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The First Amendment and the Roots of LGBT Rights Law: Censorship in the Early Homophile Era, 1958-1962

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THE FIRST AMENDMENT AND THE ROOTS OF LGBT RIGHTS LAW: CENSORSHIP IN THE EARLY HOMOPHILE ERA, 1958–1962

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ABSTRACT

Long before substantive due process and equal protection extended constitutional rights to homosexuals under the Fourteenth Amendment, in three landmark decisions by the Supreme Court of the United States, First Amendment law was both a weapon and shield in the expansion of LGBT rights. This Article examines constitutional law and "gaylaw" from the perspective of its beginning, through case studies of *One, Inc. v. Olesen* (1958),[1] *Sunshine Book Co. v. Summerfield* (1958),[2] and *Manual Enterprises, Inc. v. Day* (1962).[3] In protecting free press rights of sexual minorities to use the U.S. mail for mass communications, the Warren Court's liberalization of obscenity law and protections of free press rights for homosexuals allowed LGBT Americans to develop identity, build communities, and seek social justice during a particularly oppressive time in U.S. history.

INTRODUCTION
I. HISTORICAL CONTEXT
II. NARRATIVE CASE STUDIES
  A. One, Inc. v. Olesen
  B. Sunshine Book Co. v. Summerfield
  C. Manual Enterprises, Inc. v. Day
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INTRODUCTION

This Article examines constitutional law and LGBT rights from the perspective of its beginning, rooted in U.S. Supreme Court precedents from three cases in the early days of the Warren Court that affirmed the free expression rights of sexual minorities.[4] Each case

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1. 355 U.S. 371 (1958).
2. 355 U.S. 372 (1958).
3. 370 U.S. 478 (1962).
4. I use the acronym LGBT as the modern, inclusive term to identify lesbian, gay,

involved the censorship of magazines depicting political and sexual expression of homosexuals and nudists.[5] In *One, Inc. v. Olesen*, the Supreme Court in 1958 overturned the Los Angeles postmaster's decision to ban from the U.S. mail *ONE Magazine*, the first political and news magazine in the United States, created by and for homosexuals.[6] During the same term, in *Sunshine Book Co. v. Summerfield*, the Supreme Court overturned the postmaster general's decision to ban two nudist culture magazines, *Sunshine & Health* and *Sun Magazine*.[7] Four years later, in *Manual Enterprises, Inc. v. Day*, the Supreme Court struck down the postal ban of three "physique" magazines featuring male bodybuilders, *MANual*, *Trim*, and *Grecian Guild Pictoral*.[8]

Mass communication has been crucial in advancing social justice for LGBT Americans, and the First Amendment has been an essential tool.[9] Like the black civil rights movement and the women's liberation movement, noted historian John D'Emilio argued that the gay rights movement used many methods "to emancipate themselves from the laws, the public policies, and the attitudes that have consigned them

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bisexual and transgender individuals while using other terms in historical contexts of particular eras.

5. *See supra* notes 1–3 and accompanying text.

6. 355 U.S. at 371; One, Inc. v. Olesen, 241 F.2d 773, 773 (9th Cir. 1957); *History*, ONE ARCHIVES FOUNDATION, https://www.onearchives.org/about/history [https://perma.cc/7SES-ZSW5].

7. 355 U.S. at 372; Sunshine Book Co. v. Summerfield, 249 F.2d 115, 115 (1957).

8. 370 U.S. at 478–80, 495.

9. On the role of mass communication in minority social justice movements, see SUSAN HERBST, POLITICS AT THE MARGIN: HISTORICAL STUDIES OF PUBLIC EXPRESSION OUTSIDE THE MAINSTREAM 1–4 (1994); LAUREN KESSLER, THE DISSIDENT PRESS: ALTERNATIVE JOURNALISM IN AMERICAN HISTORY 15–16 (1984); BOB OSTERTAG, PEOPLE'S MOVEMENTS, PEOPLE'S PRESS: THE JOURNALISM OF SOCIAL JUSTICE MOVEMENTS 8–9 (2006); and RODGER STREITMATTER, VOICES OF REVOLUTION: THE DISSIDENT PRESS IN AMERICA x (2001). On the role of mass communication in the LGBT rights movement, see EDWARD ALWOOD, STRAIGHT NEWS: GAYS, LESBIANS, AND THE NEWS MEDIA 14–15 (1996); CHRISTOPHER BRAM, EMINENT OUTLAWS: THE GAY WRITERS WHO CHANGED AMERICA ix (2012); GAY PRESS, GAY POWER: THE GROWTH OF LGBT COMMUNITY NEWSPAPERS IN AMERICA 11 (Tracy Baim ed., 2012); RODGER STREITMATTER, FROM "PERVERTS" TO "FAB FIVE": THE MEDIA'S CHANGING DEPICTION OF GAY MEN AND LESBIANS 1–2 (2009); and RODGER STREITMATTER, UNSPEAKABLE: THE RISE OF THE GAY AND LESBIAN PRESS IN AMERICA ix, xiv (1995). On the role of the First Amendment in the LGBT rights movement, see CARLOS A. BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY 1–2 (2017) [hereinafter BALL, THE FIRST AMENDMENT]; Brent Hunter Allen, *The First Amendment and Homosexual Expression: The Need for an Expanded Interpretation*, 47 VAND. L. REV. 1073, 1104–05 (1994); Carlos A. Ball, *Obscenity, Morality, and the First Amendment: The First LGBT Rights Cases Before the Supreme Court,* 28 COLUM. J. GENDER & L. 229, 229–30 (2014) [hereinafter Ball, *Obscenity*]; David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct,* 29 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 319, 321–24 (1994); and Paul Siegel, *Why Lesbians and Gay Men Need Traditional First Amendment Theory, in* FREEING THE FIRST AMENDMENT: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION 224–25 (David S. Allen & Robert Jensen eds., 1995).

to an inferior position in society."[10] At each step of the way, law affected social change, either by enhancing or limiting it. In the second half of the nineteenth century and the first half of the twentieth century, many individuals engaged in mass communications were arrested and jailed for distributing information deemed violations of community standards and public morality.[11] Laws prohibiting communication and expression were used as a weapon to stop social change, while challenges to those laws were tools to advance tolerance, liberty, and equality.[12] As First Amendment law expanded during this period, LGBT citizens came out of the metaphorical "closet" and defined themselves as an insular minority group in America.[13]

The use of obscenity law to censor subcultures has a long history in the United States.[14] This Article shows how three Supreme Court precedents concerning obscenity standards and public morality hastened the development of an American homophile subculture, despite the censorial efforts of the dominant culture, authoritarian

10. JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970 1 (2d ed. 1983).

11. On how law punished expression in the late 1800s and early 1900s, see MARGARET A. BLANCHARD, REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA 14–15, 17, 38–39, 41 (1992); ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 3 (1941); THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 468–69 (1970); CHRISTOPHER M. FINAN, FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA x, 1–3, 6, 8–9, 11 (2007); HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 35 (1988); and DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870–1920 28, 30 (1997).

12. BLANCHARD, *supra* note 11, at 489–91.

13. *See* BALL, THE FIRST AMENDMENT, *supra* note 9, at 92–94; D'EMILIO, *supra* note 10, at 235–36; WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003 137(2008); WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 176, 180–82 (1999) [hereinafter ESKRIDGE, GAYLAW]; JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 72–79 (2011).

14. *See generally* WALTER BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 60 (1973); PAUL S. BOYER, PURITY IN PRINT: BOOK CENSORSHIP IN AMERICA FROM THE GILDED AGE TO THE COMPUTER AGE (2002); CAROLYN BRONSTEIN, BATTLING PORNOGRAPHY: THE AMERICAN FEMINIST ANTI-PORNOGRAPHY MOVEMENT, 1976–1986 178 (2011); MORRIS L. ERNST & ALAN U. SCHWARTZ, CENSORSHIP: THE SEARCH FOR THE OBSCENE 18–21 (1964); GORDON HAWKINS & FRANKLIN E. ZIMRING, PORNOGRAPHY IN A FREE SOCIETY (1988); HELEN LEFKOWITZ HOROWITZ, REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH-CENTURY AMERICA 12–14 (2002); RICHARD H. KUH, FOOLISH FIGLEAVES?: PORNOGRAPHY IN—AND OUT OF—COURT 17, 21–22 (1967); FELICE FLANERY LEWIS, LITERATURE, OBSCENITY AND THE LAW 26 (1976); RICHARD S. RANDALL, FREEDOM AND TABOO: PORNOGRAPHY AND THE POLITICS OF A SELF DIVIDED (1989); GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY (2017); WHITNEY STRUB, OBSCENITY RULES: ROTH V. UNITED STATES AND THE LONG STRUGGLE OVER SEXUAL EXPRESSION 10–13 (2013); AMY WERBEL, LUST ON TRIAL: CENSORSHIP AND THE RISE OF AMERICAN OBSCENITY IN THE AGE OF ANTHONY COMSTOCK (2018); LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY 13 (2013); LINDA WILLIAMS, HARD CORE: POWER, PLEASURE, AND THE 'FRENZY OF THE VISIBLE' (1989).

politicians, and aggressive law enforcement. The Article roots the *One, Inc.*, *Sunshine Book Co.*, and *Manual Enterprises, Inc.* decisions in an expanding jurisprudence of the First Amendment in the middle of the twentieth century that opened communications networks to individuals, and in the process helped create new cultural communities. While the so-called "sexual revolution" wouldn't begin in earnest until years later, this Article shows how these three First Amendment precedents laid the foundation for expansion of civil rights and liberties of LGBT Americans over the next three generations.[15] This study of the historical development of LGBT free speech and free press protections also informs current legal controversies about the nature of rights claims, the tools and methods of legal advocacy, and the judicial treatment of claims.

The Article is structured into three parts. Part I examines relevant historical context and legal doctrines of the 1950s era, including the status of homosexuals in the era, the practices of postal censorship, and the evolving judicial standards of obscenity law. Part II presents three narrative case studies of Supreme Court decisions in 1958 and 1962. Part III discusses the implications of these cases on the subsequent development of legal doctrine and judicial philosophies.

I. HISTORICAL CONTEXT

In the middle of the twentieth century, the freedoms and liberties that gays and lesbians now have at the beginning of the twenty-first century would have been impossible to forecast. In the 1950s, homosexuals faced great risk in seeking others like them. The 1969 Stonewall riots, long identified as the spark that lit the gay liberation movement, were more than a decade away.[16]

As historian David K. Johnson demonstrates, the federal government launched an unprecedented public crusade against homosexuals in government employment beginning in the late 1940s and continuing through the 1950s.[17] The federal government investigated and fired hundreds of employees for alleged homosexual orientation in what has been described the "Lavender Scare."[18] At a Senate committee meeting in February 1950, a deputy undersecretary revealed that ninety-one employees had been fired for moral turpitude.[19] "Most of these were homosexuals," John Peurifoy testified, sparking foreboding

15. Rachel Hills, *What Every Generation Gets Wrong About Sex*, TIME (Dec. 4, 2014), https://time.com/3611781/sexual-revolution-revisited [https://perma.cc/9CLH-L27L].

16. *See* MARTIN DUBERMAN, STONEWALL xv (1993).

17. DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT 1, 3–5 (2004).

18. *Id.* at 1–3, 5, 18, 103–05.

19. *Id.* at 1–2, 7.

headlines, such as "Perverts Called Government Peril" and "Federal Vigilance on Perverts Asked."[20] Wisconsin Senator Joseph McCarthy and others quickly tied homosexuality and Communism as major subversive threats to the United States, and by June of 1950 the full Senate launched an investigation into the extent of the homosexual problem.[21] A December 1950 Senate report described how "one homosexual can pollute a Government office" because of his "emotional instability" and weak "moral fiber".[22] In April 1953, President Eisenhower signed an executive order banning homosexuals from working for the federal government.[23]

In *Gaylaw: Challenging the Apartheid of the Closet*, Professor William N. Eskridge, Jr. describes the government's efforts in the 1950s as an "anti-homosexual Kulturkampf," in which the state engaged in a multifaceted campaign to erase homosexuality, going so far as to equate efforts from 1946 to 1961 against homosexuals in America as bearing an "eerie congruence" to those of Nazi Germany from 1933 to 1945.[24] Local police during this period ramped up aggressive patrols on cruising areas and bars, while lawmakers and prosecutors expanded criminal law penalties and aggressively pursued prosecutions for sodomy, lewd behavior, loitering in public restrooms and parks, cross-dressing, and other related offenses.[25] Local police devoted significant resources to vice squads to conduct stakeouts, strings and raids on potential homosexuals.[26] After analyzing available arrest data from 1946 to 1961, Professor Eskridge concluded that as many as one million Americans faced criminal penalties for same-sex dancing, touching, kissing, and sex during this period.[27] While the criminal penalties could be severe, citizens often feared the ostracism and job loss that could come with the publicity of the arrests.[28] Some men outed by the public shaming were driven to suicide.[29] Media coverage of homosexuals often portrayed "moral panics" that demonized homosexuals as perverted, unacceptable for employment,

20. *Id.* at 17; *Federal Vigilance on Perverts Asked*, N.Y. TIMES (Dec. 16, 1950), https://timesmachine.nytimes.com/timesmachine/1950/12/16/87186828.html?pageNumber=3 [https://perma.cc/6E7N-FSFB]; *Perverts Called Government Peril*, N.Y. TIMES (Apr. 19, 1950), https://timesmachine.nytimems.come/timesmachine/1950/04/19/86432041.html?pageNumber=25 [https://perma.cc/6GW9-D2NF].

21. JOHNSON, *supra* note 17, at 1–3, 5, 18, 103–05.

22. *Id.* at 114, 116.

23. ESKRIDGE, GAYLAW, *supra* note 13, at 70.

24. *Id.* at 14.

25. *Id.* at 43–44, 61, 63.

26. *Id.* at 63.

27. *Id.* at 60.

28. *Id.* at 67.

29. *See Suicide and Violence Prevention*, CTRS. DISEASE CONTROL & PREVENTION, https://www.cdc.gov/msmhealth/suicide-violence-prevention.htm [https://perma.cc/XD6G-FRX6].

readily blackmailed, emotionally unstable, immoral, inflicted with disease, obsessed with sex, dangerous to young boys, and threats to the nation's well-being.[30] Locally, arrests of homosexuals occasionally sparked media frenzies, characterized by bold headlines, dire warnings from government officials, and demeaning language to describe homosexuals.[31]

So, it was in this cultural, political, legal, and media context of the 1950s that homophiles decided to form an organization and launch a magazine—at a time when the Supreme Court was poised to begin a revolution against a century of obscenity law that would help connect gays and lesbians to a broader subculture for the first time.

Long before the telegraph, broadcast radio and television, and the internet, the post office was an essential system for mass communication among American citizens.[32] One of the government's early tools in censoring communication among and by homosexuals was the regulation of the U.S. mail.

Censorship of the mail was not authorized by Congress in the early days of the post office system.[33] For the American colonies, the postmaster general in England oversaw a postal system essential to colonial communications and commerce, until the Continental Congress created its own system that was the precursor to the U.S. Post Office.[34] President George Washington stressed the importance of the Post Office by advocating for the expansion of post roads in rural areas.[35] By 1828, President Andrew Jackson said the Post Office was:

> chiefly important as affording the means of diffusing knowledge. It is to the body politic what the veins and arteries are to the natural—conveying rapidly and regularly to the remotest parts of the system correct information of the operations of the Government, and bringing back to it the wishes and feelings of the people.[36]

Congress first considered a federal law regulating the content of the U.S. mail in 1836, when President Andrew Jackson proposed a

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30. ESKRIDGE, GAYLAW, *supra* note 13, at 39–40, 59–60, 64, 69.

31. *Id.* at 64–65, 67–68.

32. *See* WINIFRED GALLAGHER, HOW THE POST OFFICE CREATED AMERICA: A HISTORY 1, 5 (2016); RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE vii (1995); Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671–73, 676 (2007).

33. *See* DOROTHY GANFIELD FOWLER, UNMAILABLE: CONGRESS AND THE POST OFFICE ix (1977).

34. *Id.* at 1–3.

35. *Id.* at 12.

36. *Id.* at 21.

ban on anti-slavery advocacy, especially for "incendiary" materials being sent into southern states.[37] Congress refused to pass a censorship law, instead passing a law "prohibiting [anyone from] tampering with anyone's mail."[38] Soon, disputes arose between local postmasters and the postmaster general over conflicts between federal law and state laws, particularly those in the South that criminalized the sending of "incendiary" materials that sought to undermine the system of slavery.[39] As an attempt to compromise, the Postmaster General allowed localities to ban from the mail materials that were unlawful to deliver under state law.[40] During the Civil War, President Lincoln ordered the stopping of all mail correspondence with the Confederate states, and the Post Office denied mailing privileges to newspapers deemed "traitorous" to the federal government.[41] As the war went on, the Post Office also banned newspapers that published unauthorized military news, including troop movements.[42]

Separate from anti-slavery advocacy and wartime regulations, by the mid-nineteenth century, growing attention about public morality combined with the spread of mass-produced printed materials led to calls for new laws to punish overt expressions of sexuality. The first statute prohibiting obscenity was already in place under the Tariff Act passed by Congress in 1842, which authorized officials to confiscate and destroy "obscene or immoral" materials entering the country.[43] During this period, much of early U.S. obscenity law was based on precedent from England. The English Obscene Publications Act in 1857 made it a crime to sell materials that corrupted morals or shocked decency.[44] A subsequent court precedent in 1868, *Regina v. Hicklin*, established a test for obscenity that would be embraced by U.S. courts until 1957.[45] The so-called "Hicklin" test was "whether the tendency of the matter charged as obscenity . . . is to deprave and corrupt those whose minds are open to immoral influences, and into whose hands a publication of this sort may fall."[46]

Congress in 1865 passed the first ban on obscenity in the U.S. mail, after prompting from the Postmaster General, who said he

37. JAMES C. N. PAUL & MURRAY L. SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL 7 (1961).
38. *Id.* at 8.
39. *See id.* at 7–8.
40. FOWLER, *supra* note 33, at 37–38.
41. *Id.* at 44–45.
42. *Id.* at 49.
43. PAUL & SCHWARTZ, *supra* note 37, at 12.
44. *Id.* at 12–13, 15.
45. *See* Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 3 (1960).
46. PAUL & SCHWARTZ, *supra* note 37, at 16.

was concerned about "obscene books and pictures . . . sent to the Army."[47] Congress made minor changes to the list of unmailable items in the next few terms, including illegal lotteries, postcards with scurrilous epithets, poisons, glass, or explosive materials.[48] In 1873, thanks to the advocacy of a young Anthony Comstock, then lobbyist for the New York YMCA's Committee for the Suppression of Vice, Congress expanded the law to declare that no "obscene, lewd, or lascivious" publication may be transmitted in the mail, and any person who knowingly mailed or received these materials were guilty of a crime punishable by up to ten years in prison.[49] The law also prohibited the mailing of articles that dealt with the "prevention of conception or procuring of abortion" and "'any article or thing intended . . . for any indecent or immoral use or nature' or any publication . . . about such articles."[50] The 1873 law was known as the "Comstock Act,"[51] and after its passage, the Post Office Department appointed Comstock as a special agent.[52] Congress continued to make minor changes to the law as new issues arose.[53]

Beginning in the 1870s and continuing into the 1950s, the Post Office operated a system of administrative censorship.[54] The federal courts generally upheld legal challenges.[55] The Supreme Court upheld Congress' constitutional authority to regulate the mail first in 1878 in *Ex parte Jackson*, a case involving a lottery advertisement.[56] The Supreme Court heard at least a dozen cases in the 1890s, including several obscenity cases, upholding the Post Office Department's decision in all but one of the cases.[57] In the early twentieth century, the Post Office expanded categories of unmailable materials again, this time targeting anarchist and "un-American" materials during the era of World War I.[58] For example, in 1917, Postmaster General Burleson banned about sixty newspapers for advocating socialist causes.[59] In 1921, the Supreme Court upheld the mail ban of the *Milwaukee Leader*, under the Espionage Act passed by Congress in 1917, which the Court ruled in *Milwaukee Publishing*

47. *Id.* at 17.
48. FOWLER, *supra* note 33, at 59–60.
49. PAUL & SCHWARTZ, *supra* note 37, at 18–19, 21–22, 24 (quotations omitted).
50. FOWLER, *supra* note 33, at 61–62.
51. PAUL & SCHWARTZ, *supra* note 37, at 24.
52. FOWLER, *supra* note 33, at 62.
53. *Id.* at 63–64.
54. PAUL & SCHWARTZ, *supra* note 37, at 28–29.
55. For early cases, see FOWLER, *supra* note 33, at 68–72.
56. 96 U.S. 727, 728, 736–37 (1878); *see* PAUL & SCHWARTZ, *supra* note 37, at 31.
57. FOWLER, *supra* note 33, at 73.
58. *Id.* at 109–12.
59. *Id.* at 113, 115.

Co. v. Burleson did not violate the Constitution by prohibiting the advocacy of law violations.[60] Similar wartime concerns developed in the 1940s over "subversive propaganda" materials, prompting Congress to create the Office of Censorship in 1941 to review materials entering and leaving the United States.[61]

While the courts initially gave the Post Office Department great latitude in censoring the mail, courts occasionally questioned Post Office Department procedures. For example, in the one notable 1946 case *Hannegan v. Esquire*, the Supreme Court rejected the Post Office's denial of second-class mailing privileges to *Esquire* magazine.[62]

It wasn't until the mid-1950s that the Supreme Court began to more aggressively overturn Post Office Department censorship. This period represented the early years of the "Warren Court," a term affixed to the sweeping period of 1953 to 1969, when former California governor Earl Warren served as chief justice, appointed by Republican President Dwight D. Eisenhower to replace Chief Justice Fred Vinson.[63] Among the Warren Court's most significant legacies include racial desegregation;[64] expansion of due process rights for criminal defendants;[65] and the development of the right to privacy.[66]

Obscenity law was another defining issue for the Warren Court. Between 1957 and 1973, the Court defined and redefined the contours of free expression for sexual communication in dozens of decisions.[67]

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60. 255 U.S. 407, 408–10, 414, 416 (1921); *see* FOWLER, *supra* note 33, at 121.

61. FOWLER, *supra* note 33, at 146.

62. 327 U.S. 146, 148–49, 157–58 (1946).

63. Brian P. Smentkowski, *Earl Warren: Chief Justice of the United States*, ENCYC. BRITANNICA (Nov. 10, 2019), https://www.britannica.com/biography/Earl-Warren [https://perma.cc/8V93-8HT2]; *The Warren Court, 1953–1969*, S. CT. HISTORICAL SOC'Y, https://supremecourthistory.org/timeline_court_warren.html [https://perma.cc/J93U-33JW].

64. *See* Loving v. Virginia, 388 U.S. 1, 2 (1967); Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 483 (1954).

65. *See* Miranda v. Arizona, 384 U.S. 436, 436–37 (1966), Gideon v. Wainright, 372 U.S. 335, 335 (1963); Mapp v. Ohio, 367 U.S. 643, 643 (1961).

66. Griswold v. Connecticut, 381 U.S. 479, 479, 485 (1965).

67. *See* RICHARD F. HIXSON, PORNOGRAPHY AND THE JUSTICES: THE SUPREME COURT AND THE INTRACTABLE OBSCENITY PROBLEM 20 (1996); Rodney A. Grunes, *Obscenity Law and the Justices: Reversing Policy on the Supreme Court*, 9 SETON HALL L. REV. 403, 403 (1978); Kalven, *supra* note 45, at 1, 7, 17; O. John Rogge, *The High Court of Obscenity I*, 41 U. COLO. L. REV. 1, 17–20 (1969); O. John Rogge, *The High Court of Obscenity II*, 41 U. COLO. L. REV. 201, 211–13 (1969); Robert Rosenblum, *The Judicial Politics of Obscenity*, 3 PEPP. L. REV. 1, 1–7, 9–12, 23 (1976). For discussions about individual justice's approaches in individual cases, see SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 120, 122–25, 365–68 (2010); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 231, 236–39 (1979); Daniel A. Farber & John E. Nowak, *Justice Harlan and the First Amendment,* 2 CONST. COMMENT. 425, 426, 443–47, 452–54 (1985); Edward V. Heck, *Justice Brennan and the Development of Obscenity Policy by the Supreme Court*, 18 CAL. W. L. REV. 410, 410–14, 417, 430 (1992).

Justice Harlan reflected on the sheer quantity of obscenity cases in 1968, when he wrote in one decision, "[t]he subject of obscenity has produced a variety of views among members of the Court unmatched in any other course of constitutional adjudication."[68] Three years later, Justice Harlan concluded that the "obscenity problem [is] almost intractable."[69] Beginning with Justice Brennan's new definition of obscenity set forth in *Roth v. United States* in 1957,[70] the justices on the Warren Court wrestled with questions about the definition of obscenity and the implications of various legal tests as the Court narrowed the "obscenity" exception to works of so-called "hardcore pornography," or work that pandered to children or unwilling adults.[71] A major shift occurred with transitions of the Court in the early 1970s, and Chief Justice Burger's decision in *Miller v. California* in 1973 brought the Court's regular obscenity reviews to an end.[72]

In *Roth v. United States*, and its companion case, *Alberts v. California*, the Court for the first time ruled that obscenity "was outside the protection intended for speech and press" under the First and Fourteenth Amendments.[73] Chief Justice Warren assigned the decision to Justice Brennan, who joined the Court the year before. Brennan's decision drew at least the partial support of everyone but Black and Douglas, the two "absolutists" on the Court who opposed censorship and criminalization of sexual expression.[74] In terms of simple political labels, in 1957, the Court's nine justices were described as being split between four liberals—Earl Warren, William Douglas, Hugo Black, and William Brennan—and four conservatives—Felix Frankfurter, Harold Burton, John Marshall Harlan II, and Tom Clark—with the newest justice, Charles Whittaker, as a tiebreaker.[75] The cases involved two booksellers. Roth was convicted in federal court of mailing obscene circulars and books in violation of the federal obscenity statute, while Albert was convicted by a California state judge of violating the state's obscenity law.[76]

In the majority opinion, Justice Brennan said that obscenity had long been thought to be unprotected as free expression.[77] "Although this is the first time the question has been squarely presented to

68. HIXSON, *supra* note 67, at x.
69. *Id.* at ix.
70. 354 U.S. 476, 476, 479, 487, 489 (1957).
71. HIXSON, *supra* note 67, at 74–75.
72. Miller v. California, 413 U.S. 15, 15–16, 36–37 (1973).
73. *Roth*, 354 U.S. at 481, 483.
74. *See id.* at 508; HIXSON, *supra* note 67, at 48.
75. JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT 46 (2001).
76. *Roth*, 354 U.S. at 480–81.
77. *Id.* at 459, 481.

this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press."[78] Justice Brennan wrote that the guarantees of freedom of expression were not absolute in most states at the time the Constitution was ratified, and state laws included exceptions for libel, profanity and obscenity.[79] The Court had embraced that view in earlier precedents, including in *Chaplinksy v. New Hampshire*, in which the Court said "[t]here 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."[80] In "determining that obscenity is not within the area of constitutionally protected speech or press," Brennan said "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[81] Not all sexual expression is unprotected as obscenity, Justice Brennan stressed.[82]

> [S]ex and obscenity are not synonymous . . . The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.[83]

For sexual expression to be obscene, Justice Brennan wrote, it must meet the following test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[84]

Two justices wrote concurrences.[85] Chief Justice Warren concurred with the judgments but wanted a narrower decision simply upholding the prosecutions and the laws under question.[86] Justice Harlan wrote a separate opinion, concurring in part and dissenting in part.[87] He was prescient in his critique, saying that the majority opinion created a sweeping new rule for limits on free expression

78. *Id.* at 481.
79. *Id.* at 479, 482–83.
80. 315 U.S. 568, 571–72 (1942).
81. *Roth*, 354 U.S. at 479, 484–85.
82. *See id.* at 479, 487.
83. *Id.* at 487.
84. *Id.* at 489.
85. *Id.* at 494, 496.
86. *Id.* at 494–96 (Warren, J., concurring).
87. *Roth*, 354 U.S. at 496 (Harlan, J., concurring).

that was vague and unpredictable.[88] "The Court seems to assume that 'obscenity' is a peculiar *genus* of 'speech and press,' which is as distinct, recognizable, and classifiable as poison ivy is among other plants," Justice Harlan wrote.[89] But because "those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves."[90] Harlan would have upheld the judgment in *Alberts*, providing greater deference to state law and state courts to regulate obscenity, and reversed the judgment in *Roth*, saying federal censorship is a more serious constitutional problem and requires greater scrutiny by the courts.[91]

Justice Douglas wrote a dissent, joined by Justice Black, saying the majority opinion "gives the censor free range over a vast domain."[92] The decision would be the first of many in which the two First Amendment "absolutists" criticized their brethren for violating the principles of free expression in their attempt to create rules prohibiting some sexual expression but not others.[93] "When we sustain these convictions, we make the legality of a publication turn on the purity of thought which a book or tract instills in the mind of the reader," Justice Douglas wrote.[94] "I do not think we can approve that standard and be faithful to the command of the First Amendment."[95]

Over the next decade, the justices aimed to clarify the meaning of *Roth* in their review of lower court cases, but their decisions in more than a dozen obscenity cases reflected the broader challenges in regulating increasingly more sexually explicit communications.[96] Changes in the Court's makeup did little to substantively change the balance among justices on the obscenity question.[97]

Justice Brennan again took the lead in significant doctrinal shifts in 1964 when, in *Jacobellis v. Ohio*, the Court overturned the obscenity prosecution of an Ohio theater manager.[98] Brennan's majority decision made three major shifts. First, it cemented the Supreme Court's role in being the final arbiter in determining whether a

88. *Id.* at 496–97.
89. *Id.* at 497.
90. *Id.*
91. *Id.* at 500–08.
92. *Id.* at 508–09.
93. *See* HIXSON, *supra* note 67, at 48, 80.
94. *Roth*, 354 U.S. at 508.
95. *Id.*
96. *See* HIXSON, *supra* note 67, at 20.
97. *Id.* at 42 (noting Justice Potter Stewart replaced Justice Harold Burton in 1958, Justice Byron White replaced Justice Charles Whittaker in 1962, and Justice Arthur Goldberg replaced Justice Felix Frankfurter in 1962).
98. 378 U.S. 184, 185–87 (1964).

particular book, magazine or film was obscene or not.[99] While a three-judge panel had found the film in question obscene, the Court had an obligation to make its own independent judgment on the question.[100] "[I]n 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected," Justice Brennan wrote.[101] Second, Justice Brennan in effect added a new requirement beyond the *Roth* holding by requiring a work to be "utterly without redeeming social importance."[102] Justice Brennan stressed that "material dealing with sex that advocates ideas or that has literary or scientific or artistic value or any other form of social importance," cannot be found to be obscene.[103] Third, Brennan clarified the "contemporary community standards" analysis from *Roth* requires using a national standard, rather than a local community's standards.[104] "It is, after all, a national Constitution we are expounding."[105] In reviewing the film in question, Justice Brennan said the film had won numerous awards and had been shown in one hundred cities in the United States without incident.[106] An "explicit love scene" at the end of the film does not warrant the entire film to be deemed obscene, Justice Brennan concluded.[107]

While six justices agreed to overturn the theater owner's conviction, Justice Brennan's rationales did not generate full support of his colleagues.[108] Justices Black, Stewart, and Goldberg concurred in the judgment but wrote separate opinions, while Justices Warren, Clark, and Harlan dissented.[109] Justice Stewart commented in his concurrence about the "task of trying to define what may be indefinable," saying his intent in obscenity cases is to limit prohibitions to "hard-core pornography."[110] Notably, Justice Stewart wrote:

> I shall not today attempt to further define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I

99. *Id.* at 187–90.
100. *Id.* at 185–87, 189–90.
101. *Id.* at 190.
102. *Id.* at 191.
103. *Id.* at 191.
104. *Jacobellis*, 378 U.S. at 191–95.
105. *Id.* at 195.
106. *Id.* at 196.
107. *Id.*
108. *Id.* at 196–97, 199, 203.
109. *Id.*
110. *Jacobellis*, 378 U.S. at 197.

> know it when I see it, and the motion picture involved in this case is not that.[111]

In dissent, Chief Justice Warren expressed reticence in Justice Brennan's extensions of the *Roth* test, and he would have provided greater deference to the jury's finding of obscenity in the case.[112] Justice Harlan in his dissent emphasized his belief that states should have more leeway to police obscenity than the federal government.[113]

Jacobellis was one of several decisions in the mid-1960s in which the Court signaled even tougher standards for obscenity convictions. In *Memoirs v. Massachusetts*, the Court ruled that actionable obscenity required three elements: "(a) the dominant theme taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive [to] contemporary community standards . . . and (c) the material is utterly without redeeming social value."[114] In 1967, in *Redrup v. New York*,[115] the Court reaffirmed that any material not deemed to be obscene by a majority of justices would be protected expression, leading a clerk of Justice White's to recommend "Reverse on Redrup" as shorthand for overturning obscenity convictions.[116] The Court used the *Redrup* approach to overturn thirty-one obscenity convictions by per curium dismissals in the subsequent five years.[117] But the Court upheld convictions in other cases, leaving continued confusion about the application of standards. In 1969, the Court extended the right to privacy to a case of possession of obscenity.[118] In *Stanley v. Georgia*, the Court ruled that "mere private possession of obscene matter cannot constitutionally be made a crime" under the right to privacy rooted in the Court's 1965 decision in *Griswold v. Connecticut*.[119] The Court in *Stanley* distinguished the case from *Roth* and subsequent obscenity decisions, saying those precedents largely dealt with the "regulation of commercial distribution of obscene material[s]."[120] "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch," Justice Marshall wrote for the majority.[121]

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111. *Id.* (Stewart, J., concurring).
112. *Id.* at 202–03 (Harlan, J., dissenting).
113. *Id.* at 203–04 (Harlan, J., dissenting).
114. 383 U.S. 413, 418 (1966).
115. 386 U.S. 767, 767 (1967).
116. WOODWARD & ARMSTRONG, *supra* note 67, at 192–93.
117. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82 & n.8 (1973).
118. 394 U.S. 557, 568 (1969).
119. *Id.* at 559, 564 (citing Griswold v. Connecticut, 381 U.S. 479, 482 (1965)).
120. *Id.* at 563–64.
121. *Id.* at 565.

Following *Stanley*, the Court saw major changes in its makeup over the next two terms with four appointments by President Richard Nixon.[122] Chief Justice Warren Burger replaced Chief Justice Earl Warren in 1969.[123] In 1970, Justice Harry Blackmun replaced Justice Abe Fortas, who only served four years on the Court.[124] In 1972, Justice Lewis Powell replaced Justice Black, and Justice William Rehnquist replaced Justice John Marshall Harlan II.[125] Both Black and Harlan retired in the fall of 1971 in failing health and died soon after.[126] The justices in the first three years of the Burger Court were equally fractured in its approaches to obscenity cases, but the justices were growing tired of the number of obscenity cases they were reviewing, in part because of the Court's shifting standards and its difficulties in defining obscenity.[127] In a series of cases, Justice Brennan and Chief Justice Burger volleyed to attract a majority for their positions.[128] Justice Brennan was ready to adopt a more permissive position, while Chief Justice Burger sought a more restrictive position.[129]

In *Miller v. California* in 1973, Chief Justice Burger found success in stopping the "Reverse on Redrup" practice.[130] The case involved the unsolicited mailing of five brochures containing explicit advertisements for pornographic books and films to a restaurant in Newport Beach, California that were opened by the manager and his mother.[131] The manager complained to police, and prosecutors charged the sender, Marvin Miller, under the state's obscenity law.[132] A jury convicted him.[133] In reviewing what Chief Justice Burger called the "somewhat tortured history of the Court's obscenity decisions," he noted that "apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power."[134] Chief Justice Burger had convinced Justices White, Blackmun, Powell,

122. *See* HIXSON, *supra* note 67, at 96–100.
123. *Id.* at 98.
124. *Id.* at 100.
125. *Id.*
126. MURDOCH & PRICE, *supra* note 75, at 161.
127. MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 192–99 (2016).
128. WOODWARD & ARMSTRONG, *supra* note 67, at 192–204.
129. GRAETZ & GREENHOUSE, *supra* note 127, at 196–98.
130. 413 U.S. 15, 18 (1973).
131. *Id.*
132. *Id.* at 16, 18.
133. *Id.* at 15.
134. *Id.* at 20, 22.

and Rehnquist to agree to a restatement of the obscenity test, requiring the trier of fact to review:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[135]

The majority rejected the "*utterly* without redeeming social value test," but added a requirement that the prohibited expression "must be specifically defined by the applicable state law."[136] Chief Justice Burger stressed that under the new test, "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law."[137] Justice Douglas dissented as usual, as did Justice Brennan, joined by Justices Stewart and Marshall.[138]

The *Miller* decision significantly reduced the number of obscenity cases accepted by the Court, keeping intact the central holding of *Roth*.[139] Justice Brennan's view—that the long road from *Roth* to *Miller* left him convinced that censorship through obscenity law should largely be abandoned—quick fell out of favor under the Burger Court.[140]

The three cases discussed in detail below unfolded in the years immediately following to the *Roth* ruling, at a time when the Supreme Court was refining its approaches to and definitions in obscenity law.

II. NARRATIVE CASE STUDIES

A. One, Inc. v. Olesen

In 1950, Harry Hay launched the Mattachine Society, which would become one of the first and most significant homophile rights organizations in American history.[141] Hay believed that homosexuals

135. *Id.* at 16, 24.
136. *Miller*, 413 U.S. at 24.
137. *Id.* at 27.
138. *Id.* at 16.
139. WOODWARD & ARMSTRONG, *supra* note 67, at 403.
140. STERN & WERMIEL, *supra* note 67, at 365–68.
141. D'EMILIO, *supra* note 10, at 58. On the founding of the Mattachine Society, see

were an oppressed cultural minority and that an organization was needed to 1) "unify homosexuals isolated from their own kind;" 2) educate the homosexual and heterosexual populace; and 3) "provide leadership to the whole mass of social deviates."[142] For much of 1951 and 1952, the Mattachine Society held secret meetings and discussion groups in private homes, drawing men from fear and stigma into rich discussions about history, culture, and society.[143] A small but dedicated following existed, and new members came each week.[144]

The group also extended itself into legal and political advocacy, when in the spring of 1952, Hay and other Mattachine members mobilized in support of friend Dale Jennings after he was arrested for lewd and dissolute behavior.[145] The group helped get Jennings a lawyer and created a non-profit group called the Citizens' Committee to Outlaw Entrapment to raise money and draw attention to the trial and similar police arrests.[146] With Mattachine's help, Jennings received national attention when a jury deadlocked and the case was dismissed.[147] Jennings had admitted his homosexuality, but accused the police of lying and entrapment.[148] It was Mattachine's first legal victory, and it invigorated all those that were involved.[149]

Despite the Jennings victory, by late 1952, fissures began to erupt inside Mattachine.[150] A growing philosophical divide occurred between Hay's cultural model of homosexuality and Jenning's libertarian model of sexual freedom and privacy.[151] Also, members

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also VERN L. BULLOUGH, BEFORE STONEWALL: ACTIVISTS FOR GAY AND LESBIAN RIGHTS IN HISTORICAL CONTEXT 77–80 (2002); LILLIAN FADERMAN & STUART TIMMONS, GAY L.A.: A HISTORY OF SEXUAL OUTLAWS, POWER POLITICS, AND LIPSTICK LESBIANS 110–13 (2006); HARRY HAY, RADICALLY GAY: GAY LIBERATION IN THE WORDS OF ITS FOUNDER 3–4 (1996); JIM KEPNER, ROUGH NEWS—DARING VIEWS: 1950S PIONEER GAY PRESS JOURNALISM 3 (1998); CRAIG M. LOFTIN, LETTERS TO ONE: GAY AND LESBIAN VOICES FROM THE 1950S AND 1960S 2 (2012); CRAIG M. LOFTIN, MASKED VOICES: GAY MEN AND LESBIANS IN COLD WAR AMERICA 19 (2012) [hereinafter LOFTIN, MASKED VOICES]; MARTIN MEEKER, CONTACTS DESIRED: GAY AND LESBIAN COMMUNICATIONS AND COMMUNITY, 1940S–1970S 37–39 (2006); JAMES T. SEARS, BEHIND THE MASK OF THE MATTACHINE: THE HAL CALL CHRONICLES AND THE EARLY MOVEMENT FOR HOMOSEXUAL EMANCIPATION 147–55 (2006); STUART TIMMONS, THE TROUBLE WITH HARRY HAY: FOUNDER OF THE MODERN GAY MOVEMENT 142–56 (1990); C. TODD WHITE, PRE-GAY LA: A SOCIAL HISTORY OF THE MOVEMENT FOR HOMOSEXUAL RIGHTS 16–19 (2009).

142. WHITE, *supra* note 141, at 17–18.

143. D'EMILIO, *supra* note 10, at 64–69.

144. *Id.* at 67–68.

145. *Id.* at 70–71.

146. *Id.*; *see also* LILLIAN FADERMAN, THE GAY REVOLUTION: THE STORY OF THE STRUGGLE 64–65 (2015).

147. D'EMILIO, *supra* note 10, at 71; FADERMAN, *supra* note 146, at 65.

148. D'EMILIO, *supra* note 10, at 70–71; FADERMAN, *supra* note 146, at 65.

149. D'EMILIO, *supra* note 10, at 71; FADERMAN, *supra* note 146, at 65.

150. D'EMILIO, *supra* note 10, at 76–87.

151. WHITE, *supra* note 141, at 28–29.

were growing frustrated by the secrecy of the cell-like structure and potential Communist ties by Mattachine leaders.[152] A particularly damning article in the *Los Angeles Mirror* in March 1953, by journalist Paul Coates, alleged that as many as 200,000 homosexuals in the Los Angeles area could be building alliances with other subversive groups, creating a potentially "dangerous political weapon."[153] Mattachine members demanded that explicit connections between the Communist Party be severed.[154] In conventions in the spring and fall of 1953, the membership did just that, ousting Hay and other founding members.[155]

The idea of a homosexual magazine came from one of the Mattachine discussion groups.[156] On October 15, 1952, members hatched the idea at the home of Dorr Legg,[157] who would go on to serve as ONE's business manager for its entire corporate life and would become the first homosexual to receive a salary for his advocacy work.[158] Over the next weeks, a small group of men—including Legg, Jennings, Rowland, as well as Martin Block and Don Slater—discussed their plans for content and production, met with a lawyer, and settled on the name ONE, based on a passage from a Thomas Carlyle essay: "Of a truth, men are mystically united: a mystic bond of brotherhood makes all men one."[159]

Because of its broad national reach and high visibility, along with an unprecedented stability of fourteen years of publication from 1953–1967, *ONE Magazine* became the voice of the homophile movement of the 1950s and 1960s.[160] Legg ran the day to day operations for almost the entire 14 years of the magazine's existence.[161] The magazine published monthly for most of its 14 years, although its schedule was occasionally interrupted because of financial problems.[162] *ONE* averaged a monthly circulation of between 3,000 to 5,000 issues.[163] In the beginning, the magazine was available in only a handful of bookstores and newsstands, and the rest of the readership was through subscriptions.[164] Over time, the list of newstands

152. D'EMILIO, *supra* note 10, at 75–76.
153. *Id.* at 76.
154. *Id.* at 75–80.
155. *Id.* at 79–80; FADERMAN, *supra* note 146, at 71–72.
156. D'EMILIO, *supra* note 10, at 72–73.
157. WHITE, *supra* note 141, at 29–30.
158. D'EMILIO, *supra* note 10, at 87–88; LOFTIN, MASKED VOICES, *supra* note 141, at 21.
159. *See* BULLOUGH, *supra* note 141, at 88; SEARS, *supra* note 141, at 166–67; WHITE, *supra* note 141, at 34.
160. LOFTIN, MASKED VOICES, *supra* note 141, at 17–20, 41.
161. *Id.* at 21.
162. *See id.* at 34, 38.
163. *Id.* at 20.
164. *Id.*

and bookstores expanded, and the editors advertised friendly vendors on the back page of each issue.[165] *ONE Magazine*'s passionate and trailblazing editors and writers addressed a wide range of psychological, political, legal, historical and medical issues, contributing a public discussion of homosexual issues from the homosexual viewpoint—something never before done in the United States. The magazine helped develop a sense of gay identity and community among its disparate readers, many of whom articulated the fear and excitement it took just to buy or subscribe to *ONE*. The magazine's stated aim was to deal "primarily with homosexuality from the scientific, historical, and critical point of view."[166] Each issue contained essays, news articles and briefs, organizational reports, fiction, poetry, book excerpts, reviews, letters, speeches, and advertisements.[167] Common themes were identity, love, subculture, social prejudice, police harassment, discrimination, civil rights and liberties, medical and psychological views, social movements, history, literature, and international issues.[168] The purpose of many articles was to expose injustices, provoke discussions, argue for equal treatment, and open a forum for ideas.

Within months of launching, ONE Magazine was on the radar of government officials.[169] In August 1953, Los Angeles postmaster Otto Olesen sent agents to the downtown offices of One, Inc.[170] The agents confiscated that month's issue of ONE Magazine, which carried a cover story with the headline, "Homosexual Marriage?"[171]

In response to the seizure of the August 1953 issue, the editors sought the counsel of a 29-year-old heterosexual civil rights lawyer two years out of Loyola Law School.[172] Eric Julber, who attended undergraduate school at UCLA and worked on the student newspaper, the *Daily Bruin*, thought the case had the potential to be precedent setting and agreed to represent the magazine pro bono, even though he had little experience with homosexuals.[173] "I told them, 'I never had anything to do with gay people, know nothing about that way of life. . . . But I do know about one thing—civil liberties and the right to be free from censorship.'"[174] He said the case could be a "landmark" case that would expand his reputation as a civil

165. LOFTIN, MASKED VOICES, *supra* note 141, at 37.
166. *Id.* at 34.
167. *Id.* at 31, 34–38.
168. *Id.*
169. FADERMAN &TIMMONS, *supra* note 141, at 117–18.
170. *Id.*
171. *Id.*
172. *Id.* at 118.
173. *Id.*
174. *Id.*

rights attorney.[175] After reviewing the decision to confiscate the magazine, the Post Office's solicitor determined the issue as not obscene, and the Post Office returned the copies.[176] The editors prematurely declared victory over the Post Office under a bold heading, "ONE is NOT GRATEFUL," in the October 1953 edition.[177] Despite their victory, the editors were more careful about what they published.[178] Julber continued to consult with the editors about their legal vulnerabilities despite criticism from his fellow lawyers that "[p]eople are going to think you're one of them."[179]

The impetus for the Post Office's next actions was likely a letter from Senator Alexander Wiley.[180] While the junior senator from Wisconsin, Joe McCarthy, was busy connecting homosexuality and communism as major threats to the stability of the United States, the senior senator from the state was concerned as well.[181] In April 1954, Senator Wiley sent a letter to Postmaster General Arthur Summerfield to complain that the magazine shouldn't be allowed to be distributed by the Post Office.[182]

In the October 1954 issue—with a cover headline reading, "You Can't Print It!"—Julber justified and explained his role as an internal censor.[183] "[T]here is one extreme school of legal thought that would say that *ONE*, merely by its existence, is illegal. That reasoning would run as follows: Homosexual acts are made crimes in every state of the union. *ONE* is published specifically for homosexuals. Therefore, *ONE* is a magazine for criminals."[184] Julber explained that the magazine's editors risked a $5,000 fine and/or five years in prison if convicted of distributing "obscene, lewd, lascivious or filthy" material, so it was imperative for them to avoid "stimulating 'sexual desires'" in the pages of their magazines.[185] He laid forth some rules and examples:

> *ONE* cannot print the following: lonely hearts ads, cheesecake art or photos, descriptions of sexual acts or the preliminaries thereto. . . . Permissible: 'John was my friend for a year.' Not

175. FADERMAN &TIMMONS, *supra* note 141, at 118.
176. *Id.*
177. WHITE, *supra* note 141, at 48–49.
178. FADERMAN &TIMMONS, *supra* note 141, at 118.
179. *Id.*
180. *See* DOUGLAS M. CHARLES, HOOVER'S WAR ON GAYS: EXPOSING THE FBI'S "SEX DEVIATES" PROGRAM 180, 185 (2015).
181. *Id.* at 180, 182, 185.
182. *Id.* at 180.
183. MURDOCH & PRICE, *supra* note 75, at 31.
184. *Id.* at 31–32.
185. *Id.*

> permissible: 'That night we made mad love'; descriptions of homosexuality as a practice which the author encourages. . . . Characters cannot rub knees, feel thighs, hold hands, soap backs or undress before one another.[186]

Ironically, it was the same October 1954 issue that would serve as the basis of a landmark Supreme Court decision. The government deemed three items in the issue as obscene: a short story, a poem and an advertisement.[187]

ONE sought a court judgment deeming the magazine mailable and an injunction against similar actions by the postmaster,[188] after the Los Angeles postmaster deemed the October 1954 issue obscene in violation of U.S. Code Section Title 18, Section 1461, which bans "every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character."[189]

Eleven months after the Post Office's seizure, on Sept. 16, 1955, Julber filed a complaint in U.S. District Court for Southern District of California.[190] The filing delay was compounded by money woes—while Julber was volunteering his services the editors still needed money for court filings and copying costs—and by Julber's search of potential co-counsel.[191] One of his calls was to the American Civil Liberties Union (ACLU), who he thought would be interested in a potentially precedent setting press censorship case.[192] "But, believe it or not, when I said it involved a homosexual magazine, they said they wouldn't get involved. I was astounded," Julber told journalists Joyce Murdoch and Deb Price.[193] Going at the case alone, Julber's complaint argued that *ONE* was not obscene, lewd, lascivious or filthy, but was "informative and an exercise of privileged free speech and communication."[194]

Briefs filed by *ONE* and the government presented contrasting views of the content of the three items under question. Max F. Deutz and Joseph D. Mullender, Jr., assistant U.S. attorneys based in Los Angeles, argued that the only question for the court was whether the materials in ONE fit the statutory definition of nonmailable

186. *Id.* at 32.
187. *Id.* at 32–33.
188. *Id.* at 31; *see also* CHARLES, *supra* note 180, at 185.
189. 18 U.S.C.A. § 1461 (1994); MURDOCH & PRICE, *supra* note 75, at 31–32.
190. MURDOCH & PRICE, *supra* note 75, at 31; *see also* CHARLES, *supra* note 180, at 185.
191. MURDOCH & PRICE, *supra* note 75.
192. *See id.*
193. *Id.* at 31.
194. Petition for Writ of Certiorari at 2, One, Inc. v. Olesen, 355 U.S. 371 (1958) (No. 290).

matter.[195] The federal statute requires that "[e]very obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any Post Office or by any letter carrier."[196] The government argued that "Sappho Remembered" is "lustfully stimulating to the average homosexual reader," the "Lord Samuel and Lord Mantagu" poem is obscene because of the "filthy words contained in it," and the advertisement for the Swiss publication is nonmailable "because it gives information for obtaining obscene material."[197]

U.S. District Court Judge Thurmond Clarke accepted the government's arguments in their entirety and ruled in the government's favor on a motion for summary judgment.[198] "The suggestion advanced that homosexuals should be recognized as a segment of our people and be accorded special privilege as a class is rejected," the judge wrote, denying ONE's request for judgment and injunctions against further censorship.[199] ONE's editors assailed the decision in print, arguing that the judge presented no support for his claims that the Sappho story was "obviously calculated to stimulate the lust of the homosexual reader" and criticizing the judge for suggesting that homosexuals were seeking "special rights" while they were merely seeking to communicate to each other through the Post Office.[200]

While *ONE's* editors and lawyer prepared for their appeal to the Ninth Circuit Court of Appeals, unbeknownst to them, the FBI was investigating potential criminal obscenity charges against *ONE*.[201] The extent of this investigation was only made known recently, when the FBI released more than 900 pages of its files on Mattachine and ONE.[202] A week after the district court ruling against *ONE*, FBI Director J. Edgar Hoover formally requested that the Department of Justice prosecute *ONE* for obscenity, noting that *ONE* is a magazine "of primary interest to sex deviates," and that a federal judge upheld the Post Office department solicitor's determination that the magazine violated federal mail statutes.[203]

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195. Brief for the Defendant, One, Inc. v. Olesen, 241 F.2d 772 (S.D. Cal. 1957) (No. 18764-TC).

196. 18 U.S.C.A. § 1461.

197. Brief for the Defendant, *supra* note 195, at 3.

198. *See* CHARLES, *supra* note 180, at 185–86.

199. The decision was not reported but published in ONE Magazine in its March 1957 issue. *See* David S. Savage, *Supreme Court Faced Gay Rights Decision in 1958 Over 'Obscene' Magazine*, L.A. TIMES (Jan. 11, 2015), https://www.latimes.com/nation/la-na-court-gay-magazine-20150111-story.html [https://perma.cc/68Q7-666K].

200. WHITE, *supra* note 141, at 78.

201. *See* CHARLES, *supra* note 180, at 185–89.

202. *Id.*

203. *Id.*

In his thirty-four-page appeal brief to the Ninth Circuit Court of Appeals, Julber argued that the postmaster's decision to exclude the magazine from the mail was "arbitrary, capricious and an abuse of discretion" as well as unsupported by evidence" and the trial court's decision was "erroneous as a matter of law and fact."[204] His brief was divided into six general arguments. First, the postmaster and district court judge ignored several prior obscenity precedents which require the government to consider the work as a whole, and the intent and sincerity of the authors, in determining whether the material was obscene.[205] Julber's brief then describes each item in the October 1954 issue, including the statement of publishers' purposes on page two: to discuss "homo-sexuality from the scientific, historical and critical point of view . . . to promote among the general public an interest, knowledge and understanding . . . [and] to promote the integration into society."[206]

Second, none of the magazine's articles are obscene, lascivious or filthy, Julber argued.[207] More than half of the brief focused on dissecting all possible offensive passages.[208]

A critical reading and annotation of the Sappho short story spans six pages of the brief. Julber identified nine passages from the story that might be considered provocative, provides their text, and then an analysis and argument about each.[209] The story as published in ONE included the following:

> Pavia closed the door of their suite behind them, tossed her coat on a chair and gently drew the girl to her. 'Forgiven?' she asked at last. She touched the delicate pulse beat beneath the light golden hair on the child-like temple. 'Will there ever be a day when you won't blush when I do that,' she murmured.[210]

Julber provided his analysis for the Court as follows:

> This is the description of one woman caressing another's hair, in a tender and moving fashion. There is nothing obscene in the description of the act, and the question then arises whether such an act itself embodied in a story is an obscene act.

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204. Appellant Opening Brief at 4, One, Inc. v. Olesen, 241 F.2d 772 (9th Cir. 1957) (No. 15139).
205. *Id.* at 5.
206. *Id.* at 6.
207. *Id.*
208. *Id.* at 6–20.
209. *Id.* at 7–12.
210. Appellant Opening Brief, *supra* note 204, at 8.

> It is respectfully submitted that such an episode is not obscene. Countless examples may be found in literature, drama and motion pictures where one woman lovingly caresses another. In "Psychology of Women," Helene Duetsch, Grune and Stratton, 1944, the classic psycho-analytical text on the subject, the author quotes the author Collette, in "La Vagabonde":
> "Two women embracing are a melancholy and touching picture of two weaknesses; perhaps they are taking refuge in each other's arms in order to sleep there, weep, flee from man who is often wicked, and to taste what is more desired than any pleasure, the bitter happiness of feeling similar, insignificant, forgotten."
> There is nothing obscene in such an act, if it is done or described with delicacy.[211]

The brief continued in this fashion, dissecting the aspects of the three items deemed obscene, and drawing analogies and parallels to other writings.[212] The brief also argues that the small advertisements for other periodicals, found on pages 29–30 of the issue, are not for materials that are obscene or that have ever been adjudicated obscene.[213] Additionally, the advertisements and associated materials were reviewed by legal counsel before publications and determined not to be obscene.[214] "It is respectfully submitted that in the absence of such a judicial determination, any charge of 'obscenity' is purely opinion, and not even admissible as evidence," Julber wrote.[215]

Julber's third argument was that the magazine as a whole was "not obscene, lewd, lascivious, or filthy."[216] Quoting from past Supreme Court and appeals court precedents, Julber argued that the "dominant tone of the work is the controlling factor; incidental stimulation is irrelevant."[217] A reader of the entire issue of *ONE* Magazine would conclude that the magazine as a whole is "serious, responsible and sincere," Julber wrote.[218] "The dominate tone of the magazine is one of sincerity. It is an attempt to grapple with a social problem of the deepest order in terms comprehensible and palatable to laymen. It strives to create understanding of an extremely knotty social problem."[219]

Fourth, Julber argued that the Post Office was depriving *ONE* Magazine of equal protection of the laws by strict enforcement of a statute not enforced against other publishers, citing congressional

211. *Id.* at 8–9.
212. *Id.* at 9–20.
213. *Id.* at 20.
214. *Id.* at 20–21.
215. *Id.* at 21.
216. Appellant Opening Brief, *supra* note 204, at 24.
217. *Id.* at 24 (citing Walker v. Popenoe, 149 F.2d 511, 512 (D.C. Cir. 1945)).
218. *Id.* at 25.
219. *Id.* at 25–26.

testimony in 1952 from Post Office inspectors about their efforts to investigate advertisers of potential obscene materials but not the publisher of the advertisements themselves.[220] Fifth, Julber argued that obscenity law requires that a work must be lewdly stimulative to the average reader, not those of a particular class.[221] And sixth, Julber argued that a comparison of other contemporary publications shows *ONE* is not obscene under prevailing literary standards.[222] Julber attached to his brief a fifteen-page appendix, listing dozens of other publications for sale at book stores, drug stores, newsstands and at public libraries.[223] These works "all deal with the same subject matter as is dealt with in the instant work, to wit, homosexuality," Julber argued.[224]

> The fact that these books and magazines are offered for public sale—and even carried in our public libraries—and some of which have the status of minor classics, indicate that, under current prevailing standards of public and literary morality, the matter contained in the October, 1954, issue of 'ONE' is far from being 'obscene', and in fact, is innocent and inoffensive.[225]

Julber's brief made a strong case that *ONE* was well within the mainstream of the popular press of the day and careful to avoid sexually explicit language and material. The brief also used the legal precedents of obscenity law to argue that the district court made serious errors in its ruling.

However, Julber's arguments failed to persuade the Ninth Circuit, which on February 29, 1957, upheld the district court's ruling.[226] While attesting to the importance of freedom of the press—"[a]t the outset it is well to dispel any thought that this court is its brothers keeper as to the type of reading to be indulged in"[227]—the court nonetheless found *ONE* Magazine "morally depraving and debasing."[228]

In their analysis, the Ninth Circuit judges acknowledged the difficulties of policing public morals, but they had no problem in determining that *ONE* Magazine was in violation. "[W]e are not unmindful of the fact that morals are not static like the everlasting hills, but are like the vagrant breezes to which the mariner must ever trim

220. *Id.* at 28.
221. *Id.* at 31.
222. Appellant Opening Brief, *supra* note 204, at 33.
223. *Id.* at a–o.
224. *Id.* at 33.
225. *Id.* at 33–34.
226. One, Inc. v. Olesen, 241 F.2d 772,779 (9th Cir. 1957), *rev'd* 355 U.S. 371 (1958).
227. *Id.* at 774.
228. *Id.* at 778.

his sails," the court wrote.[229] The court must apply the postal laws banning "obscene, lewd, lascivious, filthy and indecent materials" by defining such expressions "in the light of today's moral dictionary, even though the definition is at best a shifting one."[230] Drawing from several judicial precedents, the court focused on the purpose of the law: to protect sexual purity.[231] Because the court believed *ONE* Magazine's material undermined this public morality by pandering to sexual impurity, the Post Office was justified in prohibiting it from the mail.[232]

The court noted the magazine's stated "lofty ideals" of "dealing primarily with homosexuality from the scientific, historical and critical points of view," but concluded that it failed to live up to high standards.[233] Specifically, the court called the Sappho story "nothing more than cheap pornography calculated to promote lesbianism," the English poem "dirty, vulgar and offensive to the moral senses," and the advertisement a way for individuals to obtain more obscenity.[234] Additionally, the court found other items in the magazine to be "obscene and filthy," including pictures, sketches, and another short story.[235] "The magazine under consideration, by reason of the articles referred to, has a primary purpose of exciting lust, lewd and lascivious thoughts and sensual desires in the minds of the persons reading it," the court concluded, denying the plaintiffs any relief and determining no violations of First Amendment or equal protection rights.[236] "Social standards are fixed by and for the great majority and not by or for a hardened or weakened minority."[237]

Appealing the U.S. Supreme Court, One, Inc.'s attorney filed a nine-page petition for a writ of certiorari on June 18, 1957.[238] Julber's brief noted the novelty of the case when he wrote "[t]here are no decisions of this Court, or, in fact, of any Court of Appeals, which deal with the matter of the depiction of homosexuality in literature, and the bounds and extent of the permissible depiction and discussion."[239] The petition framed four legal questions for the Court to consider: 1) Is the October 1954 issue of *ONE* lewd, lascivious, obscene or filthy

229. *Id.* at 775.
230. *Id.*
231. *Id.* at 775–77.
232. *One, Inc.*, 241 F.2d at 777.
233. *Id.*
234. *Id.*
235. *Id.* at 777–78.
236. *Id.* at 778–79.
237. *Id.*
238. Petition for Writ of Certiorari at 1–9, One, Inc. v. Olesen, 355 U.S. 371 (1958) (No. 290).
239. *Id.* at 6.

and therefore "non-mailable" under Title 18, Section 1461 of the U.S. administrative code?; 2) Did the postmaster and lower courts correctly gauge the "moral tone of the community" in determining *ONE* was in violation of the law, or did they apply a stricter standard than other publishers, thereby depriving them of equal protection and due process of law?; 3) Does a "good faith" exception exist to liability for advertisements where lewd material may conceivably be obtained; and 4) Was *ONE* deprived of equal protection of the law by its lack of enforcement of similar publications?[240]

Julber's petition argued that the Ninth Circuit's "grave restriction of the right of free discussion and expression in literature," decided important questions of federal law which had not been settled by the Supreme Court.[241]

By ruling that *ONE* was non-mailable because of its discussions of homosexuality, the appellate court was treating homosexual material by a different standard than other material freely available.[242] Julber said the lower courts have assumed "that the mere depiction of homosexuals or homosexual problems in literature is 'lustful' or 'stimulating' in such a manner as to render the literary work 'obscene.'"[243] Other publications that deal with similar subject matter even more explicitly have not faced similar sanctions, suggesting *ONE "*has been singled out and discriminated against and made the subject of a unique and strict application of the statute, thus denying to it equal protection of the laws and due process of law."[244] To support his argument, Julber pointed to the lengthy appendix he filed with the lower courts—of quotes from magazines and books that should be used to assess the "moral tone of the community."[245]

Julber also argued the decision established a more repressive precedent than other circuits, citing cases involving advocacy of polygamy and nudism.[246] This disparate treatment among federal circuits provided an important impetus for Supreme Court review. He pointed to five appellate cases that "permit and encourage a freer discussion of human and social problems than does the repressive and restrictive view now taken by the Ninth Circuit Court of Appeals."[247] Julber summarized the cases and argued that while

240. *Id.* at 2–3.
241. *Id.* at 6.
242. *Id.*
243. *Id.*
244. Petition for Writ of Certiorari, *supra* note 238, at 6.
245. *Id.* at 5.
246. *Id.* at 8.
247. *Id.* at 6–7 (citing Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945); Consumers Union v. Walker, 145 F.2d 33 (D.C. Cir. 1944); Parmelee v. United States, 113 F.2d 729

those ideas may be "distasteful and disgusting to the average reader," they were nonetheless not obscene under federal law.[248] "Works which attempt to elucidate, explain or grapple with thorny and fundamental human problems should be extended great latitude of expression, since they often, in the last analysis, serve humanity's ends," Julber wrote.[249] The literary works of *ONE*:

> are works dealing with and attempting to explain to the layman problems of human life that have plagued the human race through the centuries. Such an attempt to cope with a fundamental human problem should be extended every legal latitude and should be weighed with more care than that devoted by the District Court or the Court of Appeals for the Ninth Circuit in the instant case.[250]

Finally, Julber noted that in *ONE* Magazine "there is nowhere . . . any advocacy of homosexuality as a way of life, but only a discussion of the problems, social, economic, and personal, which confront those persons possessed of that particular neurosis, or complexion."[251]

Julber knew that the Court had never taken a case involving the rights of homosexuals, but he was hopeful, he later recalled, that "a rational view of the matter would prevail and 20th-century standards of free discussion of human problems would be upheld."[252]

The U.S. government urged the Supreme Court to reject the case.[253] The government's five-page opposition brief on behalf of Los Angeles Postmaster Otto Olesen was filed on August 15, 1957 by J. Lee Rankin, the U.S. Solicitor General, and also signed by Geo S. Leonard, acting assistant attorney general, and two attorneys for the Department of Justice, Samuel D. Slade and Hershel Shanks.[254] The government characterized the legal question as, "[w]hether the October 1954 issue of 'One, The Homosexual Magazine,' is obscene and therefore non-mailable under 18 U.S.C. 1461."[255]

The government acknowledged that the statute's terms defining "obscen[ity] and filthy matter have been recognized as necessarily

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(D.C. Cir. 1940); United States v. One Book Called Ulysses, 72 F.2d 705 (2d Cir. 1934); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930)).

248. *Id.* at 8.

249. *Id.*

250. Petition for Writ of Certiorari, *supra* note 238, at 8.

251. *Id.* (emphasis omitted).

252. MURDOCH & PRICE, *supra* note 75, at 41.

253. Brief for the Respondent in Opposition at 3–5, One, Inc. v. Olesen, 355 U.S. 371 (1958) (No. 290).

254. *Id.* at 5.

255. *Id.* at 2.

lacking precision."[256] The government noted the *Roth* precedent requires the trier of fact to determine "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[257] In doing so, the brief said, the "inquiry to be made is not solved by the application of a mathematical formula or by the use of a slide rule."[258]

The government's analysis of the lower courts decisions consisted of two paragraphs.[259] The brief said the appellate court's "method of decision" was consistent with the *Roth* standard.[260] The lower courts stated they considered "the magazine as a whole so as to determine its basic or primary purpose," and "examin[ed] in detail certain stories, a poem, an advertisement, and the material thus advertised."[261] The brief then included three sentences from the appellate court's decision stating the magazine's primary purpose was "exciting lust, lewd and lascivious thoughts and sensual desires in the minds of the persons reading it," included "morally depraving and debasing" articles "sufficient to label the magazine as a whole, obscene and filthy."[262] The brief concluded that "[t]here is no need for this Court to review these findings."[263]

In a lone footnote, the government said that the subject matter of homosexuality was not the sole reason for denying mail privileges to the magazine.[264] The footnote also stated the magazine failed to meet its mission of dealing "with homosexuality from the scientific, historical, and critical point of view."[265] "On the contrary," the government said, "the material in the magazine appears primarily to deal with sex—openly and covertly, by drawings and words—'in a manner appealing to [the] prurient interest' of those the magazine tries to reach. The emphasis is, in the main, not on the philosophical, scientific, or educational."[266]

While the decision-making of Supreme Court justices is cloaked in secrecy, some insights come from the justice's private notes and views of the appeal, reported by journalists Joyce Murdoch and Deb Price in their 2001 book *Courting Justice: Gay Men and Lesbians v.*

256. *Id.* at 4.
257. *Id.* (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).
258. Brief for the Respondent in Opposition, *supra* note 253, at 4.
259. *Id.* at 4–5.
260. *Id.* at 4.
261. *Id.*
262. *Id.* at 4–5.
263. *Id.* at 5.
264. Brief for the Respondent in Opposition, *supra* note 253, at 5 n.1.
265. *Id.* (quoting One, Inc. v. Olesen , 241 F.2d 772, 777 (9th Cir. 1957)).
266. *Id.* at 5 n.1 (alteration in original) (quoting Roth v. United States, 354 U.S. 476, 487 (1957)).

the Supreme Court.[267] According to the docket sheets of several justices, the justices discussed the case at its Friday conference on October 9, 1957.[268] Only one justice, Tom C. Clark, was outright opposed to taking the case, according to the docket sheets of Justice Brennan.[269] Several justices noted the *ONE* case would be held while they considered a case raising similar questions, *Sunshine Book Co. v. Summerfield*.[270]

After also accepting *Sunshine*, several law clerks argued to their justices that *ONE* Magazine was being held to a different legal standard simply because it was about homosexuality.[271] One clerk wrote to Chief Justice Warren, "were the contributions dealing with heterosexual matters, it is doubtful the community would find them prurient."[272] Chief Justice Warren's clerk recommended granting certiorari.[273] In the cert memo, the clerk wrote that *One*, Inc. "is a corporation engaged in the printing and distributing of the magazine 'One,' whose purpose is to provide a means of expression for homosexuals."[274] After summarizing the lower court decisions, the clerk said the appropriate legal standard governing the case was set forth in the Roth decision, and the clerk wrote that it "is difficult to conclude the [Ninth Circuit] applied this standard."[275]

Warren's clerk focused on two deficiencies in legal analysis. First, the clerk critiqued the lower court's application of the "average person" test in Roth, saying they instead adopted a different standard that assessed "the effect of the material on the potential reader, or other specific group, rather than the 'average person.'"[276] The clerk cited as evidence the lower court's remark "that certain advertisements in the magazine are obscene, not because the community standard is injured, but because the purpose of the advertisements is to reach homosexuals."[277] Second, the clerk emphasized that the lower courts analyzed three allegedly obscene items in the magazine in isolation rather than considering the work as a whole, as Roth requires.[278] "While the magazine may not have the high

267. MURDOCH & PRICE, *supra* note 75, at 45.
268. *Id.*
269. *Id.*
270. *Id.* at 45–46.
271. *Id.* at 42.
272. Cert Memorandum from the United States Supreme Court Justice Earl Warren's law clerk to Justice Earl Warren, One, Inc. v. Olesen, 355 U.S. 371 (1958) (on file with the Library of Congress) [hereinafter Warren Cert Memorandum].
273. *Id.* at 4.
274. *Id.* at 1.
275. *Id.* at 2.
276. *Id.*
277. *Id.* at 3.
278. Warren Cert Memorandum, *supra* note 272, at 3.

educational and scientific flavor [petitioner] would give it, it is highly questionable whether these three pieces so mar the whole publication. It is even questionable whether the pieces taken individually could be classified as obscene and not just bad taste," the clerk wrote.[279]

Warren's clerk concluded that the real offense is the topic of homosexuality. "Though the [lower courts'] opinion denies this, it is really the subject matter in general which appears troublesome below. Were the contributions dealing with heterosexual matters, it is doubtful the community would find them prurient," the clerk wrote.[280]

> Possibly because the topic is homosexuality, where the community has expressed an aversion, a stricter standard is available even under Roth in determining 'obscenity' under the community standard, e.g., that which is homosexual and non-educational has a greater tendency, by its very nature, to be prurient. But the (appellate court) does not even apply this test. I would suggest that since Roth was unavailable to the court below, that this case be reversed and remanded for reconsideration in light of Roth. In other respects, the issues involved are worthy of argument here.[281]

Justice Harold H. Burton's personal papers contain a four-page cert memo he received from his law clerks, recommending that the Court take the case and remand it back to the Ninth Circuit in light of the recent Roth decision.

> I read the issue of One with some mild interest. I must say that I found it relatively inoffensive, far less offensive than the average "men's" magazine. I think the decision below is an example of tyranny of the majority. . . . The court seems to feel that homosexuality is disgusting and therefore allusions to homosexual practices are disgusting and obscene. . . . I think *ONE* is no more descriptive of sexual practices than dozens of magazines. The fact that the practices differ from those of the "normal" person should not make the magazine obscene. If the story in *ONE* is "calculated to promote lesbianism" certain stories in Woman's Home Journal are probably calculated to promote adultery.[282]

Meanwhile, Justice Douglas—long hailed as one of the few First Amendment absolutists to serve on the court—was given a different view by his law clerk.

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279. *Id.*
280. *Id.* at 4.
281. *Id.*
282. Cert Memorandum from the United States Supreme Court Justice Harold H. Burton clerk to Justice Harold H. Burton, One, Inc. v. Olesen, 355 U.S. 371 (1958) (on file with the Library of Congress).

> The fact that any incitement to do a physical act in this magazine is inciting the commission of a crime in every state while the same cannot be said of girly magazines is difficult to ignore in arguing the standard should be the same. . . . I am torn between the desire to cut down on this sort of administrative censorship and the revulsion the magazine gives me. I suppose in the long run it is better to let the American people make the choice than a postmaster.[283]

The internal debate and voting on *ONE* is known only because of the tally sheet found in Justice Douglas's papers, made public after his death in 1980.[284] Five justices voted to take the case—one more than is required by the court's "rule of four."[285] On January 3, 1958, the justices voted on the cert. petition, with five justices voting to take case: Felix Frankfurter, William Douglas, Hugo Black, Charles Whittaker, and John Marshall Harlan.[286] Four of those, excluding Black, wanted to reverse the Ninth Circuit and rule in favor of *ONE*, according to Justice's Douglas's tally sheet.[287] On Justice Black's conference notes, he wrote "Deny?" next to *One, Inc. v. Olesen*.[288]

Rather than request briefs and hold oral arguments, as is usually the case, a week later the court held votes on the substance of *One, Inc. v. Olesen* and two other cases involving nudist magazines.[289] Frankfurter, Douglas, Clark, Harlan, and Whittaker favored *ONE*, while Warren, Black, Brennan and Burton would have upheld the Ninth Circuit's decision.[290]

Three days later, the Court issued a one-sentence ruling. "The petition for writ of certiorari is granted and the judgment of the United States Court of Appeals for the Ninth Circuit is reversed. *Roth v. United States*."[291]

B. Sunshine Book Co. v. Summerfield

The Supreme Court's landmark decision in *One, Inc. v. Olesen* may not have happened if the Court hadn't held the case to be decided alongside *Sunshine Book Co. v. Summerfield*. Two magazines

283. Cert Memorandum from the United States Supreme Court Justice William O. Douglas clerk to Justice William O. Douglas, One, Inc. v. Olesen, 355 U.S. 371 (1958) (on file with the Library of Congress).

284. MURDOCH & PRICE, *supra* note 75, at 46–47.

285. *Id.*

286. *Id.* at 45.

287. Administrative Docket Book O.T. 1957 #200-399, One, Inc. v. Olesen, 355 U.S. 371 (1958) (on file with the Library of Congress).

288. MURDOCH & PRICE, *supra* note 75, at 45.

289. *Id.* at 46.

290. *Id.*

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

advocating the lifestyle of nudism had also become targets of the Post Office in the early 1950s, ultimately prompting the Court's decision upholding their First Amendment rights to publish in tandem with *ONE Magazine's* right to publish.

The two nudist magazines, *Sunshine & Health* and *Sun Magazine*, were published in New Jersey and edited by Dr. Ilsley Boone, a Baptist minister who was described as the "dean of American nudists," and his adult daughter, Margaret A.B. Pulis.[292] *Sunshine & Health* had published for more than twenty-five years and *Sun Magazine* for six years.[293] *Sunshine & Health* focused on nudists in the United States and Canada, while *Sun Magazine* was more international in scope.[294] At the time of his appeal to the Supreme Court, Boone was seventy-eight years old. His family, including his children, grandchildren, and great grandchildren, were all nudists.[295] Dr. Boone had traveled to visit nudist camps around the world, and he advocated that nudist lifestyles were healthy and did not lead to sexual delinquency or lasciviousness.[296] "Dr. Boone believes that human beings will be healthier physically and mentally if they practice nudism; that the practice of nudism will satisfy the healthy curiosity of children and eliminate the unhealthy curiosity of adults about the human body," his lawyer, O. John Rogge, wrote.[297]

The magazine periodically ran into legal trouble in its distribution. In New York City in 1951, the police arrested several newsstand clerks for selling Sunshine & Health and Sun Magazine, charging them with violating section 1141 of the Penal Law prohibiting the sale or distribution of "any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper [or] photograph."[298] The city's Department of Licenses also threatened newsstand operators with license revocations for future violations, sending them a letter stating that the selling of the magazines would result in suspension or revocation of their licenses.[299]

New York State Supreme Court Judge Thomas L.J. Corcoran rejected Sunshine Book Company's attempt at an injunction against

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292. Petition for Writ of Certiorari at 4, Sunshine Book Co. v. Summerfield, 355 U.S. 372 (D.C. Cir. 1958) (No. 587). For a history of the American nudist movement, including background on Boone and the two magazines, see BRIAN HOFFMAN, NAKED: A CULTURAL HISTORY OF AMERICAN NUDISM 64–82 (2015) and Brian Hoffman, *'A Certain Amount of Prudishness': Nudist Magazines and the Liberalisation of American Obscenity Law, 1947–58*, 22 GENDER & HISTORY 708, 710–18 (2010).

293. Petition for Writ of Certiorari, *supra* note 292, at 4.

294. *Id.* at 4.

295. *Id.* at 5.

296. *Id.*

297. *Id.*

298. Sunshine Book Co. v. McCaffrey, 112 N.Y.S.2d 476, 478 (N.Y. Sup. Ct. 1952).

299. *Id.* at 478–79.

New York City's actions.[300] While the text in the magazines contain "nothing obscene in the literary content," noting that stories focused on reports of "meeting and conventions, reports of officers, the 'Olympic Games' of the movement, public relations theories for the expansion of nudism, reports of regional associations and local clubs, conflicts between nudism and the law, expositions of nudism for the advancement of physical and mental health, religious justifications of nudism, etc.," it is the photographs that make the magazines vulnerable.[301] While "[s]ome of them are action pictures showing nudists in their camp activities, rowing, hitting volley balls, building fires, etc.," others "show shapely and attractive young women in alluring poses in the nude" and "are front views . . . cleverly colored to picture clearly the female breasts and pubic hair."[302] Judge Corcoran had no difficulty in dismissing Sunshine Book Company's arguments, saying that nudism was a practice associated with the "lowest grades of savages" and the pictures in the magazines clearly met the standards of obscenity.[303]

> Where the dominant purpose of nudity is to promote lust, it is obscene and indecent. The distribution and sale of the magazines in this case is a most objectionable example. The dominant purpose of the photographs in these magazines is to attract the attention of the public by an appeal to their sexual impulses. The sale of these magazines is not limited to any mailing list of members or subscribers. They are sold and distributed indiscriminately to all who wish to purchase the same. Men, women, youths of both sexes, and even children, can purchase these magazines. They will have a libidinous effect upon most ordinary, normal, healthy individuals. Their effect upon the abnormal individual may be more disastrous. Their sale and distribution is bound to add to the already burdensome problem of juvenile delinquency and sex crimes, and the commissioner of police properly arrested those who participated in this violation of our Penal Law.[304]

Judge Corcoran said New York City's ban on subsequent newsstand sales of *Sunshine & Health* was not an unconstitutional prior restraint, citing *Near v. Minnesota's* exceptions to the prior restraint doctrine, including that "the primary requirements of decency may be enforced against obscene publications."[305] Judge Corcoran's

300. *Id.* at 485–86.
301. *Id.* at 480.
302. *Id.*
303. *Id.* at 483.
304. *Sunshine Book*, 112 N.Y.S.2d at 483.
305. *Id.* at 485.

decision was an overwhelming loss for the magazine's fight for newsstand sales.

The New York City newsstand cases went to trial on the question of whether the magazines were obscene, resulting in a jury finding that the magazines were obscene.[306] However, six years later, a New York appeals court later decided that the city's letter threatening newsstands with license suspension or revocation for selling the magazines was in fact a prior restraint that violated the First Amendment.[307] The appeals court wrote that there were no statutory provisions allowing a city official to determine whether publications are obscene, and "certainly, any censorship in advance of publication constitutes an unconstitutional and illegal prior restraint."[308] The city's letter to newsstands "was to compel obedience by the newsdealers; and to some extent must have been effective in curtailing, and preventing the sale of future copies of plaintiffs' magazines," the court wrote.[309] The court required the city to notify newstands that the 1951 letter was to be disregarded because it violated the magazine publisher's First Amendment rights.[310]

In addition the legal threats to newsstand sales, the magazine's subscription base was also under scrutiny by the government. The Post Office branch in May's Landing, New Jersey began flagging particular issues of *Sunshine & Health* and *Sun Magazine*, ensnarling the magazine in administrative reviews that spanned years over particular issues.[311] The first instance involved the mailability of five monthly issues of Sunshine & Health in 1948, cases that were ultimately dismissed by the Post Office Department in 1951.[312] Even though the publication won in the end, the actual seizures of issues and delivery ban caused financial burdens for the magazine, because the magazine depended on prompt delivery of its issues for its business survival.

> In this country today periodical publications depend for their existence upon their prompt circulation by means of the United States mails. This is so for two reasons: in the first place, any delay in the distribution of a dated periodical means the death of that issue; in the second place, periodicals depend for their continued existence on dissemination through the mails because

306. Sunshine Book Co. v. McCaffrey, 168 N.Y.S.2d 268, 271–72 (N.Y. App. Div. 1957).
307. *Id.*
308. *Id.* at 273.
309. *Id.*
310. *Id.* at 274.
311. Petition for Writ of Certiorari, *supra* note 292, at 9–16.
312. *Id.* at 6.

> they receive a larger percentage of return on copies so distributed to subscribers than on copies disseminated by other means.[313]

According to the magazine's lawyers, three separate investigations between 1948 and 1956 into particular issues each took about three years for final resolution through the Post Office Department's administrative procedures.[314] Interventions by the Post Office to refuse delivery of particular issues while a hearing by a postal examiner was scheduled effectively ruined that issue's economic value. "The questions involved in such proceedings are never resolved expeditiously and any monthly periodicals which are involved in them will become obsolete long before those proceedings are at an end," the magazine's lawyers wrote in their brief arguing the Supreme Court to take their case.[315]

Before the case that was granted for review by the Supreme Court, the Post Office had lost a similar case in the federal courts over seizures of the magazine.[316] In the fall of 1952, the Post Office sought to stop all incoming and outgoing mail for the magazine's addresses on the grounds that it published an obscene magazine.[317] After a hearing examiner ruled in favor of the mail ban in March 1953 and the Postmaster General upheld the ruling in June 1953, the magazine filed suit in federal court, seeking declaratory and injunctive relief.[318] A district court judge found the magazines not to be obscene,[319] and the Court of Appeals for the District of Columbia upheld the lower court.[320] The Supreme Court denied certiorari.[321]

But the magazine's victory was short lived. In the fall of 1954, the postmaster in May's Landing, New Jersey, reported that 400 issues of the February 1955 issue of *Sunshine & Health* and the January–February 1955 issue of *Sun Magazine* were being withheld from the mails at the direction of the Postmaster General.[322] An administrative hearing was scheduled before a hearing examiner of the Post Office Department.[323] The examiner determined the magazines to be "obscene, lewd, lascivious and indecent."[324] The examiner wrote:

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313. *Id.* at 26.
314. *Id.* at 27.
315. *Id.* at 27.
316. Summerfield v. Sunshine Book Co., 221 F.2d 42, 43–44, 48 (D.C. Cir. 1954).
317. *Id.* at 43–44.
318. *Id.*
319. *Id.* at 44.
320. *Id.* at 48.
321. 349 U.S. 921 (1955).
322. Brief for Respondent in Opposition at 4, Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958).
323. *Id.* at 6–7.
324. *Id.* at 10.

> The right to practice nudism and to advocate its practices by any lawful means is not in issue here. But in the course of such advocacy the display of unadorned nakedness to the public generally is surely offensive to presently prevailing American standards of decency and modesty. The fact that the photographs in these magazines may illustrate nudist life and activities and are accompanied by relevant textual matter upon the subject does not in any way tend to lessen the erotic impact of the photographs themselves upon the mind of the ordinary person.[325]

The Post Office's Solicitor General affirmed the examiner's decision.[326]

Simultaneous with the Post Office's hearing and solicitor general review, in January 1955, Sunshine Book Company filed a complaint in U.S. district court, seeking injunctive relief to stop the Post Office from impounding the issues and declaratory relief for a judgment that the magazines were not obscene.[327] The magazine was represented by O. John Rogge and Josiah Lyman.[328]

In a lengthy and remarkable decision that explicated the magazine's photographs in great critical detail, Judge James Kirkland of the District of Columbia District Court ruled in favor of the Post Office.[329]

First, Judge Kirkland began his decision by examining the definition of obscenity and the legal justifications for its status as unprotected expression.[330] Obscenity "must be calculated to lower that standard which we regard as essential to civilization or calculated with the ordinary person to deprave his morals or lead to impure purposes."[331] The federal obscenity statute, 18 U.S. Code Section 1461, uses additional adjectives to elucidate the word obscene, including "lewd," "lascivious," "filthy," and "indecent," and Judge Kirkland cited thirteen cases in which the courts provided definitions of obscenity to frame his definitional analysis.[332] The judge also discussed various definitions of the reasonable person standard before turning to the specifics of the magazine.[333] The judge determined that the "American people are a clothed race" and that "nudism in its present stage is a cult or a society or a group that represents a very small minority of the American people."[334]

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325. *Id.*
326. *Id.* at 11.
327. Sunshine Book Co. v. Summerfield, 128 F. Supp. 564, 565 (D.C. Dist. Ct. 1955).
328. *Id.*
329. *Id.* at 573.
330. *Id.* at 567–68.
331. *Id.* at 567.
332. *Id.*
333. *Sunshine*, 128 F. Supp. at 568.
334. *Id.* at 569–70.

Next, over thirty-three paragraphs going almost page by page of the magazines, the judge explained why in his determination some aspects of the magazine were not obscene but others were.[335] The judge paid particular attention to the focus and clarity of visual depictions of pubic area and genitalia.[336] For example, he determined that "broad pen sketches" of the female form "because of their indefiniteness, of failure to emphasize any particular part of the male or female genital area, are not obscene as a matter of fact."[337] Other depictions that are not obscene include "posterior views of nudes, be they male or female, young or old, whether photographed or sketched at short or long distances"[338] as well as "[p]ictures taken at sufficient distance" even if "being a front view."[339] The judge said it "depends upon the distance of the camera's focus or the projection of the artist or the one who is sketching the scene—the distance as projected from the viewer's eye."[340]

When it comes to the female breast, the judge wrote, "there is always the problem of the acceptance of its exposure by the majority of the American people."[341] While the "organ, of course, is one of nutrition for young, expanding during periods of pregnancy and reducing in size when the state of non-pregnancy and the nurture of the young child has no longer required its function," other cases in which "its accentuation, its distortion, or its grossness could, under the broad definition, depending on the situation, make it filthy or might make it indecent."[342]

But, the judge said, "[w]here photographs are taken of the pubic area at very close range they are as a matter of fact obscene, and it will follow, as a consequence, as a matter of law, obscene."[343] For example, a picture on page thirteen of the February 1955 issue of *Sunshine & Health* shows a man standing with a side view in which his penis is visible.[344] The judge explained why he found this objectionable:

> By artful use of shadow his face is completely obliterated, his entire public area is obliterated by the shadow, but prominently shown in front of the public area and against this dark background

335. *Id.* at 570–73.
336. *Id.* at 570.
337. *Id.* at 569.
338. *Id.* at 570.
339. *Sunshine*, 128 F. Supp. at 570.
340. *Id.*
341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.* at 571.

> is his male organ; the corona of the penis is clearly discernible; in fact, even a casual observation of it indicates that the man is circumcised. This obviously has no place even in illustrating the principles of nudism. It is filthy, it is foul, it is obscene, and the Court will hold such as a matter of fact.[345]

A "grotesque, vile" depiction of a nude woman with varicose veins was also found to be obscene in the judge's view:

> On page 15 there are four middle-aged women with their backs to a very large oak tree, appearing to be some 12 feet in diameter. They are holding hands and facing the camera. Only two of the women are revealed to the viewer. The woman to the left is a woman of middle age. She has very large thighs. The pubic hair is clearly shown. Her right thigh is particularly noticeable because, though there are trees nearby, the formation which appears on the thigh is not that of shadow, it appears to be matted varicose veins that cause her to be grotesque, vile, hold her up as an object of scorn, and the Court will hold under the statute that that is filthy, and that it is indecent.[346]

After describing other objections in similar terms and detail, the judge addressed the administrative procedures only briefly. He concluded that the Postmaster was "right" to exclude the magazines from the U.S. mail because in his determination five photographs contained within them made the magazine's dominant theme one that was obscene. He dismissed the case.[347]

Sunshine Book Company appealed the decision to the District of Columbia Court of Appeals.[348] On May 31, 1956, a divided three-judge panel overturned the district court's decision, issuing an injunction permanently restraining the Department from enforcing it.[349]

The panel, on a 2–1 vote, said the Post Office examiner, solicitor and district judge showed "no effort to weigh the material considered objectionable against the rest of the contents," contrary to court precedents requiring questionable materials to be considered as a whole.[350] "The standard must be the likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits it may have in that

345. *Sunshine*, 128 F. Supp. at 571.
346. *Id.*
347. *Id.* at 573.
348. Petition for Writ of Certiorari, *supra* note 292, at 62.
349. *Id.* at 68.
350. *Id.* at 65.

reader's hands," the court wrote, citing its 1945 decision in *Walker v. Popenoe*.[351] The appeals panel said there was no evidence the investigators considered the intent of the publisher, despite "uncontroverted affidavits" of a Baptist minister providing substantial evidence of sincerity of motive an the lack of "[profitable] pandering."[352]

The panel also strongly objected to the procedures in place at the Post Office preventing the distribution of materials prior to a final adjudication that the materials are obscene.[353] The criminal statute giving the Post Office authority "contains no language which can be construed to permit the Department to refuse to transport and deliver newspaper and magazines pending final decision on its part as to whether their content is acceptable to it."[354] In dissent, Judge Danaher said the magazines "were obscene by any standard."[355]

The government petitioned for an en banc review before the full District of Columbia Circuit Court of Appeals.[356] The court held arguments on September 25, 1956 but postponed its decision pending the outcome of several obscenity decisions in the Supreme Court.[357] On October 3, 1957, a divided 5–3 court reversed the panel ruling, this time, with Judge Danaher writing for the majority.[358] His decision emphasized the magazines' "continuous pattern of dissemination of nude photographs" that courts have said will "have a libidinous effect upon most ordinary, normal, healthy individuals. Their effect upon the abnormal individual may be more disastrous."[359] Judge Danaher also dismissed due process arguments, finding that the Post Office Department's procedures were sufficient and did not constitute a prior restraint.[360]

The judges in dissent emphasized the lack of safeguards in the administrative procedures: "Has the publication been found 'obscene' by a proper tribunal, applying proper standards? Has the punishment or remedy been authorized by proper legislation?" the judges wrote. "In the instant case, these questions have not yet been adequately answered."[361] The judges noted that "an administrative prior

351. *Id.* at 64 (internal quotation marks omitted).
352. *Id.* at 65.
353. *Id.* at 65–66.
354. Petition for Writ of Certiorari, *supra* note 292, at 73.
355. *Id.* at 69.
356. *Id.* at 44.
357. Petition for Writ of Certiorari, *supra* note 292, at app. I at 44 (citing Roth v. United States, 354 U.S. 476 (1957); Alberts v. California, 354 U.S. 476 (1957); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957)).
358. Sunshine Book Co. v. Summerfield, 249 F.2d 114, 115, 119 (D.C. Cir. 1957).
359. *Id.* at 119.
360. *Id.*
361. *Id.* at 120.

restraint, not plainly authorized by statute and not subject to specific standards and safeguards, is of highly doubtful validity, to say the least."[362]

Sunshine Book Co.'s last chance was an appeal to the U.S. Supreme Court. Attorney Rogge prepared a forty-page petition for writ of certiorari, filed within a month of the District of Columbia Circuit Court of Appeals decision, on October 30, 1957.[363] Rogge argued that the case presented an important, unresolved question: does the federal obscenity statute give the Post Office authority to make ad hoc determinations about whether materials are obscene, and therefore unmailable?[364] Allowing the Post Office to make decisions on whether materials are obscene would undermine the due process protections afforded in criminal proceedings, including the right to a jury trial, he argued.[365] In fact, Rogge noted, a specific provision giving the Post Office more direct authority in deciding the whether publications were obscene was stricken by Senators in legislative drafting of the first obscenity statute.[366] An attempt in 1915 to give the postmaster general greater powers also failed, on grounds that it invested too much censorial power.[367] In rejecting the proposal, one senator said the "bill would invest one man . . . with the power to destroy the business of a publisher without affording any opportunity for trial by jury, according to regular Court practice. . . . Trial by jury and a penalty inflicted for each specified act is the only safeguard against an arbitrary and tyrannical power."[368] In the present case, Rogge argued that the Post Office was acting as police, prosecutor, judge and jury. And because periodicals relied on the mail for subscriptions, the postmaster general's ability to withhold publications at will granted him "the power of life and death over periodical publications" by sweeping powers of prior restraint.[369]

Rogge argued that the decisions by postmaster general and the district and appellate courts were inconsistent with the Supreme Court's ruling in *Roth v. United States*, issued just months earlier.[370] Rogge focused on three aspects of the decisions as being inconsistent with *Roth*: using isolated photographs without considering the publication as a whole; applying inappropriate standards such as

362. *Id.* at 121.
363. Petition for Writ of Certiorari, *supra* note 292.
364. *Id.* at 2.
365. *Id.* at 20.
366. *Id.* at 21–22.
367. *Id.* at 22.
368. *Id.* at 22 (internal quotation marks omitted).
369. *See* Petition for Writ of Certiorari, *supra* note 292, at 26.
370. *Id.* at 29.

"grotesque" and "vile"; and failing to consider the conduct and intent of the publisher.[371] The postmaster and lower courts singled out five photographs to determine the entire issues of the magazine were obscene, Rogge argued, violating Roth's test that requires "the dominant theme of the material taken as a whole appeals to prurient interest."[372] The "proscribed photographs occupied but 3% of the space in the questioned issue of *Sunshine & Health* and but 2% of the space in the questioned issue of *Sun Magazine*," Rogge wrote.[373] Also, Rogge argued that the district judge did not apply appropriate standards in his evaluation of the photographs.[374] Rogge argued the judge erred by deciding that "grotesque," "vile" and "filthy" photographs were the same as obscenity.[375] Roth requires that obscenity "deals with sex in a manner appealing to prurient interest"[376] and which has "a tendency to excite lustful thoughts."[377] Finally, by failing to consider the conduct and intent of the publisher, the Post Office and courts did not attempt distinguish "honest, sincere" works from those who are "profitably pandering to the lewd and lascivious," Rogge wrote.[378] The conduct and intent of the publisher, in advocating nudism as a healthy way of life, requires "pictures to illustrate the text and show the healthy enjoyment that people derive from being out of doors in the nude," Rogge wrote.[379]

> Had the Court of Appeals for the District of Columbia Circuit taken into account the conduct and intent of Dr. Boone and his associates, their belief in nudism and their desire to advance it, their distribution of the publications in question in order to gain new converts to nudism, the absence of a dominant profit motive and the use [of] the pictures in these publications to make more effective the presentation of the ideas of nudism, the scales should have been tipped in favor of the legality of these publications.[380]

Rogge cited Warren's concurrence in *Roth* and his dissent in *Kinsley Books* as evidence of the requirement that the conduct and intent of the publisher is a critical part of the legal analysis.[381] "The

371. *Id.* at 29–31.
372. *Id.* at 29–30 (internal quotation marks omitted).
373. *Id.* at 30–31.
374. *Id.*
375. Petition for Writ of Certiorari, *supra* note 292, at 30.
376. *Id.* at 30–31.
377. *Id.* at 31.
378. *See id.* at 31–32 (internal quotation marks omitted).
379. *See id.* at 32.
380. *Id.* at 33.
381. *See* Petition for Writ of Certiorari, *supra* note 292, at 33–34.

advocacy of nudism is as old as Plato, with modern adherents throughout the world," Rogge wrote.[382] "Surely the First Amendment protects such advocacy, as well as any means which are reasonably and fairly relevant to it. This includes pictures."[383]

Rogge argued that the Post Office violated due process in its administrative procedures by failing to provide adequate hearings and allow expert testimony. "All the Post Office Department wants is to have some officials in Washington look at the questioned publications and decide for the whole country whether they are safe for the people to read or see," Rogge wrote.[384]

In its opposition brief, the government urged the Supreme Court to decline to review the case.[385] In a brief filed by Solicitor General J. Lee Rankin, the government provided a detailed accounting of the Post Office Department's procedures in the case, arguing they did not violate due process.[386] The government also argued the obscenity determination did not contradict the Supreme Court's recent ruling in *Roth*.[387]

In the personal papers of three Supreme Court justices appear memos from clerks recommending granting Sunshine Books' petition for certiorari. Clerks to Justices Douglas and Burton strongly recommended taking the case and criticized the government's likely overreach.[388] A clerk for Justice Warren was more circumspect, saying the case may not be "certworthy" on its own but would be if the Court decided to grant cert in the ONE case.[389] Justice Warren's clerk expressed skepticism of Sunshine Books' argument that the Post Office procedures amount to an improper prior restraint as an implied power not found explicitly in the statute.[390] Warren's clerk noted that the government "points to 80 years of well defined administrative practice and construction of the foregoing statute as

382. *Id.* at 34.
383. *Id.*
384. *Id.* at 35–36.
385. Brief for Respondent in Opposition, *supra* note 322, at 14, 31.
386. *Id.* at 6–11.
387. *Id.* at 27–31.
388. Cert Memorandum from the United States Supreme Court Justice William O. Douglas clerk to Justice William O. Douglas, Sunshine Book Co. v. Summerfield, 355 US 372 (Aug. 26, 1957) (on file with the Library of Congress) [hereinafter Douglas Cert Memorandum]; Cert Memorandum from the United States Supreme Court Justice Harold H. Burton clerk to Harold H. Burton, Sunshine Book Co. v. Summerfield, 355 US 372 (Dec. 31, 1957) (on file with the Library of Congress) [hereinafter Burton Cert Memorandum].
389. Cert Memorandum from the United States Supreme Court Justice Earl Warren clerk to Justice Earl Warren, Sunshine Book Co. v. Summerfield, 355 US 372 (Aug. 26, 1957) (on file with the Library of Congress) [hereinafter Cert Memorandum].
390. *Id.* at 3–4.

conferring the power which it purports to exercise here."[391] The clerk said it was "absurd" to say the Post Office couldn't withhold from the mails material that it was quickly submitting for review for suspected obscenity.[392] "The barn could never be locked until after the horses were gone," the clerk wrote.[393] "In my judgment this issue is not independently certworthy absent the unlikely circumstance that another circuit will create a conflict by adopting the dissenters' position."[394] Nor did the clerk think the administrative procedures amounted to a violation of due process.[395] The case was potentially unique to justify review under the new *Roth* standard only if the Court were to also take the *ONE* Magazine case, Justice Warren's clerk wrote.[396] "The cases are strikingly similar in that both deal with patterns of conduct deemed innocent by rather large minority groups, but so repulsive to the overwhelming majority that they give rise to criminal liability," the clerk wrote.[397] "Whether the mails can be used to disseminate written information and advocacy by such groups is the common issue."[398] He recommended taking the case only if the *ONE* case was also accepted for review.[399] Justice Douglas's clerk was more direct in recommending granting the writ of certiorari.[400] The case "presents an opportunity to limit the post master's powers and should be taken for that reason," Justice Douglas's clerk wrote in a one-page memo.[401]

The seven-page cert memo to Justice Burton encourages him to take the case "to mark the limits of the power of the Post Office to bar obscene material."[402] The case presented important questions of both statutory interpretation and constitutional law, Justice Burton's clerk wrote.[403] First, it was unclear whether 18 U.S.C. § 1461 allows the Post Office to ban materials not yet deemed obscene.[404] While it "seems fair to conclude that a gloss could reasonably be read into the statute to imply the power claimed in light of the administrative practice," the clerk criticized the District of Columbia Court of

391. *Id.* at 2.
392. *Id.* at 3–4.
393. *Id.* at 4.
394. *Id.*
395. Cert Memorandum, *supra* note 389, at 6–7.
396. *Id.* at 7.
397. *Id.* at 6.
398. *Id.* at 6.
399. *Id.*
400. Douglas Cert Memorandum, *supra* note 388, at 1.
401. *Id.*
402. Burton Cert Memorandum, *supra* note 388, at 7.
403. *Id.* at 5.
404. *Id.* at 3.

Appeals for ignoring its own precedent in *Walker v. Pepenoe*, in which the Court ruled material could not be barred from the mail until materials were deemed obscene in administrative hearing.[405] Second, the case raised important questions about the definition of obscenity as applied to the magazines.[406] By focusing on a handful of pictures depicting adult genitals or the pubic area to determine the magazines obscene, "[t]he court could have found a medical text obscene on the same theory."[407] The clerk was sympathetic to the petitioner's arguments about not examining the "dominant effect" of the magazines "as a whole," refusing to allow expert witness testimony, and not accounting for the "motive and purpose" of the sender.[408]

On January 13, 1958, the Supreme Court issued its one sentence per curiam order: "The petition for writ of certiorari is granted and the judgement of the United States Court of Appeals for the District is reversed. Roth v. United States."[409]

While the decision, like *One, Inc. v. Olesen*, was per curiam without any reporting of dissents, the docket sheet in Justice Burton's files indicate the case was close: Justice Whittaker, Harlan, Douglas and Frankfurter voted for reversal, while Justices Brennan, Clark, Burton and Warren voted no.[410] On Justice Burton's docket sheet, Justice Black's vote was left blank.[411] Justice Douglas's docket sheet contains different notations, suggesting that Justices Black and Clark supported reversal.[412]

C. Manual Enterprises, Inc. v. Day

Four years after the decisions in *One, Inc. v. Olesen* and *Sunshine Books Co. v. Summerfield*, the Supreme Court heard its second case involving the censorship of a magazine involving homosexuals. The case, *Manual Enterprises, Inc. v. Day*, involved the publications of H. Lynn Womack and his Manual Enterprises company based in Washington, D.C.[413]

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405. *Id.* at 3–4.
406. *Id.* at 5.
407. *Id.* at 6.
408. Burton Cert Memorandum, *supra* note 388, at 6–7.
409. Sunshine Book Co. v. Summerfield, 355 U.S. 372, 372 (1958).
410. Administrative Docket Book, Sunshine Book Co. v. Summerfield, 355 U.S. 372, 372 (1958) (on file with the Library of Congress).
411. *Id.*
412. Douglas Docket Sheet, Sunshine Book Co. v. Summerfield, 355 U.S. 372, 372 (1958) (on file with the Library of Congress).
413. For an excellent overview of Womack, see DAVID K. JOHNSON, BUYING GAY: HOW PHYSIQUE ENTREPRENEURS SPARKED A MOVEMENT (2019); David K. Johnson, *Physique Pioneers: The Politics of 1960s Gay Consumer Culture,* 43 J. SOC. HIS. 867 (2010); and

The tentacles of obscenity law would be a constant presence in H. Lynn Womack's life. As one of the first printers and mass distributors of gay erotica in the United States, Womack connected gay men to a subculture of sexual identity and desire more than perhaps any other publisher before.[414]

Born in Mississippi in 1923, Womack moved to Washington, D.C., for college and spent much of his middle life living in or near the nation's capital.[415] Womack struck a stark physical presence, with albino skin, white hair and weighing nearly 300 pounds.[416] He married twice and had a daughter.[417] Womack earned a Ph.D. in philosophy from John Hopkins University and then taught at George Washington University and Mary Washington College in Virginia.[418] In 1960, Womack stumbled into the publishing business after falling into money from an illegal stock scheme in which he narrowly avoided arrest.[419] A few years earlier, he left academia to start a fraudulent government consulting business that was shut down by the Securities and Exchange Commission but left him with a sizeable pot of money.[420] An accountant friend told him publishing was the most profitable business in Washington, so he bought two established printing companies, one that did printing for the government and another whose publications included a series of bodybuilding magazines, including *Grecian Guild Pictorial*, popular among homosexual men.[421] The business proved to be a success, and by the late 1960s, Womack described himself as the fourth largest pornographer in America.[422] In addition to publishing, Womack would later go on to open a chain of adult bookstores in and around Washington, D.C., creating commercial spaces for sexually themed communications.[423]

Early in his publishing career, Womack recognized a lucrative market for physique magazines.[424] He printed established titles and developed new ones, under a company he named Manual Enterprises,

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Rodger Streitmatter & John C. Watson, *Herman Lynn Womack: Pornographer as First Amendment Pioneer*, 28 JOURNALISM HISTORY 45 (Summer 2002).

414. *Supra* note 292 and accompanying text.

415. Streitmatter & Watson, *supra* note 413, at 57.

416. *Id.* at 56.

417. *Id.*

418. *Id.* at 57.

419. *Id.*

420. *Id.*

421. James Lardner, *A Pornographer's Rise, Fall*, WASH. POST (Jan. 12, 1978), https://www.washingtonpost.com/archive/politics/1978/01/12/a-pornographers-rise-fall/c66ef5d0-dd01-4c3f-80de-398a42045239/?utm_term=.1c1843b13e06 [https://perma.cc/SBP3-YYUZ].

422. *Id.*

423. *Id.*

424. *See* Streitmatter & Watson, *supra* note 413, at 57.

Inc.[425] One of Womack's former employees told scholars Rodger Streitmatter and John Watson that Womack struck deals with other distributors serving major cities on the east coast to expand newsstand sales and in creative agreements with photographers, who allowed Womack to publish their photographs without buying the rights, in exchange for listing photographers' contact information that allowed readers to buy more explicit photographs directly from the photographers.[426]

Historian David K. Johnson has shown how physique magazines in the 1950s and 1960s blurred the lines of political and consumer activism in the homophile era, in which the capitalistic impulses of publishing entrepreneurs fueled the creation of gay identity, community and resistance.[427] Publishers adopted early examples of modern media segmentation strategies to find and retain gay audiences, including through coveted mailing lists and delicate partnerships with newsstand distributors.[428] Connecting gay men to a subculture that was yet to fully blossom, scholars have argued the magazines played a powerful role in the building of a movement. "Although we call it the homophile movement, it could just as easily be labeled the physique era," Johnson argued.[429]

Physique magazines covertly pitched to gay male audiences exploded in popularity in the 1950s, evolving from earlier fitness and bodybuilding magazines which had themselves had a strong gay following.[430] The new genre of magazines for men who appreciated the "glorification of the male body" with aesthetically pleasing photographs of men with "natural" or "classical" builds often gazing at one another, suggesting friendship and comradery.[431] Full nudity was off limits, but little was left to the imagination of men wearing tight bathing suits and scant "posing straps."[432]

Early entrepreneurs of physique magazines include Bob Mizer, who turned to publishing after finding success as a physique photographer in the 1940s, taking photographs of bodybuilders at Muscle Beach in Santa Monica and selling them through a pen-pal service advertised in *Strength & Health*, a physical culture magazine of the era.[433] He launched his own magazine from Los Angeles, *Physique*

425. *Id.* at 58.
426. *Id.*
427. JOHNSON, *supra* note 413, at vii–xiv.
428. *See id.* at xii, 5.
429. *Id.* at xiv.
430. *Id.* at 7–8.
431. *Id.* at 8 (internal quotation marks omitted).
432. *See id.* at 9.
433. JOHNSON, *supra* note 413, at 26–27.

Pictorial, in 1951, that he would publish for twenty years and that historian Johnson describes as the "first large-circulation American magazine targeting gay men."[434] In Virginia, Randolph Benson and John Bullock launched *Grecian Guild Pictorial* in 1955.[435] The magazine drew on homosexual themes from the brotherhood of men in ancient Greece and quickly became popular among gay men, generating at its peak a monthly print run of 55,000 copies and $4,000 profit.[436]

From their start, physique magazines sparked the scrutiny of the government censors. Mizer's run-ins with authorities began during his photographer days. In 1945, postal inspectors raided his house and confiscated "dirty pictures," leading them to subsequently raid the photo studio where he worked and arresting his boss.[437] A year later, he was arrested for selling photographs of nude 17-year-old male as part of an investigation into teenage bodybuilders at Muscle Beach that ultimately led to a police crackdown of all photographers at the beach.[438] At one point, famed sex researcher Alfred Kinsey encouraged photographers to band together to hire a lawyer to represent them.[439] Police again targeted Mizer in 1954, after newspaper columnist Paul Coates launched a crusade against homosexuality in Los Angeles.[440] On his local television program Confidential File, Coates displayed Physique Pictorial and said it was "thinly veiled pornography" that appealed to sex deviates.[441] Police launched a sting operation to purchase nude photographs in person and bought some from a Mizer associate.[442] Mizer was arrested for aiding and abetting the sale of lewd photographs.[443] He fought the charge publicly, lambasting it in the pages of his magazine in editorials condemning censorship.[444] He was convicted by a local judge but the case was dismissed on appeal.[445]

Womack also faced legal pressures soon after he started publishing physique magazines. In March 1960, a federal jury convicted Womack on more than two dozen charges of mailing obscenity and mailing information on where to obtain obscenity, and the U.S.

434. *See id.* at 25–26.
435. *Id.* at 26.
436. *Id.* at 110.
437. *Id.* at 31.
438. *Id.* at 34–35.
439. JOHNSON, *supra* note 413, at 38.
440. *Id.* at 45.
441. *Id.* at 44.
442. *Id.* at 45.
443. *Id.*
444. *Id.* at 46.
445. *Id.*

Court of Appeals for the District of Columbia upheld the judgement.[446] Womack was initially sentenced to one to three years in prison, but he pleaded insanity.[447] A judge sentenced him to spend a year and a half at a mental hospital, where he was able to continue to run his growing printing empire.[448] "It was very pleasant," Womack later said.[449] "I had a private room, TV, typewriter. While I was sitting there I organized Guild book Service."[450]

Days after Womack's conviction on federal obscenity charges, on March 25, 1960, Post Office officials in Alexandria, Virginia, seized about 400 copies of the April 1960 issues of *MANual*, *Trim*, and *Grecian Guild Pictorial*, in parcels bound for Chicago.[451] The magazines each had a monthly circulation of about 25,000 copies, with about half being distributed through the U.S. mail. Copies sold for fifty cents each.[452]

The postmaster in Alexandria described the magazines of consisting "almost exclusively of . . . male models, accompanied by a brief caption giving the names of the model and the photographer" and an index of names and addresses of photographers whose photos were published.[453] The magazine's photographs showed scant evidence of weight lifting or muscle building, the government said, but rather:

> 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.[454]

The Alexandria postmaster referred the magazines to the General Counsel of the Post Office Department, who informed Womack the magazines were found non-mailable, but whose quantity or monetary

446. Womack v. United States, 294 F.2d 204, 206 (D.C. Cir. 1961).
447. Manual Enterprises, Inc. v. Day, 370 U.S. 478, 528 (1962) (Clark, J., dissenting).
448. Lardner, *supra* note 421.
449. *Id.*
450. *Id.*
451. *Manual Enterprises*, 370 U.S. at 481.
452. Brief for the Respondent at 70, *Manual Enterprises, Inc.*, 370 U.S. 478 (1962).
453. *Id.* at 3.
454. *Id.* at 5–6.

value did not allow for a formal hearing.[455] Womack filed suit in U.S. District Court seeking an injunction overturning the ban, and a judicial officer for the Post Office Department commenced a hearing.[456]

Womack hired lawyer Stanley Dietz to represent him.[457]

The Post Office department hearing into the mailability of Womack's magazines spanned over three days, beginning on April 21, 1960. On two of the days, the testimony ran into the early evenings well past the usual time of adjournment.[458] Three lawyers working as assistant general counsel for the Post Office, James F. Harding, Saul Mindel and Richard S. Farr, argued the government's case. They relied heavily on expert witnesses who provided testimony about the negative effects the magazines would have on homosexuals.[459] In summarizing the experts' testimony in a later brief, the government's lawyers said the experts said the magazines "were calculated to and would in fact arouse and excite the prurient sexual interest of . . . practicing homosexuals and to adolescents with latent homosexual tendencies."[460]

> [T]he magazines would have a tendency to induce adolescents with latent homosexual tendencies to engage in overt homosexual activities and become fixed in a pattern of homosexual acts, and that the excitement the magazines would arouse in both of these classes of persons would make it more difficult to treat and cure them.[461]

The photographs were designed in such ways to appeal to the prurient interest, the experts said, because "placing an object in front of the genitals, or otherwise, had a special appeal for male homosexuals," and that depictions of the naked buttocks "would especially stimulate homosexually inclined males because of its suggestion of rectal intercourse."[462]

Psychiatrist Dr. Frank S. Caprio served as the government's first and primary witness.[463] He testified that male homosexuals under his treatment indicated sexual excitement by looking at pictures of nude males.[464] The lawyers asked Caprio about how particular

455. *Id.* at 3–4.
456. *Id.* at 4.
457. *Id.* at 87.
458. Brief for the Respondent, *supra* note 452, at 86.
459. *Id.* at 7–8.
460. *Id.* at 8.
461. *Id.* at 7.
462. *Id.* at 8.
463. Transcript of Record at 4, Manual Enterprises, Inc. v. Day, 370 U.S. 478, 528 (1962) (No. 123).
464. *Id.* at 6.

photographs in the magazines appeared to pander to homosexual desires rather than to bodybuilding fans.[465] Several times, Dr. Caprio said it was "ridiculous" to suggest the photos had anything to do with bodybuilding.[466] Instead, they were targeted to appeal to the particular sexual desires of homosexuals, he said. Pictures of posing straps are of particular erotic appeal to homosexuals, the doctor testified, as are photos of nude men wearing shoes. "Many male homosexuals have reported to psychiatrists that the picture of a nude male wearing shoes gives them added excited and it comes under the category of fetishism," Caprio testified.[467] Other depictions of men holding swords hold particular fantasy for homosexual men who "get sexual excitement [by] feeling that they are overpowered [when] they are penetrated from behind and many of them have terrible nightmares feeling that somebody is trying to stab them with a knife from behind . . . ."[468]

The magazines have particular danger for adolescent boys who may have homosexual feelings but become fixated on them because of the magazines, Caprio testified. Caprio said:

> [P]ublications of this kind could very well push them into homosexuality only because mentally they find themselves conscious of the male body and I think in that respect often it lifts these young men who are not actually homosexuals but are like this and out of curiosity they look through magazines of this kind and before they know it they start masturbating, and instead of thinking of women when they masturbate they wonder whether their penis is as big as the penis in these male models and they develop all kinds of conflicts and they come to us and say, 'Dr. Caprio, I don't feel that maybe I should marry' and I say why, and 18 year old boy [says] 'well I don't feel that I am developed, I don't feel that I am strong. I came across a muscle building magazine I see some of those men in there and I think they must have real large penises and do you think I'm a queer?' 'What makes you think you're queer?' 'Well sometimes I am attracted by these pictures of muscle men I wish I could be like that. I wish I could have their muscles' and they start masturbating with images of the kind of physique that they think they would like to have. I think in this respect it does tremendous harm and I question them I say 'do you buy such magazines?' and my clinical experience has been that they do and I tell them in helping them that their normal sexual adjustment, you have got to stop buying these magazines, you've got to stop looking at these male figures

465. *Id.* at 5.
466. *Id.* at 7, 8, and 14.
467. *Id.* at 7.
468. *Id.* at 15.

> or the so-called muscle men if you eventually want to make a good normal sexual adjustment. You can't masturbate thinking of a man's penis and a man's body and hope to make a normal sexual adjustment.[469]

Caprio said his work treating homosexuals shows a relationship of cause and effect between men viewing nude photos of other men and then engaging in homosexual activity they may not have done otherwise.[470] He equated this with drug addiction in which the addict can't help himself.

> These poor fellows can't help themselves and they take their money and they send away for these pictures and they masturbate and they go out and drink beer in some tavern and pick up some fellow and have a homosexual experience and then on money they send their three dollars or six dollars for more pictures then they masturbate and then they go to the beer tavern and pick up another fellow or in the park—they send out six dollars for six more different pictures of different men and this goes on and on.[471]

In cross examination, Dietz attempted to get Caprio to describe the range of things that create sexual excitement, suggesting the magazines are no more risqué or unusual than a host of other things.[472] After asking several questions about the potential sexual appeal of photographs to lesbians (why is Playboy acceptable if it appeals to the prurient interest of lesbians?), the judicial officer tried to get Dietz move on: "[W]e can't solve every riddle of human depravity here today, I don't think," he said.[473]

A second government expert, clinical psychologist Joseph B. McGovern, testified that the magazines' audience comprised of homosexual men who are "likely to have problems as regards [to] their masculine adequacy."[474] McGovern testified that the magazine had hallmark characteristics of pornography, rather than artistic or scientific uses. The magazines present exaggerated photos of men in various forms of exhibitionism to "provide erotic stimulation."[475] McGovern said the design of the magazines used a "build-up technique" by using a "series of repetitious stimuli" where photos and

469. Transcript of Record, *supra* note 463, at 10–11.
470. *Id.* at 19–20.
471. *Id.* at 20.
472. *Id.* at 24.
473. *Id.* at 30–31.
474. *Id.* at 33.
475. Transcript of Record, *supra* note 463, at 39.

layouts led to a center spread as a "climatic or orgasmic approach."[476] McGovern said this was a "basic technique of pornography."[477]

A third government expert, psychiatrist Dr. John Cavanaugh, did not testify in the interests of time, but both parties stipulated his testimony would have supported Dr. Caprio's testimony.[478]

The defense presented two witnesses to poke holes in the government's case. Child psychiatrist Dr. Michael Miller testified that photographs do not make heterosexual men turn homosexual. "What 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," Miller said.[479] A second witness, psychologist Dr. Gordon Link, testified that the magazines would not apply to the prurient interests of "average" readers, and under questioning from Dietz, acknowledged that small segments of the population could be aroused by various photos, including men with "foot fetishism" by looking at photos of women's shoes in *Ladies' Home Journal*.[480]

Finally, a postal inspector named Harry J. Simon testified that that Womack admitted to him during conversations the magazines were intended for homosexuals.[481]

Three days after the hearings concluded, Judicial Officer Kelly issued his written decision finding that the magazines were in fact obscene because they appealed to the prurient interests of homosexuals.[482] Kelly dismissed the argument that the magazine must appeal to the prurient interests of the average reader. "It is the effect they have upon the audience for whom they are published and who are interested in them and who would read them that is the important issue here presented," Kelly wrote.[483] It was clear, Kelly concluded, the magazines were primarily read by homosexuals for prurient interests.[484] He added that "no amount of literary, scientific, or other material in these issues of the publications . . . would in any way offset the effect of the main contents of these magazines, namely, the published photos."[485] Kelly also said the advertising directory in the magazines allowed readers to purchase additional

476. *Id.* at 37.
477. *Id.*
478. *Id.* at 83.
479. *Id.* at 41.
480. *Id.* at 49–50.
481. Transcript of Record, *supra* note 463, at 53–54.
482. *Id.* at 80.
483. *Id.* at 86.
484. *Id.*
485. *Id.* at 85.

nude photographs, including "what is known as hard-core pornography in the shape of photographs, sketches, pictures and colored slides of males engaged in sex acts with each other."[486] With the photos being declared obscene as well as the advertisements facilitating the receipt of additional obscenity, the magazines were correctly determined to be non-mailable, Kelly concluded.[487]

Womack filed a lawsuit in federal district court at the same time he sought a hearing by the judicial officer within the Post Office, but the case was dismissed without prejudice to give the Post Office time to conduct a hearing.[488] Womack refiled after the Post Office's administrative decision was announced.[489] U.S. District Court Judge George L. Hart denied Womack's motions for a preliminary injunction and summary judgment on August 17, 1960 without a hearing, writing in a brief decision that the Post Office's actions were supported by substantial evidence and were not arbitrary or capricious.[490]

Womack appealed to the Court of Appeals for the District of Columbia. He lost there, too. On March 23, 1961, a three-judge panel sided with the government, finding the magazine to be obscene and the Post Office's procedures to be appropriate in banning the magazines from the mail.[491] In doing so, the Court embraced the legal argument that the "average person" test from *Roth* was not the appropriate standard. Judge Bastian wrote:

> It seems to us that the real meaning of *Roth* is that at the object in question is not to be considered in terms of the reaction of an isolated atypical consumer . . . The proper test in this case, we think, is the reaction of the average member of the class for which the magazines were intended, homosexuals.[492]

The court emphasized the expert witness testimony from the Post Office hearing to underscore its conclusions that the magazines were intended for homosexuals and intended to arouse their prurient interests.[493] Womack's appeal to the Supreme Court had to feel like a reach. Indeed, the Supreme Court had rejected his appeal in *Womack v. U.S.*[494] Nonetheless, Dietz's eleven-page petition for writ of certiorari on behalf of Womack presented three questions for the

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486. *Id.* at 84 (emphasis omitted).
487. Transcript of Record, *supra* note 463, at 87–88.
488. *Id.* at 81.
489. *Id.*
490. *Id.* at 78.
491. Manual Enterprises, Inc. v. Day, 289 F.2d 455, 456 (9th Cir. 1961).
492. *Id.*
493. *Id.*
494. Womack v. United States, *cert denied*, 365 U.S. 859 (1961).

Court to address.[495] First, were the magazines obscene? Under the Supreme Court's obscenity standard set forth in *Roth*, the expression of ideas that have even the "slightest redeeming social importance" are constitutionally protected, the petitioners argued.[496] "This Court must conclude that physique magazines, also popularly termed body building magazines, have significant social importance to a large segment of the population of the United States," wrote Womack's attorney Stanley Dietz.[497] The Court's precedents in *ONE*, *Sunshine*, and *Mounce* demonstrate the Court's insistence on "protecting ideas contrary to the prevailing climate of public opinion."[498] The petition argued the "[p]hotographs portrayed in these magazines are not better, and no worse than those portrayed in such leading magazines as *Esquire*, *Gentry*, *Rogue*, *Duke*, and *Playboy* magazines which the Post Office would not dare to argue are obscene."[499] Even the Post Office Department's psychiatrist said the photographs "are less revealing than the totally nude photographs which appear in several issues of 'Sunshine and Health' nudist magazine, and other magazines as 'Playboy,'" the petitioners argued.[500]

Second, the petitioners asked the Court to review whether the Post Office procedures effectively acted as an unconstitutional prior restraint against the magazines.[501] The Post Office's view that it has the ability to determine whether materials are obscene, based on a criminal statute that does not specifically grant the Post Office the right to make an obscenity determination, rests on a "fragile foundation" that "must be kept in mind, both in dealing with the substantive obscenity question involved and in determining the proper scope of judicial review," Dietz wrote.[502] The Post Office "conducted an unconstitutional prior restraint" in this case by first determining the magazines were non-mailable without notice or a hearing, the petitioners argued.[503] The subsequent hearing resulted in "an Order contrary to the established law," the petitioners argued.[504] "This amounts to the most obnoxious and unconstitutional censorship," Dietz wrote.[505]

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495. Petition for Writ of Certiorari at 2, Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) (No. 123).
496. *Id.* at 5–6.
497. *Id.* at 6.
498. *Id.*
499. *Id.*
500. *Id.* at 4.
501. Petition for Writ of Certiorari, *supra* note 495, at 2.
502. *Id.* at 7.
503. *Id.*
504. *Id.*
505. *Id.* at 8.

The third question Dietz framed for the Court was really two questions: whether advertisements informing people where obscene materials may be obtained are obscene themselves, and second, are magazines that appeal to the prurient interest of homosexuals protected by the First Amendment.[506] Regarding the advertisements, Dietz argued that Womack had no knowledge any advertiser was involved in criminal activity or selling obscene material.[507] Dietz pointed to *Smith v. California*, in which the Court a year earlier ruled that a book seller could not be prosecuted for selling a book later determined to be obscene if he had no knowledge as to its contents.[508] "[I]t is clear that no publisher is responsible for the unknown actions of its advertisers any more than any book dealer is responsible for the content of books for sale from his shelf of which he knows not the content," Dietz wrote.[509]

As to the question about whether the magazines were targeting homosexuals, and what role, if any, that should play in the legal analysis, Dietz drew parallels to the *ONE* case.[510] Because the Court's decisions in *ONE*, *Sunshine Books* and *Mounce* were one-sentence opinions, "no one knows" what the Court meant to indicate in overturning the obscenity convictions in each case.[511] Dietz argued that the "only reasonable interpretation" of the three decisions was that the Court "intended that all ideas, containing even the slightest amount of socially redeeming value, are constitutionally protected, even though said ideas may be contrary to prevailing public opinion."[512] *ONE* protected the expression of ideas of homosexuals as a minority group, Dietz said, and the Court should take Womack's case to clarify that indeed, the First Amendment protects the expression of minority views distasteful to the majority.[513]

In a brief opposing the writ of certiorari, Solicitor General Archibald Cox argued that the lower court's decisions should stand.[514] First, Cox said the evidence supported a finding that the magazines were properly determined to be obscene.[515] The magazines' dominant themes appealed to the prurient interests of homosexuals, the photographs sought to stimulate the erotic fantasies of homosexuals,

506. *Id.* at 2, 8.
507. Petition for Writ of Certiorari, *supra* note 495, at 8.
508. Smith v. California, 361 U.S. 147, 154–55 (1959).
509. Petition for Writ of Certiorari, *supra* note 495, at 8 (citing Smith v. California, 361 U.S. 147 (1959)).
510. *Id.* at 9.
511. *Id.*
512. *Id.*
513. *Id.*
514. Brief for the Respondent, *supra* note 452, at 14.
515. *Id.* at 20.

and the structure of the magazine was intended to have an arousing effect, Cox wrote.[516] He argued that the intended audiences of potential obscenity are key to legal analysis. "Material which might not affect the average person may nevertheless be obscene if it is primarily directed to a particularly susceptible audience, such as the immature, the deviate or the homosexual, for the purpose of satisfying or stimulating a craving for erotic fantasy," Cox wrote.[517] Even a "cursory glance" of the magazines shows "they have nothing to do with bodybuilding," Cox wrote.[518] Second, Cox also argued that the Post Office procedures in the case, including an expeditious hearing subject to judicial review, did not amount to an unconstitutional prior restraint.[519] He said the Post Office's authority to exclude obscene materials from the mail had long been recognized, and "such an exclusion, if proper, does not violate the First Amendment."[520]

The Supreme Court granted certiorari on October 9, 1961. According to Justice Douglas' docket sheet, five justices voted to hear the case (Justices Stewart, Brennan, Harlan, Douglas, Black and Warren) and three justices voted to deny the case (Justices Whittaker, Clark and Frankfurter).[521] Notes and memos reveal that Justices Harlan, Douglas and Black were viewed as strong votes in favor the magazine: "Justice Harlan would vote to reserve on the ground that the federal government has no power over sexual morality," Justice Warren's clerk speculated in a memo, while "Justices Black and Douglas would vote to reverse because no government has the power to suppress obscenity."[522] Both Justice Brennan and Chief Justice Warren focused on the administrative procedures and the lack of a jury trial's determination of obscenity. "This is a case of prior restraint. It is an administrative action barring magazines from the mails," Justice Warren wrote on the top of a clerk's memo that urged him to take the case.[523]

Unlike the *ONE* and *Sunshine* cases, the Court ordered full briefing and scheduled oral arguments. Oral arguments spanned

516. *Id.* at 8.
517. *Id.* at 11.
518. *Id.* at 10.
519. *Id.* at 12.
520. *Id.*
521. Douglas Docket Sheet, Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) (on file with Library of Congress).
522. Bench memorandum from United States Supreme Court Justice Earl Warren's clerk to Justice Earl Warren, Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) (on file with Library of Congress).
523. Cert memorandum from United States Supreme Court Justice Earl Warren's clerk to Justice Earl Warren, Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) (on file with Library of Congress).

two days in late February 1962.[524] Never before had homosexuality been so thoroughly discussed in the chambers of the U.S. Supreme Court. Stanley Dietz began his oral argument by first emphasizing the disparity between the current case and the holding in *Roth*, hoping to convince justices that the separate focus on the audience of homosexuals as "second class citizens" would require a new definition of obscenity and absent that undermines the government's case.[525] "In the Post Office, they have changed this definition" of obscenity set forth in *Roth*, Dietz argued.[526] By focusing on the prurient interest of homosexuals as a new legal standard, the Post Office has also inadvertently raised some other questions. "Just what is this so-called homosexual audience? What are they composed of?" Dietz asked.[527] He said the term homosexual "does not describe people" but rather "describes things that people do."[528] To underscore the different standard advocated by the government, Dietz pointed to nude calendars of Marilyn Monroe "on walls all over the country."[529] Dietz said the photographs in the magazines are certainly no more provocative than the Monroe pin-ups. "[I]f we so-called normal people, according to our law, are entitled to have our pin-ups then why shouldn't the second class citizens, the homosexual group, if you use that term, why shouldn't they be allowed to have their pin-up? Their pin-up is certainly no worse."[530] Next, Dietz defended Womack's actions regarding the advertisements, saying that he did everything reasonable to delete advertisers from subsequent issues once he learned they were selling "non-mailable" photographs, including ones of nude men.[531] Third, Dietz emphasized the prior restraint aspects of the Post Office's administrative procedures.[532] He walked the Court through the timeline of the magazines' seizures, the Post Office's notification, the filing of a lawsuit, and the scheduling of administrative hearings.[533] The procedures themselves can serve as an effective prior restraint for a monthly periodical that depends on the mail for readers.

> [I]f they can take a magazine keep it for 10 to 12 days before they are supposed to send you a letter saying that you're not going to

524. Oral Argument (Feb. 26–27, 1962), Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) (No. 123), https://www.oyez.org/cases/1961/123 [https://perma.cc/YBG7-5B3R].
525. *Id.* at 07:30.
526. *Id.* at 09:09.
527. *Id.* at 05:51.
528. *Id.* at 06:16.
529. *Id.* at 15:21.
530. Oral Argument, *supra* note 524, at 16:20.
531. *Id.* at 17:30.
532. *Id.* at 20:31.
533. *Id.* at 20:58.

> be able to continue through the mails with this magazine before they even start in, the mechanism for having a hearing then by the time, this hearing is finally granted, if ever, your magazines are no longer saleable because the month has passed.[534]

J. William Doolittle, Jr. argued the government's case.[535] He said the "unusual type of publication" at the center of the case is a "peculiarly insidious form of obscenity"—he also called it "hardcore pornography"—because of its covert impact on its target audience of "male homosexuals to whom the clothing, settings and props had symbolic meaning."[536]

The justices asked several questions of both lawyers. For example, several justices asked about the timing of the magazine's seizures and Womack's earlier conviction, wondering if he was being targeted by authorities. Others asked about the appropriateness of expert witnesses on the question of whether materials are obscene. Others zeroed in on Doolittle's emphasis on the magazine's audience, getting him to admit that had the magazines been sent to the Kinsey institute or "colleges," they likely would have not been seized by the Post Office.[537]

Several soliloquies between the justices and lawyers focused on the extent to which Womack admitted the audience was homosexuals and even engaged in significant back and forth about Womack's enjoyment of baiting postal inspectors in banter.[538] Chief Justice Warren asked Dietz directly, "Have you conceded or was it conceded—in this case that these magazines were beamed toward homosexuals?"[539] Deitz replied, "Never your honor."[540] He explained, "These magazines are sold to newsstands and no one really knows who the purchasers might be and there is over 40,000 of them sold a month."[541]

In another back and forth between Warren and Dietz, Dietz acknowledged that a letter Womack sent to a photographer wanting a "truck driver type, it's all showered up, clean and ready for bed," was an allusion to a model attractive to homosexuals.[542] "What is your explanation of that letter, what does that letter indicate to you?" Chief Justice Warren probed. "What kind of viewer?" he asked.[543]

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534. *Id.* at 24:13.
535. *Id.* at 40:28.
536. Oral Argument, *supra* note 524, at 40:42.
537. *Id.* at 32:49.
538. *Id.* at 34:30.
539. *Id.* at 40:47.
540. *Id.* at 40:56.
541. *Id.* at 41:57.
542. Oral Argument, *supra* note 524, at 49:05.
543. *Id.* at 49:48.

Warren asked,"You don't think this letter implies . . . this is to go . . . [to] the homosexual?" and Dietz responded:

> Let's say that it was intended to get this photograph for use to appeal to a homosexual. . . . [E]ven if these magazines are beamed . . . at homosexuals, if there's such a thing as a class of people named homosexuals, if these magazines are beamed off, then what does this One, Inc. vs. Olesen case stand for? Are homosexuals allowed to receive the pick-ups or literature that they may chose to purchase, or are they to be censored out of that because, we, as so-called normal people, don't like homosexuals.[544]

The oral arguments ended with a litany of questions to Dietz as he tried to answer them all. "I think we better get to rest," Justice Warren said as he wrapped up the second day of arguments.[545] "I know I have gone over my time, so I want to thank you. I also didn't finish half the things I wanted to say," Dietz said, to which Chief Justice Warren responded, "I'm sure of that."[546]

The week after oral arguments, the justices met in conference to discuss the case on March 2, 1962.[547] The Supreme Court issued its decision on June 25, 1962.[548] The vote was 6–1, but the rationales varied. Justice Harlan wrote the majority opinion, joined only by Justice Stewart.[549] Justice Brennan wrote a concurring opinion, joined by Justices Warren and Douglas.[550] Justice Black concurred with the result.[551] Justice Clark dissented. Justices Frankfurter and White took no part in the decision.[552]

In the majority opinion, Justice Harlan stipulated at the beginning, in seemingly damning terms to Womack, that it believed the magazines were not bodybuilding publications appealing to the ordinary male adult but were in fact magazines composed primarily to appeal to the prurient interest of "sexual deviates" and have no literary, scientific or other merit.[553] And the decision concluded with an ominous admonition that "nothing in this opinion of course remotely implies approval of the type of magazine published by these petitioners, still less of the sordid motives which prompted

544. *Id.* at 50:04.
545. *Id.* at 1:05:41.
546. *Id.* at 01:05:49.
547. MURDOCH & PRICE, *supra* note 75, at 75.
548. Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962).
549. *Id.* at 479.
550. *Id.* at 495 (Brennan, J., concurring).
551. *Id.* at 519 (Clark, J., dissenting).
552. *Id.* at 495.
553. *Id.* at 481.

their publication."[554] It was if the Supreme Court had to reinforce what already was a overwhelmingly dominant viewpoint of condemnation of homosexuality.

Despite those denunciations of homosexuality at the beginning and the end, Justice Harlan hung his analysis on whether the magazines were obscene on the question of their "patent offensiveness."[555] A determination of obscenity under the federal statute requires not only that the material pander to prurient interests, but it also must be patently offensive, Justice Harlan wrote.[556] While the prurient interest standard was the focus of most of the litigation, in part because of its emphasis in the *Roth* decision, the lower courts failed to establish the magazines were also patently offensive.[557] Justice Harlan referenced the intent and history of the federal statute. In using the words "obscene, lewd, lascivious, indecent, filthy or vile," the federal statute prohibited materials that are "so offensive as to make it unacceptable under current community *mores*," Justice Harlan wrote.[558] He said the statute's history shows it was aimed at "obnoxiously debasing portrayals of sex."[559] In most obscenity cases, the two elements of patent offensiveness and prurient interest appeal "tend to coalesce," he wrote.[560] "It is only in the unusual instance where, as here, the 'prurient interest' appeal of the material is found limited to a particular class of persons that occasion arises for a truly independent inquiry into the question whether or not the material is patently offensive."[561] The distinction between these two elements was glossed over in the court proceedings below, Harlan wrote.[562] "These magazines cannot be deemed so offensive on their face as to affront current community standards of decency," the Court wrote.[563] "Lacking that quality, the magazines cannot be deemed legally 'obscene.'"[564]

Justice Harlan did not articulate a clear test for when materials meet the patent offensiveness threshold, suggesting that "whether 'hard-core' pornography, or something less, be the proper test" is not the question before the Court.[565] But based on the Court's "own

554. *Manual Enterprises*, 370 U.S. at 495.
555. *Id.* at 482.
556. *Id.* at 486.
557. *Id.* at 482–83.
558. *Id.* at 482.
559. *Manual Enterprises*, 370 U.S. at 483.
560. *Id.* at 486.
561. *Id.* at 486.
562. *Id.* at 482.
563. *Id.* at 482.
564. *Id.* at 482.
565. *Manual Enterprises*, 370 U.S. at 489.

independent examination of the magazines," Justice Harlan wrote, "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.'"[566] He also said the photographs cannot be fairly distinguished from equivalent depictions of women that society tolerates.[567]

After determining the magazines lacked the requisite patent offensiveness to be deemed legally obscene, Justice Harlan turned to the question of the advertisements. Based both on criminal law standards and the precedent in *Smith v. California*, Justice Harlan said the government was required to prove to some degree that Womack had knowledge the advertisers were selling legally obscene material in order for his magazines to be banned from the mail.[568] "At best the Government's proof showed no more than that petitioners were chargeable with knowledge that these advertisers were offering photographs of the same character, and with the same purposes, as those reflected in their own magazines," Justice Harlan wrote.[569] The Court said the burdens on publishers would be too great if they were required to police the details of every advertiser's business practices, and there was no evidence Womack was aware that clearly obscene materials were be sold through the advertisements in his magazines.[570]

Justice Brennan wrote a lengthy concurring opinion, joined by Chief Justice Warren and Justice Douglas.[571] Brennan focused on the statutory and constitutional limits of the Post Office Department's ability to withhold materials from the mail.[572] Brennan said it was important for the Court to pay attention to both the standards for obscenity determinations, as well as the procedures used by the government to make and carry out those determinations.[573] "We risk erosion of First Amendment liberties unless we train our vigilance upon the methods whereby obscenity is condemned no less than upon the standards whereby it is judged," Brennan wrote.[574] After discussing the history of Section 1461 and the Post Office's administrative procedures, Brennan concluded that the Post Office did not have independent authority under the statute to make determinations of whether materials are obscene.[575]

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566. *Id.* at 489–90.
567. *Id.*
568. *Id.* at 492.
569. *Id.* at 494–95.
570. *Id.*
571. *Manual Enterprises*, 370 U.S. at 498.
572. *Id.* at 500–16.
573. *Id.* at 503, 518–19.
574. *Id.* at 497.
575. *Id.* at 519.

Justice Clark wrote a strong dissenting opinion, saying the majority and concurrence "requires the United States Post Office to be the world's largest disseminator of smut and Grand Informer of the names and places where obscene material may be obtained."[576] Justice Clark would have upheld the lower court's decision on the basis that the statute requires the Post Office to reject obscene material, and the magazines in question clearly contain information on where to obtain obscene material.[577]

While Womack won his landmark obscenity case before the U.S. Supreme Court in 1962, winning there was not the happy ending to his career as a publisher. A subsequent obscenity conviction in 1971 ultimately sent him to jail, nearly bankrupted him and shut down his businesses.[578] Womack has been heralded as "an unsung anti-hero of the gay liberation movement."[579] "I honestly believe if I do anything to advance the freedom of the press, I'll consider myself lucky. But if homosexuals want a literature, they have a right to it. They pay taxes and die," Womack told a reporter in 1970.[580] Womack died in 1985 at the age of 62.[581]

III. IMPLICATIONS

In 2019, reflecting on the fiftieth anniversary of the 1969 Stonewall riots that mark the birth of the modern American gay rights movement, the gay conservative writer Andrew Sullivan noted "[t]here has never been a better time or place in the history of the world to be gay than in 2019 and in the West."[582] The remarkable "gay revolution" in media, business, politics and law has ushered in an unprecedented era of equality for millions of LGBT Americans.[583] Perhaps drawing on Martin Luther King's observation that "the arc of the moral universe is long but it bends towards justice,"[584] Sullivan

576. *Id.*

577. *Manual Enterprises*, 370 U.S. at 520.

578. Lardner, *supra* note 421.

579. MURDOCH & PRICE, *supra* note 75, at 68 (quoting Cornell University historian Jackie Hatton).

580. *Dr. Herman Lynn Womack: First Amendment Pioneer*, RAINBOW HISTORY PROJECT DIGITAL COLLECTIONS, https://archives.rainbowhistory.org/exhibits/show/Womack/pioneer/womack_intro [https://perma.cc/9ZZ2-T8S4] (quoting the WASH. DAILY NEWS, April 30, 1970).

581. Streitmatter & Watson, *supra* note 413, at 64.

582. Andrew Sullivan, *The Next Step for Gay Pride*, N.Y. MAG. (June 21, 2019), http://nymag.com/intelligencer/2019/06/andrew-sullivan-the-next-step-for-gay-pride.html [https://perma.cc/WJH6-C5SM].

583. *See generally* LILLIAN FADERMAN, THE GAY REVOLUTION: THE STORY OF THE STRUGGLE (2015); LINDA HIRSHMAN, VICTORY: THE TRIUMPHANT GAY REVOLUTION (2012).

584. Chris Hayes, *The Moral Universe Does Not Inherently Bend Towards Justice*,

described recent LGBT history as "the long night of persecution [giving] way to the dawning of integration."[585] Lawyer and writer Walter Frank used similar language to describe the history of the American LGBT rights movement as having two phases: "the first being a fight for freedom from oppression, the second being a fight for full integration into society."[586]

A fuller understanding of the foundations of "gaylaw" is important because legal protections for homosexuals are a new phenomenon in the United States, at least historically speaking. They remain hotly contested in theory and practice, with political conservatives accusing justices who have expanded legal protections to gays and lesbians as being judicial activists inserting their own policy wishes over the will of voters. Historically speaking, it is hard to argue with dissenting justices when they note that gay marriage is hardly a tradition in American history—or any history for that matter. Indeed, the U.S. Supreme Court in 1972 rejected an appeal from two men in Minnesota seeking the right to marry each other. In a one sentence order, the Court wrote, "appeal . . . dismissed for want of substantial federal question."[587]

It was only seventy years ago when homosexuals were such a despised minority that the mere communication among them was subject to punishment and suppression.[588] In the 1950s and 1960s, the government instituted a multifaceted approach to shut down communications networks for homosexuals to suppress and punish homosexuals and their perceived threat to public morality.[589]

By overturning government censorship in the three cases examined in this Article, the Supreme Court made it more difficult for the government to contain a fledging homophile movement from growing. In the 1960s and 1970s, LGBT-themed publications found new markets, thanks in part to the precedents in *One, Inc.*, *Sunshine Book Co.*, and *Manual Enterprises* that emboldened publishers to produce and disseminate materials and provide legal markets to reach consumers.[590] While *One, Inc.* was grounded in more political expression, *Sunshine Book Co.* and *Manual Enterprises* clearly opened the door to

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NBC NEWS (Mar. 24, 2018, 8:02 AM), https://www.nbcnews.com/think/opinion/idea-moral-universe-inherently-bends-towards-justice-inspiring-it-s-ncna859661 [https://perma.cc/76G7-FV4S].

585. Sullivan, *supra* note 582.

586. WALTER FRANK, LAW AND THE GAY RIGHTS STORY: THE LONG SEARCH FOR EQUAL JUSTICE IN A DIVIDED DEMOCRACY 208 (2014).

587. Baker v. Nelson, 409 U.S. 810 (1972).

588. Ball, *Obscenity*, *supra* note 9, at 231–33.

589. *Id.* at 264–65.

590. *Id.* at 232, 290.

more sexually explicit publications for sexual minorities.[591] Both genres found new audiences through new modes of mass communication, connecting homophiles to others like them in ways not seen before.

Scholar Carlos Ball persuasively argues that the *One, Inc.* and *Manual Enterprises* cases represent the Supreme Court's "moral displacement" within obscenity law.[592] While the courts regularly demeaned homosexuality well after this era, these two decisions reflected an uneasiness with treating homosexuals as second-class citizens based on the government's interest in public morality that ultimately made the courts more sympathetic to claims of animus that inform LGBT law.

Indeed, the loosening of obscenity law in the 1950s and 1960s was among the first of several important First Amendment issues that helped homosexuals organize a broader social movement. Obscenity regulations threatened the very existence of homosexual communication, both in terms of sexual expression and the gay press, both of which allowed individuals to develop a "gay identity" and provided a framework for a gay community and subculture.[593] That these decisions came as the Supreme Court was struggling to define the obscene is important. John D'Emilio has argued, "Much of the gay and lesbian literature and a good deal of the queer press of the post-Stonewall decades would not have passed muster under the obscenity standards of the pre-*Roth* era. It would be impossible to overstate how important these rulings on obscenity were."[594]

The First Amendment provided additional helpful legal rights for LGBT citizens during the homophile and gay liberation eras, including in access to public forums, freedom of association, and speech rights in context of employment discrimination.[595] First Amendment jurisprudence became a battleground over the right of homophiles to wear gender-nonconforming clothes, perform in live theater, advertise in the yellow pages of phone books, associate in and operate gay bars, form corporations, organize student groups and take out ads in school newspapers, and "come out" without being fired from their jobs.[596]

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591. *Id.* at 232, 291–93.

592. BALL, THE FIRST AMENDMENT, *supra* note 9, at 16.

593. Depictions of homosexuality were banned by movie production codes. Gay themes on broadcast media were more likely to be found "indecent" and received heightened scrutiny by the Federal Communications Commission. See, for example, *In re* Pacifica Found. Inc., 2 FCC Rcd. 2698 (1987) (finding excerpts of an AIDS-related drama broadcast over radio to violate the prohibition against indecency, and opining that these excerpts also constitute obscenity).

594. John D'Emilio, *Some Lessons from Lawrence*, *in* THE FUTURE OF GAY RIGHTS IN AMERICA 10 (2006).

595. *See* Siegel, *supra* note 9, at 225–45.

596. *Id.*

The 1950s and 1960s was a period of particularly repressive government actions that gave rise to a fledging opposition movement among homosexuals who began to identify and organize.[597] It was through contesting the political, legal and cultural aspects of the "Lavender Scare" during the 1950s that homophiles began to develop notions of community and subculture that fueled the "gay liberation era" of the 1970s and 1980s, when activists fought for visibility and tolerance.[598] The 1990s and early 2000s gave rise to the "gay rights era," characterized by growing acceptance in public opinion and by lawmakers. The success of the gay marriage movement suggests a break to a "gay equality era."

Many factors have contributed to the LGBT movement's successes, including the uses of mass communication to connect individuals to a subculture and gain tolerance by changing public opinion through media representations. The expansion of legal rights was also crucial to the LGBT movement. Most major political and moral issues in America eventually make their way to the courts and seek a resolution as a matter of constitutional law. As a matter of modern American constitutional law, legal equality for gays and lesbians is the byproduct of three U.S. Supreme Court decisions: *Romer v. Evans* (1996),[599] *Lawrence v. Texas* (2003)[600] and *Obergefell v. Hodges* (2015).[601] Two other marriage equality decisions, *Hollingsworth v. Perry* (2012)[602] and *United States v. Windsor* (2013),[603] were decided on narrower grounds. Scholars, journalists and lawyers have heralded each of these cases as landmark Supreme Court decisions.[604]

In *Romer v. Evans*, the Court ruled that the Equal Protection Clause of the Fourteenth Amendment protected homosexuals from being singled out for exclusion under antidiscrimination laws.[605] In 1992, voters in Colorado approved "Amendment 2" by voter referendum.[606] The law banned municipalities from including sexual orientation as

597. JOHNSON, *supra* note 413, at 1–14.
598. *Id.* at 9–10.
599. Romer v. Evans, 517 U.S. 620 (1996).
600. Lawrence v. Texas, 539 U.S. 558 (2003).
601. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
602. Hollingsworth v. Perry, 568 U.S. 1066 (2013).
603. United States v. Windsor, 570 U.S. 744 (2013).
604. For narrative accounts of these cases, see SUSAN BERRY CASEY, APPEALING FOR JUSTICE: ONE LAWYER, FOUR DECADES AND THE LANDMARK GAY RIGHTS CASE: ROMER V. EVANS (2016); DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS (2012); DAVID BOIES & THEODORE B. OLSON, REDEEMING THE DREAM: THE CASE FOR MARRIAGE EQUALITY (2014); JO BECKER, FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY (2014); KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL (2015); ROBERTA KAPLAN, THEN COMES MARRIAGE: UNITED STATES V. WINDSOR AND THE DEFEAT OF DOMA (2015).
605. Romer v. Evans, 517 U.S. 620, 635–36 (1996).
606. *Id.* at 623–25.

a protected class in antidiscrimination laws and rescinded protections already in place in some cities.[607] Justice Kennedy for the Court's 6–3 majority said the Constitution requires "the law's neutrality where the rights of persons are at stake," citing Justice Harlan's dissent in *Plessy v. Ferguson*, a discredited precedent that upheld the "separate but equal" doctrine allowing discrimination against African Americans based on race.[608] The Court's majority found the law to be motivated by anti-gay "animus."[609] The majority wrote, "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[610] Applying the Court's equal protection framework of analysis, the majority determined the law lacked even a rational basis to advance legitimate state interests.[611] "We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."[612]

In *Lawrence v. Texas*, the Court struck down Texas' "homosexual conduct" law and ruled the Due Process Clause of the Fourteenth Amendment prohibits the government from criminalizing consensual sexual activity between same-sex adults in a private home.[613] Justice Kennedy's analysis established that the liberty interests protected by the Due Process Clause includes the right of individuals to make decisions about personal relationships and intimate conduct in their private lives. "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice," Justice Kennedy wrote for the 6–3 majority.[614] The majority said that the Texas statute furthered "no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[615] In doing so, the Court overturned its 1986 decision in *Bowers v. Hardwick*, a landmark precedent that for the previous generation justified disparate legal treatment for

607. *Id.*
608. *Id.* at 623.
609. *Id.* at 632.
610. *Id.* at 633.
611. *Romer*, 517 U.S. at 632.
612. *Id.* at 635.
613. Lawrence v. Texas, 539 U.S. 558, 564 (2003).
614. *Id.* at 579. Justice O'Connor joined in the judgment but would have decided the case on equal protection grounds and not overturned *Bowers*. *Id.* at 579–85.
615. *Id.* at 578.

homosexuals. *Bowers*' "continuance as precedent demeans the lives of homosexual persons," Justice Kennedy wrote.[616] While the *Bowers* majority rooted their decision in historical notions of moral disapproval of homosexual conduct, Justice Kennedy wrote, the key 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."[617] The answer, the majority determined, was no. Citing another precedent, the Court wrote, "Our obligation is to define the liberty of all, not to mandate our own moral code."[618] He said the authors of the Fourteenth Amendment could have been more specific in their notions of liberty they sought to protect, but they did not enumerate its limits. Justice Kennedy wrote, "They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[619]

In *Obergefell v. Hodges*, the Court ruled that marriage was a fundamental right of citizens, and both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment prohibited the government from denying citizens the right to marry a person of the same sex.[620] The decision was a culmination of several cases percolating in the lower courts and two other Supreme Court decisions favoring gay marriage, albeit on narrower grounds.[621] In *Obergefell*, the majority ruled marriage is a fundamental right under the Constitution that applies to same-sex couples as it does to opposite sex couples.[622] The right to marriage is a fundamental right rooted in the right to personal choice based on individual autonomy and the right to intimate association, and it serves important government interests in the safeguarding of family and in marriage's service to social order, the majority ruled. "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity," Justice Kennedy wrote.[623]

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616. *Id.* at 523.
617. *Id.* at 571.
618. *Lawrence*, 539 U.S. at 571 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)).
619. *Id.* at 579.
620. Obergefell v. Hodges, 135 S. Ct. 2584, 2652 (2015).
621. United States v. Windsor, 570 U.S. 744 (2013) (striking down the federal Defense of Marriage Act); Hollingsworth v. Perry, 570 U.S. 693 (2013) (upholding lower court decision that Prop 8 in California violated equal protection).
622. *Obergefell*, 135 S. Ct. at 2593–608.
623. *Id.*

Each decision had one thing in common: they were authored by Justice Kennedy, often described as the "swing" justice during his thirty years on the Court. As a result, Justice Kennedy has been called the "Thurgood Marshall of gay rights."[624] Each decision had something else in common: they came from a deeply divided Court, and their precedential power is already under scrutiny following Justice Kennedy's retirement in 2018.[625]

Each of Justice Kennedy's decisions met stark dissents at the time. In *Romer*, Justice Scalia said in his dissent that Colorado voters sought to "preserve traditional sexual mores against the efforts of a politically powerful minority."[626] He criticized as elitist the suggestion that moral disapproval of homosexuality was wrong.[627] "I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even 'animus' toward such conduct. Surely that is the only sort of 'animus' at issue here."[628] In dissent in *Lawrence*, Justice Scalia went further, accusing his brethren of embracing the "so-called homosexual agenda," in which "some homosexual activists" seek to eliminate "the moral opprobrium that has traditionally attached to homosexual conduct."[629] He said many Americans believe the homosexual "lifestyle" to be "immoral and destructive," and they do not want homosexuals as partners in their businesses or teachers in their children's schools.[630] The Court, he said, "has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."[631] Justice Scalia said the decision framed the overruling of *Bowers* as inconsistent with the Court's application of stare decisis in abortion cases, also rooted in liberty and privacy interests. He called the decision a "massive disruption of the current social order" and mocked its basis

624. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 4, 2013), http://nymag.com/news/features/antonin-scalia-2013-10/index3.html [https://perma.cc/6Y69-YRXR].

625. Matthew R. Grothouse, *Implicit in the Concept of Ordered Liberty: How* Obergefell v. Hodges *Illuminates the Modern Substantive Due Process Debate*, 49 J. MARSHALL L. REV. 1021 (2016) (arguing that *Obergefell* provides a workable framework for "recognition and protection of new rights while preserving the judicial restraint and analytical objectivity" in substantive due process doctrine); Kent Greenfield & Adam Winkler, *Without Kennedy, the Future of Gay Rights is Fragile*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/2018/06/28/opinion/kennedy-gay-rights-same-sex-marriage.html [https://perma.cc/Z3DQ-ABXK] (Justice Kennedy's "gay-rights decisions will now face a hostile majority on the court, which is likely to overturn, cut back or nullify at least some of them.").

626. Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

627. *Id.*

628. *Id.* at 644 (Scalia, J., dissenting).

629. Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

630. *Id.*

631. *Id.*

in the right to liberty.[632] Texas' homosexual conduct law "undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and for that matter, working more than 60 hours per week in a bakery. But there is no right to 'liberty' under the Due Process Clause," Justice Scalia wrote.[633] Justice Scalia said criminal laws against "fornication, bigamy, adultery, adult incest, bestiality, and obscenity" are all inconsistent with the majority's analysis.[634] "This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review."[635]

In *Obergefell*, Chief Justice Roberts and Justices Scalia, Thomas and Alito wrote scathing dissents attacking the foundations of the majority ruling. Chief Justice Roberts accused the majority of supplanting its policy choices for constitutional rule-making. "The right it announces has no basis in the Constitution or this Court's precedent," he wrote.[636] By invalidating marriage laws and ordering "the transformation of a social institution that has formed the basis of human society for millennia," Chief Justice Roberts asked his brethren, "Just who do we think we are?"[637] Chief Justice Roberts in Obergefell said the majority's "aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of Lochner."[638] Justice Scalia joined Chief Justice Roberts' dissent in full, but wrote a separate dissent to emphasize what he called "this Court's threat to American democracy."[639] Justice Scalia said the decision was the "furthest extension" of the "Court's claimed power to create 'liberties' that the Constitution and its Amendments neglect to mention."[640] His personal attacks on the majority were striking, peppered with characterizations as "pretentious" and "egotistic," and "hubris."[641] Justice Scalia wrote. "The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis."[642] Justices Thomas and

632. *Id.* at 591–93.
633. *Id.* at 592.
634. *Id.* at 599.
635. *Lawrence*, 539 U.S. at 599.
636. Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015).
637. *Id.*
638. *Id.* at 2618–19.
639. *Id.* at 2626.
640. *Id.* at 2627 (Scalia, J., dissenting).
641. *Id.* at 2629–30.
642. *Obergefell*, 135 S. Ct. at 2630.

Alito in separate dissents raised similar objections, critiquing the Court's broader substantive due process jurisprudence and its rejection of traditions.[643]

The Court's decisions in *Romer*, *Lawrence* and *Obergefell* create the foundations of constitutional rights of modern "gaylaw," but the strength of the foundations will be tested in future cases by a Court without Justice Kennedy.[644] Will a more politically conservative Court restrict or overturn Justice Kennedy's expansive view of liberty and equality rights embodied in these cases? How a Court without Justice Kennedy will address gay rights cases likely to reach the Court in coming years?[645]

The courts are likely to enter a new phase of gay rights jurisprudence partly because of Justice Kennedy's retirement. At least two LGBT rights cases are likely to appear before the Court in coming terms. In 2018, the Court declined to issue a broad ruling in a closely watched case pitting religious freedom rights against state antidiscrimination laws. The case, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, raised the question of whether a bakery could refuse to make a wedding cake for a same-sex couple based on the baker's First Amendment rights to free speech and free

643. *Id.* at at 2640–43 (Thomas, J., & Alito, J., dissenting).

644. *See generally* Brendan Beery, *Rational Basis Loses Its Bite: Justice Kennedy's Retirement Removes the Most Lethal Quill from LGBT Advocates' Equal Protection Quiver,* 69 SYRACUSE L. REV. 69 (2019) (arguing that the Court's use anti-gay animus to strike down laws on equal protection grounds under rationale basis review is less certain after Justice Kennedy's retirement); Adam Lamparello, *Justice Kennedy's Decision in Obergefell: A Sad Day for the Judiciary*, 6 HLRE: OFF REC. 45 (2015–2016) (critiquing Justice Kennedy's liberty rationale but embracing equal protection rationale); Joseph Landau, *Roberts, Kennedy and the Subtle Differences that Matter in* Obergefell, 84 FORDHAM L. REV. 33 (2015) (contrasting Justice Kennedy's "functionalist" approaches with Justice Robert's "formalist" approaches to gay-rights questions); Jane S. Schacter, *Putting the Politics of 'Judicial Activism' in Historical Perspective*, 2017 SUP. CT. REV. 209 (2017) (critiquing Justice Robert's *Obergefell* dissent through historical analysis of claims criticizing judicial activism); Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. 115 (2015) ("I argue that it is the dissenting Justices, rather than their colleagues in the majority, who have ignored the traditions of American constitutional law."); Glen Staszewski, *Obergefell and Democracy*, 97 B.U. L. REV. 31 (2017) (justifying the majority's opinion as "democratically legitimate based on the relevant legal, moral and sociological considerations"); John Paul Stevens, *Two Thoughts About* Obergefell v. Hodges, 77 OHIO ST. L.J. 913 (2016) (critiquing originalism and defending substantive due process in the context of fundamental rights); Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 147 HARV. L. REV. 129 (2015) (calling *Obergefell* a "game changer for substantive due process jurisprudence" by intertwining liberty and equality in its analysis).

645. Masha Gessen, *The Dread of Waiting for the Supreme Court to Rule on L.G.B.T. Rights*, NEW YORKER (April 23, 2019), https://www.newyorker.com/news/our-columnists/the-dread-of-waiting-for-the-supreme-court-to-rule-on-lgbt-rights [https://perma.cc/8Y8C-3VED] (writing that "all most of us can do is watch this fragile object—queer rights in the United States—take an excruciatingly slow tumble").

exercise of religion.[646] The Court narrowly ruled that Colorado failed to provide religious neutrality in its administrative proceedings,[647] but either the case on remand or a case raising similar issues may well reach the Court again soon. In 2019, the Court agreed to review three appellate cases[648] that split on the question of whether discrimination based on sexual orientation and gender identity constitute discrimination based on sex and thus prohibited in the workplace under federal law.[649]

CONCLUSION

The First Amendment's centrality to LGBT rights ideology and its importance in the development of protective legal doctrine is an important component of LGBT history. In three important cases between 1958 and 1962, the Supreme Court codified the significance of the First Amendment as critical tool for social justice for LGBT advocates. *One, Inc. v. Oleson* required the Supreme Court to decide whether a magazine that discussed homosexual topics was obscene simply by virtue of discussing homosexuality, and *Manual Enterprises, Inc. v. Day* asked whether physique magazines were akin to hardcore pornography.[650] The cases—the first Supreme Court cases dealing with questions of homosexuality—established the precedent that homosexual communication was to be treated by the same standards as other forms of communication, under the First Amendment. The homosexuals got some help from nudists, a different breed of sexual minorities who faced similar censorship in *Sunshine Book Co. v. Summerfield* but whose heteronormative views may have been more sympathetic to judges of the era. While the Stonewall riots of 1969 mark the start of the "gay liberation" era—defined by increased organizing and activism of homosexuals—this Article shows that in the "homophile era" of the preceding two decades, homosexuals used the First Amendment to establish the right of public magazines to exist in the public sphere, demonstrating the importance of traditional First Amendment theories and doctrines as instrumental in allowing LGBT citizens to identify with and create a subculture and social movement.

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646. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2019).

647. *Id.* at 1732.

648. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100 (U.S. 2018); Bostock v. Clayton Cnty. Bd. Of Comm'rs, 723 Fed. Appx. 964 (11th Cir. 2018); EEOC v. R.G. of G.R. Harris Funeral Homes, Inc., 884, F. 3d 560 (11th Cir. 2018).

649. Gabriel Arana, *Does the Civil Rights Act Protect Gay Employees? The Court Will Decide*, THE AM. PROSPECT (May 22, 2019), https://prospect.org/article/does-civil-rights-act-protect-gay-employees-court-will-decide [https://perma.cc/78PV-B8YH].

650. BALL, *Obscenity*, *supra* note 9, at 229–30.