect public sexual morality inevitably led to social disintegration: "[W]e have ample evidence for believing that peo-

382 *Id.*

383 PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 9 (1965).

384 *Id.* at 13.

385 *Id.* at 22.

386 *See supra* notes 10–57 and accompanying text.

ple will not abandon morality, will not think any better of murder, cruelty, and dishonesty, merely because some private sexual practice which they abominate is not punished by the law."[387] It was the responsibility of the legislator, Hart contended, not to take as a given the appropriateness of moral disapproval of sexual conduct outside of heterosexual marriage, including same-sex sexual conduct, but instead to apply reason and empathy to determine whether the disapproval merited codification into law. As Hart explained,

> [s]urely, the legislator should ask whether the general morality is based on ignorance, superstition, or misunderstanding; whether there is a false conception that those who practice what it condemns are in other ways dangerous or hostile to society; and whether the misery to many parties, the blackmail and the other evil consequences of criminal punishment, especially for sexual offences, are well understood.[388]

The views expressed in the Wolfenden Report and by H.L.A. Hart on the inadvisability of criminalizing consensual same-sex sexual conduct based on considerations of public morality was reflected in the Model Penal Code drafted by the American Law Institute and issued in its final form in 1962. The Code rejected the idea that consensual sexual conduct between unmarried adults should be criminalized through laws against fornication, adultery, and sodomy. As the drafters explained, "[t]he Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational and other social influences."[389] Although the drafters gave other reasons for not criminalizing consensual sexual conduct—such as the difficulties in enforcing the laws and the potential for abuse arising from that enforcement[390]—they left little doubt regarding their view that the criminal regulation of such conduct should not be driven by considerations of public morality.[391]

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387 H.L.A. Hart, *Immorality and Treason*, 62 LISTENER 162–63 (1959), *reprinted in* WILLIAM B. RUBENSTEIN, CARLOS A. BALL, JANE S. SCHACTER, AND DOUGLAS NEJAIME, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 118, 119 (5th ed. 2014).

388 *Id.* at 120. Hart elaborated on his views on the use of the law to enforce public morality in H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).

389 Model Penal Code § 207.1, comment at 207 (Tent. Draft No. 4, 1955) (quoted in Louis B. Schwartz, *Moral Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 674 (1962)).

390 Schwartz, *supra* note 389, at 674.

391 As the drafters of the Model Penal Code explained,

The Model Penal Code was the first important step in American law to demoralize the regulation of consensual same-sex sexual conduct. Starting with Illinois in 1961 and continuing for several decades, almost thirty states proceeded to decriminalize sodomy.[392] But the fact that the remaining states refused to do the same meant that, as predicted in 1962 by a co-reporter of the Model Penal Code, the constitutional question of whether the state could criminalize consensual same-sex sexual acts would have to be decided by the courts.[393]

C. Sodomy, Morality, and the Constitution

The question of whether the Due Process Clause provides protections to individuals in matters related to sexual intimacy was first addressed by Justice John Harlan in his 1961 dissent in *Poe v. Ullman*.[394] At issue in *Poe* was the constitutionality of a Connecticut statute that criminalized the use of contraceptives.[395] Although the Court's majority refused to reach the merits of the challenge on the ground that the case was nonjusticiable, Harlan thought it proper to address the substance of the plaintiffs' constitutional claim, one grounded in substantive due process.[396]

Harlan explained in his dissent that he would have struck the statute down for two reasons. First, the law impermissibly called for governmental regulation of the sexually intimate decisions of couples, in particular married ones.[397] Second, its scope intruded into

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> One need not endorse wholesale repeal of all "victimless" crimes in order to recognize that legislating penal sanctions solely to maintain widely held concepts of morality and aesthetics is a costly enterprise. It sacrifices personal liberty, not because the actor's conduct results in harm to another citizen but only because it is inconsistent with the majoritarian notion of acceptable behavior.

Model Penal Code § 213.2, Comment 2 (1962, Comments Revised 1980), *reprinted in* RUBENSTEIN ET AL., *supra* note 387, at 125.

392 RUBENSTEIN ET AL., *supra* note 387, at 125.

393 Schwartz, *supra* note 389, at 676–77 ("If state legislators are not persuaded by such arguments to repeal the laws against private deviate sexual relations among adults, the constitutional issue will ultimately have to be faced by the courts.").

394 367 U.S. 497 (1961).

395 *Id.* at 498.

396 *Id.* at 522 (Harlan, J., dissenting).

397 *Id.* at 539 (noting that the statute's enforcement "is an intolerable and unjustifiable invasion of privacy in

the home, a constitutionally privileged site.[398]

As I have argued elsewhere, sodomy statutes could have been struck down at the time of *Poe* on precisely the same two grounds.[399] Sodomy laws did not distinguish according to the marital status or gender of the sexual partners, and thus they constituted a significant intrusion into the sexual intimacy of *all* couples, including married ones.[400] In addition, it is reasonable to assume that most violations of sodomy laws were taking place in the home, the site that Justice Harlan claimed was constitutionally protected by the Due Process Clause.[401]

For Harlan, what distinguished the contraceptive statute from other laws that limited personal liberty in matters related to sexual intimacy was that public morality provided a valid justification for the other laws. As Harlan explained, "I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. So much has been explicitly recognized in acknowledging the State's rightful concern for its people's moral welfare."[402] Harlan's conclusion, albeit in dicta, that public morality served as a valid justification for criminal laws targeting same-sex sexual conduct stood in stark contrast to his conclusion, *only a year later*, in *Manual Enterprises* that moral judgments regarding that conduct constituted an impermissible basis for deeming erotic publications aimed at gay men to be obscene.[403]

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the conduct of the most intimate concerns of an individual's personal life"); *id.* at 552 ("Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations.").

398 *Id.* at 548 (the statute "involves what, throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense") (citation omitted).

399 Carlos A. Ball, *Why Liberty Judicial Review is as Legitimate as Equality Review: The Case of Gay Rights Jurisprudence*, 14 U. PA. J. CONST. L. 1, 31–32 (2011).

400 *Id.*

401 *Id.*

402 Poe v. Ullman, 367 U.S. 497, 552–53 (1961) (Harlan, J., dissenting) (citations omitted). In contrast, according to Harlan, public morality constituted an insufficient basis for a law, like the contraceptive one, that was highly intrusive of the marital relationship and the home. *See id.* at 554 ("Though the State has argued the Constitutional permissibility of the moral judgment underlying this statute, neither its brief, nor its argument . . . even remotely suggests a justification for the obnoxiously intrusive means it has chosen to effectuate that policy.").

403 *See supra* notes 323–327 and accompanying text.

Although the constitutionality of sodomy laws was not at issue in *Poe*, that was the precise question raised twenty-five years later in *Bowers v. Hardwick*.[404] The state of Georgia in that case defended the constitutionality of its sodomy statute by making two main points, both of which were grounded in considerations of morality. First, the state contended that there could be no fundamental right to engage in same-sex sodomy given that for "hundreds of years, if not thousands, [that conduct] has been uniformly condemned as immoral."[405] More specifically, Georgia claimed that sodomy was at odds with "traditional Judeo-Christian values" and that it had been consistently condemned through the centuries in Europe, and later in the American colonies and states.[406] As far as the state was concerned, "homosexual sodomy" was nothing more than "sexual deviancy . . . . It is purely an unnatural means of satisfying an unnatural lust, which has been declared by Georgia to be morally wrong."[407]

Georgia also relied on morality to make a second point: since there was no fundamental right at stake, the statute passed constitutional muster under the highly deferential rational basis test because the defense of traditional morality was a legitimate state interest. As the state explained, "in Georgia, it is the very act of homosexual sodomy that epitomizes moral delinquency. Th[e] . . . choice [to criminalize the conduct] has been made by the representatives of the people of this State, based upon the traditional moral values of society."[408] From this perspective, it was entirely appropriate for the legislature to codify the majority of Georgians' moral values into the sodomy proscription.

In his brief on behalf of Michael Hardwick—the man who was arrested in his Atlanta home for having consensual oral sex with another man— Professor Laurence Tribe rejected the notion that, as a constitutional matter, consensual sexual conduct between adults could be criminalized based on considerations of morality alone.[409] Given that the statute implicated some of the most personal and intimate decisions of individuals, it passed constitutional muster "only if it [could] be shown to serve closely some state objective *other*

404 478 U.S. 186 (1986).

405 Brief of Petitioner at 19, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140).

406 *Id.* at 20.

407 *Id.* at 27.

408 *Id.* at 36.

409 Brief for Respondent at 4, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140) ("[T]he mere invocation of contestable moral views [is not] sufficient to defend a law that so thoroughly invades individuals' most intimate affairs.").

than the bald assertion of one possible moral view."[410] For Tribe, the moral contestability of the state's claims—as reflected in the fact that by the mid-1980s, about half the states had decriminalized consensual sodomy—was enough to deprive the government of the ability to rely on morality alone to justify the criminalization of sodomy.[411]

The Court in *Hardwick* entirely embraced the state's approach. In explaining that the Constitution did not recognize a fundamental right to engage in "homosexual sodomy," the Court pointed to the statutes' "ancient roots" and to the fact that all of the original thirteen states had them at the time they ratified the Bill of Rights.[412] To argue, in the face of such long standing condemnation of same-sex sexual conduct, that there was a fundamental right at issue was, "at best, facetious."[413]

In addition, the Court rejected Tribe's contention that morality constituted an impermissible basis upon which to legislate by explaining that "the law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[414] For his part, Chief Justice Burger wrote a concurring opinion to make even more explicit a point already suggested by the majority: that sodomy had been denounced "throughout the history of Western civilization" and that the "[c]ondemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards."[415] Both of these opinions stood in marked contrast to how the Court, in *One* and *Manual Enterprises*, rejected the use of public morality as a justification for censoring gay publications. (At the end of this Part, I offer some thoughts on why the demoralization of obscenity law as it relates to homosexuality preceded the Court's eventual demoralization of substantive due process (and equal

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410 *Id.* at 26–27.

411 *Id.* at 25.

412 *Hardwick*, 478 U.S. at 190, 192.

413 *Id.* at 194.

414 *Id.* at 196. The U.S. Court of Appeals for the Fifth Circuit, a year before *Hardwick*, pointed to the promotion of morality as a permissible ground for criminalizing consensual same-sex sexual conduct. Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986) ("In view of the strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries," [Texas's sodomy statute] is rationally related to "implementing morality, a permissible state goal.").

415 *Hardwick*, 478 U.S. at 196 (Burger, C.J., concurring). *See also id.* at 197 ("To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.").

protection) law in matters related to sexual orientation.)[416]

When the Court, almost two decades after *Hardwick*, returned to the question of the constitutionality of sodomy laws in *Lawrence v. Texas*, the terms of the debate over the appropriate role of morality in justifying the criminalization of consensual sexual conduct remained the same. The state of Texas, in justifying John Lawrence and Tyron Garner's arrest for allegedly engaging in consensual sexual intimacy, relied on morality as the only justification for its sodomy law.[417] According to Texas, it had "a legitimate state interest in legislatively expressing the long-standing moral traditions of the State against homosexual conduct, and in discouraging its citizens—whether they be homosexual, bisexual or heterosexual—from choosing to engage in what is still perceived to be immoral conduct."[418]

This time around, however, the Court did what it had done more than forty years earlier in *One* and *Manual Enterprises*: It demanded that the determination of the constitutional rights of sexual minorities be conducted independently of considerations of public morality. The *Lawrence* Court, in striking down the Texas statute on due process grounds, rejected the *Hardwick* Court's holding that moral objections and disapproval of same-sex sexual conduct sufficed to uphold sodomy statutes. In the majority's view, the justices' obligation was to determine the liberty enjoyed by all without relying on their own, or society's, moral code.[419] Explicitly adopting Justice Stevens's dissenting position in *Hardwick*, the *Lawrence* Court held that moral objections were impermissible justifications for the criminalization of consensual sexual intimacy.[420]

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416 *See infra* Part IV.E.

417 539 U.S. 558, 582 (2003) (O'Connor, J., concurring) ("Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality.").

418 Respondent's Brief at 27, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102). In taking the contrary view, the brief filed on behalf of Lawrence and Garner by the Lambda Legal Defense Fund argued that "[b]y claiming the power to impose its own moral code where constitutional guarantees of personal liberty are at stake, Texas is reversing the proper relationship between the government and a free people." Brief of Petitioners at 28, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

419 *Lawrence*, 539 U.S. at 571 (reasoning that moral "considerations do not answer the question before us . . . . The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own moral code.") (internal quotation and citation omitted).

420 *Id.* at 577–78 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (quoting *Hardwick*, 417

D. Sexual Orientation, Morality, and the Equal Protection Clause

The move away from morality as a constitutionally sufficient regulatory basis in matters related to same-sex sexual relationships and conduct has taken place not only under the First Amendment and the Due Process Clause, but also under equal protection principles. In many ways, this process of demoralization can be traced back to the 1973 case of *Department of Agriculture v. Moreno*, in which the Court held that Congress's disapproval of "hippies" did not constitute a valid reason to deny food stamps to unrelated individuals living in communal settings.[421] The Court returned to the idea that legal classifications cannot be grounded in the majority's desire to condemn an unpopular group in *Romer v. Evans*.[422] At issue in that case was a Colorado constitutional amendment that sought to prevent lesbians, gay men, and bisexuals (and no others) from receiving antidiscrimination protections under state and local laws.[423] The *Romer* Court concluded that the amendment was the result of animus grounded in the disapproval of sexual minorities.[424] As a result, the amendment violated the Equal Protection Clause, even under the highly deferential rational basis test.[425]

The relationship between morality and the Equal Protection Clause was also raised in the brief filed by the Lambda Legal Defense Fund on behalf of the two defendants in *Lawrence*. The brief reminded the Court that its precedents made it clear that moral disapproval of a class of individuals did not justify either the denial of benefits nor the imposition of unequal burdens on that class.[426] This point was highly relevant in *Lawrence* because Texas law criminalized consensual intimacy only when the

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U.S. at 216 (Stevens, J., dissenting)). It was left to Justice Scalia to defend what, after *Lawrence*, became the minority view on the Court: that moral objections were enough to support the criminalization of consensual sexual conduct. Scalia complained that the Court's holding rendered unconstitutional a broad swath of criminal statutes—everything from prohibitions on incest to adultery to prostitution to bigamy—grounded in majoritarian views regarding socially acceptable manifestations of human sexuality. *Id.* at 590 (Scalia, J., dissenting). The Court's ruling, Scalia charged, "effectively decrees the end of all morals legislation." *Id.* at 599.

421 413 U.S. 528, 534 (1973).

422 517 U.S. 620 (1996).

423 *Id.* at 624.

424 *Id.* at 632.

425 *Id.*

426 Brief of Petitioners at 35–36, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102). The brief cited, inter alia, to *Moreno* and *Romer*. *Id.*

adults were of the same sex, unlike the Georgia statute at issue in *Hardwick*, which, on its face, applied to everyone. The brief reasoned that the Equal Protection Clause, like the due process one, required Texas to do precisely what it was refusing to do, that is, to justify its sodomy statute on grounds other than moral ones.[427]

Although the *Lawrence* Court decided the case on due process grounds, Justice O'Connor in her concurrence emphasized that the state, under the Equal Protection Clause, could not defend the differential treatment of a class of individuals solely on the basis of moral disapproval.[428] Citing to the Court's ruling in *Romer v. Evans*, O'Connor noted that

> moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law." Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating "a classification of persons undertaken for its own sake."[429]

The Court returned to the question of whether a statute enacted in order to express moral disapproval of a class of individuals could survive constitutional scrutiny a decade after *Lawrence* when it considered the constitutionality of the Defense of Marriage Act in *United States v. Windsor*, a case decided under both the liberty and equality protections afforded by the Fifth Amendment.[430] In striking down the DOMA provision that prohibited the federal government from recognizing state-sanctioned marriages by same-sex couples, the Court emphasized that the statute's purpose and effect was to express disapproval of same-sex couples. The majority quoted from a House Committee report stating that DOMA

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427 *Id.* at 36–37.

428 Lawrence v. Texas, 539 U.S. 558, 583–84 (2003) (O'Connor, J., concurring).

429 *Id.* at 583 (citing *Romer*, 517 U.S. at 633, 635); *see also id.* at 584 ("A State can of course assign certain consequences to a violation of its criminal law. But the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law.").

430 133 S. Ct. 2675, 2693 (2013). On the relationship between *Romer* and *Windsor* as it relates to the constitutional insufficiency of moral disapproval as a justification for the differential treatment of lesbians and gay men, see generally Linda C. McClain, *From* Romer v. Evans *to* United States v. Windsor*: Law as a Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act*, 20 DUKE J. GENDER L. & POL'Y 351 (2013).

was intended to express "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality."[431] As the Court explained, "[t]he stated purpose of the law was to promote an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.'"[432] This meant that the DOMA provision was unconstitutional because it sought to use federal law to demean same-sex couples by relegating their state-approved marriages to second-class status.[433]

The Court in both *Romer* and *Windsor*, then, made clear that moral disapproval of same-sex sexual relationships and conduct does not constitute a constitutionally valid justification for the differential treatment of lesbians, gay men, and bisexuals under the Equal Protection Clause, in the same way that the Court held in *Lawrence* that moral disapproval constitutes an insufficient basis upon which to regulate the sexual intimacy choices of sexual minorities.

E. Some Thoughts on the Chronology of Demoralization

The chronology of the demoralization of constitutional law as it impacts sexual minorities—with free speech coming first and privacy/equality second—is one that makes sense. As we have seen, the question of whether same-sex sexual *conduct* could be regulated based on moral grounds was a highly disputed one for decades, in part because of the intuitive point that much of what the criminal law prohibits—murder, rape, and theft, among other acts—is morally wrong conduct. But the constitutional questions raised in *One* and *Manual Enterprises* were not about conduct; they were instead about *expression.*

As we have also seen, starting around the 1930s, courts became increasingly skeptical of the proposition that sexually explicit materials inevitably threatened society with harm because they undermined public morals.[434] Furthermore, as the Supreme Court explicitly recognized in *Kingsley Pictures International*, the notion that the government could censor speech on the ground that what was being advocated (or even discussed) violated majoritarian moral norms was deeply inconsistent with free speech principles.[435] Under such rea-

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431 *Windsor*, 133 S. Ct. at 2693 (quoting H.R. REP. No. 104–664, at 12–13 (1996)).

432 *Id.* (quoting H.R. REP. No. 104–664, at 16 (1996)).

433 *Id.* at 2693–94.

434 *See supra* Parts I.B, I.C, and I.D.

435 *See supra* notes 158–159 and accompanying text.

soning, there were no limits to the viewpoints that the government could squelch (socialist ideas, the legalization of drugs, the defense of polygamy) based on the notion that they were morally offensive to the majority of the population.

It is not surprising that it took the Court longer to conclude that majoritarian morality was also an impermissible basis upon which to justify both the regulation of consensual same-sex sexual conduct and the differential treatment of individuals based on their sexual orientation. As a general matter, the government is on firmer ground when it regulates conduct than when it regulates speech. There are at least two reasons for this difference. First, it is reasonable to assume that conduct is more likely to cause harm than speech. Second, as the Court has explained, "the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society."[436] For both of these reasons, speech is significantly more likely to be constitutionally protected than conduct.

The Court did eventually conclude, primarily under the doctrine of substantive due process, that certain categories of conduct are constitutionally protected.[437] And when it did so in the context of same-sex sexual conduct, it reached the same conclusion that it had reached in the gay obscenity cases of several decades earlier: that the promotion and protection of public morality is a constitutionally insufficient justification for state action.[438]

Although it has not been noted before, I believe that the demoralization of First Amendment law, as it relates to issues of sexual orientation, contributed to the demoralization of substantive due process and equality law as it relates to the same issues. As I explained in Part III, the demoralization of obscenity law, as represented by *One* and *Manual Enterprises*, allowed for a discourse about the lives and aspirations of sexual minorities that had

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436 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 512 (1996). Although the Court has recognized that expressive conduct is sometimes protected by the First Amendment, such protection is both (1) limited to instances in which the person who engages in the conduct intends to communicate a message that is likely to be understood by others, see Texas v. Johnson, 491 U.S. 397, 404 (1989) (citing Spence v. Washington, 418 U.S. 405, 410–11 (1974)), and (2) less comprehensive than the protection afforded to pure speech. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) ("This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").

437 Roe v. Wade, 410 U.S. 113 (1973) (abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (use of contraceptives).

438 *See supra* notes 419–420 and accompanying text.

never before taken place in American society.[439] That discourse encouraged Americans, for the first time, to consider and weigh the interests and rights of LGBT individuals, rather than dismiss them out-of-hand as the demands of a sexually perverted and immoral group. By the time the Supreme Court decided cases such as *Romer*, *Lawrence*, and *Windsor*, the decades of debates over homosexuality, initially made possible by the protection of the free expression rights of sexual minorities, contributed to changing social understandings of LGBT individuals and their relationships.

The demoralization of due process and equal protection law in the context of sexuality that took place as a result of *Romer*, *Lawrence*, and *Windsor* occurred alongside large shifts in social understandings of LGBT individuals and their relationships, shifts that were made possible by the freedom of sexual minorities to speak on, advocate for, and associate around the issues that were important to them. The deep changes in social mores that came about as a result of these constitutionally protected modes of expression contributed not only to the Court's rejection of the constitutional sufficiency of moral condemnation of same-sex sexuality as a basis for government policy under due process and equal protection analyses, but also to its acknowledging the dignity that inheres in LGBT individuals and their relationships.[440]

While the Court's more recent skepticism of moral disapproval as a constitutionally valid justification for the differential treatment of sexual minorities parallels changing social views toward those minorities, the same cannot be said about *One* and *Manual Enterprises*. Rather than reflecting changed understandings of LGBT individuals and their relationships, the outcomes in the two cases were instead the consequence of the Court's skepticism of the constitutional viability, under the First Amendment, of promoting public morality through the enforcement of obscenity laws.[441]

To put it another way, the Court's demoralization of obscenity law as it relates to sexual orientation took place *before* society began to change its views about sexual minorities. In contrast, the demoralization of the regulation of consensual sexual conduct took place *alongside* changing understandings of LGBT people and their relationships.

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439 *See supra* notes 330–332 and accompanying text.

440 United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) ("[T]he State's decision to give [same-sex couples] the right to marry conferred upon them a dignity and status of immense import."); Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("[A]dults may choose to enter [into same-sex] relationship[s] in the confines of their homes and their own private lives and still retain their dignity as free persons.").

441 *See supra* notes 252–259, 324–327, and accompanying texts.

It is, once again, not surprising that the demoralization first took place in the context of expression. The essential purpose of the First Amendment is to afford protection to those who express views that differ from majoritarian perspectives and preferences. It was only after the Court protected the ability of sexual minorities to express themselves despite society's deep moral disapproval, that the Court, decades later, concluded that moral disapproval also constituted a constitutionally invalid justification for regulating same-sex sexual conduct and for classifying individuals according to their sexual orientation.

CONCLUSION

This Article has sought to explain why the Supreme Court, in the late 1950s and early 1960s, many years before the country and the courts were repeatedly confronted with political and legal claims on behalf of sexual minorities, ruled in favor of gay publications in their legal battles with the government over obscenity. I have shown that the first two LGBT rights victories before the Supreme Court were primarily the result of the demoralization of obscenity law that was well under way by the time the Court ruled in the two cases. This demoralization made it possible for the Court to separate the question of whether same-sex sexual relationships and conduct were moral from that of whether materials related to same-sex sexuality, including erotic ones, were obscene.

It is not surprising, after decades of controversial and compelling LGBT rights litigation before the Supreme Court involving issues such as sodomy and marriage laws, that few today remember the first two times that the Court was confronted with issues related to sexual orientation. But as this Article has shown, there is a crucial link between the now largely-forgotten early cases and the more recent and famous ones: LGBT litigants were able to prevail in both sets of cases largely as a result of the Court's unwillingness to allow the moral disapproval of LGBT individuals, their relationships, and their sexuality to serve as constitutionally appropriate justifications—whether under the First Amendment, the Due Process Clause, or the Equal Protection Clause—for laws and policies that disadvantage sexual minorities.