September, 2007

When Obscenity Discriminates

Elizabeth M Glazer

Available at: https://works.bepress.com/elizabeth_glazer/1/
Dear Articles Editor:

I have enclosed and submit for publication my article, *When Obscenity Discriminates*.

No longer do civil rights advocates worry about outright, or “first generation” discrimination. The so-called “smoking guns” – the sign on the door that “Irish need not apply,” the rejection explained by a comment that “this is no job for a woman” - are largely thought to be things of the past. Scholars have turned their attention to “second generation” discrimination, where individuals may not encounter discrimination for *being* black, but they may encounter discrimination for *acting* black. The focus on second generation, or what some call “trait discrimination,” has added value to anti-discrimination law and literature, but not without obscuring a loss: the infliction of first generation discrimination on groups in civil rights law’s “second wave,” which include sexual minorities, the elderly and the disabled. This Article is part of an emerging field of scholarship that addresses first generation harms to those whom civil rights has protected in its second wave.

In particular, the Article examines how the First Amendment’s obscenity doctrine inflicts first generation discrimination against sexual minorities by conflating sex – and the prurient representation of sex that constitutes obscenity – and sexual orientation. For example, when public indecency statutes outlaw gender nonconformity, or when movie ratings censor representations of sexual minorities, obscenity discriminates against sexual minorities. I argue that this conflation generates discrimination against sexual minorities on the basis of their status, as well as on the basis of their viewpoint. Whether discriminating on equal protection or First Amendment grounds, obscenity’s discrimination is unconstitutional. The Article constructs an obscenity doctrine that can be applied constitutionally.

The Article in this way bridges First Amendment and anti-discrimination literatures, which until now have not come together to address a harm that falls within their individual, and collective, jurisdictions. Moreover, and perhaps more importantly, the Article addresses a pervasive harm that courts will likely not have the opportunity to resolve. Because their representation is classified as obscenity, and therefore unprotected speech for First Amendment purposes, sexual minorities are effectively barred by obscenity doctrine from bringing suit to assert their First Amendment rights.

*When Obscenity Discriminates*, which is just under 15,000 words, intersects my research in First Amendment and anti-discrimination law. I teach First Amendment law, and begin this
year, my second at Hofstra, as the Co-Director of Hofstra’s Law & Sexuality Fellowship.

I hope you enjoy the Article, and appreciate your considering it for publication. I have enclosed a separate abstract of the Article, as well as my C.V. If you have any questions at all, please contact me via telephone at (201) 230-1711, or via email at elizabeth.glazer@hofstra.edu.

Sincerely,

Elizabeth M. Glazer
Associate Professor of Law
ELIZABETH M. GLAZER  
Hofstra University School of Law  
121 Hofstra University • Hempstead, NY 11549  
(201) 230-1711 • elizabeth.glazer@hofstra.edu

EDUCATION

University of Chicago Law School  J.D., 2004
Staff Member, University of Chicago Law Review  
Member, Irwin Askow Housing Development Initiative Clinic

University of Pennsylvania  M.A., Philosophy, 2001
Magna cum laude  B.A., Philosophy, 2001
Simultaneously earned M.A. and B.A.  
Vice-Chair, Philosophy Undergraduate Advisory Board  
Honors Thesis: The Unity of God: Kant’s Philosophical System Exposed Through his Discussion of God  
Masters Thesis: The Deduction of Judgments of Taste in Kant’s Critique of the Power of Judgment

EXPERIENCE

Hofstra University School of Law  2006-present
Associate Professor of Law  
Teach courses in: Property, First Amendment, Jurisprudence, 
Business Drafting & Transactional Lawyering  
Hofstra Law & Sexuality Fellowship (Co-Director, 2007–present)  
Faculty Appointments – Entry Level Committee (Member, 2007–2008)  
Strategic Planning Committee (Member, 2006–2008)  
U.S. News & World Report Committee (Member, 2006–2008)

Emory University Law School  January 2007
Visiting Scholar, Feminism and Legal Theory Project

Fried, Frank, Harris, Shriver & Jacobson LLP, New York  Summer 2003, 2004-2006
Associate, Real Estate Department

PUBLICATIONS


WORKS IN PROGRESS

When Obscenity Discriminates (addressing obscenity law’s discriminatory impact on sexual minorities from equal protection and first amendment perspectives)
Untangling Expressive Association (analyzing expressive association, and its attendant right not to associate, through its interactive and declarative dimensions)

The Expressive Elements of Public Accommodation Law (unveiling the aspects of public accommodation laws that prohibit discriminatory speech)

Firsts, Seconds, and the Next Generation of Anti-Discrimination Law (developing a new framework for anti-discrimination law that attempts to merge its first and second generations, arguing that the two generations need not be mutually exclusive)

Unifying the Right(s) to Exclude (exploring the theoretical justifications for the right to exclude in the property and first amendment law contexts to determine whether the rights are theoretically the same, or different)

SPEAKING ENGAGEMENTS

Tenth Annual Conference for the Association of the Study of Law, Culture, and the Humanities, Georgetown University Law Center (March 2007)
Presenter: Are Associations Greater than the Sums of their Parts? Shifting the Focus of Associations from their Missions to their Members

Southeastern Association of Law Schools Annual Meeting, Amelia Island (July 2007)

Northwestern University Law Review (September 2007)
DePaul Law Review (September 2007)
Presenter: “You’re too Young to be a Professor:” The (Short) Route to Academia

Loyola University Chicago School of Law (September 2007)
Presenter, Faculty Workshop: When Obscenity Discriminates

Upcoming Speaking Engagements

Hofstra Colloquium on Law & Sexuality (October 2007)
Presenter at, and co-organizer of, year-long colloquium (other presenters include Mary Anne Case, Dale Carpenter, Russell Robinson, and Zachary Kramer): When Obscenity Discriminates

Youth at Risk: Legal and Community Responses – Hofstra University School of Law (November 2007)
Moderator: Improving the Treatment of LGBT Youth in Foster Care

Third Annual First Amendment Discussion Forum - University of Louisville Louis D. Brandeis School of Law (December 2007)
Presenter (other presenters include Michael Allen, James Chen, Ronald Krotozsynski, David
Partlett, Rodney Smolla, and Russell Weaver): The Expressive Elements of Public Accommodation Law

Willamette University College of Law (January 2008)
Presenter, Faculty Workshop (exchange program with Hofstra University School of Law Faculty Workshop Series): Intentions as Property, & the Right to Intend

Junior Property Scholars Conference - Widener Law School (February 2008)
Presenter: Unifying the Right(s) to Exclude

Whittier Law School Summer Program on LGBT Rights, Amsterdam, Netherlands (July 2008)
Invited Lecturer: Sexual Orientation Law (two-week seminar)

Southeastern Association of Law Schools Annual Meeting, Palm Beach (July 2008)
Panel Organizer and Panelist (with Ann Bartow, Naomi Cahn, and Nancy Levit): Firsts, Seconds, and the Next Generation of Anti-Discrimination Law

BAR ADMISSION

New York, 2005

BLOGGING

Prawfsblawg (August 2007)
Guest blogger
Invited to return as a guest blogger from December 2007 – March 2008

PHOTO, WEBSITE

http://hofstra.facebook.com/profile.php?id=18915500
WHEN OBSCENITY DISCRIMINATES
ELIZABETH M. GLAZER†

When public indecency statutes outlaw gender nonconformity, obscenity discriminates; when movie ratings censor representations of sexual minorities, obscenity discriminates, and discriminates on the basis of their status as sexual minorities. This Article addresses obscenity doctrine’s infliction of first generation, or status discrimination against sexual minorities by conflating “sex” – and the prurient representation of sex that constitutes obscenity – and “sexual orientation.” Civil rights lawyers and scholars have turned their attentions away from “first generation” discrimination,” where groups experience discrimination on the basis of their status, and toward “second generation” discrimination, where groups experience discrimination for failing to downplay or “cover” traits constitutive of their group identities. However, some groups, particularly those in civil rights law’s “second wave” – sexual minorities, women, the elderly, and the disabled – continue to suffer first generation discrimination harms. This Article bridges first amendment and anti-discrimination literatures, which until now have not come together to address a harm that falls within their individual, and collective, jurisdictions. Moreover, and perhaps more importantly, the Article addresses a pervasive harm that courts will likely not have the opportunity to resolve. Because their representation is classified as obscenity, and therefore unprotected speech for first amendment purposes, sexual minorities are effectively barred by obscenity doctrine from bringing suit to assert their first amendment rights.

Copyright © 2007 by Elizabeth M. Glazer
† 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 Article were delivered at the Southeastern Association of Law Schools 2007 Annual Meeting and at a faculty workshop at the Loyola University Chicago School 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, Jordan Barry, John Bronsteen, Alafair Burke, I. Bennett Capers, Mary Anne Case, Robin Charlow, Amy Crawford, Martha Albertson Fineman, Jim Fleming, Eric Freedman, Bill Funk, Victoria Glazer, Joanna Grossman, Grant Hayden, Heidi Hurd, Christian Johnson, Jim Klebba, Toby Kleiner, Zak Kramer, Julian Ku, Katy Kuh, Holning Lau, Arnold Loewy, Dan Markel, Linda McClain, Allison Milld, Jonathan Remy Nash, Ashira Ostrow, Rachel Peckerman, Melanie Rowen, Erin Ryan, Greg Shaffer, Stephen Siegel, Rod Smolla, Stephanie Stern, Tara Thompson, Alex Tsesis, Bill Van Alstyne, Spencer Waller, Russ Weaver, and David Yellen. Finally, thanks to Kevin Shelton for phenomenal library and research assistance.
INTRODUCTION..................................................................................................................1
I. THE MANY MEANINGS OF LAWRENCE ...............................................................10
   A. Basic Background to Lawrence .................................................................11
   B. Interpreting Lawrence Broadly ...............................................................14
   C. Interpreting Lawrence Narrowly ............................................................16
II. OBSCENITY LAW’S DISCRIMINATION AGAINST SEXUAL MINORITIES.18
   A. The Obscenity Doctrine.............................................................................18
      1. A First Amendment Backdrop: Obscenity in Context.................20
   B. The Tension Between “Sex” & “Sexual Orientation” ......................28
      1. Obscenity’s Queer History and Present.........................................29
      2. Obscenity’s Uncertain Future............................................................31
         a. The Gender-Bending Firefighter..................................................32
         b. Of Basic Instinct & Boys Don’t Cry.........................................34
III. INDISCRIMINATE OBSCENITY........................................................................35
   A. Obscenity as Inequality...........................................................................36
   B. Obscenity as Viewpoint Discrimination..............................................38
CONCLUSION: ............................................................................................................40
THE GENERATION OF A NEW WAVE IN OBSCENITY LAW..........................40
INTRODUCTION

No longer do civil rights lawyers and scholars worry about status, or what one scholar has notably called “ontological” discrimination.¹ 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.”² The move 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.”³

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.⁴ 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. This Article situates itself amidst a small and emerging field of literature addressing first generation harms to those whom civil rights law has protected in its second wave.⁵

¹ See Kimberly A. Yuracko, Trait Discrimination as Sex Discrimination: An Argument Against Neutrality, 83 TEX. L. REV. 167, 170 (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”).
⁴ 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 and 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 Steven C. Halpern, On the Limits of Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act (1994).
Specifically, this Article addresses how the first amendment’s obscenity doctrine inflicts first generation discrimination harms on a particular second wave civil rights group - sexual minorities. For example, when public indecency statutes outlaw gender nonconformity, obscenity discriminates. When the Motion Picture Association of America rates movies with a certain amount of heterosexual sex “R,” and rates movies with an equal or lesser amount of homosexual sex “NC-17,” obscenity discriminates.

Obscenity’s discrimination against sexual minorities constitutes first generation discrimination. Not all first generation harms experienced by second wave groups have been identical to all first generation harms experienced by first wave groups. Simply because 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); Holning Lau, Transcending the Individualist Paradigm in Sexual Orientation Law, 94 CAL. L. REV. 1271 (2006) (arguing that public accommodations law – in order to avoid the commission of first generation discrimination (though Lau does not call the discrimination against which he argues “first generation” discrimination) against sexual minorities – must discard an individualist paradigm for a couples’ rights paradigm, which views as analytical units couples, not individuals).

6 In this Article, I use the term “sexual minorities” broadly, referring to those who do not identify as heterosexual.


8 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) (where BOYS DON’T CRY (Fox Searchlight 1999) film producer Christine Vachon explained 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”).
first generation discrimination harms against second wave groups may take forms different from first generation discrimination harms against first wave groups does not mean that second wave groups do not continue to suffer discrimination on the basis of their status. For instance, 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. But the cultural equivalent of that sign is hung in the lobby of Sandals’ resort hotels, where individuals wishing to share rooms with members of the same sex are prohibited from doing so. It is the effective banner greeting visitors to eHarmony’s online dating site, where hopeful singles looking for mates can look only for mates of the opposite sex.

9 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 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 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.


10 See Lau, supra note 5, at 1271-73.

Sandals’ and eHarmony’s discrimination against sexual minorities has inflicted first generation harms, namely harms against sexual minorities for being sexual minorities. Detractors have argued otherwise. Sandals and eHarmony have contended that they have permitted sexual minorities to access their businesses, in compliance with any applicable public accommodations law, so long as those sexual minorities enter as individuals. Professor Holning Lau has argued that because sexual minorities derive their identities from their group membership, denial of access to sexual minorities should be gauged by reference to the couple – not the individual – as the analytical unit.

Both public accommodations laws and obscenity doctrine have embedded an effect that is the cultural equivalent of “No Gays Allowed.” Public accommodations laws’ analysis of the individual, rather than the couple, generates discrimination particular to sexual minorities because these individuals derive their identity from the fact that they are coupled with a member of the same sex. Obscenity doctrine’s conflation of “sex” and “sexual orientation” generates discrimination particular to sexual minorities because these individuals derive their identity from their sexuality.

If expression or conduct qualifies as obscenity, it is excluded from the first amendment’s protective reach. Expression or conduct qualifies as obscenity if it satisfies a three-pronged test that seeks, essentially, to determine whether its main purpose is to depict sex in a patently offensive way. 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 “render[ed] homosexuality itself the epitome of obscenity.”17 The state in *Miller v. California*, which set forth the current obscenity test, described the materials at issue there as “depictions of cunnilingus, sodomy, buggery and other similar sexual acts performed in groups of two or more.”18 And while the *Roth* Court was careful to note that “sex and obscenity [we]re not synonymous,”19 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.

The obscenity test, in this way, has conflated “sex” – and the patently offensive representation of sex that constitutes obscenity – and “sexual orientation.” That conflation has inflicted upon sexual minorities first generation discrimination harms, much like other practices that have been shown to generate a disparate impact on particular groups, such as employers’ policies excluding pregnant employees from disability benefits plans20 or film directors’ decisions to cast whites or men instead of blacks or women.21 Obscenity’s application to exclude from constitutional reach a depiction of sex because it is more queer, as opposed to more explicit or more naked, impacts disparately the sexual minority, since it affects that community disproportionately.22

---

19 354 U.S. at 487.
What is perhaps most troubling about obscenity’s discrimination against sexual minorities is that it is not only a pervasive harm, but one that courts will likely not have the opportunity to resolve. Because their representation is classified as obscene and therefore unprotected speech for first amendment purposes, sexual minorities have been effectively barred by obscenity doctrine from bringing suit to assert their first amendment rights.

In fact, appellate courts have not seen very many obscenity cases at all in recent years.\(^\text{23}\) Much as discrimination jurists have begun to ignore first generation discrimination, first amendment jurists have only recently rediscovered nuanced interest in the obscenity doctrine,\(^\text{24}\) having confined earlier argument to the elimination of obscenity’s exceptional first amendment status altogether.\(^\text{25}\) Despite the proliferation of pornography that has accompanied the internet,\(^\text{26}\) discriminatory intent”).


\(^\text{24}\) See, e.g., Andrew Koppelman, Does Obscenity Cause Moral Harm?, 105 Colum. L. Rev. 1635 (2005) (arguing that any moral harm caused by obscenity does not justify the way in which the Miller standard censors its consumption by adults).


\(^\text{26}\) See, e.g., Anthony D’Amato, Porn Up, Rape Down (Northwestern Pub. Law Res. Paper No, 913013), 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,
the *Miller* obscenity doctrine has been left unchanged since it was formulated in 1973.\(^{27}\) The doctrine’s most recent invocation by the Court, in 2002, was used to clarify a distinction not in the *Miller* obscenity doctrine, which it reaffirmed, but instead in the *Ferber* doctrine,\(^ {28}\) the separate doctrine governing child pornography.\(^ {29}\)

This Article thus contributes to first amendment scholarship, by revisiting the ironically unsexy obscenity doctrine to determine whether cases have less frequently appeared on courts’ dockets because the doctrine effectively bars worthy plaintiffs from having their day in court. The Article contributes, too, to anti-discrimination literature, by urging scholars, before declaring the end of a generation of discrimination, to examine carefully whether it persists in some contexts. Lastly, the Article bridges first amendment and anti-discrimination literatures, which until now have not come together to address obscenity’s discrimination, a harm that falls within their individual, but also their collective, jurisdictions.

In three parts, the Article argues that the rights of sexual minorities are compromised by the obscenity doctrine’s current application. Part I sets the stage for the Article’s discussion of the rights of sexual minorities. As such, it begins with the Court’s 2003 decision in *Lawrence v. Texas*.\(^ {30}\) The type of first generation discrimination that obscenity law inflicts on sexual minorities is particularly problematic in light of the Court’s decision in *Lawrence*, where the Court invalidated a Texas statute that criminalized

\[^{27}\text{However, former Attorney General Alberto Gonzales pioneered an anti-obscenity squad, for which he recruited ten Federal Bureau of Investigations agents to gather evidence against manufacturers and purveyors of pornography between consenting adults, and described it in 2005 as “one of [his] top priorities.” See Barton Gellman, *Recruits for Porn Squad*, WASHINGTON POST, Sept. 20, 2005, at A21.}\]


\[^{29}\text{See Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (finding overbroad and unconstitutional the portions of the Child Pornography Prevention Act of 1996 prohibiting any visual depiction of anyone who either is a minor, or who appears to be a minor, engaging in sexually explicit conduct).}\]

\[^{30}\text{539 U.S. 558 (2003).}\]
consensual same-sex sodomy.\textsuperscript{31} The \textit{Lawrence} decision has been characterized as simultaneously broad and narrow.\textsuperscript{32} Where commentators at both ends of \textit{Lawrence}’s interpretive spectrum can agree, however, was that the Court, in 2003, treated sexual minorities differently than it had in 1986, when deciding \textit{Bowers v. Hardwick}.\textsuperscript{33}

That difference in treatment is significant, even if it is confined to the private sphere. This Article constructs two arguments that obscenity discriminates unconstitutionally. One is rooted in the equal protection clause. The other is rooted in the first amendment. In other words, one theory is motivated by a broad interpretation of \textit{Lawrence}, and the other by its narrow interpretation. Part I provides an exposition of the competing interpretations of the \textit{Lawrence} decision.

After understanding the rights of sexual minorities, Part II describes the obscenity doctrine. Part II.A describes the doctrine’s own peculiar rules, but also situates the doctrine in a larger context of first amendment doctrine. Obscenity is a category of expression that is excluded from the category of “speech” that the first amendment protects. Expression may in some instances be excluded from first amendment protection on the basis of content if its exclusion is based on the expression’s subject matter,\textsuperscript{34} but may not be excluded if its exclusion is based on the expression’s point of view.\textsuperscript{35} The conflation of sex and sexual orientation on the part of the obscenity doctrine – a conflation which is particularly problematic in light of \textit{Lawrence} – derives both from obscenity’s own peculiar rules as well as from its larger first amendment context. Part II.A describes both sources of obscenity’s conflation of sex and sexual orientation. Part II.B offers examples to illustrate the tension that has resulted

\begin{itemize}
\item \textsuperscript{31} See id.
\item \textsuperscript{32} See Jamal Greene, \textit{Beyond Lawrence: Metaprivacy and Punishment}, 115 YALE L.J. 1862 (2006).
\item \textsuperscript{33} 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).
\item \textsuperscript{34} See Geoffrey R. Stone, \textit{Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions}, 46 U. CHI. L. REV. 81 (1978).
\item \textsuperscript{35} 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 (or, alternatively, in support of) the War.”
\end{itemize}
When Obscenity Discriminates

from that conflation.

Part III constructs two arguments to relieve the tension between the obscenity doctrine and Lawrence. This Part explains how the obscenity doctrine’s conflation of sex and sexual orientation has caused discrimination against sexual minorities. Part III.A argues that the obscenity doctrine licenses discrimination against sexual minorities in violation of the equal protection principle that underlies Lawrence, according to its broad interpreters. Part III.B is premised on a narrow interpretation of Lawrence, arguing that in light of Lawrence the obscenity doctrine’s discrimination against sexual minorities favors expressive content on the basis of its viewpoint, as opposed to on the basis of its subject matter. 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, obscenity’s discrimination against sexual minorities should bother even Lawrence’s narrowest interpreter.

Accepting either argument presented in this Article does not require overturning the classic obscenity cases. However, while existing doctrine can accommodate the arguments offered here, uncovering the doctrine’s discriminatory impact on sexual minorities may affect profoundly the doctrine’s application. In arguing that obscenity discriminates, whether on equal protection or first amendment grounds, this Article hopes to shed light on ways that a largely ignored doctrine has inflicted a largely ignored form of discrimination on sexual minorities.

In order to “make the most of [Lawrence],” it is incumbent upon scholars, in particular, to “debug” existing laws for the anti-Lawrence viruses embedded within them. Before sexual minorities can graduate to the second generation of anti-discrimination, and before they may prevail in the war for same-sex marriage, their first generation harms must be addressed.

36 Mary Anne Case, Of “This” and “That” in Lawrence v. Texas, 2003 Sup. Ct. Rev. 75, 76.
37 As Bill 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).
I. THE MANY MEANINGS OF LAWRENCE

A reasonable place to begin a discussion of the legal rights of sexual minorities is with the Court’s 2003 decision in Lawrence v. Texas. While the holding of Lawrence was anything but straightforward, the case was a landmark decision for gay rights.

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


41 See, e.g., 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 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); Sarah 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); 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, which provides that scandalous, immoral, or disparaging marks may not receive federal trademark protection (see 15 U.S.C. § 1502(a))); 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 non-negligently
When Obscenity Discriminates

courts’ 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 sexual minorities. 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.42 The officers arrested Lawrence and Garner, two adult men, for violating Texas’s Homosexual Conduct Law - which criminalized, among other deviate sexual intercourse, “any contact between any part of the genitals of one person and the mouth or anus of another person”43 - and held them in jail over night. Lawrence’s and Garner’s convictions were affirmed by the Texas Court of Appeals, relying on Bowers v. Hardwick.44

The Supreme Court reversed, and in so doing, overruled Bowers.45 The decision was, however, “not tremendously long on doctrinal specifics.”46 To begin, the Court has been criticized for

believes to be an adult); Steven Goldberg, Cloning Matters: How Lawrence v. Texas Protects Therapeutic Research, 4 YALE J. HEALTH POL’Y L. & ETHICS 305 (2004) (arguing that since 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).

42 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 (2004).


45 See 539 U.S. at 578 (stating explicitly that, “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.”)

46 David B. Cruz, Spinning Lawrence, or Lawrence v. Texas and the Promotion of Heterosexuality, 11 WIDENER L. REV. 249, 251 (2005).
failing to apply any particular standard of review to assess the constitutionality of Texas’s Homosexual Conduct Law.\textsuperscript{47} Whereas “[i]n prior decisions on challenges to sodomy laws, courts have asked first whether the right claimed was fundamental,”\textsuperscript{48} the \textit{Lawrence} Court explicitly skirted that question, saying only that “[t]o say that the issue in \textit{Bowers} was simply the right to engage in certain sexual conduct demeans the claim the individual put forward.”\textsuperscript{49}

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. The state would then need “to demonstrate that its law served some harm-reduction goal.”\textsuperscript{50} If the right was not found to be fundamental, “an interest in promoting morality was found to be sufficient.”\textsuperscript{51} In \textit{Lawrence}, however, the 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.”\textsuperscript{52}

The Court held “that by enacting its sodomy law, the state was acting out of bounds.”\textsuperscript{53} Specifically, the Court held that Texas’s Homosexual Conduct Law violated the due process clause\textsuperscript{54} of the fourteenth amendment, which assures a right to sexual intimacy.\textsuperscript{55}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{47} See, e.g., 539 U.S. 558, 594; see also Lawrence H. Tribe, \textit{Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak its Name}, 117 HARV. L. REV. 1893, 1916 (2004); Nan D. Hunter, \textit{Sexual Orientation and the Paradox of Heightened Scrutiny}, 102 MICH. L. REV. 1528 (2004) (arguing that the \textit{Lawrence} Court’s heightened scrutiny for regulations of homosexuality will cause courts to engage in more particularized assessments of whether legitimate state interests justify classifications based on sexual orientation).
\item \textsuperscript{48} Nan D. Hunter, \textit{Living with Lawrence}, 88 MINN. L. REV. 1103, 1116 (2004).
\item \textsuperscript{49} 539 U.S. at 567.
\item \textsuperscript{50} Hunter, \textit{supra} note 48, at 1116.
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} \textit{Id.; see also} Pamela S. Karlan, \textit{Loving Lawrence}, 102 MICH. L. REV. 1447, 1450 (2004) (arguing that \textit{Lawrence} “undermine[d] the traditional tiers of scrutiny altogether”).
\item \textsuperscript{53} Hunter, \textit{supra} note 48, at 1116.
\item \textsuperscript{54} 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.
\item \textsuperscript{55} See 539 U.S. at 564
\end{itemize}
\end{footnotesize}
The Court expressly did not invoke the equal protection clause\(^{56}\) to invalidate the statute.\(^{57}\) “Because government crossed the line of impermissible action, a line 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.”\(^{58}\)

The Court could have joined Justice O’Connor’s concurrence, saying “that because homosexuality [was] just like heterosexuality, Texas’s “homosexual sodomy” ban, which outlaw[ed] same-sex but not cross-sex sodomy, [wa]s void on [e]qual [p]rotection grounds.”\(^{59}\) It did not. The facts that Lawrence did not declare that the right to engage in homosexual sex was fundamental, that it did not invalidate the Texas Homosexual Conduct Law on equal protection grounds, or that it undermined the existing tiers of constitutional review made Lawrence opaque and ambiguous. That ambiguity has spawned a group of courts and commentators that has interpreted Lawrence broadly, an equal and opposite group of courts and commentators that has interpreted Lawrence narrowly, and a group that has interpreted the decision somewhere in-between.\(^{60}\) The following sections discuss the extreme ends of Lawrence’s interpretive spectrum.

---

\(^{56}\) 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.

\(^{57}\) See 539 U.S. at 574-75; see also 539 U.S. at 582 (finding that “under the [e]qual [p]rotection [c]lause . . . moral disapproval of [sexual minorities], like a bare desire to harm the group, [wa]s an interest that [wa]s insufficient to satisfy rational basis review”) (O’Connor, J., concurring).

\(^{58}\) Hunter, supra note 48, at 1116.


\(^{60}\) 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 [could] 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”).
B. Interpreting Lawrence Broadly

While many rejoiced when *Lawrence* was decided, others reacted to the decision less optimistically. Courts and commentators who have interpreted *Lawrence* broadly could find strong support for their readings in the text of the opinion, and its dissents. The *Lawrence* decision jumps off of the pages on which it was penned, broadening in scope to encompass wide spatial, moral, liberal, 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 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 [s]tate should not be a dominant

---


64 See, e.g., Tribe, *supra* note 47 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); 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”).
presence.” The stage further widened when Kennedy continued to provide that “[f]reedom extend[ed] beyond spatial bounds,” and moreover, that Lawrence “involve[d] liberty of the person both in its spatial and more transcendent dimensions.” In fact, Justice Thomas, in his dissenting opinion in Lawrence, took issue specifically with those “more transcendent dimensions,” explaining that liberty in such dimensions was not grounded in the Constitution.

Second, 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. The Lawrence Court held that the power of the state could not be used to mandate a moral code.

Third, the Lawrence decision put forward a broad conception of liberty. 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 allow[ed] homosexual persons the right to make th[e] choice [to enter into relationships in the confines of their homes].” Moreover, the opinion opened with the broad statement that, “[l]iberty presume[d] an autonomy of self that include[d] freedom of thought, belief, expression, and certain intimate conduct.” Liberty, for the Lawrence Court, “g[ave] substantial protection to adult persons in deciding

---

65 539 U.S. at 562.
66 Id.
67 See Id. at 606 (Thomas, J., dissenting).
68 See supra note 52 and accompanying text.
69 See 539 U.S. at 571 (stating that, “Our obligation is to define the liberty of all, not to mandate our own moral code.” (quoting Planned Parenthood of Southeastern 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).
70 539 U.S. at 567.
71 Id. at 562.
how to conduct their private lives in matters pertaining to sex”72 and was composed of “manifold possibilities.”73

Fourth, and perhaps as a result of the prior three dimensions 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.74 Justice Scalia’s assertion that “it [wa]s clear . . . that the Court ha[d] taken sides in the culture war,” signing on to “the law profession’s anti-anti-homosexual culture” suggested that the implications of the opinion extended beyond the private sphere in which the facts of the case occurred.75

C. Interpreting Lawrence Narrowly

Lawrence’s ambiguity suggested that it could be understood broadly, but also narrowly.76 While some have, as a result of its ambiguity, broadened Lawrence, “Lawrence’s lack of clarity about the nature of the right it recognized may already be promoting its narrowing.”77 With some exceptions,78 courts have consistently read Lawrence narrowly, declining invitations by its ambiguity to extend the holding to invalidate a Florida statute banning same-sex adoption,79 to reduce sentences for statutory rape in same-sex

72 Id. at 572.
73 Id. at 578.
74 Of course, “culture” can take on a number of different definitions. See Frank R. ViveLo, Cultural Anthropology: A Handbook 10 (1978).
75 539 U.S. at 602 (Scalia, J., dissenting).
76 See Merriam-Webster Online Dictionary (defining “ambiguous” as “capable of being understood in two or more possible senses or ways”). Cf. Ex Ante: Ambiguity Clarified, 10 Green Bag 2d 275 (2007) (featuring an ambiguous definition of “ambiguity”).
78 See supra note 63 and accompanying text.
79 See Lofton v. Sec’y of Dep’t of Children & Family Health Servs., 358 F.3d 804 (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.
settings,\textsuperscript{80} or to invalidate an Alabama ban on the sale of sexual devices such as vibrators, dildos, anal beads, and artificial vaginas.\textsuperscript{81}

While some language in the opinion could be read to broaden \textit{Lawrence}'s scope,\textsuperscript{82} other language in the opinion simply struck down the Texas Homosexual Conduct Act, which prohibited “deviate sexual intercourse,”\textsuperscript{83} because the “[s]tate [could] not demean [sexual minorities’] existence or control their destiny by making their private sexual conduct a crime.”\textsuperscript{84} After all, the Court stated that “[p]ersons in a homosexual relationship [could] 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 d[id].”\textsuperscript{85}

Thus, despite the fact that the \textit{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”\textsuperscript{86} violated the equal protection clause, it 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.”\textsuperscript{87} And despite the fact that the \textit{Lawrence} Court did not find that the right at issue in \textit{Lawrence} was fundamental, it did argue that “to say the issue in \textit{Bowers} was simply the right to engage in certain sexual conduct demean[ed] the claim the individual put forward,”\textsuperscript{88} 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.”\textsuperscript{89}

The \textit{Lawrence} case, after all, “involved two adults who, with full and mutual consent from each other, engaged in sexual practices

\textsuperscript{81} See Williams v. Attorney Gen. of Ala., 378 F.3d 1232 (11th Cir. 2004).
\textsuperscript{82} See supra notes 65-75 and accompanying text.
\textsuperscript{83} See 539 U.S. at 563.
\textsuperscript{84} Id. at 578.
\textsuperscript{85} Id. at 574.
\textsuperscript{86} Id. at 564.
\textsuperscript{87} Id. at 567.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
common to a homosexual lifestyle.” The 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,” and that “not until the 1970’s [did] any state single[] out same-sex relations for criminal prosecution.” However, the holding, construed very narrowly, need not extend beyond Lawrence’s bedroom door.

II. OBSCenity Law’s Discrimination Against Sexual Minorities

Now that the rights of sexual minorities, as a general matter, have been covered, this Part describes how the obscenity doctrine has erected a barrier against sexual minorities who might assert their first amendment rights. First, this Part provides an exposition of the obscenity doctrine. Then, it illustrates by way of examples the tension between obscenity and the rights of sexual minorities, which can also be described as the tension between those elements that the obscenity doctrine has conflated: “sex” and “sexual orientation.”

A. The Obscenity Doctrine

Though the first amendment provides that the government may not make laws restricting the freedom of speech, the first amendment does not prohibit the government from making laws that restrict communication without regard to the message conveyed, or “content-neutral” restrictions, nor does it prohibit the government from restricting “low-value” speech. Obscenity is a

---

90 Id. at 578.
91 Id. at 569.
92 Id. at 570.
93 See Police Dep’t of Chicago 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”).
94 See Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (where the Court pronounced that “[t]here [we]re certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any [c]onstitutional problem. These include[d] the lewd and obscene, the profane, the libelous, and the
When Obscenity Discriminates

type of "low-value speech," singled out as such on the basis of its content. Thus, obscenity is a part of a larger first amendment doctrine.

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. Thus, while the obscenity doctrine is a part of a larger context of first amendment jurisprudence, it is also a doctrine unto itself. 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, obscenity can be shown to discriminate.


95 See Stone, supra note 34, at 81, note 3 (explaining that “[t]he most obvious and most common form of content-based restriction consists of government action . . . that on its face expressly accords differential treatment to the expression of certain specified messages, ideas, or information. Familiar examples are laws banning obscenity . . .”)


97 See Thomas I. Emerson, The System of Freedom of Expression at 467 (1970) (observing that “[t]he 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 [f]irst [a]mendment.”)

98 See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (where a unanimous Court clarified 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) (where the Court overturned a conviction for disturbing the peace for being in a courtroom while wearing a jacket that said, “Fuck the Draft” because others’ offense could not be a reason for censoring speech); see also New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (where the Court held that libel could “claim no talismanic immunity from constitutional limitations”).
1. A First Amendment Backdrop: Obscenity in Context

The first amendment provides that “Congress shall make no law . . . abridging the freedom of speech . . . .” However, obscenity is not protected by the first amendment. Thus, somehow the Court has reasoned that Congress may make laws abridging the dissemination of obscenity. The regulation of obscenity must somehow not qualify as an abridgement of the right to freedom of speech, as protected by the first amendment. Understanding the process by which the Court excluded obscenity from first amendment protection can help to analyze clearly the law governing obscenity, on its own.

“Speech,” for first amendment purposes, includes “the spoken or written word,” but does not end there. When drawing the parameters of first amendment “speech,” the 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. But the answer to either of these questions is anything but straightforward.

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. A theory of the first amendment’s

---

99 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) (where the Court found for the first time that a state law regulating speech violated the due process clause of the fourteenth amendment).

100 U.S. CONST. amend. I.


103 See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 11.3.6.1, at 1064-65 (3d ed. 2006)

104 Thomas Emerson focused on four categories of first amendment
purpose makes the following argument: if the purpose of the first amendment is $X$, then any spoken or written word, or any conduct, that does not promote $X$ does not constitute, on that basis, constitutionally protected speech. But neither the Court's test, nor any scholar's theory, fully explains "which speech winds up within the [f]irst [a]mendment and which speech winds up without." Thus, the rule to distinguish between the two amounts to nothing more than an analogical appeal to examples in an effort to find family resemblances.

There might not be one single test, or one general theory, of what constitutes speech under the first amendment. However, two particular distinctions, which together constitute the organizational theories in Toward a General Theory of the First Amendment, 72 Yale L.J. 877 (1963) (focusing on 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 decision-making, and to provide a check, or serve the function of a “safety valve,” of governmental power).


See id. at 1784-85 (where Schauer argued that, “however 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 [f]irst [a]mendment "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 [f]irst [a]mendment’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) (arguing that, “[t]he 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”).
framework for all of first amendment law, 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. Though scholars have for some time questioned the reason for the prominence of these distinctions in first amendment law, 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.

Levels of First Amendment Review: Courts first determine whether speech falls into one of Chaplinsky v. New Hampshire’s low value categories. Laws banning obscenity (as well as laws that ban profanity, libel, and fighting words) are examples of laws banning low-value speech. Low-value speech is comprised of those “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] amendment as to be entitled to less than full constitutional protection.” The distinction between high- and low-level speech comprises what Harry Kalven called “the two-level free-speech theory,” where, after determining whether speech is of high

---

108 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 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”).


110 315 U.S. 568 (1942).

111 Stone, supra note 34, at 82.
or low first amendment value, courts determine whether the restriction on that speech is content-based or content neutral.\textsuperscript{112}

\textit{Tiers of First Amendment Review:} The first amendment’s guarantee is not absolute.\textsuperscript{113} The government has made, and may make, laws abridging the freedom of speech. Traditionally, the government has been prohibited from making laws that are “content-based,” (e.g., a law prohibiting anti-war speech) but not necessarily prohibited from making laws that are “content-neutral” (e.g., a law prohibiting noisy protests near a school).\textsuperscript{114} A law is content-based if it restricts expression of an entire subject matter or restricts expression of a particular viewpoint.\textsuperscript{115}

Restrictions of a particular viewpoint are “presumptively invalid”\textsuperscript{116} and must meet strict scrutiny to be upheld.\textsuperscript{117} On the other hand, 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.\textsuperscript{118} In this way, the Court has endorsed a “two-tier system of review”\textsuperscript{119} using “the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content,” and “subject[ing] to an intermediate level of scrutiny” those “regulations that are unrelated to the content of speech.”\textsuperscript{120}

While restrictions of particular viewpoints are presumed invalid

\begin{itemize}
\item \textsuperscript{112} Kalven, \textit{supra} note 96, at 10.
\item \textsuperscript{113} See Chaplinsky, 315 U.S. at 571.
\item \textsuperscript{114} See Mosley, 408 U.S. at 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”).
\item \textsuperscript{115} See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983).
\item \textsuperscript{116} R.A.V., 505 U.S. 377, 382 (1992).
\item \textsuperscript{118} \textit{See} Turner Broadcasting, 512 U.S. 622.
\item \textsuperscript{119} CHEMERINSKY, \textit{supra} note 103, § 11.2.1, at 933.
\item \textsuperscript{120} 512 U.S. at 641.
\end{itemize}
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 along the hierarchy of constitutional review. In fact, as Geoff Stone has demonstrated, restrictions of an entire subject matter have not been handled systematically at all.\footnote{See Stone, supra note 34, at 83 (explaining that “such 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”).} After surveying seven cases that involved subject-matter restrictions, Stone argued that there were “two primary reasons for the Court’s strikingly speech-protective approach to content-based restrictions.”\footnote{Stone, supra note 34, at 101.} First, content-based restrictions “leave the public with only an incomplete – and perhaps inaccurate – perception of their social and political universe.”\footnote{Id. at 103.} Second, “it is per se impermissible for government to restrict speech because it disapproves of the message conveyed.”\footnote{Id. at 103.}

\textit{Levels, Tiers, and Obscenity:} Regulation of obscenity constitutes content-based regulation of low-value speech, on the basis of its subject matter. Obscenity is low-level speech,\footnote{See supra note 95 and accompanying text.} and is likely the only sort of such speech that remains from \textit{Chaplinsky’s} list.\footnote{See supra note 97 and accompanying text.} In this way, the regulation of obscenity presents the most “obvious” and “common” form of subject-matter restriction.\footnote{See supra note 95 and accompanying text.} However, while obscenity may fall within the existing first amendment levels and tiers in an obvious way, “a subject-matter classification according disadvantaged treatment to “less than fully protected” speech poses a different problem.”\footnote{Stone, supra note 34, at 83, note 7.}

Inquiring into the subject-matter (or, for that matter, viewpoint) restriction of low-value speech is, to some degree, uncharted
When Obscenity Discriminates

territory. For this reason Stone acknowledged in his seminal article on subject-matter restrictions that such restrictions on less than fully protected speech were “not . . . the central inquiry in the subject-matter cases examined in [his] article.” He offers, too, that his analysis may have “implications for the Court’s two-level theory.” It is on these implications that this Article’s analysis of obscenity focuses.


While 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, in which the Court built upon its earlier holding in Roth v. United States that obscene materials were unprotected by the first amendment. In Miller, the Court articulated “standards more concrete than those in [Roth]” to define “obscenity.”

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

(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

---

129 But see R.A.V., 505 U.S. 377 (holding that a St. Paul ordinance prohibiting placing on public or private property symbols, objects, characterizations, or graffiti including, but not limited to, a burning cross or Nazi swastika was unconstitutional because it drew content-based distinctions as to what speech was prohibited and what speech was not).

130 Stone, supra note 34, at 83, note 7.

131 Id.


133 354 U.S. 476 (1957).

134 354 U.S. at 484-85 (“hold[ing] that obscenity [wa]s not within the area of constitutionally protected speech or press”).

135 413 U.S. at 20.
defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.136

Thus, *Miller* requires that all three prongs be satisfied in order for material to be obscene. To be sure, the Court has held that the first amendment prevents a state from criminalizing mere private possession of obscene materials.137 The fact that private possession of obscenity may not be criminalized, while public dissemination of obscenity can be criminalized, seems to echo the rationale for the obscenity doctrine, which the Court articulated in *Paris Adult Theatre I v. Slaton*.138

*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*139 and in *Brockett v. Spokane Arcades, Inc.*140 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.”141 Of course, determining what constitute “community standards” when material is disseminated via the internet presents a trickier issue.142 In *Brockett*, the Court held that a Washington obscenity

---

136 413 U.S. at 24 (internal citations and quotations omitted).
138 413 U.S. 49, 57-58 (1973) (holding “that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests ‘other than those of the advocates are involved.’ These include the interests of the public in the quality of life and the total community environment, the tone of commerce in great city centers, and, possibly, the public safety itself” (internal citations omitted)).
141 418 U.S. at 106.
142 See *Ashcroft v. American Civil Liberties Union*, 535 U.S. 562 (2002) (holding, though without a majority opinion, that the Child Online Protection Act’s reliance on “contemporary community standards” in the context of “the electronic medium of the Web” did not render the statute
statute that failed to distinguish between “a shameful or morbid interest in sex,” 143 or an “abnormal sexual appetite[],” 144 and a “normal” interest was unconstitutional. 145 The former 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.” 146

The second prong, that the work describe, “in a patently offensive way, sexual conduct specifically defined by the applicable state law,” means not that the law must provide an exhaustive list of the sexual conduct that would be patently offensive. 147 However, the Court has articulated limits on what a state can determine to be patently offensive. For example, in Jenkins v Georgia, 148 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.” 149

The third – or savings – prong, that the “work, taken as a whole, lack serious literary, artistic, political, or scientific value,” is measured by whether a reasonable person would find that sort of value in the material, this being a national standard not meant to differ across communities. 150 This prong of the Miller test was intended to reject, explicitly, the test formulated in Memoirs v. Massachusetts, 151 which required the prosecution to prove that “the material [wa]s without redeeming social value.” 152

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

---

143 472 U.S. at 504.
144 Id. at 507.
145 Id.
146 354 U.S. at 487.
149 Id. at 161.
152 Id. at 418.
expression, the obscenity doctrine, particularly, has enjoyed a "somewhat tortured" history of reasoning by analogy. Justice Stewart’s famous utterance in *Jacobellis v. Ohio* that, while he understood criminal obscenity laws not to be limited, after *Roth*, to hard-core pornography, 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. But I [sic] know it when I [sic] see it.”

Three years after Justice Stewart memorably defined obscenity, the Court began the practice in *Redrup v. New York* of reversing, per curiam, convictions for disseminating materials that at least five members of the Court deemed not to be obscene. Because “[t]he Redrup procedure ha[d] cast [the Court] in the role of an unreviewable board of censorship for the 50 [s]tates, subjectively judging each piece of material brought before [them].” Because adjudicating the obscenity doctrine generated “a variety of views among the members of the Court unmatched in any other course of constitutional adjudication,” the need for a more objective standard for obscenity doctrine was deemed necessary. The formula articulated in *Miller* purported to answer the call for such a standard.

**B. The Tension Between “Sex” & “Sexual Orientation”**

This Article has thus far explained the rights of sexual minorities after *Lawrence*, as those rights might be broadly or narrowly construed. In addition, the obscenity doctrine has been unpacked. At this point, one other aspect of the obscenity doctrine deserves consideration.

Despite *Miller*’s effort to move away from “knowing it when we see it” by disaggregating obscenity’s core elements, one element of obscenity has effectively been left to instinct. The differentiation between obscenity that has been so characterized because of its (a)
When Obscenity Discriminates

high level of exposure, nakedness, or the frequency of its depictions of intercourse and (b) its representation of sexual minorities is not one that the *Miller* doctrine addresses. In fact, *Miller* itself involved such representations. This section reconstructs obscenity doctrine’s “queer” past, before offering insights into its present and future.

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 “render[ed] homosexuality itself the epitome of obscenity.”\(^{160}\) The state in *Miller v. California*, which set forth the current obscenity test, described the materials at issue there as “depictions of cunnilingus, sodomy, buggery and other similar sexual acts performed in groups of two or more.”\(^{161}\) And while the *Roth* Court was careful to note that “sex and obscenity [we]re not synonymous,”\(^{162}\) 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.

   Moreover, “*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.”\(^{163}\) Other obscenity cases, too, have involved what the *Lawrence* Court might have referred to as “sexual practices common to a homosexual lifestyle.”\(^{164}\) For example, the scenes in the videos at issue in *Paris Adult Theatre* “simulated fellatio, cunnilingus, and group sex intercourse,”\(^{165}\) all of which would have constituted “deviate sexual

---

\(^{160}\) Eskridge, *supra* note 17.

\(^{161}\) Brief for Respondent at 26, *Miller*, 413 U.S. 15, No. 70-73.

\(^{162}\) 354 U.S. at 487.

\(^{163}\) Eskridge, *supra* note 17, at 1036 (citing, *inter alia*, Ward v. Illinois, 431 U.S. 767, 771-72 & nn. 3-5 (1977) (where the Court upheld a statute criminalizing the depiction of “abnormal” sex and lumping together rape, sado-masochistic sex, and same-sex foreplay and intercourse)).

\(^{164}\) *Lawrence*, 539 U.S. at 578.

\(^{165}\) 413 U.S. at 52.
intercourse” under the Texas Homosexual Conduct Law.

More recent cases, in particular, have involved sexual minority representation. In *Tipp-It, Inc. v. Conboy*, 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,” were obscene. The first photograph showed, *inter alia*, a man who “appear[ed] to have just completed anal intercourse with another man” and another who “appear[ed] to be undergoing anal penetration.” The second photograph showed a “man who [was] seated . . . performing fellatio on [a] man who [wa]s standing.” 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.”

In a second recent case, *State v. Millville Video, Inc.* 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 these videos contained a vignette consisting “of two women who [we]re . . . engaged in bondage, sexual discipline, and sadomasochistic acts. The dominatrix bind[ed] 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.”

It should be noted that not all cases involving depictions of homosexuality have ended badly. 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 that “featured sadomasochistic imagery, including a self-portrait of himself naked except for a

---

166 596 N.W.2d 304 (Neb. 1999).
167 *Id.* at 307.
168 *Id.* at 308.
169 *Id.*
170 *Id.*
172 *Id.* at *14.
leather cap and jacket with a bullwhip inserted in his anus. Also in the 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.174

2. Obscenity’s Uncertain Future

Obscenity’s past and present suggests 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 sexual minorities. However, if this Article embraces the description that obscenity doctrine has had a disparate impact on sexual minorities, inflicting on them first generation discrimination harms, how dire is that harm? 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.175 And, perhaps counter-intuitively, it is precisely this lack of “hard” evidence that compels this issue’s publication. Steven Cole’s and Christine Vachon’s stories, which this section tells,176 illustrate the obscenity doctrine’s discriminatory effect on sexual minorities.

Their two stories might seem odd for two glaring reasons: first, neither of them involves pending litigation, and second, either of them might be read outside the context of this Article not to relate to obscenity. But beneath their surfaces lay real harms; harms inflicted on their protagonists as a result of being part of the sexual minority;

174 Gary D. Allison, The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People, 39 TULSA L. REV. 95 (2003) (internal citation omitted).
175 See Watson, 487 U.S. 977, 987 (indicating that evidence in Title VII disparate impact cases “usually focuses on statistical disparities”).
176 As many civil rights advocates suggest, understanding “[t]hose who have experienced discrimination . . . can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.” Mari Matsuda, Looking to the Bottom, 22 HARV. C.R.-C.L. L. REV. 323 (1987). This understanding is often attempted through a narrative. See STEPHEN E. GOTTLIEB, BRIAN H. BIX, TIMOTHY D. LYTON, & ROBIN L. WEST, JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS 446 (2d ed. 2006).
harm that obscenity doctrine’s history has implicitly announced that it refuses to recognize.177

This section highlights cases that demonstrate current tensions between sex and sexual orientation, but that do not yet constitute a part of obscenity jurisprudence. The future of these cases, and cases like these, is uncertain. But a better understanding of the obscenity doctrine’s unconstitutional discrimination may help courts to understand that worthy plaintiffs exist who have been silenced by a first amendment doctrine that conflates their identity with a “type of expression . . . of a wholly different, and lesser, magnitude, than the interest in untrammelled political debate.”178

a. The Gender-Bending Firefighter

At about 5 p.m. on April 3, 2007, Steven Cole, a 46 year old volunteer firefighter, was arrested at Heritage Park, in Mason, Ohio, after Troy Harphant, 35, spotted him and called the police.179 When phoning the police, Harphant said, “There’s a man out here dressed up in a wig and women’s two-piece bikini freaking people out in the park.” Harphant continued by explaining to the police that, “It’s inappropriate and I’d like somebody to come check this guy out.” Police Officer, Scott Miller, reported that Harphant “stated to [him] that ‘you need to lock up that pervert.’”180

Miller’s report stated that he “observed Cole to be wearing a very 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.”181 Miller reported that he “asked Cole what he was doing wearing a woman’s bikini at a park where families frequent and Cole did not provide an answer. Cole did state that he was headed to a ‘gay’ bar in Dayton to perform as a woman for a

177 See supra Part II.B.2.
179 See Baker, supra note 7.
181 Id.
$10,000 prize.”\textsuperscript{182} Miller’s report stated that Cole smelled of alcohol and “had very slurred speech,”\textsuperscript{183} but stated, too, that “[d]ue to Cole’s offensive attire, Cole was handcuffed and placed in the rear of [Miller’s] cruiser while [the police] continued [their] investigation.”\textsuperscript{184} Cole was booked on charges for OVI,\textsuperscript{185} Open Container, Public Indecency, and Disorderly Conduct.\textsuperscript{186}

The applicable Ohio Public Indecency Statute provided that no person could “recklessly . . . [e]xpose the person’s private parts; [e]ngage in sexual conduct or masturbation; [or] [e]ngage in conduct that to an ordinary observer would appear to be sexual conduct or masturbation.”\textsuperscript{187} For unknown reasons, in connection with his plea deal three months after the incident, Cole’s public indecency charge was dropped.\textsuperscript{188} Still, Cole’s offensive attire could have only triggered the applicable public indecency statute if his gender nonconformity\textsuperscript{189} would have appeared to an ordinary observer to be sexual conduct. Cole’s opportunity to argue that his first amendment right to express himself, and in turn, his status as a member of the sexual minority, was abridged, as a result of an

\begin{itemize}
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Id.
\item \textsuperscript{184} Id.
\item \textsuperscript{185} “OVI” means operating a vehicle while intoxicated.
\item \textsuperscript{187} OHIO REV. CODE ANN. § 2907.09 (2007).
\item \textsuperscript{188} See Firefighter in Bikini Accepts Plea Deal, ASSOCIATED PRESS, Jul. 7, 2007.
\item \textsuperscript{189} I am aware that gender nonconformity is not equivalent to, or indicative of, membership in the sexual minority. However, my awareness may not be equivalent to, or 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); 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. Instead, homosexuality is censured because it violates the prescriptions of gender role expectations”).
\end{itemize}
obscenity doctrine that would not ensure that Cole’s sexuality, as such, could not trigger the applicability of the Ohio Public Indecency Statute.

b. Of Basic Instinct & Boys Don’t Cry

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 Motion Picture Association of America’s (the “MPAA”) ratings system. The MPAA is a private nongovernmental organization.190 However, the purpose of the state action doctrine – to contribute to the right of the people to govern themselves191 - would indicate that this organization, which owns trademark rights to the rating symbols that are familiar to the billions of moviegoers in the United States, such as “G,” “PG,” “PG-13,” “R,” and “NC-17,”192 and which plays a “dominant and preemptive role . . . in the film industry” 193likely has a controlling effect on what film content disseminated, and what is not.

The difference between a rating of “R” and a rating of “NC-17” can mean literally billions of dollars.194 Kirby Dick’s documentary concluded that the MPAA “[wa]s one of the last vestiges of a censorship system.”195 Called “Hollywood’s silent partner,”196 the MPAA has not been subjected to judicial review.197 However, in the

---

190 *See* Miramax Films Corp. v. Motion Picture Ass’n, 148 Misc. 2d 1, 13 (N.Y. Sup. Ct. 1990).
193 Miramax, 148 Misc. 2d at 9-10.
195 Interview with Martin Garbus, *THIS FILM IS NOT YET RATED*, supra note 8.
196 *See* *THIS FILM IS NOT YET RATED*, supra note 8.
197 *See* Miramax, 148 Misc. 2d 1 (holding that the MPAA’s rating of a
When Obscenity Discriminates

Miramax decision, Justice Ramos noted that “although no relief [could] be afforded [t]herein,” “there [wa]s an obligation to administer the system fairly and with a foundation that [wa]s rationally based.”

The Supreme Court of New York noted further that “films [we]re produced and negotiated to fit the ratings. After an initial “X” rating of a film whole scenes or parts thereof are cut in order to fit within the “R” category. Contrary to our jurisprudence which protects all forms of expression, the rating system censors serious films by the force of economic pressure.” However, as Mr. Dick’s documentary exposes, only select producers and directors have benefited from the opportunity to engage in such negotiations. Many filmmakers have only very limited appellate procedures available to them, and receive no explanation from the MPAA’s rating board as to why their film received the rating it did. As Dick’s film demonstrates, films such as Basic Instinct, which contained 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 females.

III. Indiscriminate Obscenity

In an effort to relieve obscenity of its tension between sex and sexual orientation (and its correlative discrimination against sexual minorities), this Part constructs two arguments. The first argument is 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. The second argument – one with which even Lawrence’s narrow interpreter particular film was not arbitrary and capricious, since the rating was supported by a rational basis).

198 Id. at 10.
199 The rating of “X” was changed in 1990 to the rating of “NC-17.” See Motion Picture Association of America: Ratings History, http://mpaa.org/Ratings_history1.asp (last visited Sept. 21, 2007).
200 Miramax, 148 Misc. 2d 1, 11 (emphasis in original).
201 See THIS FILM IS NOT YET RATED, supra note 8.
202 See id.
could agree – is that since Lawrence transformed homosexual sex from subject matter to viewpoint, as first amendment categories, obscenity’s discriminatory impact on sexual minorities constitutes viewpoint discrimination that is inconsistent with the first amendment. This Part elaborates each of these arguments.

A. Obscenity as Inequality

One of the broader “holdings” of Lawrence has already been applied to the obscenity doctrine, and its application thereto has already been reversed. In United States v. Extreme Associates the Western District of Pennsylvania held that “after Lawrence, the government [could] no longer justify legislation with enforcement of a “moral code”.” The Third Circuit reversed, holding that the implications of Lawrence on moral legislation were “analytically irrelevant to the disposition of this case.”

However, Lawrence’s broad implications were not only moral, but also spatial, liberal, and cultural. Bill 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 did in Bowers v. Hardwick. In this way the broad “equality principle” underlying the Lawrence decision may broaden it, despite a failed effort in Extreme Associates.

Let us imagine that the obscenity doctrine (or any doctrine, for that matter) had been shown to inhibit, systematically, the inclusion

---

204 Id. at 586; see also Id. at 589.
206 See supra Part I.B.
207 See Eskridge, supra note 60, at 1022.
208 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) (arguing that the Lawrence “indicated that the [fourteenth] amendment’s privacy and liberty protections include[d] not only a negative right to be let alone, but also an affirmative right to equal respect and autonomy in intimate relationships that transcend[ed] the spatial spheres of the home”).
of African-American actors on television programs and in movies.\textsuperscript{209} Or, we might imagine that the tension explored in this Article were not about discrimination against the sexual minority, but against the sexual majority. For example, we could imagine that \textit{Basic Instinct} received a rating of “NC-17” while \textit{Boys Don’t Cry} received a rating of “R.” Or, we could imagine the reverse of Steven Cole’s predicament, in which Troy Harphant, or another supposedly gender-conforming individual, were forced to wear makeup or conventionally women’s clothing in order to comply with the applicable public indecency statute.\textsuperscript{210}

\textsuperscript{209} See, e.g., Leonard M. Baynes, \textit{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, \textit{“Don’t Try to Adjust Your Television – I’m Black”: Ruminations on the Recurrent Controversy over the Whiteness of TV}, 4 J. Gender Race & Just. 99 (2000) (examining the history of protests concerns the lack of portrayal of people of color on television). To be sure, the citations offered here do not make claims about obscenity doctrine, specifically. The purpose here is to imagine, hypothetically, that the obscenity doctrine had such an effect.

\textsuperscript{210} For this suggestion, I thank Spencer Waller. With respect to this sort of rule, I am reminded of Judge Kozinski’s remarks in his dissent in \textit{Jespersen v. Harrah’s Operating Co.}, 444 F.3d 1104, 1118 (9th Cir. 2005), in which the Ninth Circuit held that a sex-based difference in appearance standards alone created a \textit{prima facie} case of discriminatory intent under Title VII:

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;
Imagining any of these scenarios hopefully generates some pause. 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 tension between sex and sexual orientation in Miller and its progeny, it is incumbent upon us, and upon the Court, to officially alter obscenity’s prescription.

B. Obscenity as Viewpoint Discrimination

If Lawrence is limited to the private bedroom in which its facts occurred, the opinion may not share the equal protection implications of its broad interpretation. However, even a narrow interpretation of Lawrence can speak volumes about obscenity’s discriminatory effects. These discriminatory effects emanate not from the equal protection clause, but from the first amendment itself.211

Some have argued that the obscenity doctrine should be abandoned, or lessened in scope, because the distinction between sexual and political speech makes little sense in light of first amendment principles.212 I 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.”213 However, agreement on that score is not necessary, nor is abandoning obscenity jurisprudence altogether, in order to fashion a nondiscriminatory doctrine governing obscenity.

The exposition of Lawrence’s narrow interpretation, above,214 tracked the majority’s discussion of sexual conduct in Lawrence. 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.215 In his opinion, Justice Kennedy begins by referring to “deviate sexual intercourse.”216 Next, when framing the equal protection issue in the case, the Court described the Texas Homosexual Conduct Law as one that “criminalize[d] sexual intimacy by same sex couples, but not identical behavior by different-sex couples.”217 A few pages later, the opinion references, instead, “certain sexual conduct”218. In these excerpts, a shift can be observed, through which 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).

It seems that the Court may have been aware, albeit subconsciously, of effecting a categorical transformation for first amendment purposes. The following reference to sex in the Lawrence decision provided that “[w]hen sexuality finds overt expression . . . [t]he liberty protected by the Constitution allows homosexual persons the right to make this choice.”219 In this way, the Court seems aware that while it had previously thought of homosexuality as an entirely separate category of existence or behavior, it realized that it now thought of homosexuality as another type of sex, one that could be analogized to a differing point of view between which

213 Id. at 126.
214 See supra Part I.C.
215 See supra notes 116-124 and accompanying text.
216 See Lawrence, 539 U.S. at 563 (describing the crime prohibited by the Texas Homosexual Conduct Law as “deviate sexual intercourse,” and repeating this characterization three times).
217 Id. at 564.
218 Id. at 567.
219 Id.
individuals have a choice to express. The Court’s apparent self-awareness continued as its historical investigation led the majority to conclude that, “this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.” Here, of course, I mean to argue that by noting that homosexual sex was not a “separate category,” the Court seems to recognize the implications that at one time homosexuality constituted an entire subject matter.

By the opinion’s end, the majority seems to have eased itself into the statement that the case involved two adults who “engaged in sexual practices,” – not “deviate sexual practices. Moreover, the majority felt comfortable concluding, by the opinion’s end, that “the state [could] not demean their existence or control [these two adults’] destiny by making their private sexual conduct a crime.”

Since homosexuality has been transformed from subject matter to viewpoint in *Lawrence*, obscenity’s refusal to disaggregate between “sex” and “sexual orientation” violates the principle set forth in *R.A.V. v. City of St. Paul*, namely that content-based restrictions of low-value speech are impermissible.

### Conclusion:

**THE GENERATION OF A NEW WAVE IN OBSCENITY LAW**

The disaggregation of sex from gender, the awareness of demands placed upon individuals who display traits that are constitutive of their group identity to downplay or “cover” the

---

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

221 539 U.S. at 569.

222 *Id.* at 578.

223 *Id.* (emphasis added).

224 505 U.S. 377.

adjectives\textsuperscript{226} that make them the nouns\textsuperscript{227} that they are,\textsuperscript{228} and the
trait discrimination movement generally, have offered
discrimination law great gains “in analytic clarity and in human
liberty and equality.”\textsuperscript{229}

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 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 today, such that courts and commentators have
not yet picked it, or even seen it.

This Article has sought to point out instances of first generation
discrimination that may have been overlooked because they have
been embedded within the code of a well-settled doctrine. This
Article has brought attention to the obscenity doctrine’s infliction of
first generation discrimination on members of the sexual minority.
After, and in light of, the Court’s decision in \textit{Lawrence v. Texas},
obscenity’s discrimination against sexual minorities is particularly
offensive.

This Article has demonstrated that obscenity doctrine’s current
application has discriminated against sexual minorities on the basis
of their status as sexual minorities, and in doing so, has violated both
the equal protection clause and the first amendment itself. Lawrence’s
equality principle mandates that obscenity be debugged for

\begin{itemize}
\item \textsuperscript{226} E.g., “effeminate,” “masculine,” “flamboyant,” “ghetto,” “preppy.”
\item \textsuperscript{227} E.g., “woman,” “man,” “gay,” “black,” “white.”
\item \textsuperscript{228} 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, [was] of the view that gender is for adjectives, sex is for
nouns.” Case, supra note 225 at 11-12 (citing Richard Epstein, \textit{Gender Is for
Nouns}, 41 DEPAUL L. REV. 981, 981 (1992)).
\item \textsuperscript{229} Case, \textit{supra} note 225, at 2.
\end{itemize}
When Obscenity Discriminates

continuing to discriminate against sexual minorities after Lawrence. 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.

My hope is that what has been revealed here generates a change in the way that the obscenity doctrine can be applied with respect to sexual minorities. More broadly, I hope, too, to elicit insights from others about the ways in which first generation discrimination persists, whether against sexual minorities or against other disadvantaged groups. As with obscenity doctrine, we cannot rely on others to know it (an infliction of first generation discrimination) when they see it.