

2008

When Obscenity Discriminates

Elizabeth M. Glazer

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 Nw. U. L. Rev. 1379 (2008)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/107

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

Essay

WHEN OBSCENITY DISCRIMINATES

*Elizabeth M. Glazer**

I. INTRODUCTION.....	1380
II. THE LANGUAGE OF OBSCENITY	1386
A. <i>The Obscenity Doctrine</i>	1387
B. <i>The Tension Between "Sex" and "Sexual Orientation"</i>	1399
III. THE MANY MEANINGS OF <i>LAWRENCE</i>	1411
A. <i>Basic Background to Lawrence</i>	1412
B. <i>Interpreting Lawrence Broadly</i>	1415
C. <i>Interpreting Lawrence Narrowly</i>	1417
IV. TRANSLATING OBSCENITY FOR DISCRIMINATORS	1418
A. <i>Obscenity as Status Discrimination</i>	1419
B. <i>Obscenity as Viewpoint Discrimination</i>	1425
C. <i>Indiscriminate Obscenity</i>	1432
V. CONCLUSION: TALKING PAST MORALITY; TOWARD INDISCRIMINATE OBSCENITY	1433
APPENDIX	1434

* Associate Professor of Law, Hofstra University School of Law, 2006–present. J.D., University of Chicago, 2004; M.A., Philosophy, University of Pennsylvania, 2001; B.A., Philosophy, University of Pennsylvania, 2001. Portions of this Essay were delivered at the Southeastern Association of Law Schools 2007 Annual Meeting and at faculty workshops at the Hofstra University School of Law, University of Illinois College of Law, Loyola University Chicago School of Law, and Willamette University College of Law. I am grateful to participants in those events for their insights and ideas. For research support and assistance, thanks to Drew Gulley and Matt Kutner, whose talent and dedication were integral to this project, and to Hofstra University School of Law, whose funding was, too. For conversations, comments, and confidence, thanks to Shira Ackerman, Mike Allen, Laura Appleman, Amitai Aviram, Jordan Barry, John Bronsteen, Alafair Burke, I. Bennett Capers, Mary Anne Case, Robin Charlow, Amy Crawford, Pat Curran, Martha Albertson Fineman, Miranda Fleischer, Vic Fleischer, Jim Fleming, Eric Freedman, Bill Funk, Victoria Glazer, Joanna Grossman, Michael Gurary, Grant Hayden, Heidi Hurd, David Hyman, Christian Johnson, Joanna Kasirer, Sonia Katyal, Jim Klebba, Toby Kleiner, Zak Kramer, Julian Ku, Katy Kuh, Holning Lau, Bob Lawless, Leandra Lederman, Hans Linde, Arnold Loewy, Peter Maggs, Dan Markel, Linda McClain, Allison Milld, Jonathan Remy Nash, Ashira Ostrow, Rachel Peckerman, Melanie Rowen, Erin Ryan, Fred Schauer, Greg Shaffer, Stephen Siegel, Norm Silber, Bruce Smith, Rod Smolla, Larry Solum, Rachel A. Stanley, Stephanie Stern, Geof Stone, Tara Thompson, Alex Tsesis, Bill Van Alstyne, Spencer Waller, Russ Weaver, Norman Williams, and David Yellen. In addition, thanks to Kevin Shelton for phenomenal library and research assistance. Finally, sincere thanks to Micah Cogen, Kristine Devine, Kristin Berger Parker, and Kristin Rakowski for conscientious and thoughtful editorial guidance.

I. INTRODUCTION

This Essay argues that the First Amendment's obscenity doctrine has produced a discriminatory collateral effect against gays and lesbians.¹ If expression or conduct² qualifies as obscenity, it is excluded³ from the First Amendment's protective reach.⁴ Expression or conduct qualifies as obscenity if it satisfies a three-pronged test that essentially seeks to determine whether the expression or conduct's main purpose is to depict sex in a patently offensive way.⁵

Because the obscenity doctrine judges the offensive depiction of sex by reference to "contemporary community standards" applied by the "average person,"⁶ the doctrine has been "deemed 'objective.'"⁷ Despite that objectivity, commentators have criticized the application of the obscenity doctrine for, among other things, its incongruity with the First Amendment's core purposes,⁸ its inability to capture what is truly offensive about

¹ A note on terminology: in this Essay, I use the term "gays and lesbians" to the exclusion of other sexual minorities, as the latter term has been construed broadly. I do so deliberately because the scope of this Essay is limited to the rights of gays and lesbians as articulated by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003). I do not mean, by limiting the scope of this Essay to gays and lesbians, that the obscenity doctrine does not discriminate against those with minority sexual preferences or fetishes of other kinds. Moreover, I do not mean to suggest that the obscenity doctrine has discriminated exclusively against sexual minorities. Exploring the obscenity doctrine's possible racial biases, or biases against other minority groups, is a worthy enterprise that, while outside the scope of this Essay, is one the Essay hopes to encourage. I invite others to consider expanding the scope of this Essay to include such groups.

² In this Essay, I use "expression or conduct" to refer to those things that could, potentially, qualify as "speech" for First Amendment purposes. The Court recognized the First Amendment's extension to protect expressive conduct in *United States v. O'Brien*, 391 U.S. 367 (1968).

³ See *Roth v. United States*, 354 U.S. 476 (1957) (holding that obscenity was unprotected by the First Amendment); see also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (explaining the rationale for obscenity's exclusion from the First Amendment, namely to promote the public safety and quality of life of communities).

⁴ See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

⁵ See *Miller v. California*, 413 U.S. 15 (1973) (setting forth the current test to determine whether expression or conduct qualifies as obscenity).

⁶ *Id.* at 24.

⁷ Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 615. Moreover, it has long been established that the reasonable person standard is an objective, not a subjective, standard. See Symposium, *Pornography: Free Speech or Censorship in Cyberspace*, 3 B.U. J. SCI. & TECH. L. 3 ¶ 12 (1997) (remarks of Michael Godwin) (citing OLIVER WENDELL HOLMES, *THE COMMON LAW* 87 (Little Brown 1963)) ("The law [normally] considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that.").

⁸ See, e.g., David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 122-23 (1994) (arguing that a distinction between sexual and political speech is neither descriptively accurate nor consonant with First Amendment principles); David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974) (arguing that a moral and philosophical theory of free expression clarifies First Amendment jurisprudence, and that such a theory can explain why the obscenity doctrine has been based on defective moral and legal analysis).

speech,⁹ its obsolescence in light of new technology,¹⁰ and its codification of morals-based legislation.¹¹

This latter criticism has gained traction in light of the Supreme Court's decision in *Lawrence v. Texas*,¹² in which the Court invalidated a Texas statute that criminalized consensual same-sex sodomy.¹³ In *United States v. Extreme Associates*,¹⁴ in which a federal obscenity statute was used to prosecute defendants in the business of distributing obscene material via the Internet and the mail, the Western District of Pennsylvania held that "after *Lawrence*, the government [could] no longer justify legislation with en-

⁹ See Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107 (1994) (arguing that the obscenity doctrine should be expanded to include depictions of violence as well as of sex).

¹⁰ See, e.g., Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make It Particularly Urgent for the Supreme Court to Abandon Its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883, 955–68 (1996) (arguing against an "inside-out" approach to the First Amendment, which preserves a dichotomy between speech "inside" and "outside" the First Amendment's protection, because speech does its most important work in cases involving speech that exists "outside" the First Amendment's protective reach, particularly as new communications technologies proliferate); Arnold H. Loewy, *Obscenity: An Outdated Concept for the Twenty-First Century*, 10 NEXUS 21 (2005) (arguing, inter alia, that since the Court decided *Miller*, pornography has become more mainstream and technology has advanced such that obscenity can be disseminated privately).

¹¹ See, e.g., Loewy, *supra* note 10, at 26–27; see also *United States v. Extreme Assocs.*, 352 F. Supp. 2d 578, 590–91 (W.D. Pa. 2005) (citing Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare not Speak its Name*, 117 HARV. L. REV. 1893, 1945 (2004)), *rev'd*, 431 F.3d 150 (3d Cir. 2005); Tribe, *supra*, at 1945 ("[T]he Court's holding in *Lawrence* is hard to reconcile with retaining the state's authority to ban the distribution to adults of sexually explicit materials identified by, among other things, their supposed appeal to what those in power regard as 'unhealthy' lust, or the state's power to punish adults for enjoying such materials in private, whether alone or in the company of other adults." (footnote omitted)); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (2008) (invalidating a Texas statute criminalizing the selling, advertising, giving, or lending of a device designed or marketed for sexual stimulation in light of *Lawrence*, because the statute impermissibly burdened an individual's substantive due process right to engage in private intimate conduct of his or her choosing); Gary D. Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People*, 39 TULSA L. REV. 95, 145–48 (2003) (concluding that after *Lawrence* the government could only proscribe child pornography based on the independent governmental interest in protecting the children involved in its production); Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL'Y 25, 25 (2004) (stating that First Amendment principles favoring autonomy and the *Lawrence* decision "point toward elimination of obscenity law entirely"); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny*, 6 U. PA. J. CONST. L. 945, 964–65 (2004) (noting that obscenity laws will be void under *Lawrence* if the decision stands for the idea that moral disapproval is insufficient justification to infringe upon an individual's liberty); James W. Paulsen, *The Significance of Lawrence*, HOUS. LAW., Feb. 2004, at 32, 37 ("After *Lawrence*, any law that can be justified only because 'most people think that sort of thing is immoral' may be in constitutional trouble.").

¹² 539 U.S. 558 (2003).

¹³ See *id.*

¹⁴ 352 F. Supp. 2d 578 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005).

forcement of a 'moral code.'"¹⁵ However, the Third Circuit reversed, holding that the implications of *Lawrence* on morals-based legislation were "analytically irrelevant to the disposition of th[e] case."¹⁶

This Essay does not explore the implications of *Lawrence* on morals-based legislation.¹⁷ This Essay also does not take a position on the outcome of *Extreme Associates*. However, this Essay takes as its starting point the articulation in *Extreme Associates* of the supposed analytical irrelevance of *Lawrence* to the obscenity doctrine. One might argue that the outcome in *Extreme Associates* foreclosed the possibility of addressing, in light of the *Lawrence* decision, criticisms waged against the obscenity doctrine. This Essay demonstrates why such foreclosure is unfortunate, and is, moreover, unconstitutional.

Refusing to entertain the extension of *Lawrence* to the obscenity doctrine is unfortunate because the *Lawrence* decision has much to offer the obscenity doctrine. Despite the proliferation of pornography that has accompanied the Internet,¹⁸ obscenity cases have declined dramatically in recent years.¹⁹ As a result of the doctrine's disuse, the *Miller v. California*

¹⁵ *Id.* at 586; *see also id.* at 589.

¹⁶ *Extreme Assocs.*, 431 F.3d at 159 n.12.

¹⁷ To be sure, nor does this Essay argue that *Lawrence*'s implications on morals-based legislation are not worth pursuing. For an admirable pursuit of the morality-based implications of *Lawrence* on obscenity and hate speech doctrine, see Michael P. Allen, The Underappreciated First Amendment Importance of *Lawrence v. Texas* (Dec. 3, 2007) (unpublished manuscript, on file with author).

¹⁸ *See, e.g.*, Anthony D'Amato, *Porn Up, Rape Down* (Northwestern Pub. L. Research Paper No. 913013, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913013 (arguing that, despite a sharp rise in access to pornography as a result of the Internet, which D'Amato characterized as a "seismic change," the incidence of rape in the United States had declined by 85% from 1973 to 2003); *see also* Steven E. Landsburg, *How the Web Prevents Rape*, SLATE, Oct. 30, 2006, <http://slate.com/id/2152487/>.

¹⁹ *See* ARTHUR D. HELLMAN, WILLIAM D. ARAIZA & THOMAS E. BAKER, FIRST AMENDMENT LAW: FREEDOM OF EXPRESSION AND FREEDOM OF RELIGION 183 (2006) (explaining that "[n]ot many obscenity cases appear in the appellate reports today"); *see also* Tim Wu, *How Laws Die*, SLATE, Oct. 15, 2007, <http://slate.com/id/2175730/entry/2175743/> (reporting that despite the existence of laws punishing the downloading of material classified as obscenity, "there are very few prosecutions centered on mainstream adult pornography"). *But see* Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695 (2007) (telling the narrative of the obscenity doctrine's fall and subsequent rise); Scott Glover, *Porn Trial in L.A. Is Halted; Judge Grants a Stay After Conceding He Maintained His Own Website with Sexually Explicit Images*, L.A. TIMES, June 12, 2008, at A1 (reporting Ninth Circuit Judge Alex Kozinski's acknowledgement of posting sexual content to a website he maintained, thereby causing the judge to grant a forty-eight hour stay in the "closely watched obscenity trial" of Hollywood adult filmmaker Ira Isaacs in Los Angeles federal court); Gina Passarella, *'Text Only' Web Obscenity Case Attracts National Attention*, LEGAL INTELLIGENCER, Feb. 5, 2008, <http://www.law.com/jsp/article.jsp?id=1202136233549> (discussing charges of violating obscenity laws brought against Karen Fletcher, who maintained a subscription-based website on which she and others wrote about the kidnapping, rape, and torture of children, and which included only text and no pictures); *see also* Steve Stone, *Virginia Beach Police Seize Photos from Abercrombie Store*, PILOTONLINE.COM, Feb. 3, 2008, <http://hamptonroads.com/node/452689> (discussing the seizure by Virginia Beach city police of two large promotional photographs from an Abercrombie & Fitch store in a Virginia Beach mall, one depicting three shirtless young men from the back, walking through a field and revealing the leading man's upper

obscenity doctrine has been left unchanged since it was formulated in 1973.²⁰ The Court most recently invoked the doctrine in 2002 to clarify a distinction not in the *Miller* obscenity doctrine, which it reaffirmed, but instead in the *Ferber* doctrine,²¹ which separately governs child pornography.²²

Despite its disappearance from courts' dockets, the obscenity doctrine has operated stealthily out of court. The doctrine's tracks can be detected, among other places, in Senator Larry Craig's guilty plea under Minnesota's disorderly conduct statute²³ for "(1) put[ting] a duffel bag at the front of his stall; (2) peer[ing] through a crack into an adjoining stall; (3) tapp[ing] his foot; (4) mov[ing] his shoe over until it touched an officer's; and (5) r[unning] his fingers along the underside of the stall divider. That's it."²⁴ Further traces can be seen in volunteer firefighter Stephen Cole's arrest under Ohio's disorderly conduct statute²⁵ for his "offensive attire," which included "a skimpy woman's blue bikini with two tan water balloons placed in the top to simulate two woman's breasts and a pair of pink Speedo flip-flop sandals," an outfit he wore in anticipation of a cross-dressing contest at a nearby gay bar.²⁶

Simply because courts have not been in the business of determining the obscenity of expressive content has not meant that content has not been determined to be obscene. Seemingly neutral and objective bodies that routinely filter content have demonstrated a systematic bias against the expression of homosexuality. These filtering bodies appear to filter content through policies that may be "fair on [their] face and impartial in appearance, yet . . . applied and administered . . . with an evil eye and an unequal

buttocks as he pulled up his jeans, and the other depicting a topless woman whose hand covered only the nipple of her exposed breast, due to the store's citation under a city code section making it a crime to display obscene materials in a business open to juveniles); but see *Obscenity Charges Dropped Against Abercrombie & Fitch*, ASSOCIATED PRESS, Feb. 5, 2008, http://www.foxbusiness.com/markets/industries/retail/article/obscenity-charges-dropped-abercrombie-fitch_465764_7.html.

²⁰ However, former Attorney General Alberto Gonzales pioneered an antiobscenity squad, for which he recruited ten FBI agents to gather evidence against manufacturers and purveyors of pornography between consenting adults, and described it in 2005 as "one of [his] top priorities." See Barton Gellman, *Recruits Sought for Porn Squad*, WASH. POST, Sept. 20, 2005, at A21.

²¹ See *New York v. Ferber*, 458 U.S. 747 (1982).

²² See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (finding overbroad and unconstitutional the portions of the Child Pornography Prevention Act of 1996 prohibiting any visual depiction of anyone who appears to be (but is, in fact, not) a minor engaging in sexually explicit conduct).

²³ MINN. STAT. ANN. § 609.72(1)(3) (West 2003) (providing that one who knowingly "[e]ngages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others" is guilty of the misdemeanor of disorderly conduct).

²⁴ Posting of Dale Carpenter to The Volokh Conspiracy, http://volokh.com/archives/archive_2007_08_26-2007_09_01.shtml#1188338033 (Aug. 28, 2007, 17:53 EST).

²⁵ OHIO REV. CODE ANN. § 2907.09 (West 2006).

²⁶ City of Mason Police Department, Incident Summary, Incident Number 2007000003894, Apr. 3, 2007, available at <http://www.thesmokinggun.com/archive/years/2007/0405071drag13.html>.

hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances.”²⁷ When Google searches filter images of homosexuality in response to searches for “having sex,” or when the Motion Picture Association of America (MPAA)²⁸ rates movies with a certain amount of heterosexual sex “R,” while rating movies with an equal or lesser amount of homosexual sex “NC-17,”²⁹ obscenity discriminates.

Each of these examples affects the gay, or the apparently gay, community.³⁰ Each of these examples demonstrates that the obscenity doctrine’s apparent silence in recent years may speak volumes about the collateral effects of its application. Each of these examples, however, involves the restriction of expression or conduct that has not been held by any court to be obscene. And, paradoxically, therein lies the force in these examples.

For some time the legal academic community has investigated the remaining debris from an “explosion of scholarly interest in norms.”³¹ In connection with their investigations, scholars have articulated law’s “expressive function,” its ability to influence individual behavior by an existence decoupled from its enforcement.³² Some of these investigations have

²⁷ *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (involving a facially neutral San Francisco ordinance regulating laundries that was found to be enforced discriminatorily against persons of Chinese ancestry, thereby violating the Fourteenth Amendment).

²⁸ Of course, the MPAA is at least arguably not a state actor. I address this claim further in Part II.B.2.

²⁹ See generally *THIS FILM IS NOT YET RATED* (Independent Film Channel 2006) (where director Kirby Dick exposed biases within the MPAA’s ratings system); see also *Fresh Air: Christine Vachon’s ‘A Killer Life’* (NPR radio broadcast Dec. 21, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6658339> (film producer Christine Vachon of *Boys Don’t Cry* explaining that the film, whose plot contained homosexuality, required editing of much of its homosexual content to receive a rating of “R” from the MPAA, after receiving an initial rating of “NC-17”).

³⁰ I am aware that gender nonconformity (as in the case of Stephen Cole’s arrest) is not equivalent to, or indicative of, membership in the sexual minority. However, my awareness may not be equivalent to, or necessarily indicative of, the community standards that the *Miller* test invites. See generally Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995) (reconstructing and critiquing the conflation of sex, gender, and sexual orientation over time and across borders); see also Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196 (arguing that “the censure of homosexuality cannot be animated merely by a condemnation of sexual behavior,” and that “[i]nstead, homosexuality is censured because it violates the prescriptions of gender role expectations”).

³¹ Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 542 (1998). For further citations indicating the “explosive” aspect of the legal academy’s engagement with social norms, see Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643, 644 n.1 (2001).

³² See, e.g., Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 666 (1998) (describing a research program for the New Chicago School, which, like the Old Chicago School, approaches regulation by focusing on regulators other than the law but, unlike the Old Chicago School, hopes that the state can do more, not less, in response); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (exploring the function of law in “making statements” as opposed to controlling behavior directly); cf. Amitai Aviram, *The Placebo Effect of Law: Law’s Role in Manipu-*

focused in particular on the expressive function of criminal laws,³³ and some of them have focused in particular on how criminal laws have stigmatized homosexuals.³⁴ This Essay seeks to contribute to the productive enterprise of analyzing “the ancillary effects of law beyond concerns related to enforcement.”³⁵

One way to explain the obscenity doctrine’s lack of enforcement, and its disappearance from courts’ dockets, may be that the doctrine’s application has presented no cause for complaint. Another explanation, however, may be that the doctrine has not provided a vocabulary within which worthy claimants could verbalize the harms they have suffered due to the doctrine’s collateral effects.

The obscenity doctrine has failed to distinguish between “sex,” the patently offensive representation of which the doctrine excludes from First Amendment protection, and “sexual orientation.” As a result, gays and lesbians have been folded into the constitutionally unprotected category of obscenity, of patently offensive speech that exists outside the First Amendment’s protective reach. The collateral effect of failing to distinguish gay and lesbian content from obscenity has been an implicit yet pervasive sanctioning of the censoring of gay content. Gay and lesbian claimants arguing that their identity has been unconstitutionally categorized as obscene would only “talk past” courts because the obscenity of their identity has informed the construction of the obscenity doctrine itself.³⁶ Of

lating Perceptions, 75 GEO. WASH. L. REV. 54 (2006) (discussing the role of law as placebo, generating benefits that result from the existence of law that is perceived to be effective by the people it affects).

³³ See, e.g., ERIC A. POSNER, *LAW AND SOCIAL NORMS* 88–111 (2000); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken-Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998) (exploring alternatives to misdemeanor arrests as ways of generating more order on the streets); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350 (1997) (arguing that criminal law should foster the perception that a community is law abiding in order to effect law abiding among the community).

³⁴ See William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880–1946*, 82 IOWA L. REV. 1007, 1011, 1093–1106 (1996) (assessing the role of law in the process of the normalization of heterosexuality, “by which certain practices or character traits are established as socially preferred by prohibiting or stigmatizing their competitors”); Goodman, *supra* note 31 (analyzing the “social experience” of South African sodomy laws).

³⁵ Goodman, *supra* note 31, at 734. Of course, the project of applying social norms scholarship to assess the relationship between constitutional doctrine and social behavior is one that this Essay can endeavor only to begin.

³⁶ I refer here, by way of analogy, to Ronald Dworkin’s criticism of metasemantics, in which individuals cannot meaningfully disagree about a concept’s content (such as the definition of “law”) because a disagreement of that sort would mean that the disagreeing individuals simply used different concepts. See RONALD DWORIN, *JUSTICE IN ROBES* 9 (2006) (“People share some concepts only when they agree on a definition—rough or precise—that sets out the criteria for the correct application of the associated term or phrase.”). Whether or not one accepts the implications of Dworkin’s critique (explained in further depth and criticized in Michael Steven Green, *Dworkin v. the Philosophers: A Review Essay on Justice in Robes*, 2007 U. ILL. L. REV. 1477), one can appreciate and understand how competing analyses of the same concept, “law” in jurisprudential literature, involve theorists talking past one another. See

course, the obscenity doctrine has from its inception left individuals talking past one another. During the oral argument in *Alberts v. California*,³⁷ whose disposition was consolidated with the Court's disposition of *Roth v. United States*,³⁸ Stanley Fleishman, attorney for the appellant *Alberts*, answered Justice Frankfurter's question whether "there [was] such a thing as pornography" by saying: "If Your Honor please, pornography means different things to me than it does to you and I can't answer that question without—because we're not talking the same language."³⁹

This Essay aims to remedy the obscenity doctrine's tendency to cause individuals to talk past one another by expanding the range of possible challenges to the obscenity doctrine's constitutionality.⁴⁰ Until now, the only efforts to translate the obscenity doctrine and the *Lawrence* decision have involved either doctrine's link to morals-based legislation.⁴¹ However, those efforts have thus far proven unsuccessful.⁴² This Essay hopes to enrich the doctrines set forth in both *Miller* and *Lawrence* by offering both doctrines a relevant vocabulary with which to talk to the other. In this way, the Essay bridges First Amendment and antidiscrimination literatures, which until now have not come together to address obscenity's discrimination, a harm that falls within their individual and collective jurisdictions.

In three parts, this Essay builds such a vocabulary. Part II focuses on the language of the obscenity doctrine, while Part III focuses on the various interpretations that have been attributed to the *Lawrence* decision. Part IV begins the translation process, using both broad (Part IV.A) and narrow (Part IV.B) interpretations of the *Lawrence* decision to argue that the obscenity doctrine has discriminated against gays and lesbians. Part IV elaborates the obscenity doctrine's discrimination against gays and lesbians on both equal protection and First Amendment grounds.

II. THE LANGUAGE OF OBSCENITY

This Part first provides an exposition of the obscenity doctrine. Then, it illustrates by way of example the tension between obscenity and the

BRIAN BIX, *Conceptual Questions and Jurisprudence*, in JURISPRUDENCE: THEORY AND CONTEXT 9 (3d ed. 2004).

³⁷ 292 P.2d 90 (Cal. App. Dep't Super. Ct. 1955), *aff'd sub nom.* *Roth v. United States*, 354 U.S. 476 (1957).

³⁸ 354 U.S. 476.

³⁹ Transcript of Oral Argument, *Roth*, 354 U.S. 476 (No. 61) (1957), in OBSCENITY: THE COMPLETE ORAL ARGUMENTS BEFORE THE SUPREME COURT IN THE MAJOR OBSCENITY CASES 44 (Leon Friedman ed., 1970).

⁴⁰ Cf. Lawrence B. Solum, *Constitutional Possibilities* (Ill. Pub. Law & Legal Theory Res. Paper Series, Res. Paper No. 06-15, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=949052 (explaining that possibilities for constitutional interpretation need not be limited to particular moments in constitutional history).

⁴¹ See *supra* notes 11–16 and accompanying text.

⁴² See *supra* note 16 and accompanying text.

rights of gays and lesbians, namely the obscenity doctrine's conflation of sex and sexual orientation.⁴³

The First Amendment's protection is not absolute.⁴⁴ Obscenity is a category of expression that is excluded from the category of "speech" that the First Amendment protects.⁴⁵ Exclusions from First Amendment protection generally may not be based on their content. However, exclusions based on an expression's subject matter⁴⁶ have been permitted while exclusions based on an expression's viewpoint have been uniformly struck down.⁴⁷ The obscenity doctrine's discrimination against gays and lesbians derives both from the doctrine's own peculiar rules as well as from its larger First Amendment context. Part II.A describes the doctrine's own rules, and situates it within the larger context of First Amendment rules. Part II.B elaborates upon two facially neutral filtering systems that have generated a bias against gays and lesbians to illustrate the collateral effects of the obscenity doctrine's discrimination.

A. *The Obscenity Doctrine*

The First Amendment provides that the government may not make laws restricting the freedom of speech. Nevertheless, the First Amendment does not prohibit the government from making laws that restrict communication without regard to the message conveyed, or "content-neutral" restrictions,⁴⁸ nor does it prohibit the government from restricting "low-value" speech.⁴⁹ Obscenity is a type of low-value speech, singled out as such on the basis of its content.⁵⁰ Thus, obscenity is a part of a larger First Amend-

⁴³ See *supra* notes 30–36 and accompanying text.

⁴⁴ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) ("[T]he right of free speech is not absolute at all times and under all circumstances."); WILLIAM VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* 25 (1984).

⁴⁵ See Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1.

⁴⁶ See Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978).

⁴⁷ An exclusion based on subject matter would be, for example, "No speech about the War." An exclusion based on viewpoint would be, for example, "No speech against the War." An equally viewpoint-discriminatory exclusion would be, "No speech in support of the War."

⁴⁸ See *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972) (where the Court declared that the First Amendment "means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content").

⁴⁹ See *Chaplinsky*, 315 U.S. at 571–72 ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . ."); see also C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976) (arguing that the First Amendment should not protect commercial speech because such speech does not promote the First Amendment's purposes). But see *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that the First Amendment protects commercial speech, thereby clarifying that it is not "low-value" speech).

⁵⁰ See Stone, *supra* note 46, at 81 n.3 ("The most obvious and most common form of content-based restriction consists of government action . . . that on its face expressly accords differential treatment to

ment doctrine, situated within the more general First Amendment classifications of low-value speech and content-based restrictions.⁵¹

Arguably, however, obscenity is the only remaining type of low-value speech. Subsequent cases have heightened the First Amendment value of categories of speech that at one time were also considered of low First Amendment value.⁵² Thus, while the obscenity doctrine is a part of a larger context of First Amendment jurisprudence, it is also a doctrine unto itself.⁵³ This Section explores the ways in which obscenity comprises a part of First Amendment doctrine, and the ways in which it stands alone. In each of these settings, the obscenity doctrine discriminates.

1. A First Amendment Backdrop: Obscenity in Context.—The First Amendment provides that “Congress⁵⁴ shall make no law . . . abridging the freedom of speech”⁵⁵ However, obscenity is not protected by the First Amendment. Thus, the Supreme Court has reasoned that Congress may make laws restricting the dissemination of obscenity. Understanding the process by which the Court excluded obscenity from First Amendment protection can help to better analyze the obscenity doctrine’s separate and peculiar rules.

“Speech,” for First Amendment purposes, includes “the spoken or written word,”⁵⁶ but does not end there. Courts have analyzed on First Amendment grounds, and in particular on obscenity grounds, magazines,⁵⁷ books,⁵⁸

the expression of certain specified messages, ideas, or information. Familiar examples are laws banning obscenity . . .”).

⁵¹ See Kalven, *supra* note 45, at 10–11 (using obscenity to craft his famous “two-level speech theory,” which divides high-value from low-value speech).

⁵² See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (a unanimous Court clarifying that even though fighting words were “essentially a ‘nonspeech’ element of communication,” the government “may not regulate use [of fighting words] based on hostility—or favoritism—towards the underlying message expressed”); see also *Cohen v. California*, 403 U.S. 15 (1971) (overturning a conviction for disturbing the peace for being in a courtroom while wearing a jacket that displayed the allegedly profane words “Fuck the Draft” because others’ offense could not be a reason for censoring speech); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (holding that libel could “claim no talismanic immunity from constitutional limitations”).

⁵³ See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 467 (1970) (“The most striking thing about the law of obscenity is that it is *sui generis*, not following most of the rules developed in other areas of the First Amendment.”).

⁵⁴ The First Amendment’s protection applies not only with respect to Congress, but also with respect to the states, through its incorporation into the Due Process Clause of the Fourteenth Amendment. See *Gitlow v. New York*, 268 U.S. 652 (1925); see also *Fiske v. Kansas*, 274 U.S. 380 (1927) (finding for the first time that a state law regulating speech violated the Due Process Clause of the Fourteenth Amendment).

⁵⁵ U.S. CONST. amend. I.

⁵⁶ *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

⁵⁷ See, e.g., *One, Inc. v. Oleson*, 355 U.S. 371 (1958) (reversing the Ninth Circuit’s decision that an issue of the magazine “One” that contained an article about a twenty-year-old girl’s lesbian affairs and a poem about the homosexual activities of two English lords was obscene under *Roth v. United States*, 354 U.S. 476 (1957)).

photographs,⁵⁹ motion pictures,⁶⁰ live performances,⁶¹ and very recently, text alone.⁶² When drawing the parameters of First Amendment “speech,” the Supreme Court has asked first whether a speaker intends to communicate an idea, and second whether a person hearing or seeing the words or actions would likely understand that an idea was being communicated.⁶³ Neither of these questions generates a straightforward answer.⁶⁴

In an effort to offer a more coherent explanation of the Court’s First Amendment decisions, scholars have articulated theories of the First Amendment’s purpose.⁶⁵ However, no theory fully explains⁶⁶ “which speech winds up within the First Amendment and which speech winds up without.”⁶⁷ Instead, the rule to distinguish between protected and unpro-

⁵⁸ See, e.g., *Mishkin v. New York*, 383 U.S. 502, 509 (1966) (upholding a conviction for violation of a state criminal obscenity statute based on evidence that the defendant had produced and sold books whose covers depicted scantily clad women being beaten, and included illustrations of sex scenes that involved lesbianism and other “sexually deviant” themes).

⁵⁹ See, e.g., *Hamling v. United States*, 418 U.S. 87 (1974) (affirming a conviction for a violation of a federal criminal obscenity statute for using the mail to send a brochure containing a collage of photographs portraying heterosexual and homosexual intercourse, and depictions of sexual acts said to appeal to deviant groups).

⁶⁰ See, e.g., *Miller v. California*, 413 U.S. 15, 18 (1973) (upholding a conviction under California’s criminal obscenity statute for conducting an unsolicited mass mailing campaign of brochures advertising, among other things, a film entitled “Marital Intercourse”); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968) (holding that a Dallas ordinance applied to classify the motion picture *Viva Maria* as “not suitable for young persons” was unconstitutionally vague); *Kingsley Int’l Pictures Corp. v. Regents Univ. of N.Y.*, 360 U.S. 684 (1959) (affirming that the film *Lady Chatterley’s Lover*, which romanticized and condoned adultery, was not obscene).

⁶¹ See, e.g., *Adams Newark Theater Co. v. Newark*, 354 U.S. 931 (1957) (holding that two obscenity ordinances were constitutionally applied against an operator of a theater whose performers were indecently exposed).

⁶² See Passarella, *supra* note 19.

⁶³ See Wilson R. Huhn, *Assessing the Constitutionality of Laws that Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 803 n.7 (2004) (citing and paraphrasing the test from *Spence v. Washington*, 18 U.S. 405 (1974)).

⁶⁴ See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 11.3.6.1, at 1064–65 (3d ed. 2006) (observing that, in spite of the *Spence* approach to determining what is “speech,” problems in the test’s application are “inevitable” because of the test’s subjectivity).

⁶⁵ Thomas Emerson focused on four categories of First Amendment theories in *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963): the First Amendment’s purposes of self-fulfillment and the advancement of autonomy; the attainment of truth through the marketplace of ideas; self-governance and participation in decisionmaking; and providing a check on, or serving the function of a “safety valve” of, governmental power.

⁶⁶ Moreover, no combination of theories fully explains this either. Some theorists have argued that a theory of the First Amendment could mean a combination of First Amendment purposes. See, e.g., RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 14–17 (1992); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1993) (arguing that efforts to formulate a general theory of the First Amendment have been ineffective and counterproductive because the social reality of speech is too complex to be captured by an abstraction that does not regard the diversity of contexts in which speech regulation exists).

⁶⁷ Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1784 (2004).

tected speech amounts to nothing more than an analogical appeal to examples in an effort to find Wittgensteinian family resemblances.⁶⁸

Although there might not be one single test or one general theory of what constitutes speech protected by the First Amendment, two particular distinctions have been useful in helping courts to recognize members of the First Amendment family. These two are the distinctions between (i) two levels of expression, “high” and “low” value, and (ii) two tiers of restrictions, content-based and content-neutral.⁶⁹ Though scholars have for some time questioned the reason for the prominence of these distinctions in First Amendment law,⁷⁰ their prominence is central to its organization. Thus, a discussion of each of these two distinctions, as well as the obscenity doctrine’s situation within these distinctions, follows.

a. Levels of First Amendment review.—Courts first determine whether speech falls into one of *Chaplinsky v. New Hampshire*’s low-value categories.⁷¹ Though laws restricting obscenity arguably constitute the only remaining laws that restrict low-value speech,⁷² such laws were articulated among others (laws banning profanity, libel, and fighting words) as examples of laws banning low-value speech.

Low-value speech is comprised of “special categories of expression . . . that the Court has found to be of such low value in terms of the historical, philosophical, and political purposes of the [First] [A]mendment as to be

⁶⁸ See *id.* at 1784–85, where Schauer argued:

[H]owever hard we try to theorize about the First Amendment’s boundaries, and however successful such theorizing might be as a normative enterprise, efforts at anything close to an explanation of the *existing* terrain of coverage and noncoverage are unavailing. . . . Although any account of what the First Amendment ‘is all about’ will include some communicative acts and exclude others . . . [,] none of the existing normative accounts appears to explain descriptively much of, let alone most of, the First Amendment’s existing inclusions and exclusions.

See also FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 14 (1982); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 759 (1993) (“The law of free speech is an especially good area for investigation [of analogical reasoning], because most of the reasoning in that area is analogical in nature.”).

⁶⁹ See GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, *CONSTITUTIONAL LAW* 1060 (5th ed. 2005) (explaining that the sections of the casebook exploring the Court’s interpretation of the First Amendment are “structured in accord with two distinctions that have played a central role in the Court’s analysis[.]. . . [namely] the distinction between content-based and content-neutral restrictions. . . . [and] the distinction between ‘high’ and ‘low’ value expression”).

⁷⁰ See, e.g., Huhn, *supra* note 63; Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347 (2006); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297 (1995); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982); R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006).

⁷¹ See 315 U.S. 568 (1942).

⁷² See *supra* notes 52–53 and accompanying text.

entitled to less than full constitutional protection,”⁷³ which the Court enunciated in a case that involved a law that banned fighting words. The distinction between high- and low-value speech comprises what Professor Harry Kalven called “the two-level free-speech theory,” where, after first determining whether speech is of high or low First Amendment value, courts determine whether the restriction on that speech is content-based or content-neutral.⁷⁴

b. Tiers of First Amendment review.—In addition to its two levels, the First Amendment’s guarantee has been divided into two tiers, where one tier of First Amendment review is reserved for content-based restrictions of speech and another tier is reserved for content-neutral restrictions of speech. Despite its seemingly absolute proscription against making laws that abridge the freedom of speech, the First Amendment’s guarantee is not absolute.⁷⁵ Traditionally, the government has been prohibited from making laws that are “content-based” (e.g., a law prohibiting antiwar speech), but has not necessarily been prohibited from making laws that are “content-neutral” (e.g., a law prohibiting noisy protests near a school).⁷⁶ A law is content-based if it restricts either expression of an entire subject matter or expression of a particular viewpoint.⁷⁷

In this way, the Court has endorsed a “two-tier system of review.”⁷⁸ Restrictions of expression that apply to all expression without regard to the message conveyed, or content-neutral restrictions, must meet only intermediate scrutiny, meaning that they will be upheld if they substantially relate to an important government purpose.⁷⁹ The tier reserved for content-based restrictions has been further subdivided into two types of content-based restrictions: those that restrict viewpoints and those that restrict entire subject matters. Restrictions of a particular viewpoint are “presumptively invalid”⁸⁰

⁷³ Stone, *supra* note 46, at 82.

⁷⁴ Kalven, *supra* note 45, at 10.

⁷⁵ See *supra* note 44.

⁷⁶ See *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (where the Court declared that the First Amendment “means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content”).

⁷⁷ See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 55 (1983) (“In a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.”).

⁷⁸ CHEMERINSKY, *supra* note 64, § 11.2.1, at 933.

⁷⁹ See *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994) (holding that a federal law requiring cable companies to carry local broadcast stations was content-neutral, and met intermediate scrutiny because the government retained an important interest in protecting the over-the-air, free broadcast media, and remanding the case for a ruling consistent with that holding).

⁸⁰ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

and must meet strict scrutiny to be upheld.⁸¹ While restrictions of particular viewpoints are presumed invalid and content-neutral restrictions are upheld only if they substantially relate to an important government purpose, restrictions of an entire subject matter fall somewhere in between them along the hierarchy of constitutional review. In fact, as Professor Geoffrey Stone has famously observed, restrictions of an entire subject matter have not been handled systematically at all.⁸²

Professor Stone observed that the Court has treated inconsistently restrictions of speech on the basis of subject matter. In *Rowan v. United States Post Office Department*,⁸³ the Court upheld a statute that directed the postmaster general, at the request of a householder who found a mailing erotically arousing or sexually provocative, to issue an order directing a sender of materials that were offensive because of their lewd and salacious (but not obscene)⁸⁴ character to refrain from sending any further mailings to that householder. The *Rowan* Court upheld this statute, which singled out lewd and salacious speech but, in a way that foreshadowed its much later decision in *R.A.V. v. City of St. Paul*,⁸⁵ would not allow "the government . . . [to] treat some sexually related speech differently from other sexually related speech."⁸⁶ That is, the Court upheld this statute by treating it as though it were content-neutral.

In contrast to its decision in *Rowan*, the Court in *Police Department of Chicago v. Mosley* struck down a Chicago ordinance making it unlawful for any person to picket or demonstrate on a public way within 150 feet of a school building while the school was in session, unless the picketing was peaceful picketing of any school involved in a labor dispute.⁸⁷ Because of its finding that the ordinance "describe[d] permissible picketing in terms of

⁸¹ See *Turner Broad.*, 512 U.S. at 677 ("Preferences for diversity of viewpoints . . . may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation . . . is not enough to avoid the need for strict scrutiny of content-based justifications." (citations omitted)). Moreover, in all of the cases where a majority of the Court has applied a strict scrutiny standard for reasons of content discrimination, it has found the statute to which that standard was applied to be unconstitutional. See *McDonald*, *supra* note 70, at 1365.

⁸² See Stone, *supra* note 46, at 83 ("[S]uch restrictions do not fit neatly within the Court's general framework for reviewing laws regulating speech; it is unclear whether they should be treated as content-based, content-neutral, or something altogether different. Not surprisingly, then, the Court has encountered considerable difficulty in attempting to make sense of these cases.").

⁸³ 397 U.S. 728 (1970).

⁸⁴ See Stone, *supra* note 46, at 85 n.15 (explaining that, while *Rowan* may have been premised upon an unstated assumption that sexually offensive speech was entitled to less than full First Amendment protection, the Court subsequently rejected that classification in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)).

⁸⁵ 505 U.S. 377. For further discussion of *R.A.V.*, see *infra* Part II.A.1.c.

⁸⁶ Stone, *supra* note 46, at 85.

⁸⁷ 408 U.S. 92 (1972).

its subject-matter,”⁸⁸ the Court invalidated it. The *Mosley* Court, in sharp contrast to the *Rowan* Court, “proceeded on the assumption that subject-matter restrictions [we]re to be treated no differently from other sorts of content-based restrictions.”⁸⁹ In *Mosley*, the Court held that the Chicago ordinance was unconstitutionally restrictive “because it ma[de] an impermissible distinction between labor picketing and other peaceful picketing.”⁹⁰

Professor Stone catalogued five subsequent cases that were decided during the five years following *Rowan* and *Mosley*, highlighting how those decisions “failed to recognize the relationship between the cases or the special problem posed by subject-matter restrictions.”⁹¹ Upon reflection of the themes that emerged from the Court’s inconsistent treatment of subject-matter restrictions,⁹² Stone observed that there were “two primary reasons for the Court’s strikingly speech-protective approach to content-based restrictions.”⁹³ First, content-based restrictions “leave the public with only an incomplete—and perhaps inaccurate—perception of their social and political universe.”⁹⁴ Second, “it is per se impermissible for government to restrict speech because it disapproves of the message conveyed.”⁹⁵ Thus, if a restriction on speech is not thought to diminish the public’s perception of its social or political universe, and is not thought to restrict any particular mes-

⁸⁸ *Id.*

⁸⁹ Stone, *supra* note 46, at 86.

⁹⁰ *Mosley*, 408 U.S. at 95.

⁹¹ Stone, *supra* note 46, at 88.

⁹² See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding a series of zoning ordinances requiring motion picture theaters exhibiting nonobscene but sexually explicit movies to be dispersed throughout the city rather than concentrated in a single neighborhood, because the restriction on sexually explicit movies was determined to be “unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances [was considered to be] exactly the same” because these were viewed as content-neutral, not viewpoint-discriminatory); *Greer v. Spock*, 424 U.S. 828, 839 (1976) (treating an arguably viewpoint-discriminatory Fort Dix Military Reservation regulation prohibiting any speech or demonstration of a partisan political nature as consistent with the “American constitutional tradition of a politically neutral military,” by upholding the same, when the military base routinely permitted civilian speakers to address military personnel on subjects ranging from business management to drug abuse); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (treating subject-matter restrictions like content-neutral restrictions in invalidating an ordinance prohibiting a drive-in movie theater from displaying any film containing nudity if the theater’s screen was visible from a public street or place); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (blurring the issues of the content-neutral public forum with that of the subject-matter restriction when upholding a city’s policy permitting the interior advertising spaces of its transit vehicles to be leased for the display of commercial but not public-issue or political messages); *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973) (failing to examine the issue of subject-matter restrictiveness when determining that radio and television broadcasters could, with Federal Communication Commission approval, constitutionally refuse to sell advertising time to those seeking to express views on controversial issues of public importance while routinely selling airtime for commercial advertising).

⁹³ Stone, *supra* note 46, at 101.

⁹⁴ *Id.*

⁹⁵ *Id.* at 103.

sage, it will be treated more like a content-neutral restriction (and will more likely be upheld). Conversely, if a restriction on speech is thought to diminish the public's perception of its social or political universe, or is thought to restrict a particular message, it will be treated more like a content-based viewpoint restriction (and will almost definitely be invalidated).⁹⁶

c. Levels, tiers, and obscenity.—The regulation of obscenity constitutes content-based regulation of low-value speech on the basis of its subject matter. Obscenity is low-value speech,⁹⁷ and is likely the only sort of such speech that remains from *Chaplinsky's* list.⁹⁸ In this way, the regulation of obscenity presents the most "obvious" and "common" form of subject-matter restriction.⁹⁹ However, while obscenity may fall within the existing First Amendment levels and tiers in an obvious way, "a subject-matter classification according disadvantageous treatment to 'less than fully protected' [(i.e., low-value)] speech poses a different problem,"¹⁰⁰ which Professor Stone did not take up in his seminal article on subject-matter restrictions. The problem of a subject-matter classification according disadvantaged treatment to low-value speech differs from a subject-matter classification according disadvantaged treatment to fully protected speech, which would be upheld or invalidated depending upon the extent to which it affected the public's perception of its surrounding universe and the extent to which it restricted a particular message.¹⁰¹

The problem of a subject-matter classification according disadvantaged treatment to low-value speech may differ, too, from a viewpoint classification according disadvantaged treatment to low-value speech, a problem that the Supreme Court has since resolved. In *R.A.V. v. City of St. Paul*,¹⁰² the Supreme Court encountered a viewpoint classification that accorded disadvantaged treatment to fighting words, a category of speech that at one point was considered to be of low First Amendment value.¹⁰³ In *R.A.V.*, Justice Scalia wrote for the majority of the Court invalidating a St. Paul, Minnesota

⁹⁶ Of course, it is possible to frame a restriction as though it is more or less likely to diminish the public's perception of its social or political universe, or as though it is more or less restrictive of a particular message. The ability to frame restrictions of subject matter in these ways—namely, as though they are more like content-neutral restrictions or more like viewpoint-discriminatory restrictions—may account for why the Court's treatment of subject-matter restrictions is so confused.

⁹⁷ See *supra* note 50 and accompanying text.

⁹⁸ See *supra* note 52 and accompanying text.

⁹⁹ See Stone, *supra* note 46, at 81 n.3.

¹⁰⁰ *Id.* at 83 n.7.

¹⁰¹ See *supra* notes 94–96 and accompanying text.

¹⁰² 505 U.S. 377 (1992).

¹⁰³ See *supra* text accompanying notes 71–72. Fighting words has not necessarily been eliminated from the *Chaplinsky* list of low-value speech categories. However, for all practical purposes, "a very narrow fighting words law likely will be declared unconstitutional as impermissibly drawing content-based distinctions as to what speech is prohibited and what is allowed." CHEMERINSKY, *supra* note 64, § 11.3, at 1005.

ordinance prohibiting placing on public or private property symbols, objects, characterizations, or graffiti including, but not limited to, a burning cross or Nazi swastika.¹⁰⁴ Justice Scalia indicated that the reason for the ordinance's unconstitutionality was that it "prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresse[d]."¹⁰⁵

Whether Justice Scalia meant that the ordinance in *R.A.V.* should be invalidated because it restricted expression on the basis of subject matter or on the basis of viewpoint is not exactly clear. After intimating that the ordinance improperly restricted on the basis of subjects, Scalia illustrated that "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government."¹⁰⁶ Regardless of the way in which Scalia understood the distinction between the two types of content-based restrictions, what emerges clearly from his opinion in *R.A.V.* is that Scalia thought that further content-based restriction, whether on the basis of subject matter or viewpoint, was as unacceptable with respect to low-value speech as it was with respect to fully protected, high-value speech.¹⁰⁷

To further illustrate his point regarding the impermissibility of content-based restrictions within low-value speech, Scalia even used obscenity as an example: "A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience*—i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages."¹⁰⁸ Moreover, Scalia clarified that statutes discriminating against a particular sort of conduct, rather than against a particular form of expression, could also constitute impermissible content-based restrictions within low-value speech categories.¹⁰⁹

Thus, the *R.A.V.* decision stands for the proposition that content-based restrictions within a category of unprotected speech will likely be treated like viewpoint-discriminatory restrictions, and will as a result have to meet strict scrutiny. However, *R.A.V.* held that "[w]hen the basis for the content

¹⁰⁴ See *R.A.V.*, 505 U.S. at 379.

¹⁰⁵ *Id.* at 381.

¹⁰⁶ *Id.* at 384.

¹⁰⁷ See *id.* at 386 ("And just as the power to proscribe particular speech on the basis of a noncontent element (e.g., noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the power to proscribe it on the basis of *one* content element (e.g., obscenity) does not entail the power to proscribe it on the basis of *other* content elements.").

¹⁰⁸ *Id.* at 388.

¹⁰⁹ See *id.* at 389 ("Moreover, since words can in some circumstances violate laws directed not against speech but against conduct . . . , a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech."); see also *id.* at 390 ("Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.").

discrimination consists of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."¹¹⁰ In this way Scalia's decision in *R.A.V.* left open the possibility that a content-based restriction is permissible if it directly advances the reason that a particular category of speech is unprotected.¹¹¹ In order to know which restrictions within a particular category of low-value speech would be permissible and impermissible under *R.A.V.*, one would have to understand the "very reason" that obscenity, "the entire class of speech at issue," is "proscribable." The Sections that follow examine this issue.

2. *A Doctrine Unto Itself: The Sui Generis Law of Obscenity.*—Although obscenity is situated within a larger First Amendment context, it is situated in a sealed bubble within that context. That bubble has been sealed because it contains rules unlike any others that operate within the First Amendment. The governing standard for obscenity derives from *Miller v. California*,¹¹² in which the Court built upon its earlier holding in *Roth v. United States*¹¹³ that obscene materials were unprotected by the First Amendment.¹¹⁴ The rationale for the obscenity doctrine was articulated by the Court in *Paris Adult Theatre I v. Slaton*,¹¹⁵ namely the state's interest in reducing the amount of obscene material disseminated for the purpose of protecting the public's interest in its quality of life, the quality of life of the total community environment, the tone of commerce in the country's big cities, and even the safety of the public.¹¹⁶ In order to effect those purposes, the Court in *Miller* articulated "standards more concrete than those in [*Roth*]"¹¹⁷ to define obscenity.

The *Miller* Court offered the following three guidelines to determine whether materials constitute "obscenity":

¹¹⁰ *Id.* at 388.

¹¹¹ See CHEMERINSKY, *supra* note 64, § 11.3.3.2, at 1006.

¹¹² 413 U.S. 15 (1973).

¹¹³ 354 U.S. 476, 487 (1957) (defining obscene material as "material which deals with sex in a manner appealing to prurient interest").

¹¹⁴ *Id.* at 484–85 ("hold[ing] that obscenity [wa]s not within the area of constitutionally protected speech or press").

¹¹⁵ 413 U.S. 49, 57–58 (1973).

¹¹⁶ *Id.* at 57–58. Moreover, others have argued that the state may suppress obscenity because it may cause violent antisocial conduct. Others have argued that it corrupts character, impairs mental health, and has a deleterious effect on the individual from which the community should protect him. Still others have insisted on obscenity's suppression to prevent the erosion of moral standards either by rational persuasion or by indirect degradation of values. Finally, some have argued that shocking an individual with obscenity has the effect of a physical assault. See EMERSON, *supra* note 53, at 496; STONE ET AL., *supra* note 69, 1212–14 (citing H.M. CLOR, *OBSCENITY AND PUBLIC MORALITY* 121, 170–71 (1969)); Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 394 (1963); William B. Lockhart & Robert C. McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295, 374–75 (1954)).

¹¹⁷ *Miller*, 413 U.S. at 20.

(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.¹¹⁸

Miller requires that all three prongs be satisfied in order for material to be considered obscene.¹¹⁹ The following Sections trace the history leading up to the Court's formulation of the *Miller* guidelines, and elaborate each of *Miller*'s conjunctive prongs. As this history is reconstructed, what emerges is a blurring of the "very reason" that obscenity is proscribable.¹²⁰ If the reason for obscenity's proscription is unclear, what becomes unclear, too, is what, if any, content-based restrictions are permissible within the category of obscenity. After all, if a particular content-based restriction directly advances the reason that a particular category of speech is unprotected, the holding in *R.A.V.* may not bar it.¹²¹

a. *The road to Miller.*—The chief innovation of the *Miller* standard was the provision of a formula for judges to use when trying to recognize members of the obscenity family. Much as First Amendment doctrine generally has concerned itself with the recognition of family resemblance among expression,¹²² the obscenity doctrine particularly has enjoyed a "somewhat tortured"¹²³ history of reasoning by analogy. Justice Stewart reasoned in *Jacobellis v. Ohio*¹²⁴ that, while he understood criminal obscenity laws not to be limited to hard-core pornography after *Roth*, he could not "attempt further to define the kinds of material [he] underst[ood] to be embraced within that shorthand description; and perhaps [he] could never succeed in doing so."¹²⁵ Justice Stewart ended the *Jacobellis* opinion memorably by saying: "But I know it when I see it, and the motion picture involved in this case is not that."¹²⁶

Three years after Justice Stewart "defined" obscenity, the Court began the practice in *Redrup v. New York*¹²⁷ of reversing, per curiam, convictions for disseminating materials that at least five members of the Court deemed not to be obscene. According to the *Miller* Court, "[t]he *Redrup* procedure ha[d] cast [the Court] in the role of an unreviewable board of censorship for

¹¹⁸ *Id.* at 24 (citations omitted) (internal quotation marks omitted).

¹¹⁹ See FREDERICK F. SCHAUER, *THE LAW OF OBSCENITY* 140 (1976) (explaining that in order for a work to be properly denominated as obscene it must satisfy all three parts of the *Miller* standard).

¹²⁰ See *supra* note 110 and accompanying text.

¹²¹ See *supra* note 110 and accompanying text.

¹²² See *supra* note 68 and accompanying text.

¹²³ *Miller*, 413 U.S. at 37.

¹²⁴ 378 U.S. 184 (1964).

¹²⁵ *Id.* at 197.

¹²⁶ *Id.*

¹²⁷ 386 U.S. 767 (1967).

the 50 States, subjectively judging each piece of material brought before [them]."¹²⁸ Because adjudicating the obscenity doctrine generated "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication,"¹²⁹ the need for a more objective standard for the obscenity doctrine was deemed necessary. The formula articulated in *Miller* purported to answer the call for such a standard.

b. Miller's three prongs.—The *Miller* standard governing obscenity consists of three conjunctive prongs.¹³⁰ *Miller's* first prong, that the work appeal to the "prurient interest" to the "average person applying community standards," was clarified in *Hamling v. United States*¹³¹ and *Brockett v. Spokane Arcades, Inc.*¹³² to mean the local standards of a particular community in which the work is displayed. In *Hamling*, the Court said that "[t]he fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity."¹³³ Of course, determining what constitute "community standards" when material is disseminated via the Internet presents a trickier issue.¹³⁴ In *Brockett*, the Court held that a Washington obscenity statute that failed to distinguish between "a shameful or morbid interest in sex,"¹³⁵ or an "abnormal sexual appetite[],"¹³⁶ and a "normal" interest was unconstitutional.¹³⁷ The former, a shameful or morbid interest in sex, effects what the *Roth* Court meant when it defined "obscene material [a]s material which deals with sex in a manner appealing to the prurient interest."¹³⁸

The second prong, that the work describe, "in a patently offensive way, sexual conduct specifically defined by the applicable state law," does not mean that the law must provide an exhaustive list of the sexual conduct that would be patently offensive.¹³⁹ Instead, however, the Court has articulated

¹²⁸ *Miller*, 413 U.S. at 22.

¹²⁹ *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704–05 (1964).

¹³⁰ See *supra* note 118 and accompanying text.

¹³¹ 418 U.S. 87 (1974).

¹³² 472 U.S. 491 (1985).

¹³³ *Hamling*, 418 U.S. at 106.

¹³⁴ See *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (holding, though without a majority opinion, that the Child Online Protection Act's reliance on "contemporary community standards" in the context of the Internet need not have rendered the statute unconstitutionally overbroad, as the Third Circuit had interpreted it, and remanding the case back to the Third Circuit to resolve the question of the statute's overbreadth).

¹³⁵ *Brockett*, 472 U.S. at 504.

¹³⁶ *Id.* at 507.

¹³⁷ *Id.*

¹³⁸ *Roth v. United States*, 354 U.S. 476, 487 (1957).

¹³⁹ See *Ward v. Illinois*, 431 U.S. 767, 776 (1977) (holding, in connection with appellant's conviction under the Illinois obscenity statute for selling obscene sadomasochistic materials, that the statute's

limits on what a state can determine to be patently offensive. For example, in *Jenkins v Georgia*,¹⁴⁰ the Court concluded that the film *Carnal Knowledge* could not be found obscene because “[t]here [wa]s no exhibition whatever of the actors’ genitals, lewd or otherwise, . . . [and moreover,] nudity alone is not enough to make material legally obscene under the *Miller* standards.”¹⁴¹

The third—or savings—prong, that the “work, taken as a whole, lack serious literary, artistic, political, or scientific value,” measures whether a reasonable person would find that sort of value in the material, this being a national standard not meant to differ across communities.¹⁴² This prong of the *Miller* test was intended to reject, explicitly, the test formulated in *Memoirs v. Massachusetts*,¹⁴³ which required the prosecution to prove that “the material [wa]s without redeeming social value.”¹⁴⁴

B. The Tension Between “Sex” and “Sexual Orientation”

Despite *Miller*’s effort to move away from “knowing it when we see it” by disaggregating obscenity’s core elements, one of *Miller*’s unstated elements has been left to instinct. The differentiation between obscenity that has been so characterized because of (a) its “sex,” or its high level of exposure, nakedness, or the frequency of its depictions of intercourse, or (b) its “sexual orientation,” or its representation of gays and lesbians, is not one that the *Miller* doctrine addresses. In fact, the material at issue in *Miller* itself involved such representations.

The classification of homosexual content as obscene has been so integrated into the obscenity doctrine’s history that it has been overlooked. This Section reconstructs the obscenity doctrine’s “queer” past before offering insights into its present and future. An examination of obscenity’s history helps to explain why the doctrine has fostered a tradition of censoring homosexual content.

1. *Obscenity’s Queer History and Present.*—The fact that the obscenity doctrine makes no distinction between sex and sexual orientation is, perhaps, unsurprising; after all, from the doctrine’s inception, it has “ren-

failure to include an exhaustive list of the sexual conduct whose patently offensive description could be held obscene thereunder did not render the statute unconstitutionally overbroad).

¹⁴⁰ 418 U.S. 153 (1974).

¹⁴¹ *Id.* at 161.

¹⁴² See *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987) (holding that the *Miller* test’s third prong inquires “not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole”).

¹⁴³ 383 U.S. 413 (1966).

¹⁴⁴ *Id.* at 418.

der[ed] homosexuality itself the epitome of obscenity.”¹⁴⁵ The state in *Miller v. California* described the materials at issue in that case as “depictions of cunnilingus, sodomy, buggery and other similar sexual acts performed in groups of two or more.”¹⁴⁶ The *Miller* Court did not offer further insight into the extent to which the deviant nature of the sex depicted contributed to its verdict that the material was obscene. Of course, the absence of this sort of analysis has left room for lower courts, and even ordinary citizens, to understand that obscenity can derive from either sex or sexual orientation. Moreover, while the *Roth* Court was careful to note that “sex and obscenity [we]re not synonymous,”¹⁴⁷ neither it, nor any subsequent court, has said the same for sexuality and obscenity. Under the current obscenity test, expression or conduct may be deemed patently offensive because it contains more explicit depictions of intercourse, on the one hand, or because it suggests an individual’s sexual minority status, on the other.

Professor William Eskridge has observed that “*Miller* triggered a brief new wave of censorship, especially of gay publications, almost all of which the Burger Court upheld, sometimes in openly homophobic opinions.”¹⁴⁸ Other obscenity cases, too, have involved what the *Lawrence* Court might have referred to as “sexual practices common to a homosexual lifestyle.”¹⁴⁹ For example, the scenes in the videos at issue in *Paris Adult Theatre* “simulated fellatio, cunnilingus, and group sex intercourse,”¹⁵⁰ all of which would have constituted “deviate sexual intercourse”¹⁵¹ under the Texas Homosexual Conduct Law.¹⁵²

More recent cases, though ones that preceded the Court’s decision in *Lawrence v. Texas*, have involved depictions of homosexuality. In *Tipp-It, Inc. v. Conboy*,¹⁵³ the Nebraska Supreme Court affirmed a declaratory judgment finding that three photographs in “The Run Bar,” a gay bar that “cater[ed] solely to a gay clientele,”¹⁵⁴ were obscene. The first photograph showed, among other things, a man who “appear[ed] to have just completed anal intercourse with another man” and another who “appear[ed] to be un-

¹⁴⁵ William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1036 (2005).

¹⁴⁶ Brief for Respondent at 26, *Miller v. California*, 413 U.S. 15 (1973) (No. 70-73), 1971 WL 134291 at *26.

¹⁴⁷ *Roth v. United States*, 354 U.S. 476, 487 (1957).

¹⁴⁸ Eskridge, *supra* note 145, at 1036 (citing, inter alia, *Ward v. Illinois*, 431 U.S. 767, 771–72 & nn.3–5 (1977), which upheld a statute criminalizing the depiction of “abnormal” sex and lumped together rape, sadomasochistic sex, and same-sex foreplay and intercourse).

¹⁴⁹ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹⁵⁰ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 52 (1973).

¹⁵¹ *Lawrence*, 539 U.S. at 563.

¹⁵² For further discussion, see *infra* Part III.

¹⁵³ 596 N.W.2d 304 (Neb. 1999).

¹⁵⁴ *Id.* at 307.

dergoing anal penetration.”¹⁵⁵ The second photograph showed a “man who [was] seated . . . performing fellatio on [a] man who [wa]s standing.”¹⁵⁶ The third photograph showed “a bearded man [who] appear[ed] to be undergoing anal penetration by a standing man who ha[d] a ‘Mohawk’ haircut.”¹⁵⁷

In a second recent pre-*Lawrence* case, *State v. Millville Video, Inc.*,¹⁵⁸ the Court of Appeals of Ohio affirmed a conviction for two counts of pandering obscenity. The reason for the video store’s indictment was the sale of certain videos from the store’s “back room.” One of these videos contained a vignette consisting “of two women who [we]re . . . engaged in bondage, sexual discipline, and sadomasochistic acts. The dominatrix [bound] the victim in a complex series of ropes, place[d] sexual devices in the victim’s mouth, and touche[d] the victim’s genitals with her hands and other devices.”¹⁵⁹

However, an honest account of the obscenity doctrine’s history must reflect the fact that not all cases involving depictions of homosexuality have ended badly. For example, in 1990, Louis Sirkin successfully defended the Contemporary Arts Center in Cincinnati against obscenity charges brought against it for displaying photographs taken by Robert Mapplethorpe.¹⁶⁰ The photographs

featured sadomasochistic imagery, including a self-portrait of [Mapplethorpe] naked except for a leather cap and jacket with a bullwhip inserted in his anus. Featured, too, in the same exhibit, was a photograph of a man’s torso in a three-piece suit, with a large black penis sticking out of the unzipped pants.¹⁶¹

Moreover, obscenity’s more generalized history with respect to gays and lesbians has not been completely negative. As Professor Patricia Cain noted in her careful and illuminating account of the legal history of litigating for gay and lesbian rights, “[t]he Supreme Court’s formulation of obscenity doctrine in the 1950s and 1960s ensured gay and lesbian publications of greater First Amendment protections.”¹⁶² After all, the Court had reversed the Ninth Circuit’s decision in *One, Inc. v. Oleson*,¹⁶³ which determined to be obscene and therefore excluded from First Amend-

¹⁵⁵ *Id.* at 308.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ No. CA99-10-179, 2000 Ohio App. LEXIS 4192 (Ohio Ct. App. Sept. 18, 2000).

¹⁵⁹ *Id.* at *14.

¹⁶⁰ See Clay Calvert & Robert D. Richards, *Gay Pornography and the First Amendment: Unique, First-Person Perspectives on Free Expression, Sexual Censorship, and Cultural Images*, 15 AM. U. J. GENDER SOC. POL’Y & L. 687, 693–94 (2007).

¹⁶¹ Allison, *supra* note 11, at 132 n.328 (citing RACHEL KRANZ & TIM CUSICK, LIBRARY IN A BOOK: GAY RIGHTS 103 (2000)).

¹⁶² Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1579 (1993).

¹⁶³ 241 F.2d 772 (9th Cir. 1957), *rev’d*, 355 U.S. 371 (1958).

ment protection *One*, the publication distributed by members of the Matachine Society, an organization formed in Los Angeles around 1950 whose mission was "to liberate the homosexual minority from the oppression of the majority and to call on other minorities to fight with them against oppression."¹⁶⁴ However, when reversing the Ninth Circuit, the Supreme Court issued only a very brief per curiam opinion, which provided in its entirety: "The petition for writ of certiorari is granted and the judgment of the United States Court of Appeals for the Ninth Circuit is reversed."¹⁶⁵ The opinion cited *Roth v. United States*, and provided no further explanation of its reason for reversal.

The Court's decision in *One* was, to say the very least, a positive development in the fight for gay rights. In fact, "[t]he 1958 *One* ruling flung open the door for gay publications, which began to proliferate. Gay magazines and newspapers became a cornerstone for building gay communities by encouraging people to come out, to connect with one another and to share a sense of identity and injustice."¹⁶⁶ The Court reversed the Ninth Circuit's decision that *One's* homosexual viewpoint rendered it inherently obscene. However, without explaining why it so ruled, the Court left open the possibility that homosexuality could be a factor weighed when courts applied the *Miller* test.

2. *Obscenity's Uncertain Future*.—Obscenity's past and present suggest that the doctrine has failed to distinguish between content that is obscene because it contains too much sex, and content that is obscene because it contains representations of gays and lesbians. However, if this Essay embraces the description that the obscenity doctrine has generated discriminatory collateral effects on gays and lesbians, this Essay must also describe the seriousness of those effects. Unfortunately, because obscenity has not appeared on courts' dockets with much frequency, there are few cases from which inferences can be drawn. Unfortunately, too, this Section does not offer statistics of the sort that might be expected when demonstrating disparate impact.¹⁶⁷ However, this Section offers the requisite first steps toward the collection of these sorts of data.

After the Court's decision in *Lawrence v. Texas*, there have been only around 150 cases that have even discussed obscenity and the *Miller* test. None of those cases has been brought to the Supreme Court and none has found material involving the sexual depiction of adults to be obscene; re-

¹⁶⁴ Cain, *supra* note 162, at 1558–59.

¹⁶⁵ *One, Inc. v. Oleson*, 355 U.S. 371 (1958).

¹⁶⁶ JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 50 (Basic Books 2001).

¹⁶⁷ See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (indicating that evidence in Title VII disparate impact cases "usually focuses on statistical disparities").

cent cases have focused on child pornography, which is governed by a separate standard from the standard set forth in *Miller*.¹⁶⁸

Perhaps counterintuitively, it is precisely the lack of obscenity litigation that compels attention to, and eventual resolution of, obscenity's discriminatory collateral effects. Moreover, while the evidence of obscenity's discrimination may not exist in case form, the doctrine's discriminatory collateral effects can be detected in systematic biases against homosexual content that the doctrine's disuse has certainly not helped to prevent. These systematic biases can be represented through data, albeit data that might not demonstrate the sorts of statistical disparities that a showing of disparate impact might require. Before offering and analyzing data that seek to demonstrate the biases against homosexual content in two major media, I should explain the way in which collateral effects can be detected in the First Amendment context. This Essay, after all, argues that obscenity has generated discriminatory *collateral* effects on gays and lesbians.¹⁶⁹

It has been said that "the role of the First Amendment has been important, perhaps as much for what it is believed to do as for what it does."¹⁷⁰ The effect of the First Amendment's protection (or lack of protection) can be felt each time an individual walks through a public park during a protest, and each time a protester is arrested for crossing the invisible line that separates speech from nonspeech. The First Amendment's guarantee is intended to be broad and therefore subject to few exceptions. For this reason, any restriction of speech must pass through the Amendment's levels and tiers.¹⁷¹

The effect of excluding from constitutional protection some speech generates a silencing effect that is at once patent and latent. The effect of excluding speech silences in a patent way because what law could have more "expressive function"¹⁷² than the law that governs expression? The effect of excluding speech silences in a latent way, too, because knowing what speech has been silenced, particularly in the absence of the obscenity doctrine's enforcement, is difficult if not impossible. Thus, scholars looking to assess law's collateral effects should pay special note to the collateral effects of speech not protected by the First Amendment.

Moreover, particularly harmful are the collateral effects of speech not protected by the First Amendment because of its classification as obscenity. Professor Eskridge has explained that the obscenity doctrine is particularly problematic:

¹⁶⁸ See *supra* note 22 and accompanying text.

¹⁶⁹ See *supra* notes 31–35 and accompanying text.

¹⁷⁰ Hans A. Linde, *Courts and Censorship*, 66 MINN. L. REV. 171, 207 (1981).

¹⁷¹ See *supra* Part II.A.1.

¹⁷² See *supra* note 32 and accompanying text.

[Because] the Court [has] never successfully defined exactly or stably what is the difference between unprotected obscenity and protected indecency, . . . the current formulation of *Miller*—work appealing to “the prurient interest in sex,” adjudged “patently offensive” to local community standards, and having no redeeming social value—is so vague that it might cover virtually anything, or nothing.¹⁷³

As a result, “*Miller*’s framework has encouraged censorship of harmless gay pornography while allowing violently misogynistic straight pornography.”¹⁷⁴

The censorship that the *Miller* framework has encouraged may not come directly from the state, but its collateral effects pervade two major media for potentially obscene content: the film industry and the Internet. Professor Robert Ellickson remarked when discussing the importance of investigating social norms with respect to the Fair Housing Act: “It is possible that someone like Bill Cosby will do more for fair housing than will all the lawyers in this room put together.”¹⁷⁵ Building upon Professor Ellickson’s keen observation that major media, arguably more than court cases, influence which norms the public ultimately adopts, the following Sections elaborate biases against homosexual content by the Motion Picture Association of America (MPAA) and Google, industry leaders in film ratings and Internet searching, respectively.

a. The MPAA’s rating bias against homosexual content.—In 2007 alone, the roughly 613 films released generated revenues of \$9.63 billion.¹⁷⁶ Many of the major obscenity cases that have come before the Court have involved films,¹⁷⁷ likely because film has been both a profitable and an effective way of communicating ideas to a large audience. As a way to regulate the content of such an influential medium of expression, on November 1, 1968, the MPAA, a trade association of the motion picture industry, established a ratings system. Former president of the MPAA, Jack Valenti, has said that the ratings system was designed to address the “slip-

¹⁷³ WILLIAM N. ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 203 (2002).

¹⁷⁴ *Id.* Of course, the problem of allowing violently misogynistic pornography is one that—while outside the scope of this Essay—this Essay does not mean to ignore. For a famous account of pornography as a form of sex discrimination, see, for example, ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981); CATHERINE MACKINNON, *FEMINISM UNMODIFIED* (1987); CATHERINE MACKINNON, *ONLY WORDS* (1994); Catherine MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 18–20 (1985).

¹⁷⁵ Remarks of Professor Robert Ellickson, in *THE FAIR HOUSING ACT AFTER TWENTY YEARS* 61 (Robert G. Schwemm ed., 1989).

¹⁷⁶ See Peter Sanders, *Hollywood Box Office is Up Though Costs Rise*, WALL ST. J., Mar. 6, 2008, at B4.

¹⁷⁷ See *supra* note 60 and accompanying text.

page of Hollywood studio authority over the content of films collid[ing] with an avalanching revision of American mores and customs.”¹⁷⁸

The MPAA’s ratings system controls much of the profitability and effective communicative impact of the film industry.¹⁷⁹ After all, if a film receives an unfavorable rating, it cannot be widely distributed nor can its advertisements be televised freely. This Section describes the MPAA’s bias in applying its ratings system against homosexual content. In so describing, this Section aims to demonstrate that a systematic bias in the film industry against homosexual content is noteworthy, particularly when considered as a possible collateral effect of the obscenity doctrine’s failure to distinguish between sex and sexual orientation.

To dispose of a threshold issue, one might argue that the MPAA—referred to on its website as “a little State department”¹⁸⁰—is not a state actor. First, with respect to an assessment of the obscenity doctrine’s collateral effects, it is unnecessary to determine the status of the MPAA. The Supreme Court of New York, however, offered some insight into the uniquely pervasive influence of the MPAA on censorship in *Miramax v. MPAA*.¹⁸¹ When voicing its reluctance to tamper with the voluntary independent system of film ratings, the *Miramax* court recognized “the dominant and preemptive role played by the MPAA in the film industry.”¹⁸² In light of the MPAA’s dominance, the court determined that “there is an obligation to administer the system fairly and with a foundation that is rationally based. . . . The MPAA, having acquiesced in the use of the ‘X’ rating by the pornography industry, may well have some affirmative responsibility to avoid stigmatizing films with an ‘X’ rating.”¹⁸³ The *Miramax* court ended by administering some cautionary words to the MPAA, despite its reluctance to overturn an “X” rating in the particular film at issue in that case. The court acknowledged that

[w]hile the petition before this court d[id] not adequately present a case for addressing these serious issues, it appears that the MPAA should strongly consider some changes in its methods of operations to properly perform its stated mission. Unless such concerns are meaningfully dealt with, the MPAA may

¹⁷⁸ Jack Valenti, How it All Began, Motion Picture Association of America, http://www.mpa.org/Ratings_HowItAllBegan.asp (last visited Apr. 28, 2008).

¹⁷⁹ The highest opening gross of a film rated NC-17 remains *Showgirls*, which collected only \$8,112,627. Timeline: The MPAA’s Greatest Hits, <http://www3.ifctv.com/thisfilm/greatesthits.php> (last visited Feb. 27, 2008).

¹⁸⁰ Motion Picture Association of America, <http://mpaa.org/AboutUs.asp> (last visited Apr. 28, 2008).

¹⁸¹ 560 N.Y.S.2d 730, 731–32 (N.Y. Sup. Ct. 1990).

¹⁸² *Id.* at 735–36.

¹⁸³ *Id.* at 736.

find its rating system subject to viable legal challenge by those groups adversely affected herein.¹⁸⁴

Though the MPAA has not come under the “viable legal challenge” of which the *Miramax* court warned, some of the MPAA’s practices have recently come under extreme and very public attack. In 2006, a documentary film called *This Film is Not Yet Rated*, directed by Kirby Dick, debuted at the Sundance Film Festival to expose to an audience of industry insiders the injustices of the MPAA ratings system. The film argued that the MPAA “engaged a double standard when applying ratings to sex and violence”¹⁸⁵ and that the MPAA engaged a double standard when rating films that contained depictions of sex of heterosexual and homosexual natures.

The MPAA is a private nongovernmental organization.¹⁸⁶ However, the organization owns trademark rights to the ratings symbols that are familiar to the billions of moviegoers in the United States, such as “G,” “PG,” “PG-13,” “R,” and “NC-17,”¹⁸⁷ that play a “dominant and preemptive role . . . in the film industry”¹⁸⁸ and that have a controlling effect on what film content is disseminated, and what is not. Moreover, the MPAA is controlled by and comprises six major film studios: Walt Disney Studios Motion Pictures, Paramount Pictures Corp., Sony Pictures Entertainment, Inc., Twentieth Century Fox Film Corp., Universal City Studios LLLP, and Warner Bros. Entertainment, Inc.¹⁸⁹ The MPAA’s board is constituted by a collection of chairmen and presidents of each of these studios.¹⁹⁰

Kirby Dick’s documentary concluded that the MPAA “[wa]s one of the last vestiges of a censorship system.”¹⁹¹ Mr. Dick’s documentary exposes the way in which the MPAA allows only select producers and directors to engage with the MPAA in any discussion of negotiation regarding a film’s rating. Most filmmakers have only very limited appellate procedures available to them, and receive no explanation from the MPAA’s ratings board for an unfavorable rating. In fact, the MPAA’s raters’ identities were unknown until Mr. Dick’s documentary exposed their identities.¹⁹² As Mr. Dick’s film demonstrates, films such as *Basic Instinct*, which contained

¹⁸⁴ *Id.*

¹⁸⁵ Craig R. Smith, *Violence as Indecency: Pacifica’s Open Door Policy*, 2 FIU L. REV. 75, 91–92 (2007) (arguing for the reversal of the Court’s ruling in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), which upheld the ability of the FCC to prohibit indecent language disseminated over television and radio, because the ruling allows the FCC to treat broadcasters like second class citizens).

¹⁸⁶ See *Miramax*, 560 N.Y.S.2d at 731–32.

¹⁸⁷ See Richard M. Mosk, *Motion Picture Ratings in the United States*, 15 CARDOZO ARTS & ENT. L.J. 135 (1997).

¹⁸⁸ *Miramax*, 560 N.Y.S.2d at 735–36.

¹⁸⁹ Motion Picture Association of America, Members Page, <http://mpaa.org/AboutUsMembers.asp> (last visited Apr. 28, 2008).

¹⁹⁰ See *id.*

¹⁹¹ Interview with Martin Garbus, in *THIS FILM IS NOT YET RATED*, *supra* note 29.

¹⁹² See *THIS FILM IS NOT YET RATED*, *supra* note 29.

graphic depictions of sex and nudity, have more easily received ratings of "R" from the MPAA than have films such as *Boys Don't Cry*, which contained far less nakedness, exposure, or sex, but depicted sex between two women.¹⁹³

A particular scene in Mr. Dick's documentary is especially revealing. The film's interviews with scores of directors, producers, and journalists who know the film industry intimately suggest almost uniformly that the MPAA exercises different judgment with respect to heterosexual sex than with respect to homosexual sex. In order to demonstrate the extent of this bias against homosexual content, the documentary compares particular homosexual scenes in films that were either rated "NC-17," or that were cut from films for the purpose of receiving an "R" rating instead of an "NC-17" rating, to equally suggestive heterosexual scenes in films that were rated "R."

In scenes involving masturbation, oral sex culminating in an orgasm, sex in the missionary position with humping, nude humping, or anal sex, films containing scenes between two individuals of the same sex received ratings of "NC-17" while films containing scenes involving individuals of opposite sexes received ratings of "R." For example, 1999's *But I'm a Cheerleader* received a rating of "NC-17" and contained a scene in which Natasha Lyonne's hand is seen moving up and down her fully clothed crotch area, thereby creating the inference that she is masturbating. A fully nude Kevin Spacey, in the same year's *American Beauty*, masturbated in the shower, earning that film an "R" rating. Moreover, the same year's re-release of *American Pie*, also rated "R," featured—not only in the body of the film but in the film's advertising trailer—lead actor Jason Biggs lying on his stomach on the island counter in his parents' kitchen with his shorts pulled down to expose his nude buttocks, as his unseen penis penetrates an apple pie.

The film *Boys Don't Cry*, also released in 1999, provided a few scenes to compare with similarly suggestive heterosexual scenes. The film, which featured Hilary Swank cast as Brandon Teena, a biological woman passing as a man, received an initial rating of "NC-17" before cutting certain scenes from its final version. For example, a scene in which Hilary Swank performed oral sex on Chloë Sevigny had to be cut because Ms. Sevigny's orgasm was, according to the MPAA's raters, too long. Steven Weber's equally long and expressive orgasm following heterosexual oral sex in 1992's *Single White Female* did not get in the way of the film's "R" rating, however.

A fully clothed Hilary Swank also engaged with Chloë Sevigny in *Boys Don't Cry* in slow humping in the missionary position, with the possible inference that Hilary Swank's dildo penetrated Chloë Sevigny's vagina. The scene was left in the film's "R" version, but may have contributed to

¹⁹³ See *id.*

the “NC-17” rating when the rating was first administered by the MPAA. In *American Pie*, a fully nude sex scene involving slow humping in the missionary position between Thomas Ian Nicholas and Tara Reid did not affect the film’s “R” rating. Further, nude humping was treated differently when between Uma Thurman and Maria de Medeiros in 1990’s *Henry & June*, rated “NC-17,” than it was when between a significantly more nude Thomas Hayden Church and Sandra Oh in 2004’s *Sideways*, rated “R.”

Lastly, even depictions of anal sex—most often associated with homosexual men—have been treated differently when the act is depicted between two individuals of the same sex than when depicted between two individuals of opposite sexes. For instance, the 2004 film *Mysterious Skin*, which contained homosexual anal sex involving Joseph Gordon-Levitt and a male partner who can barely be seen on the screen, received a rating of “NC-17.” On the other hand, 2002’s *Unfaithful* received a rating of “R” and featured anal sex between a nude and exposed Olivier Martinez and a nude and exposed Diane Lane.

It is surely possible that the MPAA rated the films whose scenes this Section highlights with a particular rating for reasons other than the sexual orientation of their characters. Of course, the film descriptions that this Section offers are not meant to suggest, conclusively, that the obscenity doctrine has caused the MPAA to treat heterosexual content in films differently from homosexual content. This Section merely describes comparably suggestive sex scenes in films rated “R” and “NC-17,” where the only difference between sex scenes in R-rated and N-17-rated films was that the films’ characters were of opposite sexes or the same sex, respectively.

b. Google’s gay filter.—Even those who may contribute to the arguable decline in box office sales¹⁹⁴ most likely avail themselves of the Internet’s “new linchpins,”¹⁹⁵ search engines. As Professor James Grimmelmann has noted, search engines are the Internet’s librarians, its messengers, its inventors, and its spies.¹⁹⁶ The search engine’s “core process” is to “combine[] its own knowledge of available content with user queries to provide recommendations to its users.”¹⁹⁷ Of the various search engines that have entered the market, Google has been reported to have “an ever-greater stranglehold on the online search market” such that it “now dominates” it.¹⁹⁸

¹⁹⁴ See, e.g., Sarah McBride, *Viacom Looks for a Web Kick*, WALL ST. J., Dec. 13, 2007, at D2 (“Box office sales are down about 7% for the holiday season beginning November 2[, 2007], according to Media by Numbers LLC.”). But see *supra* note 176.

¹⁹⁵ James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 3 (2007) (providing a roadmap for the law’s suggested responses to questions that arise from search engines).

¹⁹⁶ See *id.*

¹⁹⁷ *Id.* at 4.

¹⁹⁸ Emily Steel, *Sizing Up a Post-Yahoo Ad Landscape—Marketing Executives See Potential New Order Under Proposed Deals*, WALL ST. J., Apr. 11, 2008, at B7 (noting, in light of proposed mergers between Yahoo and Microsoft, or, in the alternative, Yahoo and AOL Time Warner, that Google cap-

Because of the growing importance of search engines in delivering content to Internet users, Professor Grimmelmann's project—organizing the ways in which search engine law matters—has proven to be invaluable and timely.¹⁹⁹ Because of the effect that search engines have on the content with which individuals engage, part of Grimmelmann's project highlighted the possibility that search engine results may constitute speech. He commented: "Many legal questions involving search require a theory of search engine speech. The First Amendment rights of search engines, users, and providers may provide defenses to third parties' attempts to impose liability for harmful content flows."²⁰⁰ Grimmelmann's project did not attempt to put forward a fully developed theory of search engine speech.²⁰¹ This Essay does not attempt to do so either.

This Essay merely recognizes the potential First Amendment implications that an increasingly essential portal to content like Google may have. In light of this recognition, this Essay relates the results of "Googling"²⁰² for images a particular search term, "having sex," under Google's various security settings. The results are not intended to demonstrate, dispositively, that the obscenity doctrine's collateral effects discriminate against gays and lesbians. The results, moreover, are not accompanied by the claim that Google's search algorithm has specifically targeted homosexual images in filtering images of "having sex."²⁰³ After all, some search engine algorithms are so complicated that determining why a computer made a particular decision to filter some content, but not other content, may be impossible.²⁰⁴

Despite caveats about search engines' complexity and unpredictability, the search engine's "user sees only the results of the software's individual decisions."²⁰⁵ And it is only about these results that this Essay reports.

tured 71.2%, or six billion dollars, of the United States' search-advertising market in 2007, while Yahoo's paid-search sales for 2007 totaled only 746 million dollars, or 8.9% of the United States' search-advertising market).

¹⁹⁹ See generally Grimmelmann, *supra* note 195.

²⁰⁰ *Id.* at 58.

²⁰¹ See *id.*

²⁰² Intangible evidence of Google's dominance in the search engine market may derive from its name's mutation into a verb. See Jonathan Duffy, *Google Calls in the "Language Police,"* BBC NEWS ONLINE, June 20, 2003, <http://news.bbc.co.uk/1/hi/uk/3006486.stm> ("In the U.S. Google has mutated into a verb. Singletons will 'google' a new boyfriend or girlfriend—run their name through a search engine—to check them out. People now talk about 'googling' and 'being googled.'").

²⁰³ The decision to search for "having sex," rather than "sex," was made in order to avoid results pertaining to front page news stories about sex scandals and images of book covers of books about sex (but whose covers do not actually picture individuals engaged in sex).

²⁰⁴ See James Grimmelmann, Note, *Regulation by Software*, 114 YALE L.J. 1719, 1734–38 (2005) ("Another way of understanding why software is so often unpredictable is to note that programming is a difficult profession. . . . Almost every computer program makes decisions that its creator neither expects nor intends nor understands.").

²⁰⁵ *Id.* at 1736.

When searching for images of “having sex” in Google under each of its three SafeSearch filtering options,²⁰⁶ the difference in results is, if not alarming, at least worthy of notation. The table in the Appendix catalogues the first twenty results, all of which appear on the first page of the search’s result, for a search in Google Images for “having sex.”

As the table demonstrates, under Google’s Strict filtering setting, four of the first twenty images, or twenty percent of the results, depict sex. All four of those images depict heterosexual sex. Of those four images, only one depicts sex in a position other than the traditional missionary position, where a man lies on top of a woman during sex as the partners face each other; that single image of nonmissionary sex depicts two robots—one appearing to be male and the other appearing to be female—who do not appear to have any genitalia or any synthetic representations of genitalia, positioned to have anal sex. Only one of the first twenty images generated under the Strict filter depicts male nudity, albeit in cartoon form. Two images depict female nudity, only one of which depicts female nudity in photograph form.

When Google’s filter is turned off, the table demonstrates that depictions of sex increase by forty percent from those generated by a strictly filtered search, totaling sixty percent of the search’s results, or twelve depictions of sex. Of those twelve depictions, three, or one quarter, are homosexual in nature, and ten, or eighty-three percent, depict sex in a position other than the missionary position. Nine images, almost half of the results, depict both male and female nudity.

Google’s Moderate filter generates eight depictions of sex, or forty percent of the search’s total results. This number represents an increase of twenty percent over the number of depictions of sex generated by a strictly filtered search, and a decrease of twenty percent from the number of depictions of sex generated by an unfiltered search. Notably, not one of these eight images of sex depicts homosexual sex. One of the images depicts sex that is not traditionally heterosexual—an image of two llamas (who are presumably of opposite sexes) having sex. That image does not depict sex in the missionary position either, though llamas do not traditionally engage in sex in the missionary position. The other seven images mostly depict sex in the missionary position, save two of them, one of which is the aforementioned image of robots engaged in anal sex. The other image of nonmissionary position sex features a woman sitting on top of a man with whom

²⁰⁶ Google offers users the choice of one of three SafeSearch settings: (a) Moderate filtering, Google’s default setting, which claims to “exclude[] most explicit images from Google Image Search results but doesn’t filter ordinary web search results”; (b) Strict filtering, which claims to “appl[y] SafeSearch filtering to all . . . search results (i.e., both image search and ordinary web search)”; and finally (c) No filtering, which “turns off SafeSearch filtering completely.” See Web Search Help Center: Setting Preferences, <http://www.google.com/support/bin/static.py?page=searchguides.html&ctx=preferences&hl=en> (last visited Apr. 28, 2008).

she is having sex. Only two images feature male nudity, one of which features it in cartoon form, while three images feature female nudity.

Google's Moderate and Strict filters generate roughly the same number of depictions of male and female nudity, and the identical number of images that depict sex in a position other than the missionary position. The most striking discrepancy between Google's three filter settings is that not only its Strict filter, but its Moderate filter, which is the search engine's default setting, filters completely from a search for images of "having sex" all images of homosexual sex. Twenty-five percent of the images generated from the same unfiltered search depict homosexual sex.

Google's search algorithm is not transparent. Moreover, even if it were transparent, it is unclear whether it would offer any meaningful information about whether Google specifically censors homosexual content.²⁰⁷ This Section has only offered a description of the differences among Google's various search filters, and has proposed that the only material difference among them is the exclusion of homosexual content.

III. THE MANY MEANINGS OF *LAWRENCE*

A useful place to begin a discussion of the legal rights of gays and lesbians is with the Supreme Court's 2003 decision in *Lawrence v. Texas*.²⁰⁸ Although the holding of *Lawrence* was anything but straightforward,²⁰⁹ the case was a landmark decision for gay rights.²¹⁰

Perhaps because of its opacity, scholars have applied *Lawrence* to a variety of seemingly unrelated legal settings.²¹¹ Scholars' and lower courts'

²⁰⁷ See *supra* note 204 and accompanying text.

²⁰⁸ 539 U.S. 558 (2003); see Edward Stein, *Introducing Lawrence v. Texas: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN'S L.J. 263, 263 (2004) (characterizing *Lawrence* as "a groundbreaking decision relating to the legal position of lesbians, gay men and other sexual minorities in the United States").

²⁰⁹ See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 29 (characterizing the decision as "remarkably opaque").

²¹⁰ See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1399 n.2 (2004) (listing comparisons between *Lawrence* and *Brown v. Board of Education*, 347 U.S. 483 (1954)).

²¹¹ See, e.g., Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(a) Trademark Law After Lawrence v. Texas*, 9 MARQ. INTELL. PROP. L. REV. 187 (2005) (applying *Lawrence* to Section 2(a) of the Lanham Act, 15 U.S.C. § 1502(a), which provides that scandalous, immoral, or disparaging marks may not receive federal trademark protection); Steven Goldberg, *Cloning Matters: How Lawrence v. Texas Protects Therapeutic Research*, 4 YALE J. HEALTH POL'Y L. & ETHICS 305 (2004) (arguing that because arguments to ban therapeutic cloning have rested on a sense of repugnance, after *Lawrence* those arguments must be rejected and should not drive public policy); Arnold H. Loewy, *Statutory Rape in a Post Lawrence v. Texas World*, 58 SMU L. REV. 77 (2005) (extending *Lawrence* to provide a constitutional defense for an individual who engages in sexual intercourse with a person that he nonnegligently believes to be an adult); Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 89-90 (2006) (uncovering a "previously neglected aspect of *Lawrence*[, namely] . . . that it almost certainly trumpets the beginning

perspectives have also varied widely on the more traditional implications of *Lawrence*'s holding, namely how *Lawrence* affects cases that relate directly to the rights of gays and lesbians. This Part, after a brief introduction to the case, introduces the competing interpretations of *Lawrence v. Texas* by highlighting its broad and narrow readings.

A. Basic Background to *Lawrence*

On the night of September 17, 1998, the Harris County Police Department received a call reporting a weapons disturbance in John Geddes Lawrence's private apartment in Houston, Texas. Upon entering Lawrence's apartment in response to the call, officers observed Lawrence and Tyron Garner, another man, having anal sex.²¹² The officers arrested Lawrence and Garner, two adult men, for violating the Texas Homosexual Conduct Law—which criminalized “engag[ing] in deviate sexual intercourse with another individual of the same sex,” and defined “deviate sexual intercourse” to include, among other conduct, “any contact between any part of the genitals of one person and the mouth or anus of another person”²¹³—and held them in jail overnight. Lawrence's and Garner's convictions were affirmed by the Texas Court of Appeals, relying on *Bowers v. Hardwick*.²¹⁴

The Supreme Court reversed, and in so doing, overruled *Bowers*.²¹⁵ The decision was, however, “not tremendously long on doctrinal specifics.”²¹⁶ To begin, the Court has been criticized for failing to apply any particular standard of review to assess the constitutionality of the Texas Homosexual Conduct Law.²¹⁷ Courts employ particular standards of review

of a new era of greater privacy protection for public employees by no longer permitting government employers to terminate an employee merely because that employee does not live up to the employer's conception of morality. . . .”); Lior Jacob Strahilevitz, *Consent, Aesthetics, and the Boundaries of Sexual Privacy after Lawrence v. Texas*, 54 DEPAUL L. REV. 671 (2005) (applying *Lawrence* to nuisance law); Sara L. Dunski, Note, *Make Way for the New Kid on the Block: The Possible Zoning Implications of Lawrence v. Texas*, 2005 U. ILL. L. REV. 847 (arguing that the reasoning of *Lawrence* can be extended to invalidate existing familial zoning ordinances).

²¹² For an illuminating alternative account of the “correct . . . factual record” in *Lawrence*, see Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1466 (2004) (arguing that, inter alia, it is unlikely that the sheriff's deputies actually witnessed the two men having sex).

²¹³ TEX. PENAL CODE ANN. §§ 21.01(1), 21.06(a) (Vernon 2003).

²¹⁴ See *Lawrence v. State*, 41 S.W.3d 349 (Tex. App. 2001).

²¹⁵ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

²¹⁶ David B. Cruz, *Spinning Lawrence, or Lawrence v. Texas and the Promotion of Heterosexuality*, 11 WIDENER L. REV. 249, 251 (2005).

²¹⁷ See, e.g., *Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting); see also Tribe, *supra* note 11, at 1916 (“One aspect of *Lawrence* that was bound to draw criticism and is likely to generate confusion unless promptly put in proper perspective is the absence of any explicit statement in the majority opinion about the standard of review the Court employed to assess the constitutionality of the law at issue.”); Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528 (2004) (arguing that the *Lawrence* Court's heightened scrutiny for regulations of homosexuality will

to correspond to particular sorts of rights.²¹⁸ However, because the *Lawrence* Court did not determine whether the right at issue in *Lawrence* was fundamental, the applicable standard of review remained indeterminate as well. Whereas “[i]n prior decisions on challenges to sodomy laws, courts have asked first whether the right claimed was fundamental,”²¹⁹ the *Lawrence* Court explicitly skirted that question, noting only that “[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward.”²²⁰ Thus, by avoiding a determination of the fundamentality of the right in *Lawrence*, the Court also avoided determining which standard of review to apply.

In prior challenges to sodomy laws, if a right was found to be fundamental, only then did the Court require that the law meet strict scrutiny.²²¹ The state would then need “to demonstrate that its law served some harm-reduction goal.”²²² If the Court determined that a right was not fundamental, “an interest in promoting morality was found to be sufficient”²²³ to justify the law’s constitutionality. In stark contrast to this model, the *Lawrence* Court found that “the state’s intrusion into private sexual life was impermissible absent a showing by the state that it was justified by more than the desire to promote certain concepts of morality.”²²⁴ Thus, the *Lawrence* Court held that, despite its failure to make a finding that the right to engage in same-sex sodomy was fundamental, the Texas Homosexual Conduct Law was presumed to be invalid unless the state could demonstrate that something more than a desire to promote morality motivated the law.

Justice Kennedy played a variation on the theme of doctrinal vagueness²²⁵ when holding “that by enacting its sodomy law, the state was acting out of bounds.”²²⁶ Specifically, the Court held that the Texas Homosexual Conduct Law violated the Due Process Clause of the Fourteenth Amendment,²²⁷ which assures a right to sexual intimacy.²²⁸ The Court expressly did

cause courts to engage in more particularized assessments of whether legitimate state interests justify classifications based on sexual orientation).

²¹⁸ The three levels of judicial scrutiny are strict scrutiny, intermediate scrutiny, and rational basis review. For further elaboration on the divisions between the levels of judicial scrutiny and how they have historically evolved in connection with various classifications of rights, see Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984).

²¹⁹ Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1116 (2004).

²²⁰ *Lawrence*, 539 U.S. at 567.

²²¹ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

²²² Hunter, *supra* note 219, at 1116.

²²³ *Id.*

²²⁴ *Id.*; see also Pamela S. Karlan, *Loving Lawrence*, 102 MICH. L. REV. 1447, 1450 (2004) (arguing that *Lawrence* “undermine[d] the traditional tiers of scrutiny altogether”).

²²⁵ See *supra* note 216 and accompanying text.

²²⁶ Hunter, *supra* note 219, at 1116.

²²⁷ The Due Process Clause provides that “No State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

not invoke the Equal Protection Clause²²⁹ to invalidate the statute.²³⁰ Because of the majority opinion's focus on whether the government crossed some inexact "line of impermissible action, . . . drawn in part by the understanding that private sexual conduct is a zone of decision making entitled to respect, the exact nature of the right being traversed—i.e., fundamental . . . or not—was a question that the Court did not have to reach."²³¹

Of course, the Court's decision not to resolve the fundamentality of the right at issue was deliberate. The Court could have joined Justice O'Connor's concurrence, stating "that because homosexuality [wa]s just like heterosexuality, Texas's 'homosexual sodomy' ban, which outlaw[ed] same-sex but not cross-sex sodomy, [wa]s void on equal protection grounds."²³² It did not. Instead, the Court left *Lawrence* opaque and ambiguous. That ambiguity has spawned one group of courts and commentators that have interpreted *Lawrence* broadly,²³³ an equal and opposite group of courts and commentators that have interpreted *Lawrence* narrowly,²³⁴ and a group that has interpreted the decision somewhere in between.²³⁵ The following Sections discuss the extreme ends of *Lawrence*'s interpretive spectrum.

²²⁸ See *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (in overruling *Bowers v. Hardwick*, deciding that "Petitioners' criminal convictions for adult sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment").

²²⁹ The Equal Protection Clause provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

²³⁰ Referring to petitioners' argument that the statute was invalid under the Equal Protection Clause, the Court responded:

That is a tenable argument, but . . . the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Lawrence, 539 U.S. at 574–75; see also *id.* at 582 (O'Connor, J., concurring) (finding that "under the Equal Protection Clause . . . moral disapproval of [gays and lesbians], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review").

²³¹ Hunter, *supra* note 219, at 1116.

²³² Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1627–28 (2004) (citing *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring)).

²³³ See *infra* Part III.B.

²³⁴ See *infra* Part III.C.

²³⁵ See, e.g., William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021 (2004) (arguing that *Lawrence* gave gay Americans "nothing less than, but nothing more than, a jurisprudence of tolerance," meaning that "traditionalists c[ould] no longer deploy the state to hurt gay people or render them presumptive criminals, but room remain[ed] for the state to signal the majority's preference for heterosexuality, marriage, and traditional family values"); Sonia K. Katyal, *Sexuality and Sovereignty: the Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL RTS. J. 1429 (2006).

B. Interpreting *Lawrence* Broadly

While many rejoiced when *Lawrence* was decided,²³⁶ others reacted to the decision less optimistically.²³⁷ Courts and commentators who have interpreted *Lawrence* broadly²³⁸ could find strong support for their readings in the text of the opinion and the dissents. The *Lawrence* decision jumps off the pages on which it was penned, broadening in scope to encompass wide spatial, liberal, moral, and cultural dimensions. The remainder of this Section addresses these four dimensions of the *Lawrence* opinion.

First, the *Lawrence* decision's spatial dimensions were quite broad. While *Lawrence*'s stage could have been limited to John Geddes Lawrence's apartment, Justice Kennedy's opinion began not only "in the home," but also in the "other spheres of our lives and existence, outside the home, where the State should not be a dominant presence."²³⁹ The stage further widened when Justice Kennedy continued to provide that "[f]reedom extends beyond spatial bounds," and moreover, that *Lawrence* "involve[d] liberty of the person both in its spatial and more transcendent dimensions."²⁴⁰ In fact, Justice Thomas, in his dissenting opinion in *Lawrence*, took issue specifically with those "more transcendent dimensions," explaining that liberty in such dimensions is not grounded in the Constitution.²⁴¹ As a result, the space occupied by the *Lawrence* decision seems wider than the confines of John Geddes Lawrence's apartment, or, as *Lawrence*'s narrowest interpreters argue, Lawrence's bedroom. That wide

²³⁶ See, e.g., E.J. Graff, *The High Court Finally Gets it Right*, BOSTON GLOBE, June 29, 2003, at D11.

²³⁷ See, e.g., Ruthann Robson, *The Missing Word in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 397, 402 (2004) (arguing that what was missing from *Lawrence*, despite the opinion's inclusion of rhetoric about equality, liberty, privacy, history, and lesbians, was an apology "for the seventeen years of grief, pain, and death caused by *Bowers v. Hardwick*"); Marc Strasser, *Lawrence, Same-Sex Marriage and the Constitution: What is Protected and Why?*, 38 NEW ENG. L. REV. 667, 679 (2006) (articulating a pessimistic view on *Lawrence*'s implications for equality and same-sex marriage).

²³⁸ See, e.g., *Fields v. Palmdale Sch. Dist.*, 271 F. Supp. 1217, 1221 (C.D. Cal. 2003) (indicating that *Lawrence* recognized the "right to engage in private homosexual conduct"); *Lewis v. Harris*, 908 A.2d 196, 227–28, 231 (N.J. 2006) (Poritz, J., dissenting) (citing *Lawrence* in support of requiring that same-sex couples have access to the "status" of marriage and everything that the status of marriage entails); *Martin v. Zihlerl*, 607 S.E.2d 367 (Va. 2005) (ruling, in light of *Lawrence*, that a fornication statute violated the Due Process Clause of the Fourteenth Amendment); see also Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1185 (2004) (explaining that since *Lawrence* held that the state was no longer free to criminalize same-gender sexual conduct, "the argument that the state is limited in its ability to refuse to recognize the relationships that often accompany that sexual conduct becomes considerably more viable"); Tribe, *supra* note 11, at 1898, 1933–45 (arguing that the "broad and bold strokes with which the Court painted in *Lawrence*" advanced "an explicitly equality-based and relationally situated theory of substantive liberty" that correctly views liberty as layered, multi-dimensional, and transcending the specifics of the Constitution's enumeration).

²³⁹ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

²⁴⁰ *Id.*

²⁴¹ See *id.* at 606 (Thomas, J., dissenting).

space is theoretically limitless, and has been considered to encompass the public sphere.²⁴²

Second, the *Lawrence* decision put forward a broad conception of liberty. The opinion opened with the broad statement that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”²⁴³ Despite the fact that the *Lawrence* Court did not find that engaging in homosexual sodomy was a fundamental right, the Court held that “[t]he liberty protected by the Constitution allows homosexual persons the right to make th[e] choice”²⁴⁴ to enter into relationships in the confines of their homes. Liberty, for the *Lawrence* Court, “gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”²⁴⁵ and is composed of “manifold possibilities.”²⁴⁶ Of course, one of the manifold possibilities derives from a broad conception of liberty that was the generation of *Lawrence*’s famed “equality principle.”²⁴⁷ The implications of that equality principle ground the argument that obscenity discriminates on the basis of the Fourteenth Amendment.²⁴⁸

Third, the *Lawrence* decision’s implications for moral legislation were quite broad as well. Instead of using traditional tiers of constitutional scrutiny, the *Lawrence* Court found that the Texas Homosexual Conduct Law was constitutionally impermissible because the state could not demonstrate its justification by reference to something other than its desire to promote certain concepts of morality.²⁴⁹ The *Lawrence* Court held that the power of the state cannot be used to mandate a moral code.²⁵⁰ Of course, while *Lawrence*’s moral dimension may be regarded by some to be very broad (and

²⁴² See Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271, 1272–73 (2006) (extrapolating from *Lawrence* to the public sphere (i.e., where individuals could marry or where businesses operate) in arguing for equal application for sexual minorities of public accommodations statutes).

²⁴³ *Lawrence*, 539 U.S. at 562.

²⁴⁴ *Id.* at 567.

²⁴⁵ *Id.* at 572.

²⁴⁶ *Id.* at 578.

²⁴⁷ See Eskridge, *supra* note 145, at 1053–54 (“The Framers of the Fourteenth Amendment emphasized that ‘the American system rests on the assertion of the equal right of every man to life, liberty, and the pursuit of happiness.’” (citing Brief of the Cato Institute as Amicus Curiae in Support of Petitioners, *Lawrence*, 539 U.S. 558 (No. 02-102))).

²⁴⁸ See *infra* Part IV.A.

²⁴⁹ See *supra* note 224 and accompanying text.

²⁵⁰ See *Lawrence*, 539 U.S. at 571 (“Our obligation is to define the liberty of all, not to mandate our own moral code.” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992))). But see Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004) (demonstrating that for some time before the Court handed down its decision in *Lawrence*, morals-based legislation had not been held constitutionally permissible).

perhaps justifiably so),²⁵¹ *Lawrence*'s broad implications for morals-based legislation unfortunately already have proven unsuccessful.²⁵²

Fourth, and perhaps as a result of the three dimensions that are broadened by the *Lawrence* decision, *Lawrence* affected a cultural climate on the other side of John Geddes Lawrence's apartment door, and beyond the pages of its opinion.²⁵³ Justice Scalia's assertion that "it is clear . . . that the Court has taken sides in the culture war," signing on to "the law profession's anti-anti-homosexual culture," suggests that the implications of the opinion extend beyond the private sphere in which the facts of the case occurred.²⁵⁴ Thus, if *Lawrence* cannot be extended, spatially, to the public sphere by its broad spatial dimensions; if it cannot generate an equality principle as a result of its broad conception of liberty; and if further attempts to extend its moral dimensions prove unsuccessful, those who interpret *Lawrence* broadly may still rely on the opinion's broad cultural dimension in deriving implications beyond those that only a narrow interpreter would read.

C. Interpreting *Lawrence* Narrowly

In contrast to the above broad reading of *Lawrence*'s ambiguity, other scholars have suggested that the decision should be understood narrowly. In fact, "*Lawrence*'s lack of clarity about the nature of the right it recognized may already be promoting its narrowing."²⁵⁵ With few exceptions,²⁵⁶ most courts have read *Lawrence* narrowly, declining invitations to extend its ambiguity to invalidate other laws. Courts have rejected the application of *Lawrence* to cases where plaintiffs sought to invalidate a Florida statute banning same-sex adoption,²⁵⁷ to reduce sentences in Kansas for statutory

²⁵¹ See *supra* notes 11–15 and accompanying text.

²⁵² See *supra* note 16 and accompanying text.

²⁵³ Of course, "culture" can take on a number of different definitions. See FRANK R. VIVELLO, *CULTURAL ANTHROPOLOGY: A HANDBOOK* 10 (1978). Notably, however, literature that has focused on incorporating social norms into a discussion of law and economics has focused on the connection between law and culture. See Ellickson, *supra* note 31, at 542 (explaining that "sociologists traditionally have seen informal groups and cultures as operative engines [of limiting an individual's choices]," and suggesting that law and economics scholars follow suit).

²⁵⁴ *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

²⁵⁵ James Allon Garland, *Sexual Expression: Sex as a Form of Gender and Expression after Lawrence v. Texas*, 15 COLUM. J. GENDER & L. 297, 307 (2006).

²⁵⁶ See *supra* note 238 and accompanying text.

²⁵⁷ See *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004). For a summary of the case and an excellent analysis of the extent to which rights of procreative liberty can be denied to gays and lesbians, see John A. Robertson, *Gay and Lesbian Access to Reproductive Technology*, 55 CASE W. RES. L. REV. 323 (2004).

rape in same-sex settings,²⁵⁸ and to invalidate an Alabama ban on the sale of sexual devices such as vibrators, dildos, anal beads, and artificial vaginas.²⁵⁹

Some language in the *Lawrence* opinion could be read to allow a broader scope.²⁶⁰ Other language in the opinion, however, might leave readers wishing for more. Supporters of gay rights have called upon courts and individuals to “make the most of [*Lawrence*].”²⁶¹ But such a call would not be necessary if the decision’s implications were clear. Despite broad strokes that can be read between the lines of the *Lawrence* opinion, the opinion, on its face, leaves much to the imagination. After all, the majority did not assert, expressly, that gays and lesbians should be accorded equal rights. The majority neither asserted, expressly, that the Texas Homosexual Conduct Law interfered with the liberty of homosexual persons to express their sexual preference—to express their identity—in the same way heterosexual persons could.

Unfortunately, reading the plain text of the *Lawrence* opinion generates a feeling of unease more than anything else. Had the Court upheld the Texas Homosexual Conduct Law, its holding would have precluded a broad interpretation of *Lawrence*. However, *Lawrence*’s broad interpreter must contend with the obvious objection that to broaden *Lawrence* is to read into the opinion dimensions to which the opinion may have alluded,²⁶² but that were in fact not occupied by the opinion’s plain words.

IV. TRANSLATING OBSCENITY FOR DISCRIMINATORS

The *Lawrence* decision, where the Court invalidated a Texas statute that criminalized consensual same-sex sodomy,²⁶³ has been characterized as simultaneously broad and narrow.²⁶⁴ However, commentators at both ends of *Lawrence*’s interpretive spectrum agree that the Court, in 2003, treated gays and lesbians differently than it had in 1986 when it decided *Bowers v. Hardwick*.²⁶⁵

That difference in treatment is significant, whether confined to the private sphere or extended to the public sphere. This Essay draws upon both the obscenity doctrine and *Lawrence* to construct two arguments that obscenity discriminates unconstitutionally. One is rooted in the Equal Protec-

²⁵⁸ See *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004).

²⁵⁹ See *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004). But see *Reliable Consultants Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008).

²⁶⁰ See *supra* notes 239–54 and accompanying text.

²⁶¹ Mary Anne Case, *Of “This” and “That” in Lawrence v. Texas*, 2003 SUP. CT. REV. 75, 76.

²⁶² See *supra* text accompanying notes 236–54.

²⁶³ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁶⁴ See Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862 (2006).

²⁶⁵ 478 U.S. 186 (1986) (upholding a Georgia statute that criminalized sodomy by participants of the same or opposite sexes, on the basis that no fundamental right existed to engage in sodomy).

tion Clause. The other is rooted in the First Amendment.²⁶⁶ One argument is motivated by a broad interpretation of *Lawrence*. The other is motivated by its narrow interpretation. As a result, this Part argues that obscenity's discrimination against gays and lesbians should bother even *Lawrence*'s narrowest interpreter.²⁶⁷

Part IV.A argues that the broad equality principle animating the *Lawrence* decision insists that the obscenity doctrine cannot weigh one's sexual minority status when implementing the *Miller* test. Part IV.B is premised on a narrow interpretation of *Lawrence*, arguing that in light of *Lawrence* the obscenity doctrine's discrimination against gays and lesbians favors expressive content on the basis of its viewpoint, as opposed to on the basis of its subject matter. As Part IV.B demonstrates, a narrow interpretation of *Lawrence*, confined to the private sphere, transformed homosexuality from subject matter (as in, a strange tendency entirely separate from heterosexuality) to viewpoint (as in, simply another way that individuals might engage in sex). As a result of the transformation from subject matter to viewpoint, obscenity's discrimination against gays and lesbians constitutes a constitutionally impermissible viewpoint-discriminatory restriction on speech.

A. Obscenity as Status Discrimination

A broad interpretation of *Lawrence* grounds a claim that the obscenity doctrine's collateral effects inflict first generation discrimination on gays and lesbians.²⁶⁸ This Section explains first generation, or status, discrimination. Next, this Section explains how, in light of the *Lawrence* decision, the obscenity doctrine inflicts status discrimination on gays and lesbians.

1. *The First Generation of the Second Wave of Discrimination.*—Civil rights lawyers and scholars no longer worry about status discrimination, often referred to as “first generation” discrimination.²⁶⁹ In the “second generation” of discrimination law, the “smoking guns—the sign on the door that ‘Irish need not apply’ or the rejection explained by the comment that ‘this is no job for a woman’—are largely things of the past.”²⁷⁰ The move

²⁶⁶ Cf. Abner S. Greene, *Is There a First Amendment Defense for Bush v. Gore?*, 80 NOTRE DAME L. REV. 1643 (2005) (arguing that “even if there is no Equal Protection Clause requirement that votes be counted (or recounted) in the same way across a state,” there is a First Amendment argument against allowing officials statutory discretion to favor one viewpoint over another).

²⁶⁷ A useful hypothetical interlocutor would be Justice Scalia himself, who of course penned the dissent in *Lawrence* as well as the majority opinion in *R.A.V.*

²⁶⁸ See *supra* Part III.B.

²⁶⁹ Notably, one scholar has termed status-based discrimination “ontological” discrimination. See Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 170 n.15 (2004) (defining “ontological discrimination” as “discrimination that is status-based in the most basic sense—all women or men are excluded because of their status as such”).

²⁷⁰ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60 (2001).

from first to second generation discrimination has been characterized as “progress: individuals no longer need[] to *be* white, male, straight, Protestant, and able-bodied; they need[] only to *act* white, male, straight, Protestant, and able-bodied.”²⁷¹

Much as the move from first to second generation discrimination has been seen as progressive, so, too, has the move from the first to the second “wave” of civil rights.²⁷² However, what may have gone unnoticed amidst the confetti when celebrating the graduation from civil rights law’s first to second generation, or the commencement of its second wave, was that the second wave of civil rights may still be experiencing first generation problems.²⁷³

The disaggregation of sex from gender,²⁷⁴ the awareness of the demands placed upon individuals who display traits that are constitutive of their group identity to downplay or “cover” the adjectives²⁷⁵ that make them the nouns²⁷⁶ that they are,²⁷⁷ and the trait discrimination movement generally, have offered discrimination law great gains “in analytic clarity and in human liberty and equality.”²⁷⁸ However, the pervasiveness of those gains has arguably obscured a loss: discrimination’s second wave has not fully entered its second generation, and perpetuating a focus on traits, while admirable and relevant to many current civil rights issues, does not clarify all of them. Moreover, the pervasiveness of the trait discrimination movement

²⁷¹ KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 22 (2006).

²⁷² The gay and lesbian movements, the women’s movement, and the disability movement have been said to reflect a “second wave” of civil rights activism. See Ryken Grattett & Valerie Jenness, *Examining the Boundaries of Hate Crime Law: Disabilities and the “Dilemma of Difference,”* 91 J. CRIM. L. & CRIMINOLOGY 653, 671 (2001); see also STEPHEN C. HALPERN, *ON THE LIMITS OF LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT* (1994).

²⁷³ An emerging literature has focused on first generation discrimination harms inflicted on second wave civil rights groups. See, e.g., Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 410 (2006) (explaining that while overt discrimination has subsided to some degree on the bases of race, sex, and physical disability, it has persisted on the basis of mental illness); Lau, *supra* note 242 (arguing that public accommodations law—in order to avoid the commission of first generation discrimination against gays and lesbians—must discard an individualist paradigm for a couples’ rights paradigm, which views as analytical units couples, not individuals).

²⁷⁴ See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (arguing that Title VII must protect an effeminate man as it had protected a masculine woman in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1999)).

²⁷⁵ For example, “effeminate,” “masculine,” “flamboyant,” “ghetto,” “preppy.”

²⁷⁶ For example, “woman,” “man,” “gay,” “black,” “white.”

²⁷⁷ The reference to adjectives and nouns derives meaning from Mary Anne Case’s debate with Richard Epstein, in which she agreed with Epstein that discrimination lawyers should use the term “sex,” rather than “gender,” but disagreed with him about why to differentiate between the two terms. While Epstein has insisted that “gender is for nouns,” Case, “on the contrary, [is] of the view that gender is for adjectives, sex is for nouns.” Case, *supra* note 274, at 11–12 (citing Richard Epstein, *Gender Is for Nouns*, 41 DEPAUL L. REV. 981, 981 (1992)).

²⁷⁸ Case, *supra* note 274, at 2.

suggests, falsely, that all status discrimination is obvious, and that all status discrimination has stopped. Not all status discrimination is obvious. Not all status discrimination has stopped. Some status discrimination hangs particularly high on the discrimination tree, such that courts and commentators have not yet picked it, or even seen it.

The obscenity test²⁷⁹ has conflated “sex”—and the patently offensive representation of sex that constitutes obscenity—and “sexual orientation.” This conflation has collaterally inflicted upon gays and lesbians first generation discrimination harms. These collateral effects may be analogized to other practices that have been shown to generate a disparate impact on particular groups, such as employers’ policies excluding pregnant employees from disability benefits plans²⁸⁰ or film directors’ decisions to cast whites or men instead of blacks or women.²⁸¹ The obscenity doctrine’s failure to articulate a distinction between excluding from constitutional reach a depiction of sex because it is more queer, and excluding from constitutional reach a depiction of sex because it is more naked, impacts disparately the sexual minority.²⁸²

Moreover, obscenity’s discrimination against gays and lesbians constitutes first generation, or status, discrimination. These second wave groups continue to face first generation discrimination harms, albeit in forms that are sometimes different from the first generation discrimination harms experienced by first wave groups. Consider, for instance, an example from public accommodations law. A culture of antidiscrimination may prevent restaurant owners from hanging “No Gays Allowed” signs on their doors where an innkeeper in 1951 would not have been so deterred.²⁸³ But the

²⁷⁹ See *supra* text accompanying note 118.

²⁸⁰ See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2007)); see also, e.g., *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987) (holding that the Pregnancy Discrimination Act of 1978 did not preempt a California state statute requiring employers to provide leave and reinstatement to employees disabled by pregnancy).

²⁸¹ See Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CAL. L. REV. 1 (2007) (arguing that some race and sex classifications in discriminatory casting announcements violate Title VII).

²⁸² See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986–87 (1988) (explaining that after the Court’s holding in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), “facially neutral employment that have significant adverse effects on protected groups have been held to violate the [Civil Rights] Act [of 1964] without proof that the employer adopted those practices with a discriminatory intent” (emphasis omitted)).

²⁸³ I mean here to refer, albeit casually, to the emerging “law and culture” movement, which has argued, among other things, that culture influences the law, but also that the law creates and influences culture, “participat[ing] in the production of meanings within the shared semiotic system of a culture.” Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 47 (2001). Professor Mezey encapsulates the movement as follows:

[W]e tend to think of playing baseball or going to a baseball game as cultural acts with no significant legal implications. We also assume that a lawsuit challenging baseball’s exemption from antitrust laws is a legal act with few cultural implications. I think both of these assumptions are profoundly wrong, and that our understandings of the game and the lawsuit are impoverished

cultural equivalent of that sign was hung in the lobby of Sandals' resort hotels, where individuals wishing to share rooms with members of the same sex were prohibited from doing so because of a former Sandals policy against accommodating members of the same sex in a single hotel room.²⁸⁴ It is the effective banner greeting visitors to eHarmony's online dating site, where hopeful singles who answer the site's 436-question survey, which "does not contain any questions that are so clearly inapplicable to gay male couples,"²⁸⁵ will only be matched with members of the opposite sex.²⁸⁶

Sandals' and eHarmony's discrimination against gays and lesbians has inflicted first generation harms, namely harms against gays and lesbians for being gays and lesbians. Detractors argue otherwise. For instance, Sandals and eHarmony have contended that, as a formal matter, the companies permit gays and lesbians to access their businesses, in compliance with any applicable public accommodations law, so long as those gays and lesbians enter as individuals.²⁸⁷ However, Professor Holning Lau has argued that because gays and lesbians derive their identities from their relational status with another individual of the same sex, denial of access to gays and lesbians should be gauged by reference to the couple—not the individual—as the analytical unit.²⁸⁸

Both public accommodations laws and the obscenity doctrine have generated the cultural equivalent of signs that read, "No Gays Allowed." Public accommodations laws' analysis of the individual, rather than the couple, generates discrimination particular to gays and lesbians because these individuals derive their identity from the fact that they couple with a member of the same sex. Similarly, the obscenity doctrine's conflation of sex and sexual orientation generates discrimination particular to gays and lesbians because their group identity is derived from their sexuality.²⁸⁹ Gays

when we fail to account for the ways in which the game is a product of law and the lawsuit a product of culture—how the meaning of each is bound up in the other, and in the complex entanglement of law and culture.

Id. at 35–36. For a list of other influential writings in the field of law and culture, see Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 506 n.53 (2001). The law and culture movement and the social norms movement (see *supra* notes 31–35 and accompanying text) are related, but are distinct; the social norms scholarship with which this Essay engages examines the particular ways in which *unenforced* laws have shaped social norms.

²⁸⁴ See Lau, *supra* note 242, at 1271–73.

²⁸⁵ *Id.* at 1317 n.189.

²⁸⁶ See *id.*; see also Carlson v. eHarmony.com, Inc., No. BC371958 (Cal. App. Dep't Super. Ct., May 31, 2007); Ambrose Aban, *Lesbian's eHarmony Lawsuit Stirs Passions on Both Sides*, EDGE BOSTON, June 21, 2007, <http://www.edgeboston.com/index.php?ch=news&sc=glbt&sc2=news&sc3=&id=21288>; Jill Serjeant, *eHarmony Sued in California for Excluding Gays*, REUTERS, May 31, 2007, <http://www.reuters.com/article/wtMostRead/idUSN3122132120070531>.

²⁸⁷ See Lau, *supra* note 242, at 1292–93.

²⁸⁸ See *id.*

²⁸⁹ The visible pair bonding of same-sex individuals—even in the absence of actual copulation—may constitute enough to trouble society. See Mary Anne Case, *Couples and Coupling in the Public*

and lesbians are, in this way, overwhelmed by the obscenity doctrine's refusal to disaggregate their very identity as individuals of minority sexual orientations from graphic and overexposed depictions of majority sexual practices.

2. *Extending Lawrence to a New Generation of the Obscenity Doctrine.*—After, and in light of, the Court's decision in *Lawrence v. Texas*,²⁹⁰ the obscenity doctrine's discrimination against gays and lesbians presents particular problems. Not only does the obscenity doctrine operate stealthily,²⁹¹ but even its stealth operation inflicts first generation discrimination harms on gays and lesbians. For those who interpret *Lawrence* broadly,²⁹² the obscenity doctrine's first generation discrimination harms raise serious concern. While earlier efforts to extend one of *Lawrence*'s broader "holdings" to the obscenity doctrine have been unsuccessful,²⁹³ *Lawrence* presented other opportunities for extension. *Lawrence*'s broad implications were not only moral, but also spatial, liberal, and cultural.²⁹⁴ Professor Eskridge has argued that, despite reservations about the *Lawrence* opinion's implications for gay rights, *Lawrence* progressed by treating gay people as equal citizens, rather than "as presumptive outlaws," as the Court had in *Bowers v. Hardwick*.²⁹⁵ In this way the broad "equality principle" underlying the *Lawrence* decision may broaden its implications, despite a failed effort to do so in *Extreme Associates*.²⁹⁶

Let us imagine that the obscenity doctrine (or any doctrine, for that matter) had been shown to inhibit, systematically, the inclusion of African-American actors on television programs and in movies.²⁹⁷ Alternatively, we

Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights, 79 VA. L. REV. 1643 (1993).

²⁹⁰ See *supra* Part III.

²⁹¹ See *supra* notes 23–29 and accompanying text.

²⁹² See *supra* Part III.B.

²⁹³ See *United States v. Extreme Assocs.*, 431 F.3d 150, 159 n.12 (3d Cir. 2005) (holding that the implications of *Lawrence* on morals-based legislation were "analytically irrelevant to the disposition of th[e] case"); *supra* notes 14–16 and accompanying text.

²⁹⁴ See *supra* Part III.B.

²⁹⁵ See Eskridge, *supra* note 235, at 1022.

²⁹⁶ See Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 356 (2006) ("*Lawrence* indicated that the Fourteenth Amendment's privacy and liberty protections include not only a negative right to be let alone, but also an affirmative right to equal respect and autonomy in intimate relationships that transcends the spatial spheres of the home.").

²⁹⁷ While this problem has not been attributed to the obscenity doctrine, scholars have documented the systematic status discrimination of African-American actors. The purpose here is to imagine, hypothetically, that the obscenity doctrine had such an effect. See, e.g., Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293 (2003) (demonstrating that the absence and the stereotyping of people of color by the mass media should be a concern for all individuals); Gary Williams, "Don't Try to Adjust Your Television—I'm Black": Ruminations on the Recurrent Controversy over the Whiteness

might imagine that the tension explored in this Essay were not about discrimination against the sexual minority, but against the sexual majority. For example, we could imagine that *Basic Instinct* received a rating of "NC-17" while *Boys Don't Cry* received a rating of "R."²⁹⁸

Imagining either of these scenarios hopefully generates some pause. Pause to consider that, perhaps, were we to imagine a bias against those who have traditionally experienced first generation discrimination, or, alternatively, those who suffer from what Professor Zachary Kramer has artfully termed the "paradox of privilege,"²⁹⁹ we could imagine the problem resulting in front page news rather than law journal coverage. More forcefully, imagining these scenarios should cause those who argue that obscenity's status quo is acceptable to recognize that the doctrine's prongs fail to disaggregate further that which we only know when we see.

Miller's guidelines were intended to adjust our eyes. After examining the conflation of sex and sexual orientation in *Miller*, and the way in which *Miller* sets forth a very broad and very vague obscenity standard,³⁰⁰ it is incumbent upon us, and upon the Court, to alter obscenity's prescription. Moreover, it is incumbent upon us, and upon the Court, to remember that there is much in the majority opinion in *Lawrence* to expand.

Lawrence's equality principle demands that we "make the most of [*Lawrence*]."³⁰¹ It is incumbent upon scholars, in particular, to unpack the vocabularies of existing doctrines and determine whether they are compatible with the vocabulary of the *Lawrence* decision. Before gays and lesbians

of TV, 4 J. GENDER RACE & JUST. 99 (2000) (examining the history of protests concerning the lack of portrayal of people of color on television).

²⁹⁸ With respect to this sort of rule, I am reminded of Judge Kozinski's remarks in his dissent in *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2005), in which the Ninth Circuit held that a sex-based difference in appearance standards alone did not create a prima facie case of discriminatory intent under Title VII. Judge Kozinski dissented from the opinion:

Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance. I suspect many of my colleagues would feel the same way.

Everyone accepts this as a reasonable reaction from a man, but why should it be different for a woman? It is not because of anatomical differences, such as a requirement that women wear bathing suits that cover their breasts. Women's faces, just like those of men, can be perfectly presentable without makeup; it is a cultural artifact that most women raised in the United States learn to put on—and presumably enjoy wearing—cosmetics. But cultural norms change; not so long ago a man wearing an earring was a gypsy, a pirate or an oddity. Today, a man wearing body piercing jewelry is hardly noticed. So, too, a large (and perhaps growing) number of women choose to present themselves to the world without makeup. I see no justification for forcing them to conform to Harrah's quaint notion of what a "real woman" looks like.

Id. at 1118 (Kozinski, J., dissenting).

²⁹⁹ See Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. (forthcoming 2008) (manuscript at 27) (defining the paradox to mean the idea that heterosexuality is at once "everywhere and nowhere").

³⁰⁰ See *supra* note 173 and accompanying text.

³⁰¹ Case, *supra* note 261, at 76.

can graduate to the second generation of antidiscrimination, and before they may prevail in the war for same-sex marriage, their first generation harms must be addressed.³⁰²

B. Obscenity as Viewpoint Discrimination

A narrow interpretation of *Lawrence*³⁰³ grounds a claim that the obscenity doctrine's collateral effects discriminate on the basis of viewpoint by censoring depictions of homosexuality. Because this Section is premised on a narrow interpretation of *Lawrence*, it examines closely the opinion's plain words. Next, this Section explains how the *Lawrence* opinion's plain words, when examined carefully, demonstrate a shift in the Court's attitude toward homosexual sex. This Section argues that such a shift is material for First Amendment purposes, since it causes homosexuality to transform from subject matter to viewpoint. Once homosexuality so transforms, discrimination against content in light of its homosexuality constitutes, for First Amendment purposes, an unconstitutional content-based restriction of speech.

1. *From a Narrow Interpretation of Lawrence to Viewpoint Discrimination.*—If *Lawrence* is limited to the private bedroom in which its facts occurred, the opinion may not implicate the equal protection concerns of its broad interpretation. However, even a narrow interpretation of *Lawrence* can speak volumes about obscenity's discriminatory effects. To be sure, on the basis of the obscenity doctrine's purpose to promote public safety,³⁰⁴ the doctrine has already been determined not to apply to the private possession of materials classified as obscene.³⁰⁵ Nevertheless, obscenity's discriminatory effects are not hampered by the doctrine's exception for private conduct. When the obscenity doctrine and a narrow interpretation of *Lawrence* can interact with the same vocabulary, the obscenity doctrine's discriminatory collateral effects are objectionable even if *Lawrence* and the obscenity doctrine operate in the private and public spheres, respectively. The obscenity doctrine's discriminatory collateral effects need not emanate from the Equal Protection Clause, but instead from the First Amendment itself.³⁰⁶ Some have argued that the obscenity doctrine should be abandoned,

³⁰² As William Eskridge has argued, the most successful route to same-sex marriage may be one of incremental change. See WILLIAM N. ESKRIDGE, *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* (2001).

³⁰³ See *supra* Part III.C.

³⁰⁴ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57–58 (1973).

³⁰⁵ See *Stanley v. Georgia*, 394 U.S. 557 (1969).

³⁰⁶ It should be noted here that the First Amendment's principle of "equal liberty of expression" may itself embody parts of the Equal Protection Clause. See Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). However, because this principle is part of the "central meaning of the First Amendment," I refer to, and treat in this Essay, First Amendment discrimination as a species distinct from equal protection discrimination. See *id.*

or lessened in scope, because the distinction between sexual and political speech makes little sense in light of First Amendment principles.³⁰⁷ I happen to agree that “the argument that sexual speech is ‘noncognitive’ because it is designed to produce a physical effect is predicated on an impoverished view of sexuality.”³⁰⁸ However, agreement on that score is not necessary, nor is abandoning obscenity jurisprudence altogether, in order to fashion a doctrine governing obscenity that reduces the possibility for discriminatory collateral effects.

The exposition of *Lawrence*’s narrow interpretation above³⁰⁹ admitted that the plain text of *Lawrence*’s majority opinion leaves supporters of gay rights wishing that the broad dimensions articulated by the decision’s broad interpreters actually existed. Unfortunately, less ambitious readers with more conservative imaginations may not be able to envision new dimensions after reading *Lawrence*. However, even *Lawrence*’s plain words may ground a narrow interpreter’s claim that obscenity discriminates.

As I explain above, discrimination exists not only in the realm of equal protection jurisprudence, but in the context of the First Amendment as well.³¹⁰ In the First Amendment context, discrimination of expression on the basis of viewpoint is presumptively invalid, while discrimination of expression on the basis of subject matter is treated inconsistently.³¹¹ Based on Professor Stone’s observations,³¹² if a restriction on speech³¹³ is not thought to diminish the public’s perception of its social or political universe, and is not thought to restrict any particular message, the restriction will be treated more like a content-neutral restriction (and will more likely be upheld). Conversely, if a restriction on speech is thought to diminish the public’s perception of its social or political universe, or is thought to restrict a particular message, the restriction will be treated more like a content-based viewpoint restriction (and will almost definitely be invalidated). In the majority’s opinion in *Lawrence*—even if the only right protected is the right for two adults to engage in consensual sex in private—homosexuality transforms, for First Amendment purposes, from subject matter to viewpoint.³¹⁴ As a result, a showing that the obscenity doctrine has had the collateral effect of encouraging discrimination against depictions of homosexuality is

³⁰⁷ See, e.g., Cole, *supra* note 8, at 123.

³⁰⁸ *Id.* at 126.

³⁰⁹ See *supra* Part III.C.

³¹⁰ See *supra* Part II.A.1.

³¹¹ See Stone, *supra* note 46.

³¹² See *supra* Part II.A.1.b.

³¹³ Speech, of course, includes both conduct and expression. See *supra* note 2.

³¹⁴ Cf. Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint Discrimination*, 9 HARV. J.L. & PUB. POL’Y 461, 480 (1986) (arguing that the “Government cannot suppress graphic sexually explicit expression because it portrays women as sexual objects who enjoy humiliation and rape without opening the door to other forms of viewpoint-based suppression,” and that education and consciousness-raising, rather than censorship, should generate the necessary change in society’s acceptance of pornography).

more likely to constitute invalid content-based restriction of speech for First Amendment purposes.³¹⁵

2. *Lawrence's Plain Words.*—A narrow interpretation of *Lawrence* focuses on its plain words. To review, the majority opinion in *Lawrence* invalidated the Texas Homosexual Conduct Law because it prohibited “deviate sexual intercourse.”³¹⁶ The law was invalidated because the “State cannot not demean [gays and lesbians’] existence or control their destiny by making their private sexual conduct a crime.”³¹⁷ After all, the Court stated that “[p]ersons in a homosexual relationship may seek autonomy for [the] purposes [of defining one’s concept of existence, of the universe, and the mystery of human life], just as heterosexuals persons do.”³¹⁸

Admittedly, the *Lawrence* Court did not find that the Texas Homosexual Conduct Law, which the Court characterized when framing the issue of whether the law violated the Equal Protection Clause as “criminaliz[ing] sexual intimacy by same-sex couples, but not identical behavior by different-sex couples,”³¹⁹ violated the Equal Protection Clause. However, the Court did find that “the liberty protected by the Constitution allows homosexual persons the right to” choose “with whom they enter into a relationship in the confines of their own homes.”³²⁰

Despite the fact that the *Lawrence* Court admittedly did not find that the right at issue in *Lawrence* is fundamental, it did argue that “to say the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward,”³²¹ because “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.”³²² The *Lawrence* case, after all, “involve[d] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.”³²³

Moreover, despite the *Lawrence* Court’s ambivalence toward *Lawrence* and *Garner*, toward homosexuals, and toward homosexual sex, the

³¹⁵ Of course, even if homosexuality was considered, for First Amendment purposes, subject matter and not viewpoint, discrimination against its depiction might still constitute an invalid content-based restriction of speech. See *supra* note 107 and accompanying text (explaining that although Justice Scalia may not have rested his decision in *R.A.V. v. City of St. Paul* on the distinction between restrictions of subject matter and viewpoint, what emerges clearly from his opinion in *R.A.V.* is that he thought that further content-based restrictions of any kind were as unacceptable with respect to low-value speech, like obscenity, as they were with respect to fully protected, high-value speech).

³¹⁶ See *Lawrence v. Texas*, 539 U.S. 558, 563 (2003).

³¹⁷ *Id.* at 578.

³¹⁸ *Id.* at 574.

³¹⁹ *Id.* at 564.

³²⁰ *Id.* at 567.

³²¹ *Id.*

³²² *Id.*

³²³ *Id.* at 578.

Court made sure to note that, as a matter of American history, “this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons,”³²⁴ and that “not until the 1970’s [did] any State single[] out same-sex relations for criminal prosecution.”³²⁵ Narrowly construed, however, the *Lawrence* holding need not extend beyond Lawrence’s bedroom door.

3. “*Reading Back*” *Obscenity into Lawrence*.—The practice of reading back opinions to reveal the “way judicial opinions function as cultural productions,” particularly with respect to the way in which judicial opinions affect marginalized groups, is an emerging enterprise.³²⁶ Professor Bennett Capers has innovatively linked the practice of “reading back” with the practice of “reading black,” in order to “excavate the racialized thinking that informs even those opinions most removed from racial concerns.”³²⁷

When jurors ask for a “read back” of testimony, they do not ask to hear the testimony again because they missed a word or two when they heard the testimony for the first time. Instead, they ask for such a reading to “rehear [the testimony] within the context of having heard and seen all of the evidence, armed with the tools to ascertain not only what was said, but what was not said.”³²⁸ To “read black” is to read “not only critical[ly], but particularly attuned to the frequencies and registers of race.”³²⁹ By reading back the *Lawrence* majority opinion, armed with knowledge of the obscenity doctrine’s tools, even the opinion’s plain words fill broader dimensions.

Justice Kennedy framed the question before the Court in *Lawrence*—“the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct”³³⁰—in a way that foreshadowed his decision that “the State cannot demean their existence . . . by making their private sexual conduct a crime.”³³¹ After reading back Justice Kennedy’s references to sex in the *Lawrence* opinion, a reader can observe a sharp distinction between the Justice’s own references to the sex at issue in the case, and the Justice’s citation or paraphrasing of others’ references to the sex at issue in the case.

When speaking about the sex in his own words, Justice Kennedy consistently separates a description of the sex act and a description of those engaged in it. For instance, he explains that “[t]he officers observed Lawrence and another man, Tyrone Garner, engaging in a sexual act.”³³² He

³²⁴ *Id.* at 569.

³²⁵ *Id.* at 570.

³²⁶ See, e.g., I. Bennett Capers, Idea, *Reading Back: Reading Black*, 35 HOFSTRA L. REV. 9 (2006).

³²⁷ *Id.* at 13.

³²⁸ *Id.* at 12.

³²⁹ *Id.*

³³⁰ *Lawrence*, 539 U.S. at 562.

³³¹ *Id.* at 578.

³³² *Id.* at 563.

explains that the Texas Homosexual Conduct Law “criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples.”³³³ Moreover, he describes petitioners’ convictions for neither gay nor straight “adult consensual sexual intimacy in the home.”³³⁴ When reciting the facts in *Bowers v. Hardwick*,³³⁵ Kennedy describes that in that case, “Hardwick, in his own bedroom engage[ed] in intimate sexual conduct with another adult male.”³³⁶ The following reference to sex in the *Lawrence* decision provides that “[w]hen sexuality finds overt expression . . . [t]he liberty protected by the Constitution allows homosexual persons the right to make this choice.”³³⁷ In each of these instances, Justice Kennedy consistently separates the homosexual act from the homosexual individual. However, when Justice Kennedy describes the criminalization of the act in which Lawrence and Garner allegedly engaged, he refers to “deviate sexual intercourse,”³³⁸ “homosexual sodomy,”³³⁹ “same-sex relations,”³⁴⁰ and “homosexual conduct.”³⁴¹

Efforts to understand the psychology of grammar have offered new significance to sentence structure, word order, and choice of punctuation.³⁴² But consultation of nothing more than the moment when a significant other becomes not merely a “friend who is a boy/girl” but instead a “boyfriend” or a “girlfriend” can help one to see how the opinion builds gradually but steadily to a climax, where the sexual act in which Lawrence and Garner engaged on the night of September 17, 1998, transformed from an entire subject matter into another way that individuals might choose to have sex, a differing point of view about a single subject matter (sex).

The difference between Justice Kennedy’s characterization of Lawrence and Garner’s sex when using his own, or others’, words suggests that he may have been aware that he had previously thought of homosexuality as an entirely separate category of existence or behavior, yet now thinks of homosexuality as another type of sex, one that can be analogized to a differing point of view that individuals have a choice to express.³⁴³ As the Court articulated in *R.A.V.*, the First Amendment’s prohibition against the pro-

³³³ *Id.* at 564.

³³⁴ *Id.*

³³⁵ 478 U.S. 186 (1986).

³³⁶ *Lawrence*, 539 U.S. at 566.

³³⁷ *Id.* at 567.

³³⁸ *See id.* at 563 (describing the crime prohibited by the Texas Homosexual Conduct Law as “deviate sexual intercourse,” and repeating this characterization three times).

³³⁹ *Id.* at 570, 582, 583.

³⁴⁰ *Id.* at 570.

³⁴¹ *Id.* at 571, 575.

³⁴² *See, e.g.,* J. R. KANTOR, AN OBJECTIVE PSYCHOLOGY OF GRAMMAR (1936).

³⁴³ I should note here that I do not mean to suggest that the Court took a stance on whether homosexuality is biological, or whether it is, instead, a choice that individuals make independently of biology. Here, I mean to invoke “choice” for the sole purpose of analogizing homosexuality to a point of view.

scription of speech "because of disapproval of the ideas expressed" extends to expressive conduct as well.³⁴⁴

The Court's apparent self-awareness appears in phrases that articulate homosexuality's transition from subject matter to viewpoint. During these moments of self-awareness, Justice Kennedy uses neutral phrases to refer to sex acts. For example, when elaborating upon the opinion in *Bowers*, Justice Kennedy explains that "to say that the issue in *Bowers* was simply the right to engage in *certain* sexual conduct demeans the claim the individual put forward," and explained further that "[t]he laws involved in *Bowers* and [*Lawrence*] are . . . statutes that purport to do no more than prohibit a *particular* sex act."³⁴⁵

Perhaps the most explicit demonstration of Justice Kennedy's awareness that homosexuality had transformed from subject matter to viewpoint was when his historical investigation led him, on behalf of the *Lawrence* majority, to conclude that "this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons."³⁴⁶ Here, I mean to argue that by noting that homosexual sex was not a "separate category," the Court seems to recognize the implication that at one time, but not any longer, homosexuality constituted an entire subject matter, something totally different from heterosexuality. The majority acknowledged that "[p]ersons in a homosexual relationship may seek autonomy for [the] purposes [of defining one's concept of existence, of the universe, and the mystery of human life], just as heterosexual persons do."³⁴⁷ Just as heterosexual persons possess the liberty to choose a direction, so, too, do homosexual persons. In this way the *Lawrence* decision marked a transformation of homosexuality from subject matter to viewpoint.

4. *R.A.V.'s Loopholes, and How They Do Not Excuse Obscenity's Discrimination.*—Of course, homosexuality arguably need not transform from subject matter to viewpoint in order for a court to strike down a further restriction against homosexual content within the category of obscenity. According to Justice Scalia's opinion in *R.A.V.*, one might conclude that even a restriction on the basis of subject matter would constitute an impermissible restriction within a particular category of low-value speech.³⁴⁸ However, *R.A.V.* certainly held that discrimination on the basis of viewpoint within a category of low-value speech would be impermissible. Thus, it follows that discriminating on the basis of homosexuality would constitute viewpoint discrimination within the category of obscenity. Obscenity's

³⁴⁴ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citing *Texas v. Johnson*, 491 U.S. 397, 406 (1989)).

³⁴⁵ *Lawrence*, 539 U.S. at 567 (emphases added).

³⁴⁶ *Id.* at 569.

³⁴⁷ *Id.* at 574.

³⁴⁸ See *supra* notes 107, 315 and accompanying text.

refusal to disaggregate between sex and sexual orientation violates the principle set forth in *R.A.V.*, namely that content-based restrictions of low-value speech are impermissible.³⁴⁹ In addition to his refusal in *R.A.V.* to distinguish explicitly between restrictions of subject matter and restrictions of viewpoint, Justice Scalia also left open the possibility that a content-based restriction would be permissible if it directly advanced the reason that a particular category of speech was not protected.³⁵⁰ As noted above, if the reason for obscenity's proscription is unclear, what is also unclear is what, if any, content-based restrictions would be permissible within the category of obscenity. After all, if a particular content-based restriction directly advanced the reason that a particular category is not protected by the First Amendment, one could argue that the holding in *R.A.V.* would not bar such a restriction.³⁵¹

This Essay has argued that the obscenity doctrine has conflated sex and sexual orientation from its inception.³⁵² One might then argue that discrimination against homosexuality advanced the very reason that obscenity is categorically unprotected by the First Amendment. However, despite obscenity's tradition of disfavoring homosexual content, and the way in which that tradition has encouraged further censorship of homosexual content, the purpose of the obscenity doctrine was not to censor content depicting homosexuality. Surely even the obscenity doctrine's strongest advocates, for practical reasons, would not argue that the doctrine was a pretext through which to discriminate against gays and lesbians.

Putting that practical consideration to the side, the obscenity doctrine's history has not been exclusively antigay.³⁵³ The Court's holding in *One, Inc. v. Oleson*,³⁵⁴ where it reversed, without explanation in a single sentence, the Ninth Circuit's determination that an issue of *One*, the magazine whose purpose was to fight oppression on behalf of the homosexual minority,³⁵⁵ was obscene under *Roth v. United States*, left open the possibility that homosexuality could be a factor weighed when courts applied the *Miller* test. For this reason, gay rights advocates might wish that the Court offered more in the way of explanation in its *One* opinion. However, perhaps the *One* ruling "flung open the door for gay publications, which began to proliferate"³⁵⁶ in the wake of the decision because the opinion, though arguably too succinct, successfully preempted the argument that obscenity and homosexuality are one and the same. Thus, the argument that the very reason for

³⁴⁹ *R.A.V.*, 505 U.S. 377 (1992).

³⁵⁰ See *supra* notes 111, 121 and accompanying text.

³⁵¹ See *supra* notes 111, 121 and accompanying text.

³⁵² See *supra* Part II.B.1.

³⁵³ See *supra* Part II.B.1.

³⁵⁴ 355 U.S. 371 (1958).

³⁵⁵ See *supra* note 57; note 164 and accompanying text.

³⁵⁶ MURDOCH & PRICE, *supra* note 166, at 50.

obscenity's proscription is to discriminate against homosexual content is untenable. The holding in *R.A.V.* does not provide an effective loophole for further content-based restrictions against homosexual content within the category of obscenity.

C. Indiscriminate Obscenity

To be sure, accepting either argument presented in this Part requires re-fining—but not overturning—the obscenity test set forth in *Miller*.³⁵⁷ The stealth effects of the obscenity doctrine's refusal to distinguish between sex and sexual orientation have generated a need within the gay and lesbian community to assert rights that are being violated. Problematically, up until now, potential claimants were not equipped with the proper tools to translate their claims into First Amendment language. Once so equipped, claimants will be able to assert their rights.

However, if this Essay focuses on exposing the obscenity doctrine's collateral effects, one might reasonably wonder what, if any, practical effect the arguments proffered here may have. After all, if the obscenity doctrine has not been enforced, what good are its potential challenges? Moreover, would one need to present those challenges to a court in a hypothetical obscenity case in order to mitigate the doctrine's discriminatory collateral effects?

Potential challenges to the obscenity doctrine are valuable despite its lack of enforcement in recent years. Although the doctrine's lack of enforcement may not persist,³⁵⁸ and therefore one could argue that arming jurists with potential challenges to it may serve some end in the future, there is another benefit to airing the doctrine's discriminatory collateral effects. The doctrine's refusal to distinguish between sex and sexual orientation has left open the possibility that content can be classified as obscene because it is either more naked, or, in the alternative, because it is more gay. Understanding that the *Lawrence* decision can ground both an equal protection and a First Amendment claim of discrimination can stabilize and clarify *Miller*'s vague and all-encompassing standard.³⁵⁹

Because an awareness of obscenity's potential challenges may ameliorate its discriminatory collateral effects, it is unnecessary that an obscenity case be decided in court in order for this Essay's goal to be met. The hope

³⁵⁷ *Miller v. California*, 413 U.S. 15 (1973).

³⁵⁸ The Court's March 17, 2008 grant of certiorari in *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647 (Mar. 17, 2008), however, may indicate its willingness to revisit definitions of low-value speech that have become stale. In *Fox*, the Court will determine whether the Second Circuit Court of Appeals erred in striking down the FCC's determination that the broadcast of vulgar expletives may violate restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. § 1464, when the expletives are not repeated. See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007).

³⁵⁹ See *supra* note 173 and accompanying text.

is that, by raising consciousness regarding the harmful effects of a pervasive social norm that the obscenity doctrine has generated, that norm may change. More concretely, perhaps by highlighting the way in which the obscenity doctrine has fostered a tradition of censoring homosexual content, that tradition can come to an end. By understanding the obscenity doctrine's unspoken tradition of censoring gay and lesbian speech, filtering entities such as Google and the MPAA may understand how to avoid future litigation about the unconstitutionality of their filtering standards under the obscenity doctrine.

V. CONCLUSION: TALKING PAST MORALITY; TOWARD INDISCRIMINATE OBSCENITY

The collateral effects of the obscenity doctrine's current application have discriminated against gays and lesbians. Further, by so discriminating, the collateral effects of the doctrine have violated both the Equal Protection Clause and the First Amendment itself. *Lawrence's* equality principle mandates that the obscenity doctrine, or for that matter any other doctrine, not discriminate against gays and lesbians. Moreover, the transformation of the concept of homosexuality in *Lawrence*—from subject matter to viewpoint—mandates on First Amendment grounds that this sort of content-based restriction is constitutionally impermissible.

This Essay brings together the obscenity doctrine and the rights of gays and lesbians, such that the one is not “analytically irrelevant”³⁶⁰ to the other. The hope, in doing so, is that scholars and courts dealing with these two areas of law can find between them a solution to a problem that they share—the systematic discrimination of gays and lesbians. The problem has been so pervasive that, perhaps counterintuitively, it has generated a dearth rather than an abundance of cases challenging the obscenity doctrine. This Essay argues that the lack of cases challenging obscenity's discriminatory application against gays and lesbians may be attributed to the obscenity doctrine's inability to “talk to” gay rights doctrine. Because those versed in either doctrine's vocabulary have not, until now, been able to communicate effectively, this Essay aims to introduce them, and to help start their conversation. As such, the Essay contemplates further discussion on the basis of its translation effort, and, of course, further refinement of anything lost therein.

³⁶⁰ See *supra* note 16 and accompanying text.

APPENDIX

Each SafeSearch Setting column describes the content of each image according to the following legend:

S: Depiction of sex? If yes, homosexual or heterosexual?

P: Depiction of sex in a position other than the missionary position? If yes, which position(s)?

M: Male nudity? If yes, which part(s)?

F: Female nudity? If yes, which part(s)?

		<i>SafeSearch Setting</i>			
		<i>Moderate Filtering</i>			
		<i>S</i>	<i>P</i>	<i>M</i>	<i>N</i>
Image Number	1	Y; heterosexual	N	Y; male action figure's buttocks	Y; female action figure's right breast
	2	N	N	N	N
	3	N	N	N	N
	4	N	N	N	N
	5	N	N	N	N
	6	Y; heterosexual	N	Y; cartoon depiction of buttocks	Y; cartoon depiction of left breast
	7	Y; heterosexual	N	N	N
	8	N	N	N	N
	9	Y; heterosexual	N	N	N

		<i>SafeSearch Setting</i>			
		<i>Moderate Filtering</i>			
		<i>S</i>	<i>P</i>	<i>M</i>	<i>N</i>
	10	Y; heterosexual	N	N	N
	11	Y; heterosexual	Y; woman on top	N	N
	12	N	N	N	N
	13	Y; heterosexual	Y; robots positioned to have anal sex	N	N
	14	N	N	N	N
	15	N	N	N	N
	16	N	N	N	N
	17	Y; other (llamas having sex)	Y; from behind	N	N
	18	N	N	N	N
	19	N	N	N	Y; lightly covered breasts and vagina
	20	N	N	N	N

		<i>SafeSearch Setting</i>			
		<i>Strict Filtering</i>			
		<i>S</i>	<i>P</i>	<i>M</i>	<i>N</i>
Image Number	1	Y; heterosexual	N	Y; cartoon depiction of buttocks	Y; cartoon depiction of left breast
	2	Y; heterosexual	N	N	N
	3	N	N	N	N
	4	N	N	N	N
	5	Y; heterosexual	Y; robots positioned to have anal sex	N	N
	6	N	N	N	N
	7	N	N	N	N
	8	N	N	N	N
	9	Y; heterosexual	N	N	N
	10	N	N	N	N
	11	N	N	N	N
	12	N	N	N	N

		SafeSearch Setting			
		Strict Filtering			
		<i>S</i>	<i>P</i>	<i>M</i>	<i>N</i>
	13	N	N	N	N
	14	N	N	N	N
	15	N	N	N	N
	16	N	N	N	Y; Natalie Port- man's buttocks covered by a thong bikini
	17	N	N	N	N
	18	N	N	N	N
	19	N	N	N	N
	20	N	N	N	N

NORTHWESTERN UNIVERSITY LAW REVIEW

		<i>SafeSearch Setting</i>			
		<i>No Filtering</i>			
		<i>S</i>	<i>P</i>	<i>M</i>	<i>N</i>
Image Number	1	Y; heterosexual	Y; doggy style (rear-entry)	N	Y; breasts; top of bare vagina
	2	Y; heterosexual	Y; woman on top	Y; testicles and upper shaft of penis	Y; breasts; buttocks
	3	Y; heterosexual	Y; doggy style (rear entry) and woman on top	Y; testicles and upper shaft of penis	Y; breasts; vagina with pubic hair; clitoris
	4	N	N	N	N
	5	N	N	N	N
	6	N	N	N	N
	7	N	N	N	N
	8	Y; homosexual	Y; cunnilingus	N	Y; breasts; clitoris
	9	Y; heterosexual	N	Y; cartoon depic- tion of buttocks	Y; cartoon depic- tion of left breast
	10	N	N	N	N
	11	N	N	Y; chest and stomach	N

		<i>SafeSearch Setting</i>			
		<i>No Filtering</i>			
		<i>S</i>	<i>P</i>	<i>M</i>	<i>N</i>
	12	Y; heterosexual	Y; woman holding penis in her hand, seemingly about to insert penis into her mouth	Y; testicles and full, erect penis	Y; breasts; vagina
	13	Y; homosexual	Y; anal sex between men	Y; buttocks and testicles	N
	14	N	N	N	N
	15	Y; heterosexual	N	N	N
	16	Y; other (hermaph- rodite sex)	Y; oral; woman on top; cunnilingus; doggy style (rear entry)	Y; full, erect penis	Y; breasts; but- tocks; clitoris
	17	Y; other (sex with a large spider)	Y; spider perform- ing cunnilingus	Y; buttocks	N
	18	Y; heterosexual	Y; woman on top	Y; testicles, upper shaft of penis; buttocks	Y; buttocks
	19	Y; heterosexual	Y; doggy style (rear entry)	N	Y; right breast
	20	N	N	N	N

