

## THE RIGHT TO BE HEARD:

# *ONE Magazine*, Obscenity Law, and the Battle Over Homosexual Speech

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**Abstract.** In the years following the Second World War, the movement for LGBT rights in the United States evolved dramatically from a state of near invisibility to one of outward protest and pride. How can historians account for this radical shift within the movement? Previous historical analyses have focused on the rise of queer consciousness. This article, however, suggests that growing consciousness does not provide a complete explanation, and that the issue of obscenity law must be taken into consideration.

It does so through a study of the censorship battles of *ONE Magazine*. A self-described “homosexual magazine” founded in Los Angeles in 1952, *ONE* emerged as the nation’s first major gay periodical. In 1954, US postal inspectors refused to transmit the magazine, declaring it to be obscene under federal obscenity law. *ONE* challenged this classification, leading to a legal struggle over the definition of obscenity and the magazine’s eventual victory at the Supreme Court in 1958.

This article asserts that *ONE*’s battles against censorship advanced the argument for gay rights by disentangling homosexuality and obscenity. Although *ONE* initially viewed obscenity law as an obstacle to protesting civil rights issues, its staff came to understand the dissociation of homosexuality and obscenity as a cause in itself. Relying on the magazine’s own archives, FBI surveillance files, and the papers of Supreme Court justices, this article argues that *ONE* paved the way for gay pride by securing a legal victory that established a free speech right to discussions of homosexuality.

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*Until we are willing to speak out openly and frankly in defense of our activities, and to identify ourselves with the millions pursuing these activities, we are unlikely to find the attitudes of the world undergoing any significant change.*

—Donald Webster Cory, *The Homosexual in America* (1951)

## INTRODUCTION

In 1950, gay America was locked in the closet. The postwar landscape was one of fear; a nationwide consensus held homosexuality to be perverse and even dangerous, and gays and lesbians faced harassment by public authorities and private citizens alike. The private nature of sexual orientation presented homosexuals with a paradox: to fight prejudice, activists had to be open about their sexualities, but in so doing they exposed themselves to repression. The conflict proved to be an effective deterrent to collective action. Prewar homosexual associations struggled to attract membership, as gay men and women opted to keep their sexualities private rather than risk public exposure and its consequences, which included public shaming, loss of employment, and criminal prosecution. This tension placed an organizational hurdle in front of the gay rights movement, distinguishing it from other postwar social movements.<sup>1</sup> The dynamic remained in place even with the rise of self-styled homophile organizations, postwar groups that formed to create gay community and eventually advocate for gay rights.<sup>2</sup> The Mattachine Society—the first major homophile organization, founded in 1950—hosted private discussions groups. Its members met behind closed doors and drawn shades, taking part in conversations that fostered community but not political action.<sup>3</sup>

By the 1960s, the terrain for gay rights activists had changed markedly.

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1. Constitutional scholar Geoffrey Stone differentiates homosexuals from other demographic groups that fought for civil rights, such as African Americans and women. Unlike members of those groups, “whose identities were unmistakable,” gays and lesbians could “mask their true selves,” a prospect that was both “an advantage and a burden.” GEOFFREY STONE, *SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA’S ORIGINS TO THE TWENTY-FIRST CENTURY* 233 (2017).

2. The homophile movement broadly refers to homosexual organizations that emerged after World War II—largely on the West Coast—as a result of both increasing gay consciousness and intensifying governmental repression. Further discussion and definition of the movement is offered in Part I. I use the term homophile to describe these groups and their politically active members. I generally use contemporary language, and therefore refer to individuals throughout this article as homosexuals, gays, and lesbians. Terms such as queer and LGBT were not part of the vocabulary of the 1950s, and as a result I avoid their usage.

3. Scholarly discussion of the Mattachine Society often occurs in the context of broader studies of the homophile movement, which will be detailed further. For works on the Mattachine Society in particular, see JAMES T. SEARS, *BEHIND THE MASK OF THE MATTACHINE* (2006); STUART TIMMONS, *THE TROUBLE WITH HARRY HAY: FOUNDER OF THE MODERN GAY MOVEMENT* (1990); Martin Meeker, *Behind the Mask of Respectability: Reconsidering the Mattachine Society and Male Homophile Practice, 1950s and 1960s*, 10 J. HIST. SEXUALITY 78 (2001).

In major cities, from San Francisco to New York, homosexual groups organized public protests against local police harassment, federal anti-gay policies, and private discrimination—including the denial of restaurant service to gay patrons and the medical community’s characterization of homosexuality as a disease. These groups favored unabashedly public protest tactics, including rallies, marches, and picket lines. In 1965, homosexual activists picketed such sites as Independence Hall in Philadelphia and the United Nations headquarters in New York. That year, gay organizations picketed the White House on three separate occasions.<sup>4</sup> By the decade’s close, leaders of homosexual rights organizations embraced the rhetoric of pride and positivity. On June 28, 1970, one year after gays and lesbians rioted against a police raid of New York’s Stonewall Inn, homosexual groups organized a march from Greenwich Village to Central Park. A leader of the rally explained, “We have to come out into the open and stop being ashamed. This march is an affirmation and declaration of our new pride.”<sup>5</sup>

How can historians account for the radical shift from shame and fear to pride within the movement for homosexual rights? In less than a generation, the model of gay organizing moved from internal community-building to outward-facing protest. Historians have explored this question for decades, seeking to understand the relatively rapid escalation in gay rights tactics. In 1983, historian John D’Emilio offered one of the first and most influential treatments of the issue. In *Sexual Politics, Sexual Communities*, D’Emilio observed, “[i]solated men and women do not create, almost overnight, a mass movement premised upon a shared group identity . . . [instead there was a] historical process through which a group of men and women came into existence as a self-conscious, cohesive minority.” For D’Emilio, the formation of gay consciousness and a gay constituency in the postwar years laid the foundation for the movement’s increased activity in the 1960s and beyond.<sup>6</sup>

More than three decades later, D’Emilio’s account remains influential. Community and consciousness continue to be the primary objects of focus for historians of the homophile movement. In a 2006 study, *Contacts Desired*, Martin Meeker placed an emphasis on the communications networks of gay groups, arguing that new forms of media—from homophile magazines to gay pulp fiction—delivered information about homosexuality and influenced “the process of gay male and lesbian

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4. FRANK KAMENY, *GAY IS GOOD: THE LIFE AND LETTERS OF GAY RIGHTS PIONEER FRANKLIN KAMENY* 93, 173-74 (Michael G. Long ed., 2014).

5. Lacey Fosburgh, *Thousands of Homosexuals Hold a Protest Rally in Central Park*, N.Y. TIMES, June 29, 1970.

6. JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 2-4 (1983).

identity formation.”<sup>7</sup> The homophile organizations, Meeker asserted, shared the common goal of fighting the social isolation felt by gay Americans, and the groups’ publications became “conduits of communication.”<sup>8</sup> In 2012, American Studies scholar Craig Loftin wrote in *Masked Voices* of the myriad ways in which gays and lesbians communicated with each other, especially across geographical distances. He argued that homophile organizations and their publications “were an important dimension of this growth of postwar national communication networks.”<sup>9</sup> In *Rethinking the Gay and Lesbian Movement*, also from 2012, Marc Stein offered a reassessment, but nonetheless concurred that between 1953 and 1960, “the movement tried to help individuals while developing the social basis for political action.”<sup>10</sup> Taken together, historians of the homophiles tend to identify the movement’s significance as its contributions to these “social bases” for later political organizing.<sup>11</sup>

The development of a self-conscious homosexual minority was a vital component of the movement’s evolution, but it does not provide a complete explanation. A crucial part of the transition from fear to pride was a battle over the relationship between homosexuality and obscenity. In the early 1950s, the law held homosexuality itself to be obscene. In every state, anti-sodomy statutes asserted the illegality of homosexual activities, while obscenity laws reinforced this notion by restricting discussion of homosexuality. As a result, open discussion of gay rights was not only deterred by fear of harassment or a lack of gay communities; it was also repressed by the force of law. In order to protest the issues that gay men and women faced daily—from entrapment to employment discrimination—homosexual rights groups first needed to wage a more fundamental battle for the ability to publish and disseminate pro-gay speech. The vanguard of this battle was *ONE Magazine*, a homosexual periodical that paved the way for the gay press by challenging federal censorship in court, eventually achieving a victory that would allow the broader gay rights movement to print and picket in later years. The activists of the 1960s still faced widespread prejudice and displayed enormous courage by publicly asserting their rights. They did not, however, fear the suppression of their words, a result of the legal advances made by *ONE*.

This essay is an investigation into the censorship battles of *ONE Magazine* and the pivotal role they played during an inflection point in the

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7. MARTIN MEEKER, CONTACTS DESIRED: GAY AND LESBIAN COMMUNICATIONS AND COMMUNITY, 1940S-1970S, at 10 (2006).

8. *Id.* at 31–35.

9. CRAIG M. LOFTIN, MASKED VOICES: GAY MEN AND LESBIANS IN COLD WAR AMERICA 14-15 (2012).

10. MARC STEIN, RETHINKING THE GAY AND LESBIAN MOVEMENT 58 (2012).

11. *Id.*

movement for homosexual rights. Founded in Los Angeles in 1952, *ONE* was the first widely published and sustained homophile publication. The founders of *ONE* sought to create a medium through which to discuss issues like entrapment, employment discrimination, and social exclusion. They quickly learned, however, that obscenity law stood in their way. Victorian-era statutes allowed the federal government to police the distribution of printed material considered indecent or immoral, enabling the repression of content related to homosexuality. The first issue of *ONE* reached newsstands in January 1953, after which the staff worked to release a new magazine each month. In October 1954, the Los Angeles Postmaster seized that month's issue of *ONE*, declaring it obscene and refusing to transmit it through the postal service. The action set off a years-long legal battle culminating in *ONE*'s vindication by the United States Supreme Court in 1958.

The case—*One, Inc. v. Olesen*—lasted for four of the magazine's first six years.<sup>12</sup> It became a defining part of the publication's identity, enabling *ONE* to challenge anti-gay discrimination both in print and in court. Historians of the homophile movement pay limited attention to the case, and when they do, they often frame it as an important but discrete moment in the saga of *ONE*.<sup>13</sup> Legal historians, meanwhile, have either neglected to discuss the case in the context of obscenity law, or have failed to synthesize the history of the case with the larger history of the homophile movement.<sup>14</sup>

This article aims to bridge the divide between legal histories of obscenity and social histories of the homophile movement, arguing that *One, Inc. v. Olesen* cannot be separated from the broader saga of *ONE Magazine*. The story of the nation's first major gay periodical is not simply the tale of a publication that voiced opposition to repression. It is also the story of a more fundamental fight over free speech and the very definition of obscenity. *ONE*'s editors did not choose to debate the nature of obscenity; that issue was forced upon them. But in addressing it, they

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12. 355 U.S. 371 (1958).

13. Marc Stein, for instance, does indeed write that the homophiles concentrated somewhat on publications, "partly because rights of . . . expression were seen as stepping stones toward freedom and equality." STEIN, *supra* note 10, at 61. He calls *One, Inc. v. Olesen* "the movement's greatest success" but dedicates a single paragraph to its discussion. *Id.*

14. Examples of legal histories of obscenity that fail to mention *One, Inc. v. Olesen* include RICHARD F. HIXSON, *PORNOGRAPHY AND THE JUSTICES: THE SUPREME COURT AND THE INTRACTABLE OBSCENITY PROBLEM* (1996); WHITNEY STRUB, *OBSCENITY RULES: ROTH V. UNITED STATES AND THE LONG STRUGGLE OVER SEXUAL EXPRESSION* (2013); WHITNEY STRUB, *PERVERSION FOR PROFIT: THE POLITICS OF PORNOGRAPHY AND THE RISE OF THE NEW RIGHT* (2011). William N. Eskridge does discuss the case, albeit briefly, in *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 95-96* (1999). Several popular histories, written by journalists rather than legal scholars, delve into the case, including JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* (2001). Carlos Ball provides the most extensive work of legal scholarship on the case, but he focuses on broader trends in obscenity law rather than the context of the homophile movement. See

contributed to the distinction between homosexuality and obscenity in the eyes of the law, spurring the movement for gay civil rights.

Part I focuses on the founding of *ONE Magazine* and its first year of publication. It argues that *ONE* was born into an age of fear and that as a result, the primary influences on the magazine's original character and positions were the daily issues facing gay Americans, such as entrapment and assault. I examine the ways in which *ONE* challenged the inward-facing nature of the homophile movement and offered a public alternative. Part I also explores *ONE*'s initial clashes with government censors, demonstrating that the magazine was not shielded from the repression to which it responded. These clashes prompted the formulation of a legal and editorial strategy intended to minimize the risk of further conflict with federal officials. Part II discusses the seizure of *ONE*'s October 1954 issue in the context of pervasive forms of anti-gay prejudice, including the widespread social and political associations between homosexuality, obscenity, and subversion. The surveillance of *ONE* by the Federal Bureau of Investigation demonstrates the hostility of the federal government towards homophile groups. Part II argues that quieter, more abstract forms of discrimination forced *ONE* to focus increasingly on the threat of censorship, as the magazine established a stricter scheme of internal regulation that ultimately failed to deter federal authorities. The section follows *ONE*'s lawsuit against the Los Angeles Postmaster at the district and appellate levels. By the time *ONE* appealed its case to the Supreme Court, its staff began to view obscenity as an important area of debate in itself, rather than an obstacle to discussion of the civil rights issues that inspired its founding. Part III turns to *ONE*'s case before the Supreme Court, and its arrival at a time of changes to the landscape of obscenity law. An analysis of developments in obscenity law, including the Court's 1957 landmark decision in *Roth v. United States*, places *ONE*'s case into the context of a legal system struggling to define and regulate indecency. Part III argues that *One, Inc. v. Olesen* was less a victory for free speech absolutism than a vindication of organizations like *ONE* in its suggestion that homosexuality was not inherently obscene.

This essay seeks to advance understanding of *One, Inc. v. Olesen* and the homophile movement through the usage of a range of archival and primary sources, many of them seldom, if ever, used in previous studies. I rely on collections within the ONE National Gay & Lesbian Archives at the University of Southern California Libraries. These include the papers of several of the editors of *ONE Magazine* and the institutional records of ONE, Inc. The collections include a variety of materials, such as meeting minutes, correspondences, and fundraising materials. I also utilize declassified files from the investigations into ONE, Inc. and the Mattachine Society by the Federal Bureau of Investigation. These files are

available through the FBI Vault, an online library of FBI documents that have been made public through Freedom of Information Act requests. Finally, I make use of the papers of Supreme Court Justices Earl Warren, William O. Douglas, and Harold Burton. These collections, housed in the Manuscript Division of the Library of Congress, contain documents related to *One, Inc. v. Olesen*, such as memos, conference notes, and vote details.

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In 1975, an interviewer asked William Lambert—formerly one of the most prominent editors of *ONE Magazine*—for his opinion on a conflict stirring within the community of homosexual activists. Frank Kameny, a leading figure in East Coast gay rights efforts during the 1960s, had recently described the postwar homophile movement as one of “blandness.”<sup>15</sup> Lambert took issue with Kameny’s characterization. “I don’t consider it bland when a little pipsqueak outfit like *ONE* hauls the Post Office Department into court,” Lambert countered.<sup>16</sup>

For the magazine’s staff members, *One, Inc. v. Olesen* represented their most significant gay rights achievement on the national stage. In historical perspective, *ONE*’s battles against censorship reflect a turning point in the movement. *ONE* elevated the issue of censorship, framing the battle to distinguish homosexuality from obscenity as a First Amendment right. Overcoming censorship was a necessary first step in the evolution and growth of the movement for gay rights in the United States, one that has been defined by an evolving set of objectives. In the decades following World War II, activists fought for freedom from harassment, nondiscrimination in the workplace, and marriage equality. But before they engaged in those fights, the editors of *ONE* asserted their simple right to be heard.

#### I. CAUTIOUS STEPS FORWARD: PUBLISHING IN AN AGE OF FEAR

March 21 was the first Friday of spring in 1952. In Los Angeles, Dale Jennings spent the evening strolling his neighborhood and browsing the offerings of local cinemas. The thirty-four-year-old community theater director and World War II veteran had an empty night to fill. Originally from Amarillo, in the Texas Panhandle, Jennings had been living in California for thirteen years.<sup>17</sup> The first two theaters he visited had no

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15. Interview by Brad Mulroy with Dorr Legg (1975) (on file with ONE Archives, Dorr Legg Papers, Box 1, Folder 6).

16. *Id.* Lambert’s full name was William Dorr Lambert Legg, and he identified himself as William Lambert or Dorr Legg at different stages during his life. In text, I primarily refer to him as William Lambert. In citations, I refer to him in the way he is identified by the document in question.

17. INTERNAL SECURITY CASE REPORT ON MATTACHINE SOCIETY, FBI RECORDS: THE VAULT,



appealing options; on the way to a third, just before nine o'clock, he stopped to use a restroom in a public park. There, Jennings gained a follower, a man he described as "a big, rough looking character who appeared out of nowhere."<sup>18</sup> The man followed Jennings to the third theater and back home, where he forced his way inside and made "sexual gestures and proposals."<sup>19</sup> As Jennings resisted, the man revealed himself to be a member of the Los Angeles Police Department vice squad, and promptly arrested Jennings.<sup>20</sup>

Los Angeles police had been harassing and arresting gay men for decades; the first half of the twentieth century saw the arrests of hundreds of gay Angelinos, who faced charges like sodomy and lewd vagrancy.<sup>21</sup> In the postwar years, police harassment became a consistent threat to gay men in American cities, where officers targeted centers of gay social life, such as gay bars. In some cities, like Seattle and San Francisco, harassment began in the 1940s and petered out as a result of lawsuits by bar owners; in other metropolitan centers, such as New York City, raids continued well into the 1960s.<sup>22</sup> In Los Angeles, where vice squads were particularly prevalent, officers in plainclothes entrapped gay men by soliciting "come-ons" in the city's gay bars.<sup>23</sup>

In Los Angeles, a number of parks, bathhouses, and shops became known as "The Run," an epicenter of same-sex activity, catering to men who could not bring partners home for fear of being caught by neighbors or family members.<sup>24</sup> The city police worked to clean the streets of this perceived moral depravity: in 1949, the department arrested 74 men for sodomy, 351 men for sex perversion, and 1,319 men for lewd vagrancy, the catch-all charge brought against Jennings.<sup>25</sup>

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pt. 1, at 43 [hereinafter FBI MATTACHINE FILE].

18. Dale Jennings, *To Be Accused, Is To Be Guilty*, ONE, Jan, 1953.

19. *Id.*

20. *Id.*

21. For further discussion of gay life in prewar Los Angeles, see DANIEL HUREWITZ, *BOHEMIAN LOS ANGELES AND THE MAKING OF MODERN POLITICS* (2007). Hurewitz argues that during the first half of the century, the politicization of gay identity in Los Angeles was a result of a growing homosexual population that faced increasing oppression from the police, and in turn started organizing. They thereby laid the foundation for the homophiles of the 1950s.

22. Community studies are illuminating with respect to the issues of police harassment. See GARY ATKINS, *GAY SEATTLE: STORIES OF EXILE AND BELONGING* (2003); NAN ALAMILLA BOYD, *WIDE OPEN TOWN: A HISTORY OF QUEER SAN FRANCISCO TO 1965* (2003); GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940* (1994). For a more general overview of gay life in American cities, see CHARLES KAISER, *THE GAY METROPOLIS: 1940-1996* (1997).

23. LILLIAN FADERMAN & STUART TIMMONS, *GAY L.A.: A HISTORY OF SEXUAL OUTLAWS, POWER POLITICS, AND LIPSTICK LESBIANS 78-79* (2006).

24. HUREWITZ, *supra* note 21, at 49.

25. *L.A. Police Really Busy Cleaning Up the City of Sex and Moral Offenders*, KEYHOLE (Jan. 1950). On the history of vagrancy law in the postwar years more generally, see RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* (2016).

These increased levels of enforcement were tied to a rise in homophobic attitudes and to practices that were institutionalized by local authorities. In 1949, an interim Chief of Police named William A. Worton told the City Council that the LAPD would step up its efforts to arrest “vagrants and perverts” in downtown Pershing Square, while keeping “undesirables” out of public parks.<sup>26</sup> Throughout the nation, the criminalization of homosexual activity placed gays and lesbians into the same category as other criminals while creating hostility between them and officers of the law. The Los Angeles police in particular exhibited an eagerness to lock away gays. One newspaper reporter noted that in contrast to the police force in San Francisco, members of the LAPD frequently “set themselves up as ‘plants’ to entrap sex deviates into illicit advances.”<sup>27</sup>

In the 1950s, these practices became further institutionalized. After assuming the role of Chief of Police in 1950, William Parker led the department through an era of brutality towards both racial minorities and homosexuals.<sup>28</sup> A set of training bulletins distributed throughout the department during the 1950s acknowledged the prevalence of undercover vice squad members and urged uniformed officers to avoid harassing them.<sup>29</sup> In addition to imprisonment, homosexuals arrested on sex crimes also faced the possibility of permanent legal blacklisting. In 1950, the city of Los Angeles began requiring all people convicted of offenses such as sodomy and lewd vagrancy to register as sex criminals.<sup>30</sup>

Most men arrested on these charges pled guilty, even when they were victims of entrapment or other kinds of police intimidation. Legal battles were not only expensive; they also brought unwanted publicity that was too high a cost for many. But during his trial, in June of 1952, Dale Jennings pled not guilty.

Rather than shirk publicity in the interest of avoiding humiliation, Jennings embraced it. At the trial, Jennings shocked the courtroom by publicly declaring that while he was, in fact, a homosexual, he was innocent of the crime of which he stood accused. In doing so, he insisted that to be gay was not, in itself, evidence of guilt. Jennings’s attorney, a heterosexual man from Long Beach named George E. Shibley, supported this assertion by explaining the patterns of discrimination that affected homosexuals in Los Angeles. Shibley reportedly told the jury,

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26. *Cops Patrol Park to Pick ‘Pansies’*, KEYHOLE (Nov. 1949).

27. Ernest Lenn, *Sex Deviate Problem in S.F. Detailed*, SAN FRANCISCO EXAMINER (Sept. 24, 1954).

28. Whitney Strub, *The Clearly Obscene and the Queerly Obscene: Heteronormativity and Obscenity in Cold War Los Angeles*, 60 AM. Q. 373, 377 (2008).

29. LOS ANGELES POLICE DEPARTMENT, DAILY TRAINING BULLETIN OF THE LOS ANGELES POLICE DEPARTMENT: CONSISTING OF BULLETINS FROM VOLS. II, III, IV 175 (1958).

30. ESKRIDGE, *supra* note 14, at 7, 62.

“homosexuality and lasciviousness are not identical.”<sup>31</sup> On June 23, 1952, after two days of deliberation, eleven out of twelve jurors voted to acquit Jennings, resulting in a hung jury and Jennings’s dismissal.<sup>32</sup>

#### *A. Origins of the Homophile Movement*

Unlike most gay Americans who were entrapped and arrested during the 1950s, Jennings did not fight his charges alone. He was a member of the Mattachine Society, one of the country’s earliest homosexual rights organizations. Upon Jennings’s arrest, Mattachine’s leadership set up the ad hoc Citizens’ Committee to Outlaw Entrapment in order to fundraise for his legal defense.<sup>33</sup> Mattachine, however, provided more than occasional legal aid to its members. The history of the Society provides an understanding of both the emergence of postwar gay consciousness and the eventual founding of *ONE Magazine*.

The 1950s saw the rise of a concerted gay rights movement that had not previously existed.<sup>34</sup> This was in part the result of postwar social shifts that allowed homosexuals to become a more cohesive and conscious minority.<sup>35</sup> During World War II, despite the military’s explicit policies that forbade the enlistment of homosexual individuals, many lied about their sexualities and joined the armed forces.<sup>36</sup> The experiences of homosexuals in the military contributed significantly to the development of homosexual communities in the civilian world. The sex-segregated nature of the military, combined with the relaxation of peacetime social norms, allowed gays and lesbians to discover their personal sexual identities and their homosexual peers. This process of discovery enabled homosexuals to find common ground and develop consciousness as a minority.<sup>37</sup> They took these new experiences back to American cities where the gay life that already existed in the form of bars and nightclubs

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31. EDWARD ALWOOD, *STRAIGHT NEWS: GAYS, LESBIANS, AND THE NEWS MEDIA* 29 (1996).

32. FBI MATTACHINE FILE, *supra* note 17, pt. 1, at 44.

33. Open Letter to Friends of the Citizens’ Committee to Outlaw Entrapment (July 1952) (on file with ONE Archives, Mattachine Society Project Collection, Box 1, Folder 14).

34. Prior to World War II, gays and lesbians faced significant obstacles to organizing. In 1924, World War I veteran Henry Gerber made one of the only pre-Mattachine attempts to create a homosexual rights organization in the form of the Chicago Society for Human Rights. Gerber struggled to gain supporters because gays and lesbians did not want to associate themselves with the Society for fear of public exposure and its consequences. Gerber attempted to publish a magazine through the Society, but only distributed two issues before Chicago police raided Gerber’s home and destroyed uncirculated copies. STONE, *supra* note 1, at 232.

35. D’EMILIO, *supra* note 6, at 4.

36. Homosexuals who joined the military included both men serving in combat roles and women who joined the Women’s Army Corps. LEILA J. RUPP, *A DESIRED PAST: A SHORT HISTORY OF SAME-SEX LOVE IN AMERICA* 135 (1999).

37. Historian and activist Allan Bérubé writes that homosexuals “made friends with other gay people, and began to name and talk about who they were.” ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 6 (1990).

began to grow.<sup>38</sup>

On the home front, a piece of scientific research simultaneously made waves in American society and altered widespread conceptions about sexual normalcy. In 1948, a zoologist at Indiana University named Alfred Kinsey published *Sexual Behavior in the Human Male*. The volume consisted of data and results following interviews with 5,300 men concerning their sexual habits and inclinations.<sup>39</sup> While previous academic studies estimated the homosexual population to be between two and five percent of the total, Kinsey found that thirty-seven percent of his subjects had experienced some kind of homosexual contact between adolescence and old age.<sup>40</sup> He calculated that over six million American men were predominately homosexual.<sup>41</sup> To Kinsey, the data suggested that same-sex relations could not genuinely be considered unnatural, as many contemporary doctors suggested. Because same sex relations were not truly “rare,” Kinsey reasoned, it was “difficult” to consider them “abnormal or unnatural.”<sup>42</sup> He even directly rebuked the notion that homosexuality could be equated with criminality: “The judge who is considering the case of the male who has been arrested for homosexual activity, should keep in mind that nearly 40 per cent of all the other males in the town could be arrested at some time in their lives for similar activity.”<sup>43</sup>

The Kinsey Report was received with intense praise and criticism, and was widely reported on by the popular press. Articles on Kinsey appeared in *Time*, *McCall's*, and *Ladies' Home Journal*.<sup>44</sup> A feature in *Life* summarized the diverse opinions on *Sexual Behavior in the Human Male*, explaining, “[t]he Report has been hailed as a ‘milestone of science,’ among other things, and has been attacked as an assault on the family as a basic unit of society, as a negation of moral law, as a celebration of licentiousness and as a bad influence generally.”<sup>45</sup> The response to the Kinsey Report reflected the broader state of homosexuality: it was becoming more prominent and visible, while it was also increasingly the subject of repression and denunciation.

In this environment, the Mattachine Society emerged.<sup>46</sup> Founded in

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38. D’Emilio also discusses the impact of the war, explaining that soldiers who had experienced sexual self-discovery in the barracks returned to war-boom cities like Los Angeles and New York, where homosexual communities grew. D’EMILIO, *supra* note 6, at 31–32.

39. ALFRED C. KINSEY, WARDELL BAXTER POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* vii (1948).

40. *Id.* at 618, 623.

41. *Id.* at 665.

42. *Id.* at 659.

43. *Id.* at 664.

44. ALWOOD, *supra* note 31, at 22.

45. Francis Sill Wickiware, *Report on Kinsey*, *LIFE*, Aug. 2, 1948.

46. In addition to studying the influence of war-induced social changes and the Kinsey Reports,

1950 by an English-born former member of the Communist Party named Harry Hay, Mattachine defined its mission as providing “a consensus of principle around which all of our people can rally and from which they can derive a feeling of ‘belonging.’”<sup>47</sup> Modeled after the Communist Party’s cell structure, Mattachine initially consisted of “area councils” in Los Angeles, eventually spreading throughout California and to cities across the country.<sup>48</sup> Its activities took the form of private discussion groups, often held in member’s homes and focusing on a wide range of social and political topics that impacted homosexuals. During a discussion in October of 1951 titled “Social Directions of the Homosexual,” conversation focused on the concept of gays as “‘lone wolves’ through fear.” An information sheet distributed at the discussion identified a dilemma central to the Mattachine project: “Homosexuals do not understand themselves and thus it is not surprising that heterosexuals do not understand them either.”<sup>49</sup>

This theme had been prevalent since Mattachine’s beginning. At the first discussion group in 1950, Hay argued that the conversations would allow homosexuals to develop better self-understanding as a collective, thereby helping to achieve “the heroic objective of liberating one of our largest minorities from the solitary confinement of social persecution and civil insecurity.”<sup>50</sup> Reflecting on Mattachine’s early years, Hay maintained that self-reflection had been a central component of the Society from the start. He later recalled, “I had proposed from the very beginning that it would be Mattachine’s job to find out who we Gays were (and had been over the millennia).”<sup>51</sup> The discussions fostered an understanding of homosexuals as an oppressed minority group, giving way to the emergence of the country’s first broad-based movement for homosexual rights: the homophile movement. Although gays and lesbians rarely identified themselves publicly, they began to take part in homophile organizations that served as vehicles for community-building and discussion of social issues.<sup>52</sup>

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recent scholars have noted the impact of popular culture on gay consciousness. In the postwar years, authors of fiction increasingly included homosexual characters in their books and contested anti-gay hostility. These included Truman Capote, Carson McCullers, Tereska Torres, and Gore Vidal. STEIN, *supra* note 10, at 43.

47. Mission and Purposes of the Mattachine Society (1951) (on file with ONE Archives, Mattachine Society Project Collection, Box 1, Folder 5).

48. VERN L. BULLOUGH, BEFORE STONEWALL: ACTIVISTS FOR GAY AND LESBIAN RIGHTS IN HISTORICAL CONTEXT 79 (2002).

49. Discussion Group: Social Directions of the Homosexual (Oct. 4, 1951) (on file with ONE Archives, Mattachine Society Project Collection, Box 1, Folder 11).

50. Remarks to First Discussion Group (1951) (on file with ONE Archives, Harry Hay Papers, Box 1, Folder 4).

51. Jonathan Katz, *The Founding of the Mattachine Society: An Interview with Henry Hay*, 11 RADICAL AMERICA 40 (1977).

52. Craig Loftin explains that gay people in the 1950s described themselves as “masked” (rather than “closeted”). LOFTIN, *supra* note 9, at 11. Masked status implied “situational passing as

Inspired by homosexual subcultures throughout Europe, the American homophile movement consisted of groups that were dedicated to addressing the isolated experience of the homosexual in the United States.<sup>53</sup> The use of the term homophile was itself a political act. It challenged the word “homosexual,” which, according to homophile activist William Lambert, carried “medical connotations of mental illness, abnormality, and pathology.”<sup>54</sup> Writing in the 1990s as Dorr Legg, Lambert explained, “[t]he word ‘Homophile’ lifted discussion out of the age-old grip of medical, psychological and theological obloquy onto the levels of philosophical, moral, and ethical discussions, properly befitting full-fledged members of society.”<sup>55</sup> The homophile movement framed itself not just as a response to the mistreatment of homosexuals by the larger society, but also as an attempt to change the way gays and lesbians understood themselves.

### *B. Something Practical: The Founding of ONE*

Mattachine’s project of self-understanding became a limitation, as it was restricted to inward-facing discussions. The arrest and trial of Dale Jennings galvanized members of the Society, but in the months that followed some wondered when and how discussions would begin to attack the underlying issues confronting the gay community. On October 15, 1952, during a Mattachine discussion group at the home of William Lambert, a forty-seven-year-old landscape architect, participants began to question the value of the Society as an intrinsically private one.<sup>56</sup> A Berkeley-educated painter named Johnny Button expressed frustration at the inward nature of the organization: “We keep talking, talking, talking—what the hell’s happening? We don’t get anyplace. What’s going to be, why don’t we do something real, why don’t we do something practical?”<sup>57</sup>

The chair of the discussion group was Martin Block, a thirty-three-year-old bookstore owner who had joined the Mattachine Society within its first months. Block largely agreed with Button and suggested that a form of media available to the public was necessary. Another Mattachine member, present at the meeting, recalled Block arguing, “[w]e won’t get anywhere until we have a regular respected publication to get our ideas across to homosexuals, and to the general public.” Because the predetermined

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heterosexual” but the ability to “identify as homosexual and participate in a subaltern, camouflaged gay public sphere.” *Id.* Mattachine and other homophile groups existed in this sphere.

53. MEEKER, *supra* note 7, at 31.

54. DORR LEGG, *HOMOPHILE STUDIES IN THEORY AND PRACTICE* 25 (1994).

55. *Id.* at 26–27.

56. Minutes of Meetings Concerning a Proposed Publication (Oct. 15, 1952) (on file with ONE Archives, ONE, Inc. Records, Box 1, Folder 27).

57. Interview by Rodger Streitmatter with Martin Block (1993) (on file with ONE Archives, Martin F. Block Papers, Box 1, Folder 7).

discussion topic was unrelated to Button and Block's tangent, Block requested that those interested in talking about a publication begin a conversation in the next room. He promptly handed off his gavel and joined the new discussion.<sup>58</sup>

Within weeks, the project took the form of a magazine. The new publication's founders agreed that the next step in homosexual activism ought to push the message outward, not only to gays and lesbians outside of their reach, but to heterosexuals throughout the country. During a meeting on November 23, they settled on the name *ONE*, inspired by Scottish philosopher Thomas Carlyle's dictum, "[o]f a truth, men are mystically united . . . a mystic bond of brotherhood makes all men one."<sup>59</sup>

*ONE*, Inc., the corporation created to publish *ONE Magazine*, filed its articles of incorporation in California in February of 1953 and received its charter on May 27 of that year. The organization's stated purpose was "to publish and disseminate a magazine dealing primarily with homosexuality from the scientific, historical and critical point of view, and to aid in the social integration and rehabilitation of the sexual variant."<sup>60</sup> This mission suggested distinct and perhaps irreconcilable components. While *ONE* set out to create content from a benign set of perspectives, it also made clear that it would do so in service of "social integration," a goal as malleable as it was elusive.<sup>61</sup> In articulating such a mission, *ONE*, Inc. laid the foundation for a fundamental tension between the constraints of defined purposes and the impulse towards expanding the possibilities of social and political literature.

As a result of this tension, *ONE* came to occupy a unique place within the larger homophile movement. In contrast to other homophile initiatives—such as the Mattachine Society and the Daughters of Bilitis, a lesbian group founded in San Francisco in 1955—*ONE*, Inc. was the only American homophile organization formed exclusively to create a publication.<sup>62</sup> True to its origins as a reaction against the slow-moving and private nature of Mattachine, *ONE* also prided itself on its willingness to push the boundaries in ways that its counterparts would not.<sup>63</sup> The editors plainly admitted their tendency towards provocation; Jim Kepner, a science fiction enthusiast who became an influential member of *ONE*'s

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58. "My First 64 Years of Gay Liberation" (on file with ONE Archives, Jim Kepner Papers, Box 5, Folder 14).

59. C. TODD WHITE, *PRE-GAY L.A.: A SOCIAL HISTORY OF THE MOVEMENT FOR HOMOSEXUAL RIGHTS* 34 (2009).

60. *One, Inc. Articles of Incorporation* (May 27, 1953) (on file with ONE Archives, ONE, Inc. Records, Box 1, Folder 27).

61. *Id.*

62. For more on the Daughters of Bilitis, see MARCIA M. GALLO, *DIFFERENT DAUGHTERS: A HISTORY OF THE DAUGHTERS OF BILITIS AND THE RISE OF THE LESBIAN RIGHTS MOVEMENT* (2006).

63. D'Emilio writes that *ONE* "published provocative articles intended to spark debate." D'EMILIO, *supra* note 6, at 89.

staff beginning in 1953, wrote that “*ONE*’s militance [sic]” distinguished it from the Mattachine Society, which took a “conformist, assimilationist approach to our issues.”<sup>64</sup> He claimed that Mattachine aimed to portray homosexuals as “respectable citizens” and asserted that “the few embarrassing queens, dikes, and hustlers would disappear once legal persecution ended.”<sup>65</sup> Despite its mission of publishing content only from scientific, historical, and critical perspectives, from its earliest issues *ONE* was a medium for discussions and debates that had not been previously aired beyond homophile communities.<sup>66</sup>

These tendencies were apparent from the earliest editions of the magazine. In the first issue of *ONE*, published on January 1, 1953, Dale Jennings authored the cover story, recounting his entrapment, arrest, and trial in a piece titled, “To Be Accused, Is To Be Guilty.” At its conclusion, he offered a political statement:

Were all homosexuals and bisexuals to unite militantly, unjust laws and corruption would crumble in short order and we, as a nation, could go on to meet the really important problems which face us. Were heterosexuals to realize that these violations of our rights threaten theirs equally, a vast reform might even come within our lifetime. This is no more a dream than trying to win a case after admitting homosexuality.<sup>67</sup>

In punctuating his story with a call not only for unity among homosexuals, but for militancy that could dismantle the systematic injustices against them, Jennings set the tone for *ONE* as a bold and unapologetic publication.

Other portions of the January 1953 issue pointed to *ONE*’s provocative and assertive nature. It included an introspective and unsigned article in which the author detailed his own struggle with bisexuality. He described bisexuality as an anguishing experience that would never provide fulfillment, writing, “I cannot stay a bisexual if I am to find any measure of happiness at all. . . . No one can expect to receive full measure of love from another individual unless he is prepared to give full measure himself.”<sup>68</sup> The passage may well have appeared indecent to heterosexuals by virtue of its detailed discussion of bisexual attraction and its suggestion that happiness might be achieved by choosing a partner of the same sex.

64. JIM KEPNER, *ROUGH NEWS, DARING VIEWS: 1950s’ PIONEER GAY PRESS JOURNALISM* 6 (1998).

65. *Id.*

66. A number of scholars have explored in greater depth the varying degrees of militancy and conservatism of homophile organizations. See, for instance, Meeker, *supra* note 3, at 88; John Dennett Master, *A Part of Our Liberation: ONE Magazine and the Cultivation of Gay Liberation, 1953-1963* (2006) (unpublished Ph.D. dissertation, University of California, Riverside) (available through *ProQuest Dissertations & Theses Global*).

67. Jennings, *supra* note 18.

68. *As For Me . . .*, *ONE*, Jan. 1, 1953.



But it also surely would have sparked debate within the homophile community, a reality of which the editors were aware, prompting them to preface the article with an editorial note. They explained, “The editors debated long over this provocatively subjective article until they realized just how long a debate it had provoked. Then they decided unanimously to include it. It is exactly this type of strong, personal opinion which *ONE* means to present to its readers as regularly as possible.”<sup>69</sup> As early as January of 1953, *ONE*’s editors plainly acknowledged their interest in publishing a magazine of ideas that were subjective, controversial, and provocative.

*C. Respectable Without Primness: ONE’s Early Months*

*ONE*’s early months were a time in which the magazine’s staff focused not only on establishing their publication as a business, but also on crafting an editorial identity. During the first year, staff meetings were held at editors’ homes and at Studio Bookshop, Martin Block’s store on Hollywood Boulevard.<sup>70</sup> At these meetings, the editors debated circulation strategies, advertising policies, and *ONE*’s physical layout. Issues measured six inches by seven inches, until the staff moved to a more standard format of eight-and-a-half by five-and-a-half inches in 1954.<sup>71</sup> On paper, *ONE* existed only in a mailbox: Post Office Box 5716, Los Angeles 55, California. An inaugural advertising campaign attempted to explain the publication’s nature and goals. It suggested that the magazine was appropriate for all ages, as it was meant to be “respectable without primness,” “honest without causing embarrassment,” and aimed at “mutual understanding and stimulation for everyone.”<sup>72</sup> It sought to provide a perspective on homosexuality that was not “somberly clinical or hysterically bigoted,” as other media on the subject tended to be. And its subjects would include “humor, science, literature, sports, the arts, philosophy, history, and the law,” a catalogue that expanded beyond the contents listed in its official articles of incorporation.<sup>73</sup>

The first newsstand to carry *ONE*, at the corner of Hollywood Boulevard and Las Palmas Avenue, sold it for twenty cents.<sup>74</sup> The cost of yearly subscriptions fluctuated during early months, stabilizing at two dollars and fifty cents per year by early 1954. Subscribers also had the option of paying one extra dollar per year for discretely-sealed, first class

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69. *Id.*

70. Minutes of Meetings of ONE, Inc. (Nov. 29, 1952) (on file with ONE Archives, ONE, Inc. Records, Box 1, Folder 27).

71. KEPNER, *supra* note 64, at 5.

72. “ONE is a deviation from all other magazines” (1952) (on file with ONE Archives, ONE, Inc. Records, Box 1, Folder 27).

73. *Id.*

74. “My First 64 Years of Gay Liberation,” *supra* note 58.

shipping.<sup>75</sup> This reflected a harsh reality for many gays and lesbians in the 1950s who were not open about their sexuality with friends, families, and neighbors. They lived in environments of isolation and fear, in which homosexuality was not only scrutinized, but pathologized.<sup>76</sup> Halsey Gaw Meyer, a man from New London, Connecticut, who began subscribing to *ONE* in late 1953, expressed his anxiety in a note he sent to the magazine along with his dollar for first class postage. He wrote: “I am sorry that I have to resort to this apparent subterfuge of which I do not in any sense approve; but living in a small community of immense mediocrity one has no alternative if he is to survive.”<sup>77</sup>

In its first year, *ONE* embarked on a mission of educating the public about homosexuality. In doing so, it also provided comfort to homosexuals across the country who had never before read a publication with such frank discussions of sexuality and gay life. In his letter, Meyer concluded hopefully, telling the magazine’s staff, “This publication is something quite wonderful.”<sup>78</sup> By the end of 1953, *ONE* had distributed, to newsstands and subscribers, nearly thirty thousand issues of the magazine.<sup>79</sup> The year also ended with a change: in November, *ONE* moved into its own downtown office at 232 South Hill Street. The magazine’s suite was on the third floor, above a Goodwill store and in a neighborhood that was “shabby and occupied largely by small, lower class industries.” Constantly short of extra funds, the editors announced to readers, “Visitors are heartily welcome and invited to bring any office furniture they’d like to contribute.”<sup>80</sup> The location represented a sense of permanence for *ONE*, as it worked to establish itself within the homophile movement.

While *ONE* published articles on a range of issues—including medical and social scientific topics—its primary content came in the form of essays, poems, and pieces of fiction that explored the homosexual experience.<sup>81</sup> Contributors often discussed the fear of social and political repression that was a defining part of life for American gays and lesbians. An anonymous author detailed the broad environment of fear, writing,

75. ONE Subscription Form (1954) (on file with ONE Archives, ONE, Inc. Records, Box 16, Folder 35).

76. MEEKER, *supra* note 7, at 31.

77. Letter from Halsey Gaw Meyer to Editors of ONE Magazine (Dec. 17, 1953) (on file with ONE Archives, ONE, Inc. Records, Box 46, Folder 2).

78. *Id.*

79. *Circulation Report*, ONE Confidential 3, 4 n.1A (1958).

80. ONE announces a new address (Nov. 1953) (on file with ONE Archives, ONE, Inc. Records, Box 1, Folder 27).

81. Social science in *ONE* took the form of articles and lectures, sometimes by academics connected to the homophile movement. For example, *ONE* printed pieces by Edward Sagarin, writing under the pen name Donald Cory Webster, a gay sociologist and criminologist who commented on diverse topics related to social treatment of homosexuals. See DONALD WEBSTER CORY, *THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH* (1951).

“We live in a world of fear: we fear revelation, we fear publicity, we fear knowledge and we fear detection.”<sup>82</sup> A poem in the May 1953 issue read, “I’m sick of kisses in dark doorways/pulling down the shades/watching every word I say/each inflection, gesture, step I take./Sick of feeling a stranger in my own land.”<sup>83</sup> Fear of the law in particular came through in *ONE*’s pages. An April 1953 article offered analyses of bills in the California State Legislature related to sex offenders, and their potential impacts on homosexuals.<sup>84</sup> Throughout the country, state houses debated how to regulate sexual deviance, and their decisions reverberated in everyday life for many gays and lesbians.

Perhaps encouraged by Dale Jennings’s inaugural cover story for *ONE*, contributors specifically targeted vice squads as purveyors of entrapment and peddlers of injustice. In a May 1953 essay, attorney George Henry Mortenson recounted defending a man arrested for a sex crime. Mortenson stressed that his client was innocent, but had been initially convicted thanks to “the vicious distortion of fact voiced by the perjured testimony of the arresting officer.”<sup>85</sup> Mortenson had attempted to describe to his client the nature of entrapment in California:

I found it almost impossible to explain that the Vice Squad detail of our law enforcement body resorted to unscrupulous methods of deliberate entrapment. That these men, whose sense of morality and truthfulness may have never existed . . . do flourish in our city and do present under sacred oath such fabrications, distortion, and willful lies, that were they not officers of the law, they would be confined to mental institutions.<sup>86</sup>

In the pages of *ONE*, entrapment came to represent the state at its most cynical and depraved. The targets of entrapment faced arrest as well as public humiliation. So pressing were fears of entrapment and arrest that in March of 1953, *ONE* published a list entitled, “Your Rights in Case of Arrest.”<sup>87</sup> Suggestions on the list included, “Deny all accusatory statements by arresting officers with, ‘I am not guilty and I’d like to contact a lawyer,’” and “DO NOT SIGN ANYTHING.”<sup>88</sup> While the daily possibility of arrest fostered fear and anxiety for homosexuals throughout the country, it was not the only legal threat that loomed over gay organizations, as *ONE*’s staff would learn later in the magazine’s first year.

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82. *As for me . . .*, *ONE*, Apr. 1953.

83. *Blanked-Off Verse*, *ONE*, May 1953.

84. *The Law*, *ONE*, Apr. 1953.

85. George Henry Mortenson, *To Be Accused Is To Be Guilty*, *ONE*, May 1953.

86. *Id.*

87. *Your Rights in Case of Arrest*, *ONE*, March 1953.

88. *Id.*

When subscribers received the August 1953 issue of *ONE*, they saw a cover with a solid green background, an abstract design of overlapping white rectangles, and the words “HOMOSEXUAL MARRIAGE?” blazoned across the top of the magazine. The author of the cover story, E.B. Saunders, argued that homosexual marriage would benefit marriage as an institution because it would limit promiscuity amongst gays. Saunders criticized homophile organizations for not emphasizing the issue, writing, “one would think that in a movement demanding acceptance for this group, legalized marriage would be one of its primary issues. . . . But nowhere do we see this idea prominently displayed in either [Mattachine] Society publications or the magazine *ONE*.”<sup>89</sup> The article presented a nuanced discussion of the concept of gay marriage, taking a socially conservative approach by underscoring a desire to decrease extramarital sexual relations. The essay and the cover, however, were undoubtedly provocative. They attracted the attention of Los Angeles postal inspectors, who notified *ONE*’s staff that they considered the issue obscene and were seizing all copies of it until further notice.<sup>90</sup>

The Post Office drew its authority to do so from an eighty-year-old federal law that asserted the government’s right to identify and enforce moral norms. During the latter half of the nineteenth century, public perception of moral decay in political institutions, combined with Victorian moral codes, led to the rise of a politics focused on public morality.<sup>91</sup> Simultaneously, Reconstruction demonstrated the capacity of the government to embark upon programs of social reform. In this context, advocacy groups lobbied the federal government to take a more proactive stance against immorality in American life. Among the strongest voices in favor of morality-based legislation was the New York Society for the Suppression of Vice, founded in 1873 by Andrew Comstock.<sup>92</sup>

Comstock and the NYSSV pressured elected officials to enact policies that would uphold Victorian moral standards, often invoking the fear of moral decay in children.<sup>93</sup> Comstock was particularly concerned with obscene literature. In the years following his founding of the NYSSV, he wrote several works elucidating his philosophy. In *Traps for the Young*, published in 1883, Comstock decried the “shameless recklessness in many homes as to what the children read,” singling out the pervasiveness of

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89. E.B. Saunders, *Reformer’s Choice: Marriage License or Just License*, *ONE*, August 1953.

90. Dorr Legg, *Exploring Frontiers: An American Tradition*, 19 *NEW YORK FOLKLORE* 229 (1993).

91. STRUB, *OBSCENITY RULES*, *supra* note 14, at 16.

92. NICOLA BEISEL, *IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA* 49 (1998).

93. Sociologist Nicola Beisel explores how Comstock succeeded by focusing on children and taking advantage of parents’ concerns over whether their children would be “unfit for desirable jobs and social positions.” *Id.* at 4–5.

“pernicious literature” with “debasement character.”<sup>94</sup> He warned against the power of obscene stories to “render the imagination unclean, destroy domestic peace, desolate homes, cheapen women’s virtue.”<sup>95</sup> In *Morals Versus Art*, published in 1887, Comstock reiterated his argument, writing, “[t]he morals of the youth of this country are endangered by obscenity and indecency. . . . Obscenity in any guise or form is a moral monster.”<sup>96</sup>

In 1873, the efforts of organizations like NYSSV came to fruition in the form of the passage of a federal law targeting obscene content. On March 3, Congress passed “An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use.” It dictated, “no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character . . . shall be carried in the mail.”<sup>97</sup> The statute, which became known as the Comstock Act, placed the responsibility for the regulation of obscene material in the Post Office, an agency under the exclusive direction of the federal government. During the nineteenth century, the postal system was the primary—if not the only—way in which citizens interacted with the federal government on a daily basis.<sup>98</sup> In 1896, the United States Supreme Court affirmed the appropriateness of the Comstock Act, approving of a test of obscenity based on “whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence.”<sup>99</sup> This standard would prove enduring, remaining in place for nearly half a century.<sup>100</sup>

When *ONE*’s staff learned that the August 1953 issue of the magazine had been seized by the Post Office, they sought legal assistance from Eric Julber, an attorney with whom they had recently begun working. Born in New York City to German parents, Julber was a twenty-nine-year-old Navy veteran who had studied political science at the University of California, Los Angeles. In 1951, he received his law degree from Loyola Law School. He had been involved with various leftist and liberal groups, including the Progressive Citizens of America.<sup>101</sup> The magazine’s board approached Julber for legal counsel after he met Dale Jennings at a cocktail party in Malibu hosted by Samson De Brier, an actor and

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94. ANTHONY COMSTOCK, TRAPS FOR THE YOUNG ix (1883).

95. *Id.* at 25.

96. ANTHONY COMSTOCK, MORALS VERSUS ART (1887).

97. An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of Immoral Use of 1873, 17 Stat. 598.

98. The Post Office was also particularly open to social and political influences because it was controlled by Congress. WAYNE EDISON FULLER, MORALITY AND THE MAIL IN NINETEENTH-CENTURY AMERICA ix (2003).

99. *Rosen v. United States*, 161 U.S. 29 (1896).

100. For a comprehensive history of twentieth century battles over obscenity and censorship, see EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS (1992).

101. Report on Eric Julber, March 2, 1956, FBI MATTACHINE FILE, *supra* note 17, pt. 3 at 17-18.

Hollywood socialite.<sup>102</sup> Unlike the editors and contributors to *ONE*, Julber was heterosexual and had no previous involvement in homophile issues. He later recalled telling the editors, “I never had anything to do with gay people, know nothing about that way of life. . . . But I do know about one thing—civil liberties and the right to be free from censorship.”<sup>103</sup>

Postal officials in Los Angeles forwarded the magazine to federal postal inspectors in Washington, who cleared the issue and lifted the seizure on September 18.<sup>104</sup> Julber’s role in resolving the seizure of the August 1953 issue is not entirely clear. He certainly corresponded with postal officials in Los Angeles, and editors of *ONE* later claimed that he actively contributed to the magazine’s release. William Lambert told an interviewer that Julber “immediately got that issue released.”<sup>105</sup> However, letters from postal officials to Julber suggest that the release was a function of clearance by federal inspectors, and not of Julber’s own efforts. Regardless, the ordeal prompted the development of a legal strategy under which *ONE* henceforth operated.

#### *D. A Conservative and Judicious Course*

Julber had been providing legal advice to *ONE* in relation to postal censorship as early as August 5, 1953. In one of his first letters to Lambert, he offered counsel on the avoidance of conflict with federal authorities. Concerning the possibility of justifying the magazine before postal inspectors, Julber explained, “such considerations, while remote, should be taken into consideration if, as you have indicated to me, you desire to steer a conservative and judicious course.”<sup>106</sup> By the end of the month, Julber advocated for a consistent “magazine policy, particularly with respect to what I believe you should refrain from printing.”<sup>107</sup> Over the next several months, Julber assisted *ONE* by reading manuscripts, aiding with copyright issues, and editing the corporation’s bylaws.<sup>108</sup> The editors valued his work; beginning in November 1953 they entered a retainer agreement with him, under which the magazine paid Julber seventy-five dollars per month for his legal services.<sup>109</sup>

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102. Sten Russell, “‘One and the Supreme Court’ by Mr. Eric Julber” (1958) (on file with ONE Archives, ONE, Inc. Records, Box 81, Folder 13).

103. FADERMAN & TIMMONS, *supra* note 23, at 118.

104. Letter from Michael D. Fanning to Eric Julber (Sept. 18, 1953) (on file with ONE Archives, ONE, Inc. Records, Box 46, Folder 2).

105. Interview by Brad Mulroy with Dorr Legg, *supra* note 15.

106. Letter from Eric Julber to William Lambert (Aug. 5, 1953) (on file with ONE Archives, ONE, Inc. Records, Box 46, Folder 2).

107. Letter from Eric Julber to William Lambert (Aug. 24, 1953) (on file with ONE Archives, ONE, Inc. Records, Box 46, Folder 2).

108. Costs for Professional Services (Nov. 4, 1953) (on file with ONE Archives, ONE, Inc. Records, Box 4, Folder 7).

109. Letter from Eric Julber to William Lambert (Nov. 5, 1953) (on file with ONE Archives, ONE, Inc. Records, Box 41, Folder 22).

Julber served as a gatekeeper, reviewing all content and advertisements submitted to *ONE* and screening out anything that could be construed as obscene and therefore non-mailable under the Comstock Act. In doing so, he developed a strategy of precaution and avoidance. Unlike other twentieth century advocacy groups that intentionally broke laws in order to challenge their constitutionality in court, *ONE* aimed to stay within the bounds of the law.<sup>110</sup> Early feedback from Julber came in the form of letters to the magazine's editors that included lists of edits, often focusing on individual words and sentences. On October 1, 1953, he sent Dale Jennings a set of suggestions for that month's magazine:

At page 14 . . . eliminate the phrase beginning "in other words, we are promiscuous. . . ." On page 17, delete the word "excitingly." In fact, the sentence beginning "since society withholds" and ending "excitingly lots more", should be phrased more subtly. . . . On page 24, eliminate the words "and, of course, the word sex."<sup>111</sup>

On the subject of referencing promiscuity, he mentioned the danger of provoking postal inspectors, writing, "The advocacy of promiscuity gains you nothing and may alienate readers (who may include the Post Office)."<sup>112</sup>

Julber returned a similar set of edits to Jennings prior to the publication of the November 1953 issue. These included several small-scale changes intended to reduce the chances of flagging by postal authorities:

On page 2, delete the words "orgasm or" in the first paragraph. It sounds too extreme the way it is. On page 3, in the last paragraph, eliminate the words "bed-siding." If this means what I think it means, it should never have been permitted to appear. On page 3, the last sentence in the article has an unpleasant sound to it. . . . On page 16, in the middle of paragraph 3, the word "coupling" should be changed to "sleeping"<sup>113</sup>

These word-level changes indicate that while at times objectionable content had to be screened out of the magazine, it was more often the case that Julber removed individual phrases that had a high probability of standing out to postal inspectors. These changes did not often alter the overall tone of any given article or advertisement. For instance, in January

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110. The more proactive strategy is demonstrated by the example of birth control activists. The Comstock Act forbade the distribution of contraceptive devices and related information, categorizing them as obscene materials. Margaret Sanger began publishing *The Woman Rebel*, a newsletter that promoted use of contraception. In doing so, she hoped to provoke censorship of the publication and create a test case of the Comstock Act. MARGARET A. BLANCHARD, *REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA* 50 (1992).

111. Letter from Eric Julber to Dale Jennings (Oct. 1, 1953) (on file with ONE Archives, ONE, Inc. Records, Box 41, Folder 22).

112. *Id.*

113. Letter from Eric Julber to Dale Jennings (Oct. 26, 1953) (on file with ONE Archives, ONE, Inc. Records, Box 46, Folder 2).

1954, he recommended the removal of the word “physique” from an advertisement in order to make it “a trifle more innocuous.”<sup>114</sup>

Over the course of his first several months with *ONE*, Julber became more integrated with the magazine’s staff, attending board meetings and providing editorial comments in addition to legal ones. In his edits for the November 1953 issue, he concluded: “Those are the only corrections that I would recommend from a legal point of view. As for my opinion on your editorial content, I think the articles are very good this month.”<sup>115</sup> In time, Julber came to resemble a member of the staff more than an external lawyer. In his letters to the editorial staff, he transitioned away from addressing them to “Mr. Lambert” or “Mr. Jennings,” instead simply writing to Bill and Dale. *ONE*’s staff used Julber as a bridge to individuals who were not involved with the homophile movement. In 1954, Lambert wrote to Norman Mailer in an attempt to solicit an essay from the author for the magazine. He offered, “[y]ou could meet our hard-working staff and our brilliant young attorney (not homosexual) and observe how we are going about a unique job in American journalism and social investigation.”<sup>116</sup> Lambert further stressed Julber’s ability to serve as *ONE*’s ambassador to outsiders: “If you would like to have an ‘outside’ opinion I am sure our attorney, Mr. Eric Julber, 333 South Beverly Drive, Beverly Hills would be glad to write you frankly on any subject you might propose.”<sup>117</sup> While it is unclear whether Mailer ever contacted Julber, he did contribute an article to *ONE*’s January 1955 issue.<sup>118</sup>

Julber’s role at *ONE* solidified in time, and he developed a more sophisticated understanding of the part he played. By 1954, one of the Managing Editor’s official responsibilities was to send Julber all the manuscripts intended for publication.<sup>119</sup> In August of that year, Julber wrote a letter to Drew Pearson, a columnist and radio host who had mentioned *ONE* in a broadcast. In it, he described his work for the magazine, using the language of *ONE, Inc.*’s articles of incorporation:

My primary job for *ONE* magazine is to read every word that goes into the magazine. I ruthlessly delete everything which might be

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114. Letter from Eric Julber to William Lambert (Jan. 8, 1954) (on file with *ONE* Archives, *ONE, Inc.* Records, Box 46, Folder 2).

115. *Id.*

116. Letter from William Lambert to Norman Mailer (Sept. 4, 1954) (on file *ONE* Archives, *ONE, Inc.* Records, Box 41, Folder 23).

117. *Id.*

118. Mailer’s article in *ONE* was titled “The Homosexual Villain,” and it focused on his personal shift away from anti-homosexual prejudice. Mailer later reprinted the *ONE* piece in *Advertisements for Myself*, along with a short essay about the process of writing it. In the essay, Mailer described “The Homosexual Villain” as “beyond a doubt the worst article I have ever written” because he had “nothing interesting to say about homosexuality.” NORMAN MAILER, *ADVERTISEMENTS FOR MYSELF* 220-22 (1992).

119. Managing Editor’s Duties (1954) (on file with *ONE* Archives, *ONE, Inc.* Records, Box 2, Folder 1).



considered provocative [sic] or obscene. I have laid down the legal limitation that ONE can only print matter dealing with legal, social, and psychological problems of homosexuals; it cannot under any circumstances, cater to their sexual appetites.<sup>120</sup>

Julber's activities at *ONE* reflected the fundamental tension between the magazine's roots as a provocative publication and its intent to stay true to its mission. After postal officials seized the August 1953 issue, this tension became further complicated by a desire to avoid confrontation with federal authorities. These dynamics can also be seen in the ways in which other staff members described Julber's role. In early 1954, Dale Jennings described Julber as the magazine's "professionally prudish attorney who looks askance at the mildest bawdiness." Julber's job was to "keep us in business and he's been successful a year now in spite of a sperm-like flow of erotic literature we've tried to sneak by his griffins."<sup>121</sup> Jennings was undoubtedly hyperbolic, and Julber's edits generally continued to consist of changes to individual words and phrases. However, it is clear that the editorial desires of *ONE*'s staff and contributors did not always align with the legal guidelines enforced by Julber.

This tension was apparent in the magazine's public response to the seizure of the August issue. Internally, the seizure contributed to the development of a cautious legal strategy. However, *ONE* outwardly celebrated the magazine's release while lambasting the Post Office and its application of obscenity law. The front cover of the October 1953 issue included a statement to subscribers under the heading, "ONE is not grateful."<sup>122</sup> The statement explained that the August issue "was late because the postal authorities in Washington and Los Angeles had it under a microscope . . . and finally decided that there was nothing obscene, lewd or lascivious in it."<sup>123</sup> The magazine's staff relayed their belief that "[t]his official decision changes our status considerably" because "[n]ever before has a governmental agency of this size admitted that homosexuals not only have legal rights but might have respectable motives as well." Still, the editors expressed outrage at their run-in with censorship, and vowed to continue fighting all forms of anti-gay repression:

ONE thanks no one for this reluctant acceptance. . . . As we sit around quietly like nice little ladies and gentlemen gradually educating the public and the courts at our leisure, thousands of homosexuals are being unjustly arrested, blackmailed, fined, jailed, intimidated, beaten, ruined and murdered. ONE's victory might seem

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120. Letter from Eric Julber to Drew Pearson (Aug. 9, 1954) (on file with ONE Archives, ONE, Inc. Records, Box 41, Folder 23).

121. Letter from Dale Jennings to James Barr (Jan. 7, 1954) (on file with ONE Archives, James Barr Papers, Box 1, Folder 15).

122. *ONE is Not Grateful*, ONE, (Oct. 1953).

123. *Id.*

big and historic as you read of it in the comfort of your home (locked in the bathroom? hidden under a stack of other magazines? sealed first class?). But the deviate hearing of our late August issue through jail bars will not be overly impressed. There's still a bit to be done.<sup>124</sup>

*ONE*'s public response to the seizure of the August 1953 issue reveals a great deal about the magazine's internal dynamics. It reflects the beginning of a shift for the magazine from fighting for civil rights to fighting against its own repression through censorship. In the statement, the editors highlighted the issues that they sought to attack by founding *ONE*, including arrest and social isolation. However, the clash with postal inspectors showed the staff that their magazine—itsself a medium for protest—was not insulated from government harassment.

The staff's response underscores that the publication was, at its core, defined by aggressiveness and provocation. The editors' adoption of strict editorial standards with respect to obscenity was a function of legal necessities and not a desire for respectability. They reasoned that by continuing to follow Julber's guidelines, they shielded the magazine from additional conflict with postal authorities. The extent to which this attempt at protection would truly keep *ONE* safe from censorship, however, proved uncertain. What was clear beyond doubt was that *ONE* found itself up against a wide range of adversaries, including a hostile federal government and a social climate of fear and intolerance in the United States.

## II. UNWANTED ESCALATION: CONFRONTING THE LEGAL FACTS OF LIFE

On a late April day in 1954, Alexander Wiley walked down a New York City street and passed a newsstand. Wiley, a seventy-year-old former dairy farmer and member of the Republican Party, was serving his third term as a United States Senator from Wisconsin. Wiley was the state's senior senator, Joseph McCarthy its junior. In New York that day, a magazine caught his eye: its cover featured a shirtless man with his back turned and arms crossed. The publication declared itself to be "The Homosexual Magazine." Wiley flipped open the March issue of *ONE* to find a series of mission statements. "ONE advocates in no way any illegal acts," it read.<sup>125</sup> "This magazine is not and does not wish to be merely an erotic publication."<sup>126</sup> Nonetheless, it was unabashedly political: "ONE claims positively that homosexuals do not have the civil rights assured all other citizens. ONE is devoted to correcting this."<sup>127</sup>

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124. *Id.*

125. *ONE: The Homosexual Magazine*, *ONE*, Mar. 1954.

126. *Id.*

127. *Id.*

As Wiley leafed through the magazine, he found articles on homosexual life, a subject he and many other politicians in Washington had kept at arm's length. He scanned a poem entitled "Gay," which meditated on homosexuality, the "tempting lagoon/that makes mad/all who swim therein."<sup>128</sup> He skimmed the cover story, an essay called "The Importance of Being Different," in which the author wrote of homosexuals' "wild and mysterious desires to cross the line which all the authorities have set" while vigorously defending "my right to be different as I damn please."<sup>129</sup> The articles Wiley discovered shocked him. They did not simply raise political issues or protest social currents. They presented homosexuality as an identity to be celebrated.

*ONE* outraged Wiley. Realizing that the publication had been moved through the mail, he wrote to Arthur Summerfield, the Postmaster General of the United States. In his letter, sent April 26, 1954, Wiley protested "the use of the United States mails to transmit a so-called 'magazine' devoted to the advancement of sexual perversion."<sup>130</sup> He invoked concerns about moral decay, specifically in children, writing that the transmittal of such "vile material" through the postal system "runs utterly contrary to every moral principle" and "to our intentions to safeguard our nation's youngsters."<sup>131</sup> He implored Summerfield to use the Comstock Act to regulate *ONE* and similar publications, appealing directly to the Postmaster General's own moral code: "I am sure that with your keen sense of moral principle that you will give this matter your prompt attention."<sup>132</sup>

The federal Post Office had reviewed *ONE* before, in September 1953. But Wiley's letter once again brought the magazine to the attention of postal inspectors. The March 1954 issue continued to be distributed without interference, but as a result of Wiley's concerns, Los Angeles Postmaster Otto K. Olesen made it a practice to send a copy of every issue of *ONE* to the Post Office Department in Washington, allowing federal authorities to scan them for obscene content.<sup>133</sup>

The Postmaster, however, was not the only federal official to receive Wiley's complaints. On April 28, one of Wiley's Senate aides forwarded a copy of Wiley's letter, along with the March issue of *ONE*, to Louis B. Nichols, the Assistant Director of the Federal Bureau of Investigation.<sup>134</sup>

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128. *Gay*, *ONE*, Mar. 1954.

129. Lyn Pedersen, *The Importance of Being Different*, *ONE*, Mar. 1954.

130. Letter from Alexander Wiley to Arthur Summerfield (Apr. 26, 1954), FBI MATTACHINE FILE, *supra* note 17, pt. 2 at 23.

131. *Id.*

132. *Id.*

133. ESKRIDGE, *supra* note 14, at 77.

134. Memorandum from L.B. Nichols to Clyde Tolson (Apr. 28, 1954), FBI MATTACHINE FILE, *supra* note 17, pt. 2 at 8. It is unclear why Wiley's office reached out to the FBI, but the aide did not expect an immediate response, writing, "Please don't bother to acknowledge." *Id.*

Although the FBI did not take immediate action, Nichols added the letter to the Bureau's growing files on ONE, Inc. and the Mattachine Society.<sup>135</sup> Unbeknownst to both Wiley and the staff of *ONE*, the Bureau had begun an investigation of the magazine nearly a year earlier, in May 1953.

The FBI's initial interest in *ONE* grew out of an attempt to discover the presence of communists among the publication's editors. On May 19, 1953, agents in San Diego received a copy of the April 1953 issue from a confidential informant whom they identified as a "sex deviate."<sup>136</sup> Reviewing an article that contested federal policies barring the hiring of gay employees, the agents concluded that "the writer of the article is at least pro-communist" and that the publication as a whole "is written for Sex Deviates."<sup>137</sup>

The director of the FBI, J. Edgar Hoover, ordered a full investigation of ONE, Inc. and Mattachine.<sup>138</sup> Agents in Los Angeles led the effort, marshaling information and resources provided by other offices throughout the country, from Seattle to New Haven. On September 9, 1953, they sent an internal security report to Hoover, bringing together intelligence gathered through corporate records, interviews with informants, and surveillance of the magazine's staff.

The FBI's September 1953 report described *ONE* as a magazine "concerning the civil rights of homosexuals based on allegations of entrapment and persecution by police departments and unfair treatment by the government."<sup>139</sup> While the investigation was prompted by possible communist infiltration of the organization, the investigating agents focused on the deviant nature of the magazine, implicitly linking political subversion to sexual perversion. In the course of researching *ONE* editor Dale Jennings, the FBI found that he was one of several staff members who "have police records as homosexuals."<sup>140</sup> Upon noticing that Jennings subscribed to the leftist newspaper *National Guardian*, an FBI informant suspected him of communist leanings. Agents soon discovered that Jennings was a registered member of the Independent Progressive Party, a left wing party active in national politics from the late 1940s to the mid 1950s.<sup>141</sup>

The FBI collected extensive information on the editors and the

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135. *Id.*

136. The name of the informant was mentioned but has been redacted from FBI files.

137. The article in question referenced an investigation of the private lives of an airline company's employees, conducted by the FBI. The Bureau pointed specifically to *ONE*'s criticism of these investigative techniques as evidence of the magazine's "pro-communist" tilt. Memorandum from SAC San Diego to Director (May 21, 1953), FBI MATTACHINE FILE, *supra* note 17, pt. 1 at 2.

138. The FBI was initially under the false impression that ONE, Inc. and the Mattachine Society were two parts of a single larger organization, and as a result kept a combined file on them.

139. FBI MATTACHINE FILE, *supra* note 17, pt. 1 at 22.

140. *Id.* at 24.

141. *Id.* at 44.

magazine. Agents discovered where the staff members lived and worked, what political parties they belonged to, and whether they had criminal records. The Bureau reviewed the magazine's articles of incorporation and dozens of essays that pointed to possible communist sympathies. Los Angeles agents even called upon their counterparts in Connecticut to investigate a New Haven rental service company that had placed an advertisement in the June 1953 issue of *ONE*.<sup>142</sup>

The investigations, however, failed to demonstrate that *ONE* had been infiltrated by communists. After four additional months of monitoring *ONE*, the FBI closed its investigation on December 31, 1953. In a letter to Hoover, the Special Agent in Charge of the Los Angeles Office explained that based on the office's findings, "no Communist infiltration or control is indicated."<sup>143</sup> Despite discovering that editors like Jennings had leftist leanings, agents found no evidence that the magazine's staff supported a broadly communist agenda. Nonetheless, the Los Angeles Special Agent in Charge clarified that the Bureau, along with local police forces, would continue to monitor *ONE*'s articles and activities. "Arrangements have been made to obtain issues of the publication 'ONE' on a regular basis," he reported. "It is known that the Los Angeles Police Department Vice Squad, and the Los Angeles Police Department Anti-Subversive Detail are maintaining active interest in this organization."<sup>144</sup> That the Bureau maintained an interest in *ONE*, even after it failed to produce evidence of subversion within the organization, demonstrates the FBI's deep suspicion of the magazine and its interest in homosexuality.

The involvement of both Wiley and the FBI in *ONE*'s affairs reflects the conservative, moralistic politics of the 1950s that fused together issues of national security, communism, homosexuality, and obscenity. These concerns united individuals across the political spectrum and figures as different as Wiley and Joseph McCarthy. A moderate Republican, Wiley was first elected to the Senate in 1938 and rose to prominence as the chairman of the powerful Judiciary and Foreign Relations Committees.<sup>145</sup> Wiley was traditional and courteous in temperament, calling in 1953 for "a calm and judicious foreign policy" and condemning the "many irresponsible statements being made today."<sup>146</sup> He clashed with McCarthy, who had unsuccessfully challenged Wiley in the 1944 Republican primary before winning his own Senate seat in 1946.<sup>147</sup>

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142. *Id.* at 72.

143. Memorandum from SAC Los Angeles to Director (Dec. 31, 1953), FBI MATTACHINE FILE, *supra* note 17, pt. 1 at 83.

144. *Id.*

145. Albin Krebs, *An American Success*, N.Y. TIMES, Oct. 27, 1967.

146. Alexander Wiley, *The Test of American Leadership*, PROCEEDINGS OF THE AMERICAN BAR ASSOC. 22 (1953).

147. ROBERT GRIFFITH, THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE 5-7

While Wiley privately condemned McCarthy's tactics, he did engage in the moral conservatism of the day, considering the campaign against vice to be part of a broader effort to morally fortify the nation against communism.<sup>148</sup> In 1951, for instance, he called for Senatorial investigations of vice in Washington, including illicit gambling.<sup>149</sup> In 1953, he warned that communists "seek to pit Americans against Americans and breed dissension in our great land."<sup>150</sup> In the coming years, Wiley would argue that one of the ways to defend against communists was to protect the moral purity of the American homeland. In 1955, he excoriated American films that presented "an America of . . . corruption, filth and degradation" because such films tarnished the image of the United States and weakened it in the fight against Soviet propaganda.<sup>151</sup> That year, Wiley sat on the Senate Subcommittee on Juvenile Delinquency, which aimed to investigate the sources of the decaying moral structure of American youth. One such source, the Subcommittee would determine, was obscenity in popular culture and literature.

The argument that American moral decay contributed to an environment conducive to Soviet propaganda justified the federal government in actively discriminating against homosexuals. The FBI's investigation of *ONE* is just one instance in which a federal entity put anti-homosexual prejudice into practice. Intelligence agencies monitored homophile groups while federal departments purged themselves of gay employees. During the early 1950s, it is likely that the federal government fired at least five thousand homosexual employees, not to mention countless informal dismissals and resignations under pressure.<sup>152</sup>

Beyond the daily forms of repression that gays and lesbians faced in the postwar years, quieter modes of discrimination emerged. Political and social currents held homosexuality to be a threat to moral health and national security in the United States. *ONE Magazine* navigated these currents. In 1954, *ONE* began its second year of publication, entering a period of modest literary success; it distributed tens of thousands of issues

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(1987).

148. For further discussion on McCarthy's complicated relationships with other Republican politicians, see DAVID M. OSHINSKY, *A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY* 134, 232, 488 (2005). Wiley privately opposed McCarthy's "name-calling" and rejected his tactics, but refused to outright condemn McCarthy. When the Senate censured McCarthy in December 1954, Wiley did not vote, believing that a vote for censure would alienate him from Wisconsin Republican leaders but that a vote against would alienate him from independents. *Id.* On the issue of censure, he wrote in a letter to his constituents that no man "should be penalized for his vigor in combating Communism." *Id.*

149. John W. Ball and Roger Farquhar, *Wiley Asks Senate Unit Investigate D.C. Crime*, WASH. POST, Aug. 19, 1951.

150. Wiley, *supra* note 145, at 23.

151. PETER LEV, *TRANSFORMING THE SCREEN, 1950-1959* 100 (2003).

152. DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* 166 (2004).

and solicited scores of contributions from writers. It retained a consistent staff that breathed life into a magazine still in its infancy. However, *ONE*'s editors also began to understand that the periodical could not serve as a vehicle for civil rights protest without encountering repression in the form of censorship. As *ONE*'s legal fights became a defining part of its identity, the editors slowly embraced the issue of obscenity not as an obstacle, but as a stand-in for broader injustices. The magazine was a small player in the larger battle over homosexual rights in the United States, one waged between homophile groups—organizing, protesting, and publishing against unfair treatment—and an oppressive network of policies and social mores. But *ONE* was on the front line of this war, responding to the systemic issues that emanated from the federal government and from society at-large. From its earliest days, and certainly during the turbulent times that began in 1954 when Wiley stopped at that newsstand in New York, *ONE* had to make decisions about how to survive with political consensus and popular opinion firmly against homosexuality.

*A. Anti-Communism, Moral Crusading, and the Politicization of Sexuality*

Politics in the postwar years reflected the rise of ideologies concerned with disparate but deeply intertwined issues, from sexuality to security. The fusion of moral politics with anti-communism and anti-homosexuality resulted in rhetoric and actions that targeted gay individuals and groups. A postwar conservative movement, taking the form of a moral crusade, laid the foundation for this fusion. Prior to World War II, religious moralism influenced public policies throughout the country, and especially in California.<sup>153</sup> In the postwar years, conservative political actors continued to seize upon moral issues. In particular, female Republican leaders invoked the notion of moral crusades, growing a coalition of conservative women who fought vigorously for policies that attacked immoral behaviors. Groups like the National Federation of Republican Women framed politics as a moral crusade, attracting large bases of Protestant, white women who sought to repel assaults on American institutions.<sup>154</sup>

In the 1950s, political thinkers defined conservatism in terms of morality, crafting a political ideology at the center of which stood strict moralism. Social critic Russell Kirk contributed to the midcentury redefinition of conservatism, outlining six “canons of conservative

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153. In a case study of Orange County, California, historian Lisa McGirr shows how a “strict moralism” influenced conservative policy and culture both before and after the war. LISA MCGIRR, *SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT* 30-31 (2001).

154. For a detailed study of the role of conservative women in postwar politics, see Catherine E. Rymph, *REPUBLICAN WOMEN: FEMINISM AND CONSERVATISM FROM SUFFRAGE THROUGH THE RISE OF THE NEW RIGHT* (2006).

thought.”<sup>155</sup> Kirk’s first canon was “a belief that a divine intent rules society as well as conscience, forging an eternal chain of right and duty.”<sup>156</sup> Put more simply, “[p]olitical problems, at bottom, are religious and moral problems.”<sup>157</sup> Arguing that apathy to moral and religious teachings deteriorated American political systems, Kirk charged conservatives with solving political problems by first addressing the moral decay of the nation.<sup>158</sup>

Conservatives applied a moralistic approach to a wide variety of issues, including the Cold War and anti-communism. In February 1950, Joseph McCarthy—still in Alexander Wiley’s shadow as an obscure, junior Republican Senator from Wisconsin—rose to national prominence by accusing the State Department of harboring communists. McCarthy focused not just on security, but also morality. He decried the “immoralism” of communism and advocated for “a new birth of honesty and decency in government.”<sup>159</sup>

Alongside the development of fierce anti-communism, the 1950s also saw the politicization of gender and sexuality. Gender politics and anti-communism became linked as popular concerns over masculinity and the potential loss of family values manifested in political rhetoric.<sup>160</sup> Homosexuality in particular became a central issue because it reflected wide-ranging concerns about sexuality and American character.<sup>161</sup> The topics of gender and sexuality did not merely enter the cultural mainstream; they influenced political rhetoric and policy formation.<sup>162</sup> The development of foreign policy in the early years of the Cold War reflected the debates over sexuality and masculinity on the home front. In 1946, when George Kennan—the deputy chief of the United States mission in

155. RUSSELL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO SANTAYANA* 7 (1953).

156. *Id.*

157. *Id.*

158. See W. WESLEY McDONALD, *RUSSELL KIRK AND THE AGE OF IDEOLOGY* (2004).

159. It is worth noting that McCarthy’s speech was delivered to a Republican Women’s Club, demonstrating the central role of conservative women, particularly in issues that could be construed as moral crusades. Joseph McCarthy, “Enemies from Within,” Speech at the Republican Women’s Club in Wheeling, West Virginia (Feb. 9, 1950), [historymatters.gmu.edu](http://historymatters.gmu.edu).

160. For further exploration of the “cult of masculine toughness” and its influence on American politics, see K. A. Cuordileone, *‘Politics in an Age of Anxiety’: Cold War Political Culture and the Crisis in American Masculinity, 1949-1960*, 87 J. AM. HIST. 515 (2000).

161. Historian Miriam Reumann highlights the ways in which homosexuality “served as a signifier for sexual abandon, mirroring broader concerns about American character.” MIRIAM G. REUMANN, *AMERICAN SEXUAL CHARACTER: SEX, GENDER, AND NATIONAL IDENTITY IN THE KINSEY REPORTS* 188 (2005).

162. Margot Canaday provides a theoretical treatment of the salience of sexuality in law and policy. She explores the emergence of a “legal regime of heterosexuality” between 1930 and 1960, under which heterosexuality became a “regulatory system.” In her view, “the federal government would come to be involved in both punishing homosexual deviance and rewarding heterosexual marriage in previously unprecedented ways.” Margot Canaday, *Heterosexuality as a Legal Regime*, in 3 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER* 443-49 (Michael Grossberg & Christopher Tomlins eds., 2008).



Moscow—outlined a strategy of containing the Soviet threat, he presented the Soviet Union as both politically and sexually menacing. Kennan analogized the Soviet government to a rapist applying “insistent, unceasing pressure for penetration and command” upon the West.<sup>163</sup> Pervasive concerns about sexuality and masculinity, combined with the centrality of homosexuality in these debates and the more general fear of communism, created a link between anti-communist and anti-homosexual ideologies. Conservative attitudes held that the nation had an obligation to fight threats to sexual orthodoxy as vigorously as it fought communism.<sup>164</sup>

The connections between anti-communism and anti-homosexuality manifested in the issue of obscenity. Conservative politicians perceived obscene content as a source of moral decay that weakened the United States in its battle against communism, a battle over character as well as ideology. Political leaders at all levels—from state governments to the United States Congress—gave speeches, held hearings, and passed legislation targeting obscenity such as violent comic books and pornography. Obscenity law served alongside sodomy laws and other policies to support the accepted sexual order, becoming a part of the Cold War project to reinforce the nuclear family as the base of American society.<sup>165</sup> The primacy of the regulation of obscenity in Cold War America would have significant consequences for homosexual organizations and publications like *ONE*.

Popular culture reflected the deep connections being drawn between communism and homosexuality. Scientific and literary writing asserted that gay individuals themselves were dangers to national security. In 1951, Jack Lait and Lee Mortimer published *Washington Confidential*, an inside look at the underworlds of the nation’s capital. The book included a chapter on gays in the city; the authors estimated that there were “at least 6,000 homosexuals on the government payroll,” referring to gays as “fairies,” “fags,” and “the pervert species.”<sup>166</sup> Lait and Mortimer advanced the notion that gays were security risks. “Homosexuals are vulnerable,” they wrote.<sup>167</sup> “They can be blackmailed or influenced by sex more deeply

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163. For further analysis of Kennan’s diplomatic language through the lens of gender and sexuality, see Frank Costigliola, *‘Unceasing Pressure for Penetration’: Gender, Pathology, and Emotion in George Kennan’s Formation of the Cold War*, 83 J. AM. HIST. 1309 (1997).

164. Historian Robert Dean has shown how the federal government, and particularly the American foreign policy apparatus, embraced the fight against perversion as an extension of the battle against communism. ROBERT D. DEAN, *IMPERIAL BROTHERHOOD: GENDER AND THE MAKING OF COLD WAR FOREIGN POLICY* 66-67 (2001).

165. In addition to these observations, historian Whitney Strub also draws attention to the ways in which homosexuality served as an “internal, domestic counterpart” to communism, and how the debates over sexuality often amounted to “moral panic.” STRUB, *PERVERSION FOR PROFIT*, *supra* note 14, at 13–14.

166. JACK LAIT & LEE MORTIMER, *WASHINGTON CONFIDENTIAL* 95 (1951).

167. *Id.*

than conventional citizens.”<sup>168</sup>

Such ideas proved influential. In the first three weeks of print, 150,000 copies of *Washington Confidential* sold, pushing it to number one on the *New York Times* bestseller list. The release of a paperback edition in 1952 propelled sales into the millions.<sup>169</sup> As the decade progressed, portrayals of gays as dangerous did not fade.<sup>170</sup> In 1957, psychiatrist Arthur Guy Mathews published *Is Homosexuality a Menace?* Mathews argued, “It is a recognized fact that many nations use homosexuals as spies and undercover agents who are trained to undermine governments from within.”<sup>171</sup>

Anti-homosexual ideas entered national politics through federal policy decisions. Politicians drew connections between communist subversion and sexual perversion, linking the two as an intertwined force that threatened American character and security. In April 1950, two months after McCarthy’s “Enemies Within” speech, Republican National Committee Chairman Guy George Gabrielson stressed, “[p]erhaps as dangerous as the actual communists . . . [are] the sexual perverts who have infiltrated our Government in recent years.”<sup>172</sup> Such attitudes about homosexuality were not limited to Republicans; Democrats concurred that gays presented clear dangers. Millard Tydings, a Democratic Senator from Maryland and critic of McCarthy, characterized homosexuality in clinical terms, claiming, “[o]f course it is a security risk to have in the Government service people who are afflicted with that disease.”<sup>173</sup>

The fear of communist insurgency and the mainstream understanding of sexual deviants as dangerous created the conditions under which the federal government actively persecuted gays and lesbians. Beginning in the late 1940s, government agencies initiated investigations into and mass firings of gay employees, a period that historian David K. Johnson calls the Lavender Scare. Anti-gay prejudice was not merely a conservative rhetorical tool. It manifested in government reports and policies that drove the Lavender Scare.<sup>174</sup>

In December 1950, the Investigations Subcommittee of the Senate Committee on Expenditures in the Executive Departments issued a report titled, “Employment of Homosexuals and Other Sex Perverts in Government.”<sup>175</sup> The Subcommittee, chaired by North Carolina Democrat

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168. *Id.*

169. JOHNSON, *supra* note 153, at 91.

170. John D’Emilio confirms this, writing, “The homosexual menace continued as a theme of American political culture throughout the McCarthy era.” D’EMILIO, *supra* note 6, at 43.

171. ARTHUR GUY MATHEWS, *IS HOMOSEXUALITY A MENACE?* 8 (1957).

172. *Perverts Called Government Peril*, N.Y. TIMES, Apr. 18, 1950.

173. JOHNSON, *supra* note 153, at 27.

174. Johnson defines the Lavender Scare as “a fear that homosexuals posed a threat to national security and needed to be systematically removed from federal government.” *Id.* at 9–10.

175. S. Res. 280, 81st Cong. (1950) (Employment of Homosexuals and Other Sex Perverts in

Clyde Hoey, took for granted that homosexuals should not have been employed by the United States. In its introduction, the document—known as the Hoey Report—counted among its objectives to explain why the employment of “homosexuals and other sex perverts in Government” was “undesirable.”<sup>176</sup> The Subcommittee found that homosexuals were generally “unsuitable” for government work because “those who engage in overt acts of perversion lack the emotional stability of normal persons.” This reasoning played into the understanding of gays as security risks because, in the Hoey Report’s evaluation, “the weakness of their moral fiber . . . makes them susceptible to the blandishments of the foreign espionage agent.”<sup>177</sup> The Report conflated personal behavior with professional capacity on a moral level, concluding, “[t]here is no place in the United States Government for persons who violate the laws or the accepted standards of morality, or who otherwise bring disrepute to the Federal service by infamous or scandalous personal conduct.”<sup>178</sup>

While individual agencies had been dismissing gay employees for several years, the Lavender Scare reached the White House in 1953. On April 27, Dwight Eisenhower signed Executive Order 10450, which created new guidelines for investigating security risks within the federal government. It included broad language through which homosexuality became a just cause for dismissal from federal agencies. The order classified “notoriously disgraceful conduct . . . or sexual perversion” as inconsistent with national security.<sup>179</sup>

As public officials crafted policies that targeted gays and lesbians, the federal apparatus also repressed homophile organizations in subtler ways. Beginning in the late 1930s, the FBI collected information on gay groups and individuals, institutionalizing the project in 1950 as the Sex Deviates Program and File.<sup>180</sup> It was this program that begot the Bureau’s investigation into ONE, Inc. and the Mattachine Society. The operation was codenamed COMINFIL, a portmanteau of Communist Infiltration; the project started as an effort to determine whether communists or other subversives had infiltrated ONE and Mattachine. COMINFIL evolved to focus primarily on obscenity, investigating the content of *ONE* and the character of its editors in an effort to silence the homophile organizations.<sup>181</sup> Gay activists became aware and paranoid of federal

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Government: Interim Report Submitted to the Committee on Expenditures in the Executive Departments by Its Subcommittee on Investigations).

176. *Id.*

177. *Id.*

178. *Id.*

179. Exec. Order No. 10450 (1953) (Security Requirements for Government Employees).

180. DOUGLAS M. CHARLES, HOOVER’S WAR ON GAYS: EXPOSING THE FBI’S “SEX DEVIATES” PROGRAM 37 (2015).

181. Douglas M. Charles, *From Subversion to Obscenity: The FBI’s Investigations of the Early Homophile Movement in the United States, 1953-1958*, 19 J. HIST. SEXUALITY 263 (2010).

surveillance. Martin Block, a founding editor of *ONE*, told an interviewer in 1993, “[y]ou always felt that Mr. Hoover or one of his men was right behind you everything you did and surely even in our group somebody would be turning us in to Hoover. It’s ridiculous but it’s true and it’s the way you lived.”<sup>182</sup>

While the FBI’s investigations of *ONE* may have shifted from a focus on subversion to one on obscenity, the two issues were deeply connected. Conservatives viewed obscene content as a tool through which subversive elements undermined American morality and national security. Indeed, in between the two phases, federal intelligence agencies maintained active interest in *ONE*. In March of 1954, Air Force internal investigators requested that the FBI monitor the mail sent to *ONE*’s headquarters. Air Force officials explained that their interest was rooted in “the assumption that any military personnel connected with the group would be homosexuals and subject to discharge from the Air Force.”<sup>183</sup> Although the FBI declined to cooperate with the Air Force, it continued to collect and review copies of *ONE* throughout 1954.

#### *B. Our Purpose Is Not to Incite: The Challenges of Self-Censorship*

The anti-homosexual policies pursued by the federal government influenced the work of homophile organizations, including the Mattachine Society and *ONE Magazine*. When Harry Hay founded the Mattachine Society, he did so largely in response to the mass firings of homosexual civil servants. Hay later explained that he sensed that gays were a natural target of government oppression. He believed that “the government was going to look for a new enemy, a new scapegoat,” reasoning:

Blacks were beginning to organize and the horror of the Holocaust was too recent to put the Jews in this position. The natural scapegoat would be us, the Queers. They were the one group of disenfranchised who did not even know they were a group because they had never formed as a group.<sup>184</sup>

In 1950, prior to the founding of Mattachine, Hay wrote a statement of purpose for an unnamed homosexual rights organization. He directly addressed the plight of gay federal employees, highlighting “the government indictment against Androgynous Civil Servants.”<sup>185</sup>

*ONE* directly addressed the Lavender Scare as early as 1953, its first

182. Interview by Rodger Streitmatter with Martin Block, *supra* note 57.

183. Letter from Name Redacted to A.H. Belmont (Mar. 18, 1954), FBI MATTACHINE FILE, *supra* note 17, pt. 2 at 2.

184. HARRY HAY, RADICALLY GAY: GAY LIBERATION IN THE WORDS OF ITS FOUNDER 60-63 (1996).

185. Hay used the term “androgynous” as an alternative to “homosexual” because the latter carried a clinical connotation. For similar reasons, gay groups eventually adopted the term “homophile.” *Id.*

year of publication. A number of articles focused on the wrongful association between homosexuality and communism and the dismissals of gay government workers. In April 1953, *ONE* alluded to the loyalty inquiries made by congressional committees in an article titled, “Are You Now or Have You Ever Been a Homosexual?” The article—which was collected by FBI agents and inserted into the Bureau’s file on ONE, Inc. on May 21, 1953—was a reprint of a report delivered at a Mattachine Society conference.<sup>186</sup> The report referenced the “purge of the State Department in the late summer and fall of 1949 . . . a purge which spread to the Agriculture Department, the Departments of the Interior, of Labor, and of Commerce.”<sup>187</sup> The article railed against the argument that homosexuals constituted “basic security risks,” calling such reasoning “horrifying in its complete lack of justification other than fantasy and hysteria.”<sup>188</sup> In May 1953, days after Eisenhower signed Executive Order 10450, *ONE* ran a piece criticizing the policy titled, “You Are a Public Enemy.” The article warned that the new order allowed the government “to hound and harry not only every homosexual in government and in basic industry, but all his friends, acquaintances, and associates.”<sup>189</sup>

Other pieces in the magazine focused on broad political ideologies in addition to specific policies. In September 1953, a contributor to *ONE* named Harry Johnson discussed the linkages between sexuality and subversion. In his essay, Johnson condemned the entire political culture surrounding the Lavender Scare:

The thinking . . . runs like this: communists are bad. Homosexuals are bad. Therefore communists are homosexuals. Illogical? Of course, but who gives a thought to logic when writing against homosexuals or communists? We live in the age of McCarthyism, and to question even the *logic* of anti-communist or anti-homosexual arguments is to commit treason.<sup>190</sup>

Beyond covering the daily concerns of gays and lesbians, from bar raids to entrapment, *ONE* focused on the broader political and institutional problems that homosexuals faced. These problems did not only influence the content in the pages of *ONE*, but also the strategic decisions of the magazine’s staff.

The increasing hostility of the federal government led *ONE* to impose

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186. FBI agents paid particular attention to the articles *ONE* published about the Bureau and about federal purges of homosexuals. These articles sometimes implied, or outright asserted, the presence of gay individuals at high levels of government, including inside the FBI. As a result, agents collected these articles as evidence that *ONE*’s staff had knowledge of specific gays and lesbians serving in the federal government.

187. *Are You Now or Have You Ever Been a Homosexual?*, *ONE*, Apr. 1953.

188. *Id.*

189. *You Are a Public Enemy*, *ONE*, May 1953.

190. Harry Johnson, *And a Red Too . . .*, *ONE*, Sept. 1953.

stricter limitations on itself in order to avoid conflict with a state that was all too willing to repress homosexuals. In doing so, *ONE*'s staff likely looked to other media industries that developed self-censorship guidelines to avoid governmental interference. Publishing companies treated controversial texts with wariness. They were concerned with the legal issues associated with obscenity as well as the negative social and commercial effects of printing an obscene work.<sup>191</sup> Hollywood studios adopted a set of internal guidelines—the Motion Picture Production Code—in 1930. The Code represented an effort to bring films in line with accepted moral norms.<sup>192</sup> In 1934, the studios established the Production Code Administration, a state-like entity that enforced the Code. Joseph Breen, the leader of the PCA, understood the Administration as a “private judicial tribunal,” the decisions of which carried “the force of law for the industry.”<sup>193</sup> Although the Production Code lost power when some filmmakers began releasing their features without approval from the PCA, it dictated the standards for studio films in the United States into the 1950s and remained intact until 1968.<sup>194</sup>

Other forms of creative self-censorship remained strong in the 1950s. Concerns about the moral health of children in the postwar years led to attacks on violent content in comic books. Civic and religious groups called for boycotts of inappropriate comics. Following the examples of publishing houses and film studios, the Comics Magazine Association of America adopted an internal set of standards in October 1954, commonly referred to as the Comics Code. While violence was the initial concern of many critics, others were offended by depictions of religion, marriage, and sex, leading the CMAA to develop a broad self-regulation scheme. Influenced by the sexual mores of the time, the Comics Code implicitly addressed homosexuality. An item in the Code read, “Sex perversion or any inference to same is strictly forbidden.”<sup>195</sup>

There is no doubt that the publishing and film industries faced legal threats that influenced their internal regulatory guidelines. Customs agents stopped the importation of controversial novels like *Ulysses*, leading to prolonged censorship battles, while state censor boards banned racy films

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191. Vladimir Nabokov, for instance, sent the manuscript for *Lolita* to at least five publishers who rejected it. One explained that although it was “literature of the highest order,” the company feared “possible repercussions both for the publisher and the author.” De Grazia, *supra* note 100, at 244–55.

192. Stephen Vaughn, *Morality and Entertainment: The Origins of the Motion Picture Production Code*, 77 J. AM. HIST. 39 (1990).

193. LEONARD J. LEF, *THE DAME IN THE KIMONO: HOLLYWOOD, CENSORSHIP, AND THE PRODUCTION CODE* xvi (2001).

194. For further discussion of Hollywood censorship, including before the Production Code, see LEE GRIEVESON, *POLICING CINEMA: MOVIES AND CENSORSHIP IN EARLY-TWENTIETH-CENTURY AMERICA* (2004); THOMAS PATRICK DOHERTY, *HOLLYWOOD'S CENSOR: JOSEPH I. BREEN & THE PRODUCTION CODE ADMINISTRATION* (2007).

195. AMY KISTE NYBERG, *SEAL OF APPROVAL: THE HISTORY OF THE COMICS CODE* 168 (1998).

released without the approval of the Production Code Administration.<sup>196</sup> Indeed, the interference of governmental entities was made possible by the expansion of state power over the course of the twentieth century, allowing the state to unilaterally exert pressure rather than rely on partnerships with private anti-vice groups.<sup>197</sup> However, after clearing the hurdles presented by both internal guidelines and state censorship authorities, these books and films often proved to be immensely popular. *ONE*, in contrast, was a publication created by and for a persecuted minority. Its lack of mainstream appeal meant that self-regulation was a necessity, and that censorship by the state presented a threat to the magazine's survival.

*ONE*'s experiment with self-censorship was, from the start, a difficult project to execute. Beginning in mid-1954, discussions at *ONE*'s staff meetings suggested that the editors hoped to exclude provocative content, even if this desire did not comport with the magazine's practice. On April 7, 1954, an editorial meeting included conversation about appropriate types of articles. The editorial board concluded, "All fiction must be carefully screened. It can contain no descriptions that are obviously provocative [sic]."<sup>198</sup> In attendance at this meeting was not just the editorial board, but also Eric Julber, the attorney who began working with *ONE* more than six months earlier.<sup>199</sup>

The magazine's staff attempted to relay these guidelines directly to writers. In an April 13, 1954 letter to a frequent contributor to *ONE* named James Barr, editor Ben Tabor requested a degree of self-censorship:

Articles dealing with the dignity of homosexuality must be very subtle [sic]. Any fiction at all is difficult to justify from a legal point of view. Humor and satire [sic] is O.K.—as long as it cannot be construed as encouraging any activity among homosexuals. Outrageous? Sure. But these are the legal facts of life for *ONE*, Inc.<sup>200</sup>

*ONE*'s editors did not merely seek to self-censor by genre; they felt as though discussion of certain subjects in relation to homosexuality, such as "dignity," could be considered obscene. However, these guidelines were not always followed, in letter or spirit. The May 1954 issue, for example,

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196. *Ulysses* was the focus of a number of censorship trials, beginning in 1922. In 1933, a federal district court vindicated the novel in *United States v. One Book Called Ulysses*, a ruling that was affirmed on appeal. See PAUL VANDERHAM, JAMES JOYCE AND CENSORSHIP: THE TRIALS OF ULYSSES (1998).

197. WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003 82 (2008).

198. Minutes of Editorial Meeting (Apr. 7, 1954) (on file with ONE Archives, ONE, Inc. Records, Box 2, Folder 1).

199. *Id.*

200. Letter from Ben Tabor to James Barr (Apr. 13, 1954) (on file with ONE Archives, James Barr Papers, Box 1, Folder 15).

included an essay by Arthur B. Krell titled, “We Need a Great Literature,” which called for an expansion of fiction by and for gay Americans. Such literature would have provided a “tribal wisdom” for homosexuals. The concept cast aside the notion that homosexuality was treatable, instead calling for media that would “guide the homosexual toward a good life.”<sup>201</sup> By publishing Krell’s piece, *ONE* engaged in a precarious balance: the article itself might not have been obscene, but it called for the proliferation of literature that could be classified as such.

Over the next several months, articles in *ONE* showcased the provocative impulse of the magazine. In June 1954, *ONE* ran an article critiquing Christian views on homosexuality, and specifically the suggestion that homosexual acts were unnatural. The author wrote, “If sex-acts are natural, how is nature being offended? There is neither rhyme nor reason to the many contradictory explanations as to what is sexually normal and abnormal.”<sup>202</sup> While the essay did not describe the “sex-acts” that it referenced, it opined that contemporary moral norms were flawed, and that to be gay was not necessarily to be abnormal or immoral. Gesturing towards acceptance of homosexuality, a poem at the end of the issue suggested pride in sexual difference: “there’ll be a celebration of our birth/that we were born/but not as others were.”<sup>203</sup> The July 1954 magazine included a fiction piece in which a female narrator recognizes the “joy” and “happiness” that her former boyfriend achieves through a relationship with a man.<sup>204</sup> Like other essays and stories in *ONE*, the piece did not include overtly sexual language, but it did suggest the legitimacy of a same-sex relationship.

*ONE*’s editors attempted to follow their self-regulatory guidelines, sometimes rejecting pieces of writing on legal rather than editorial grounds. Beginning in August 1954, editor Jim Kepner sent back submissions to writers along with information about why the magazine could not publish such work. On August 9, Kepner wrote to Allen Merrill, who had offered a poem to *ONE*, and explained, “Most of the poems we turn down pass beyond the strict limits of propriety which our lawyer demands.” Kepner suggested that future submissions avoid “strong elements of sensualism or suggestivity [sic].”<sup>205</sup> A similar letter from Kepner, sent on August 29 to a contributor, described *ONE*’s conservative

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201. Arthur B. Krell, *We Need a Great Literature*, *ONE*, May 1954.

202. Wallace David, *A Minister and His Conscience*, *ONE*, June 1954.

203. Elliot Cross, *Then We Shall Celebrate . . .*, *ONE*, June 1954.

204. Jody Shotwell, *The Triangle*, *ONE*, July 1954.

205. Lyn Pedersen to Allen Merrill (Aug. 9, 1954) (on file with ONE Archives, ONE, Inc. Records, Box 42, Folder 2). Kepner often wrote under the pseudonym Lyn Pedersen. The editors often had several pseudonyms each, part of an attempt to project an artificially large base of contributors. In cases of pseudonymously-written articles and letters, I use the pseudonym in citations and, when relevant, identify the writer in text.



approach to avoiding legal conflict: “Although we may disagree with certain current laws, our purpose is not to incite illegal acts or arrangements. Our lawyer scans every item we print for anything that might be interpreted as lewd.”<sup>206</sup>

In September, this pattern continued. On September 7, Kepner wrote a letter to David Ricks in which he explained that Ricks’ short story submission was received well by “our entire editorial board,” but “our lawyer absolutely vetoed it.”<sup>207</sup> Kepner explained that the magazine’s continued existence and overall mission were more important than the publication of individual pieces, writing: “It’s in the nature of a magazine like ours to have to be rather more circumspect than other publications, if we want a fair chance to continue publication at all.”<sup>208</sup> He explained that “in order to avoid the accusation” of obscenity, “we have to bend over backward” to exclude “sensual elements and sexual references.”<sup>209</sup> Kepner reiterated *ONE*’s conviction that these acts of self-censorship were in service of a larger goal: “This doesn’t mean we agree that such censorship is justified; it just means that we think a magazine is needed in which homosexuality can be discussed fairly, and we feel that this is the only way we can get it done.”<sup>210</sup>

By October 1954, conversations about legal restrictions became regular parts of *ONE*’s board meetings.<sup>211</sup> During a meeting on October 15, Julber presented his legal report. The magazine’s staff had become aware of the letter that Alexander Wiley sent to the Postmaster General six months earlier.<sup>212</sup> Julber was unconcerned, assuring the board that federal postal inspectors had affirmed “*ONE*’s current legal fitness for circulation as a medium for intellectual and scientific approaches to the problems of homosexuality.”<sup>213</sup> Julber was convinced that if *ONE* continued to follow the guidelines that he had developed, the magazine faced no danger from federal censors. However, he emphasized that such standards could not be forgotten and advocated for “a continuing, and perhaps increasing

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206. Lyn Pedersen to Fred Palmer (Aug. 29 1954) (on file with ONE Archives, ONE, Inc. Records, Box 42, Folder 2).

207. Lyn Pedersen to David Ricks (Sept. 7, 1954) (on file with ONE Archives, ONE, Inc. Records, Box 42, Folder 2).

208. *Id.*

209. *Id.*

210. *Id.*

211. In his capacity as the magazine’s counsel, Julber had to approve potentially controversial “special reports.” In the case of one such report on “Transexuality,” Julber advised that it “be kept to a strictly scientific and factual tone.” Minutes of Corporation and Staff Meeting (Oct. 15, 1954) (on file with ONE Archives, ONE, Inc. Records, Box 2, Folder 1).

212. It is not entirely clear how *ONE* learned about Wiley’s letter. In 1953, Julber was in contact with the postal officials in Washington, so it is possible that the staff learned about the letter directly from the Post Office.

213. *Id.*

strictness in matters of legal self-censorship.”<sup>214</sup> In crafting a scheme of internal regulations, *ONE* sought to balance a perceived necessity to self-censor and a desire to speak out against an oppressive society. Ultimately, *ONE*’s attempts at self-censorship failed to keep out controversial content, and the magazine’s staff quickly learned the consequences.

*C. Some Legal Problems: The October 1954 Issue*

In 1954, *ONE* reached its peak circulation for the decade; nearly 1,500 subscribers received the magazine directly, and thousands of additional readers picked it up from newsstands. In total, by the end of the year, *ONE* distributed almost 60,000 copies.<sup>215</sup> In October of its most successful year, *ONE* released a new issue featuring two essays on law and politics, a short fiction story, a poem, and a six-page set of illustrations of humanoid animals titled “The Gay Menagerie.” After sending out the magazine for distribution, the editors met in mid-October, discussing the next month’s issue and how to strengthen their existing legal guidelines. What the staff did not know was that postal inspectors in Los Angeles had already reviewed the October issue and found it obscene, sending it to Washington for final assessment by the central Post Office Department. On October 20, Los Angeles Postmaster Otto K. Olesen sent a letter to *ONE*, stating that all copies of the issue would be held by the Post Office until further notice from Washington.<sup>216</sup>

On Friday, November 12, just after eight o’clock in the evening, *ONE*’s corporation met again for its monthly meeting. The largest single agenda item was the report of counsel, given by Eric Julber, about “the major events of the Post Office action in October.”<sup>217</sup> Julber had spoken to federal officials who gave *ONE* fifteen days to file a brief demonstrating that the October issue was not obscene before they made a final determination. Having already weathered a postal seizure in August 1953, Julber and the rest of the staff were unperturbed. During the meeting, he opined that it was best “to underplay the situation; that the particular issue in question, and the criticisms involved, were not sufficiently important to *ONE* or to homosexuals, to warrant an all-out fight at this time.”<sup>218</sup> His reasoning reflected the sentiment that quotidian issues of civil rights took precedence over abstract forms of discrimination, like the conflation of obscenity and homosexuality. Having already prepared the magazine’s brief, Julber concluded his report, and the staff moved on to the planning

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214. *Id.*

215. *Circulation Report*, ONE Confidential 3, 4 n.1A (1958).

216. Minutes of Corporation and Staff Meeting (Nov. 12, 1954) (on file with ONE Archives, ONE, Inc. Records, Box 2, Folder 2).

217. *Id.*

218. *Id.*

of the next month's magazine.

From his conversation with federal postal inspectors, Julber learned that the Post Office objected to two stories from the October issue. The first, "Sappho Remembered," was four pages of fiction written by frequent contributor James Barr under the pen name Jane Dahr.<sup>219</sup> The story centered on the romantic attraction between two women: Pavia, a nightclub singer, and Jill, Pavia's twenty-year-old secretary. The beginning of the article included several references to physical contact between the two. While they ride together in the back seat of a car, "Pavia pressed her knee conspiratorily [sic] against Jill's."<sup>220</sup> When they leave the car and enter a hotel lobby, "Pavia instinctively took Jill's elbow."<sup>221</sup> After they enter a hotel room together, Pavia "gently drew the girl to her."<sup>222</sup> In a moment of private intimacy, Pavia then "touched the delicate pulse beneath the light golden hair on the child-like temple."<sup>223</sup> In these early moments, Barr established the physical and emotional connection between the two characters, showing their romantic dynamic to be similar to traditionally accepted heterosexual relationships.

The tension of the story emerges as Jill must choose between a relationship with Pavia and an engagement to her boyfriend Jerry. Without delving into political or legal issues, Barr foregrounded some of the social problems facing homosexual couples. Considering what Jerry, "a nice young man," can offer Jill, Pavia reflects, "he would give Jill a good life with healthy babies and her share of bliss and mediocrity. Could I do more, Pavia thought with a sharp ache in her heart."<sup>224</sup>

At the conclusion of the story, Jill decides to pursue her relationship with Pavia over a potential marriage to Jerry. She tells Pavia, "I don't love him . . . like I do you!"<sup>225</sup> "Sappho Remembered" not only demonstrated how gays and lesbians pursued relationships on the grounds of romance rather than promiscuity. In crafting this ending, Barr also asserted that homosexual relationships were legitimate alternatives to heterosexual ones, capable of providing love and happiness.

The second piece to which postal inspectors objected was a poem entitled, "Lord Samuel and Lord Montagu." The two-page, anonymously-written ballad recounts the high-profile arrests of several British men in early 1954 on sodomy charges. Among those arrested were journalist

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219. Several women did write for and edit *ONE*, but gay men made up the overwhelming majority of the magazine's staff. The editors actively sought out the "feminine viewpoint" in their content, and men wrote under female pseudonyms to better appeal to women readers.

220. Jane Dahr, *Sappho Remembered*, *ONE*, Oct. 1954.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

Peter Wildeblood and the Third Baron Montagu of Beaulieu, a member of the House of Lords.<sup>226</sup> The poem contained innuendos, referring to Baron Montagu and “His ins and outs with various Scouts.”<sup>227</sup> The author alluded to the history of sodomy laws, referencing their origins “In good Victoria’s glorious days” and the famous conviction of Oscar Wilde under such statutes: “Were things perverse a great deal worse?/Is Wildeblood worse than Wilde?”<sup>228</sup>

Though the poem included provocative moments, it apparently passed the magazine’s internal guidelines with respect to self-censorship. The author suggested fluidity between genders, writing, “some boys WILL be girls,” and mentioning “King Elizabeth” and “Queen James.”<sup>229</sup> As a whole, however, “Lord Samuel and Lord Montagu” was undeniably political in nature. It warned homosexual men of the possibilities of entrapment and arrest. The penultimate stanza acknowledged the practice of some gays to seek out sexual partners in predetermined public places: “And if you wish to Pick a Dilly/When you’re strolling out at night,/Just make sure it’s not a ‘Lily’/Or a male transvestite.”<sup>230</sup> Because police officers knew that public bathrooms could serve as meeting locations for gay men, the final line cautioned, “AVOID THE PUBLIC ‘GENTS’!”<sup>231</sup>

Although not targeted by postal inspectors, the cover story of the October issue ironically focused on “The Law of Mailable Material,” and was written by Julber. The essay outlined the history of obscenity law and how *ONE* navigated the balance between free speech and self-censorship. Julber referenced the magazine’s policies against certain types of content, such as “Fiction with too much physical contact between characters.”<sup>232</sup> He pointed out that there existed schools of legal thought that would find *ONE* inherently illegal because of the illegality of homosexual acts, making *ONE* “a magazine for criminals, their edification and guidance.”<sup>233</sup> However, he dismissed this viewpoint and offered a hopeful conclusion that justified *ONE*’s internal regulations:

The path is difficult and requires great judgment and responsibility. But if *ONE*, and the writers and viewpoints it represents, can become an accepted institution in American literary life (and this seems to be happening), it will have served a great and important purpose for its readers and for the cause of freedom of speech; for in its own way,

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226. Wildeblood published a book detailing the ordeal, bringing publicity to the case and helping to initiate campaigns for reform of British laws concerning homosexuality. See PETER WILDEBLOOD, *AGAINST THE LAW* (1956)

227. *Lord Samuel and Lord Montagu*, *ONE*, October 1954.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. Eric Julber, *The Law of Mailable Material*, *ONE*, Oct. 1954.

233. *Id.*

ONE is helping broaden the areas of free expression in this country.<sup>234</sup>

Julber described lofty ideals that the magazine strived to uphold, but misread the social and political moment as one in which legal and social acceptance for publications like *ONE* was growing. Further, while the Post Office did not explicitly target Julber's essay, it is possible that his article provoked action by postal inspectors. The cover of the October issue advertised the piece with a simple design. Images of leaves floated on the right side of the magazine, indicating the start of autumn, while the left side featured a simple quote: "You Can't Print It!"<sup>235</sup>

When it became clear that the Post Office would not release the October issue, *ONE*'s staff contemplated action. Landmark cases during the 1950s demonstrated that the federal courts provided a potential path of relief for victims of discrimination.<sup>236</sup> While many of *ONE*'s officers favored legal action against the Post Office, the magazine's financial state made litigation a difficult approach. After allocating money for publishing fees, the organization had limited funds for other pursuits. In February 1955, *ONE, Inc.* had twenty-three dollars and twenty-seven cents on hand, with another three dollars and sixty-four cents in the bank.<sup>237</sup> Although Julber agreed to handle the Post Office case pro-bono, the magazine still needed to pay for legal expenses, such as printing and filing fees. As *ONE* raised money for the case, Julber prepared the paperwork necessary to initiate a lawsuit against the Los Angeles Postmaster, completing it by March 1955. Lacking funds to see the process through, *ONE* delayed filing the suit until September.<sup>238</sup>

The United States District Court for the Southern District of California agreed to hear the case, with Judge Thurmond Clarke—a recent Eisenhower appointee—presiding. On January 16, 1956, Julber and several Assistant United States Attorneys for the Southern District arrived at the United States Court House on North Spring Street, adjacent to City Hall in downtown Los Angeles. The federal building included, in addition to courtrooms, a post office on the first floor.<sup>239</sup>

Presenting *ONE*'s case, Julber argued that the Post Office's seizure of the October 1954 issue was an inappropriate application of the Comstock Act. He addressed the specific articles in question, defending "Sappho Remembered" as a story that raised questions and themes that were

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234. *Id.*

235. *Id.*

236. *See, e.g.,* *Brown v. Board of Education*, 347 U.S. 483 (1954); *Hernandez v. Texas*, 347 U.S. 475 (1954).

237. Minutes of Corporation and Staff Meeting (Feb. 11, 1955) (on file with ONE Archives, ONE, Inc. Records, Box 2, Folder 3).

238. WHITE, *supra* note 59, at 71.

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“common and accepted in modern literature.”<sup>240</sup> Addressing the fact that the piece was indeed a love story between two women, Julber refuted the notion that discussions of homosexual relationships were necessarily inappropriate: “The statement that a woman loves another woman above all else is not, per se, obscene.”<sup>241</sup> Julber’s overarching argument held that the Post Office would have to consider *ONE* in its entirety rather than scanning individual articles or passages for obscenity, as such an approach would be a denial of due process. He offered the Court a defense of *ONE*’s mission, explaining, “The dominant tone of the magazine is one of sincerity. It is an attempt to grapple with a social problem of the deepest order in terms comprehensible and palatable to laymen.”<sup>242</sup>

Defending the Postmaster, the government rejected Julber’s assertion that *ONE* had to be understood as a project larger than the sum of its parts, and instead analyzed individual articles through the lens of obscenity. The defense targeted “Sappho Remembered,” calling it a story “calculated to excite lewd thoughts and sensual desires in the sexual deviate reading it.”<sup>243</sup> The government further contested the idea that *ONE*’s fictional stories served any social or political purposes beyond the stimulation of readers. They argued, “It is difficult to see what other purpose this story could serve.”<sup>244</sup> Through this argument, the United States not only offered an interpretation of particular articles as obscene; the government portrayed *ONE*’s readership as deviant, a class undeserving of a magazine of their own.

As *ONE*’s staff awaited a decision from the District Court, the organization experienced a number of internal shifts. The previous year had been one of changes to both the personnel and focus of *ONE*, Inc. In March 1954, Dale Jennings resigned his position in the magazine under pressure from other staff members, leaving behind no letter of resignation to explain his decision.<sup>245</sup> In June of 1954, Jim Kepner joined *ONE* as the magazine’s editorial secretary, only to depart in February 1955 and rejoin again the following year. Despite changes to the staff, Eric Julber continued to serve as *ONE*’s counsel, providing consistency in the magazine’s efforts against the Post Office.

*ONE*, Inc. also began to explore operations beyond publication. In January 1955, *ONE* held its first Midwinter Institute, an annual conference

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240. Transcripts of oral arguments from the case do not exist. These quotes are taken from *ONE*’s brief, as Julber’s oral arguments are presumed to echo the same points articulated in the brief. Brief of Plaintiff, *One, Inc. v. Otto K. Olesen*, No. Civil 18764-TC (S.D. Cal. 1956).

241. *Id.*

242. *Id.*

243. Brief of Defendant, *One, Inc. v. Olesen*, No. Civil 18764-TC (S.D. Cal. 1956).

244. *Id.*

245. C. Todd White is one of the few scholars who devotes significant attention to *ONE*, Inc., focusing specifically on the internal divisions that developed within the organization. WHITE, *supra* note 59, at 63.

that brought together homophile leaders and social scientists. The Midwinter Institutes morphed into a permanent educational division of the organization called the ONE Institute. The Institute would offer courses in “homophile studies,” a way to study the gay experience through academic subjects like anthropology and sociology.<sup>246</sup> These courses focused on the social experiences of homosexuals, as well as the legal and political problems they faced. At the 1955 Midwinter Institute, Julber delivered a talk entitled “Some Legal Problems.”<sup>247</sup> Although the text of the speech is lost, it came two weeks after he argued on behalf of *ONE* before a federal district court, and as the magazine awaited the judge’s ruling.

All the while, *ONE* faced renewed scrutiny from the FBI. In January 1956, the Bureau anonymously received an issue of *ONE* that included an article alleging the presence of gay agents within the FBI. The Bureau subsequently reopened its investigation of the magazine.<sup>248</sup> In February, agents went to *ONE*’s headquarters at 232 South Hill Street, intending to interview the magazine’s staff members about their knowledge of gay government employees. There, they discovered William Lambert, a dedicated editor of the magazine. Lambert refused to identify himself, informing the agents that they would need to take any questions to *ONE*’s attorney. When they alluded to the possibility that *ONE* had broken the law through the content it published, Lambert assured them, “Our attorney has approved everything that goes into the magazine.”<sup>249</sup>

*ONE*’s assertions that gays secretly occupied important federal roles—and that such individuals were fully capable of serving their country—irked the FBI, so much so that agents treated the magazine with hostility. Before the interviewing agents left, Lambert asked them, “What would you gentlemen say if this had been taped?”<sup>250</sup> In a memo labeled “URGENT,” agents assured their superiors that *ONE*’s office was “poorly equipped with used furniture,” indicating that the publication was a “shoestring operation.”<sup>251</sup> As a result, they reasoned, “It is very doubtful that the interview was recorded.”<sup>252</sup>

FBI agents concluded that Lambert was “strictly no good,” and that “this entire crowd” was of an “unsavory nature.”<sup>253</sup> They decided not to

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246. *Id.* at 74.

247. Invitation to Midwinter Institute (Jan. 12, 1955) (on file with ONE Archives, ONE, Inc. Records, Box 81, Folder 10).

248. Memorandum from M.A. Jones to Louis B. Nichols (Jan. 26, 1956), FBI MATTACHINE FILE, *supra* note 17, pt. 2 at 21.

249. Memorandum from Director to SAC Los Angeles (Feb. 2, 1954), FBI MATTACHINE FILE, *supra* note 17, pt. 2 at 43-45.

250. Memorandum from FBI Los Angeles to Director (Feb. 2, 1956), FBI MATTACHINE FILE, *supra* note 17 pt. 2 at 27-28.

251. *Id.*

252. *Id.*

253. Memorandum from M.A. Jones to Louis B. Nichols (Feb. 7, 1956), FBI MATTACHINE FILE,

pursue further direct contact with Lambert or other *ONE* staff members. Nonetheless, the Bureau opened an investigation into Lambert, Julber, and the magazine as a whole. While *ONE*'s editors anticipated a decision from Judge Clarke, the FBI investigated them, compiling police records, political affiliations, work histories, and excerpts from articles. In laying out the operation to other agents, Associate Director of the FBI Clyde Tolson expressed, "I think we should take on this crowd and make them 'put up or shut up,'" a plan with which J. Edgar Hoover concurred.<sup>254</sup> The Bureau resolved to use federal obscenity law as way to pressure *ONE*, forwarding issues of the magazine to the Department of Justice to be reviewed for obscenity, and carefully following the development of *ONE*'s pending lawsuit.<sup>255</sup>

*D. Nothing More Than Cheap Pornography: One, Inc. v. Olesen in the Lower Courts*

On March 23, Clarke issued a written decision for the Southern District of California in *One, Inc. v. Olesen*, affirming the classification of the October 1954 issue as nonmailable. Clarke wrote that "Sappho Remembered" was obscene because it was "lustfully stimulating to the average homosexual reader," and that "Lord Samuel and Lord Montagu" was indecent "because of the filthy language used in it."<sup>256</sup> The ruling hinged on an understanding of *ONE* not as a magazine with a social or political purpose, but as a publication that attempted to arouse its readers. This interpretation, while in keeping with stereotypes of homosexuals as inherently promiscuous, certainly contrasted with *ONE*'s conscious—if inadequate—efforts to edit sexual content out of the magazine. Clarke ordered *ONE* to pay the Post Office's legal fees, totaling twenty dollars.

The magazine's staff appealed the ruling to the United States Court of Appeals for the Ninth Circuit, based in San Francisco. The FBI continued to pay careful attention to *ONE*'s legal proceedings, as Hoover ordered the head of the Los Angeles office to "have the appeal followed closely" and collect new issues of the magazine.<sup>257</sup> On October 15, 1956, *ONE*'s editors met for a board meeting, during which they learned that a three-judge panel traveling to Los Angeles would hear *ONE*'s case on November 2.<sup>258</sup> Unbeknownst to the court, the hearing was scheduled for the day after the

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*supra* note 17, pt. 2 at 31.

254. Memorandum from M.A. Jones to Louis B. Nichols (Feb. 10, 1956), FBI MATTACHINE FILE, *supra* note 17, pt. 2 at 35.

255. Memorandum from Director to SAC Los Angeles (Feb. 26, 1956), FBI MATTACHINE FILE, *supra* note 17, pt. 2 at 42.

256. *One, Inc. v. Otto K. Olesen*, No. Civil 18764-TC (S.D. Cal. 1956).

257. Memorandum from Director to SAC Los Angeles (May 22, 1956), FBI MATTACHINE FILE, *supra* note 17, pt. 3 at 52.

258. Minutes of Corporation Meeting (Oct. 15, 1956) (on file with ONE Archives, ONE, Inc. Records, Box 2, Folder 3).



publication of *Howl and Other Poems*, a collection by openly gay writer Allen Ginsburg that would spark a censorship battle of its own.<sup>259</sup>

On February 27, 1957, the Ninth Circuit handed down its opinion, in which it rejected *ONE*'s argument and upheld the district court decision. The language of the decision was far more critical than that of the lower court. The panel described "Sappho Remembered" as "nothing more than cheap pornography calculated to promote lesbianism."<sup>260</sup> "Lord Samuel and Lord Montagu" was "of such a vulgar and indecent nature" that it brought on "a feeling of disgust and revulsion," and was as a whole "offensive to the moral sense."<sup>261</sup> The judges entirely rebuffed Julber's claim that *ONE* had been unfairly targeted because it dealt with homosexuality. They found no evidence that *ONE* had been denied equal protection and affirmed the Los Angeles Postmaster's application of the Comstock Act. Perhaps most significantly, the panel refuted the premise that minority groups were entitled to diverging interpretations of the obscenity of a given piece of literature. The judges wrote, "[s]ocial standards are fixed by and for the great majority and not by or for a hardened or weakened minority."<sup>262</sup>

The Ninth Circuit's decision represented a rejection of *ONE*'s project. Not only did the Court uphold postal inspectors' classification of *ONE*'s articles as obscene. It also denied that the magazine had a social function, excluding any possibility that fictional stories about homosexuality were of value to gays and lesbians throughout the country. In no uncertain terms, the Court repudiated the notion that the homosexual minority needed a platform through which to share experiences of oppression and fight for rights.

With unambiguous defeats at the district and appellate levels, *ONE*'s staff faced the difficult decision of whether to appeal to the United States Supreme Court. Unsure of its ability to continue the case financially, the magazine had set up a special fund for donations to its legal activities in January of 1956. During a corporation meeting on March 7, 1957, *ONE*'s editors agreed that further litigation would require external assistance, and they resolved to reach out to legal aid organizations such as the Fund for the Republic and the American Civil Liberties Union.<sup>263</sup> Their letters to

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259. *Howl* spent seven months on shelves at San Francisco bookstore City Lights before police arrested the shop's manager for selling the obscene work. One year later, a California Superior Court judge released the manager and deemed *Howl* not obscene because it had "redeeming social importance." See HOWL ON TRIAL: THE BATTLE FOR FREE EXPRESSION 199 (Bill Morgan & Nancy J. Peters eds., 2006).

260. *One, Inc. v. Otto K. Olesen*, 241 F.2d 772 (9th Cir. 1957).

261. *Id.*

262. *Id.*

263. Minutes of Corporation and Staff Meeting (Mar. 7, 1957) (on file with ONE Archives, ONE, Inc. Records, Box 2, Folder 6).

these groups went unanswered.<sup>264</sup>

On March 18, the magazine's staff met again to make a final determination about their case. Julber advocated for an appeal to the Supreme Court. He acknowledged the possibility of defeat, explaining that a Supreme Court loss would mean a possible decrease in *ONE*'s characteristic boldness: "we would have to pull in our horns a bit and go ahead."<sup>265</sup> However, he also told the staff, "we must work for the right of homosexuals to freedom of speech and press."<sup>266</sup> The case had become not only an effort to vindicate the October 1954 issue, but an endeavor to certify the principle of free speech for gays and lesbians. The lawsuit slowly became a cause in itself. Months earlier, obscenity law was no more than an obstacle standing in the way of *ONE*'s discussion of pressing civil rights issues. As Julber and the editors reckoned with their appellate defeat, they embraced the issue of obscenity as one central to the homophile movement. Closely following the case, subscribers sent small donations to *ONE*'s litigation efforts and passed along words of hope. A reader from Fort Worth, Texas donated twenty-five dollars and wrote, "My prayers (and I mean it literally) and my spirit [are] behind you and our fight for the rights of men. . . . May the Divine Spirit guide and protect you in your efforts to better the life of mankind."<sup>267</sup>

During the March 18 meeting, *ONE*'s staff debated the merits and risks of an appeal to the highest court in the land. At the end of the discussion, one of the editors moved, "that we continue fighting our case to the Supreme Court."<sup>268</sup> The motion passed unanimously, and *ONE* prepared for the final stage of its defining legal battle.

### III. NEWFOUND CAUSE: *ONE* AND THE SUPREME COURT

In the spring of 1957, the editors of *ONE Magazine* turned their attention to the Supreme Court of the United States. They decided to feature *One, Inc. v. Olesen* prominently in the magazine's pages. The March 1957 issue included a sixteen-page piece about the appeal, a rarity for a publication that typically printed essays and stories of just a few pages in length. In the piece, the magazine's editors detailed the

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264. The ACLU proved particularly unhelpful. Not only did the group decline to aid *ONE*, but it also adopted the stance that anti-gay laws did not constitute threats to civil liberties at all. A 1957 policy statement by the Union called homosexuality "socially heretical or deviant." MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 6 (2013).

265. Minutes of Corporation and Staff Meeting (Mar. 18, 1956) (on file with ONE Archives, ONE, Inc. Records, Box 2, Folder 6).

266. *Id.*

267. Letter from Anonymous to Staff of ONE Magazine (Oct. 19, 1957) (on file with ONE Archives, ONE, Inc. Records, Box 90, Folder 5).

268. Memorandum from Director to SAC Los Angeles (May 22, 1956), FBI MATTACHINE FILE, *supra* note 17, pt. 3 at 52.

background of “The Postoffice Case,” reprinting in full the decision by the Ninth Circuit Court of Appeals that upheld the classification of *ONE* as obscene. They defended their decision to appeal against arguments that the magazine ought to move on and focus on current issues:

Although it might be said that continued disputation over a magazine already in the hands of thousands of readers is pretty academic, such is not the case. If *ONE* were to drop the matter now, the postoffice would be in the strong position of having won its case, and perhaps more ready than ever to interfere with mailings.<sup>269</sup>

For *ONE*'s editors, the case was more than a matter of principle. Despite the fact that *ONE* continued to publish freely, its editors believed that the seizure of the October 1954 issue exposed all future issues of the magazine to possible censorship.

This viewpoint informed the loftiness with which *ONE* approached the case. Although “appeals costs are heavy and the course is hazardous,” the editors argued, “the issues at stake are enormous.”<sup>270</sup> To them, the case involved questions of free speech and the broader acceptance of homosexuality in society. The staff contended that the Supreme Court had an opportunity to answer such questions, including, “Will the homophile press be granted the same freedom to publish in the homosexual field as is now enjoyed by the nation’s press as a whole?” and “Will homosexuality come to be regarded as an accepted form of socio-sexual behavior?”<sup>271</sup>

Both in public content and private fundraising appeals, *ONE*'s staff exhibited anxiety over their ability to finance the legal operation. Although Eric Julber, *ONE*'s attorney, was handling the case for no additional charge beyond his yearly retainer, the corporation still needed to pay for legal fees, such as printing and filing. In the March 1957 article, the staff estimated that legal expenses would cost at least two thousand dollars. In a letter written to contributor James Barr on March 30, editor Jim Kepner expressed concern over the funding of the case. Kepner wrote, “We hope to try an appeal to the Supreme Court, but getting the thousand dollars that will cost won’t be easy. So on we merrily go.”<sup>272</sup> Staff members used the legal battle to appeal to subscribers and donors, arguing that any monetary contributions aided in the broader fight for rights. In an April 1957 letter sent to former subscribers, *ONE* requested aid and renewals of subscriptions, connecting them with support for the movement for rights. The letter read, “Subscribe NOW—we need your moral support. Join us and fight for OUR right to publish and YOUR right to

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269. *ONE & the U.S. Postoffice*, *ONE*, March 1957.

270. *Id.*

271. *Id.*

272. Letter from Jim Kepner to James Barr (Mar. 30, 1957) (on file with ONE Archives, Jim Kepner Papers, Box 47, Folder 5).

read.”<sup>273</sup> As the magazine prepared for the final stage of the case, it outwardly framed itself as not simply a publication, but as an institution taking part in activist efforts for homosexual rights.

By the time *ONE* decided to appeal to the Supreme Court, its priorities had shifted. In *ONE*'s early years, the issue of obscenity was an obstacle to be avoided because it threatened to derail the magazine's work on civil rights. As *One, Inc. v. Olesen* became a defining component of the publication's identity, the editors embraced the fight over obscenity, viewing it with a level of importance and urgency they had previously reserved for subjects like entrapment and employment discrimination. In doing so, they waded into a seemingly intractable debate over the meaning of obscenity, aiming to decouple homosexuality and indecency in the eyes of the law.

#### *A. Samuel Roth and the Effort to Redefine Obscenity*

One month after *ONE*'s board voted to appeal the ruling of the Ninth Circuit, two attorneys arrived at the Supreme Court. On April 22, 1957, David von G. Albrecht and O. John Rogge delivered oral arguments on behalf of their client, a sixty-four-year-old publisher named Samuel Roth. In July 1955, a federal grand jury had indicted Roth on twenty-six counts, alleging that the New York City resident had transmitted pornography through the mail in violation of the Comstock Act.<sup>274</sup> Through his publishing business, Roth distributed issues of periodicals that featured naked photographs and articles focused on sex. Roth's trial began on January 3, 1956; after nine days, a judge ordered him to pay a five thousand dollar fine and sentenced him to five years in prison.<sup>275</sup>

The ordeal was not Roth's first encounter with the law or his only moment in the public spotlight. In his early publishing career, Roth envisioned himself as a man of letters, founding and distributing several literary magazines. His circulation, and therefore his advertising revenue, was small, so he began including erotic material in his publications to raise his profile. After filing for bankruptcy in the early 1930s, he increased his output of such content, gaining a reputation as a purveyor of smut. In December 1936, Roth was convicted of distributing obscenity, and served three years in a federal penitentiary in Lewisburg, Pennsylvania.<sup>276</sup>

In the 1940s and 1950s, Roth continued to deal in salacious content,

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273. Letter to Former Subscribers (Apr. 1957) (on file with ONE Archives, ONE, Inc. Records, Box 16, Folder 35).

274. *Publisher Accused in New Indictment*, N.Y. TIMES, July 21, 1955.

275. STRUB, OBSCENITY RULES, *supra* note 14, at 137.

276. JAY A. GERTZMAN, BOOKLEGGERS AND SMUTHOUNDS: THE TRADE IN EROTICA, 1920-1940 269-71 (1999).

provoking debates over the definition of pornography, its degree of harmfulness, and its relationship to obscenity. In June 1955, one month before Roth's federal indictment, the Senate Subcommittee on Juvenile Delinquency subpoenaed Roth and other leading pornographers to testify as witnesses. Roth attempted to defend the benignity of his trade, arguing that "no one under twenty-five could be influenced for the bad" by the content he distributed.<sup>277</sup> In thanking Roth for his testimony, subcommittee chairman Estes Kefauver—a Democrat from Tennessee—condemned the publisher and his activities directly. Kefauver informed Roth, "the kind of slime that you have been sending through the mails is highly deleterious to our young people, and damaging to their morals."<sup>278</sup> After three days of hearings, Kefauver concluded that pornography was a leading contributor to increasing levels of juvenile delinquency.

After his conviction in January 1956, Roth returned to Lewisburg Penitentiary. From his prison cell he appealed the case, successfully reaching the Supreme Court and taking advantage of changing trends in obscenity law scholarship.<sup>279</sup> William Lockhart and Robert McClure—both professors at the University of Minnesota School of Law and two of the country's leading experts on obscenity—advocated for a reconsideration of obscenity statutes. In March 1954, they published a law review article arguing that "constitutional protection for literature attacked as obscene is an open and live issue today," and that "it is essential for this issue to be raised and carried to the Supreme Court in a strong case in order to establish that literature dealing with sex is entitled to the same freedom of expression as literature dealing with any other significant social problem."<sup>280</sup>

In the fall of 1955, *Law and Contemporary Problems*, a journal published by the Duke University School of Law, focused a full issue on obscenity. Lockhart and McClure contributed an article, diagnosing the regulation of obscene literature as a misguided and backward application of law. "A recrudescence of Puritanism is again epidemic in the United States," they wrote.<sup>281</sup> They underscored the notion that courts applied obscenity law not in an effort to protect readers, but in the pursuit of

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277. *Smut Held Cause of Delinquency*, N.Y. TIMES, June 1, 1955.

278. STRUB, OBSCENITY RULES, *supra* note 14, at 121.

279. Beyond these changes in scholarship, courts began to rule on obscenity in new ways. Legal historian Carlos Ball describes the process of postwar "demoralization," by which "courts rejected, minimized, or ignored" the idea that obscenity laws were necessary to "promote and protect public morality." Ball, *supra* note 14, at 230. Although the Supreme Court had not yet decided an obscenity case, it had raised the First Amendment to a "preferred position" by the mid-1940s. STRUB, OBSCENITY RULES, *supra* note 14, at 75.

280. William Lockhart & Robert McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 301 (1953).

281. William Lockhart & Robert McClure, *Obscenity in the Courts*, 20 L. & CONTEMP. PROBS. 587 (1955).

guarding against the possibility that “‘obscene’ literature may lead to sexual behavior that is illegal or otherwise inconsistent with current moral standards.”<sup>282</sup> Writing in the same issue, attorney and free speech activist Edward de Grazia criticized the informality with which the Post Office exercised its censorship powers. “There are no rules or regulations,” he wrote.<sup>283</sup> “No hearing of any kind familiar to judicial or administrative due process is ordinarily, at any time, held.”<sup>284</sup> More broadly, de Grazia objected to how obscenity laws “bring to bear on the individual the coercive powers of the state” and argued that “[n]othing could be more repugnant to the ends of freedom of thought and freedom of expression.”<sup>285</sup>

When Albrecht and Rogge—Roth’s attorneys—arrived at the Supreme Court in April 1957, they did so prepared not to defend their client’s actions, but to attack the regime of American obscenity law. In oral arguments, they did not attempt to persuade the Court that the materials Roth had distributed were not pornographic or obscene. Instead, they argued that the Constitution limited the government’s ability to regulate obscenity at all. Albrecht asserted his lack of interest in debating the definition or merits of obscene content. “I am not here to defend the question of pornography,” he explained, “because I don’t really know what pornography here is.”<sup>286</sup> Albrecht focused on federalism, contending that the federal government “has absolutely no right” to place limits on what can be transmitted through the postal system.<sup>287</sup>

Rogge—a former assistant attorney general with extensive experience in civil rights litigation—targeted statutes like the Comstock Act as unconstitutional violations of the freedom of speech. He explained simply, “[t]he Postmaster General has to carry the material because the First Amendment said, ‘Congress shall make no law.’”<sup>288</sup> Addressing the claim that obscene materials could cause harm to Americans, particularly children, Rogge voiced skepticism: “We assume . . . that somehow or other, publications are going to cause sexual or other delinquency. The truth of the matter is, we don’t know.”<sup>289</sup> With the possibilities of such harm in doubt, Rogge urged the Court to defer to the First Amendment. Without offering excuses for the distribution of pornography, Albrecht and Rogge looked to the Constitution to vindicate their client as a citizen

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282. *Id.* at 593.

283. Edward De Grazia, *Obscenity and the Mail: A Study of Administrative Restraint*, 20 L. & CONTEMP. PROBS. 609 (1955).

284. *Id.*

285. *Id.* at 620.

286. Transcript of Oral Argument, *Roth v. United States*, 354 U.S. 476 (1957).

287. *Id.*

288. *Id.*

289. *Id.*

exercising one of his fundamental liberties. With the argument concluded, Samuel Roth awaited the Court's decision from his prison cell in Lewisburg.

*B. Great Latitude of Expression: ONE's Legal Arguments*

As summer approached, *ONE's* staff prepared to continue fighting their own case. Despite their optimism and enthusiasm, the editors remained cautious. While the magazine was free to continue printing and distributing new issues through the mail—so long as they were not deemed obscene by postal inspectors—the staff feared repression by Los Angeles postal officials in response to the appeal, and elected to steer clear of them. Beginning in March 1957, editors gathered newly printed magazines and drove out of the city center, often up to 150 miles. They dropped off the issues at suburban mailboxes and post offices, from which the magazines would be distributed throughout the nation.<sup>290</sup>

In order for *One, Inc. v. Olesen* to be heard by the Supreme Court, the magazine first needed to file a petition for certiorari, formally requesting that the Court review the judgment by the Ninth Circuit. As Julber prepared the petition, the staff remained concerned about whether the magazine would be able to properly finance the appeal, and sought numerous ways to cut costs and raise funds. In late May, Julber submitted a motion to the Court to file the petition *in forma pauperis*, a status given to individuals lacking funds that allows them to waive certain legal costs, including filing fees. The Justices, however, unanimously denied the motion on the grounds that the designation applied only to natural persons and not corporations like *ONE*.<sup>291</sup>

For additional funding and assistance, *ONE* reached out to its readers and to external groups. While organizations like the ACLU declined to support *ONE's* lawsuit, the magazine continued to collect small-dollar donations to its legal fund, often from homophile groups or gays and lesbians throughout the country. The president of the Daughters of Bilitis—a lesbian rights group based in San Francisco—sent a “small contribution” for the lawsuit. Enclosing a note with the donation, she promised continued moral, if not financial, support: “Wish it could be much more—We wish you success and will do all we can to help as time goes on.”<sup>292</sup> Despite these fundraising efforts, the magazine frequently lacked cash; Julber occasionally paid for printing costs upfront using his

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290. “March 1957” (on file with ONE Archives, Jim Kepner Papers, Box 6, Folder 1).

291. Motion for leave to proceed in forma pauperis by a corporation (June 3, 1957) (on file with Library of Congress, William O. Douglas Papers, Box 1173).

292. Letter from Helen Sanders to Editors of ONE Magazine (July 11, 1957) (on file with ONE Archives, ONE, Inc. Records, Box 42, Folder 11).

own personal credit, requesting reimbursements in later months.<sup>293</sup>

On June 13, 1957, Julber submitted *ONE*'s petition for certiorari to the Supreme Court. In any given year, the vast majority of such petitions are declined, forcing petitioners to accept the rulings of lower courts. The petition—shorter than a full brief—included an explanation of the case background and a summary of *ONE*'s arguments. Julber outlined the questions that the case would bring before the Court. First, the case raised the issue of whether the October 1954 issue was in fact “lewd, lascivious, obscene or filthy, and therefore ‘non-mailable’ matter” under the Comstock Act. Referring to the common standard with which courts determined obscenity, Julber identified another core question:

Have the Postmaster and the Courts below correctly gauged the ‘moral tone of the community in declaring the appellant’s publication to be non-mailable,’ or have they applied a stricter standard to the appellant’s publication to that applied to other publishers and magazines, thus depriving appellant of equal protection of the laws and due process of the law?<sup>294</sup>

In laying out these questions, Julber built the foundation for an argument based not on free speech or federalism, but on the narrower issue of whether the government acted appropriately in classifying *ONE* as obscene, or in a way that denied the magazine’s editors equal protection and due process.

Julber made a far-reaching argument critiquing the government’s censorship scheme while advocating for the usefulness of a publication like *ONE*. He claimed that the Ninth Circuit erred not only because it incorrectly identified *ONE* as obscene, but also because it did so in a manner that was inconsistent with broader trends of literary regulation. The petition explained that the Court of Appeals refused to consider the fact that “other publications and books are permitted to deal with the same subject matter, in even more explicit fashion, without any action being taken by the Postmaster.”<sup>295</sup> As a result, Julber asserted, “the appellant has been singled out and discriminated against . . . thus denying to it equal protection of the laws and due process of law.”<sup>296</sup> In the petition, Julber did not expand upon his claims with respect to equal protection. However, his argument implied that while other publications—including popular novels—dealt with homosexuality, federal authorities discriminated against *ONE* because it was a homophile organization.<sup>297</sup>

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293. For instance, a letter from Julber to Lambert read, “Dear Bill: Could you please take care of this printing bill this month, since this is on my personal credit. Thanks.” Letter from Eric Julber to William Lambert (Aug. 16, 1957) (on file with *ONE* Archives, *ONE*, Inc. Records, Box 4, Folder 11).

294. Petition for Writ of Certiorari, *One, Inc. v. Olesen*, No. Civil 18764-TC (S.D. Cal. 1956).

295. *Id.*

296. *Id.*

297. In reality, other media dealing with controversial subjects did indeed face censorship by



Julber did not seek a new definition of obscenity or of governmental authority to regulate the obscene. Instead, he disputed that *ONE* was obscene at all. By asserting that the magazine had been subjected to unequal treatment, Julber argued that if considered appropriately under existing legal standards, *ONE* was not an indecent publication. He only briefly mentioned homosexuality, drawing attention away from issues of sexual orientation. He focused instead on the ways in which *ONE* was a part of a tradition of works that discuss “human and social problems.”<sup>298</sup> The petition did not seek a redefinition of the obscene, but a confirmation that homosexuality was not inherently lewd.

Julber urged the Court to understand *ONE* in broader context. Implicitly conceding that passages from the magazine’s articles could be read as obscene, he alleged that the Ninth Circuit “did not consider at all lengthy portions of appellant’s publication which were obviously informative, instructive, and serious in tone.”<sup>299</sup> Julber insisted that a comprehensive reading of the magazine as a whole would allow for an understanding of the purpose of any individual article. He highlighted the status of homosexuality as a subject that deserved attention and public discussion. Unlike Samuel Roth’s attorneys, Julber did not claim that postal censorship itself was unconstitutional. Rather, he argued that the government should have to overcome high barriers to censor content related to particularly pressing social issues:

Works which attempt to elucidate, explain or grapple with thorny or fundamental human problems should be extended great latitude of expression. . . . In the case now under consideration, the works held to be “obscene” are works dealing with and attempting to explain to the layman problems of human life that have plagued the human race through the centuries.<sup>300</sup>

Julber explained that the magazine served a clear function for its audience of predominately homosexual readers. While *ONE* did not contain “any *advocacy* of homosexuality as a way of life,” readers found in its pages “a discussion of the problems, social, economic, and personal, which confront those persons possessed of that particular neurosis.”<sup>301</sup>

The petition represented a drastically different legal strategy than the one taken by Albrecht and Rogge on behalf of Roth. Julber crafted a narrow argument, aimed at demonstrating that the censorship of *ONE* denied readers access to a publication that could assist them in

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various entities. As explored in Part II, novels, comics, and films clashed with federal, state, and private authorities in the 1950s.

298. Petition for Writ of Certiorari, *One, Inc. v. Olesen*, No. Civil 18764-TC (S.D. Cal. 1956).

299. *Id.*

300. *Id.*

301. *Id.*

understanding the “fundamental human problem” of homosexuality. Beyond demanding clarification on whether homosexuality was obscene, the petition argued affirmatively for *ONE* as a publication that offered significant, social value to its readers. While Albrecht and Rogge shirked from debating the nature of the content their client distributed, Julber embraced such a discussion. In a shift years in the making, the petition boldly claimed that homosexuality was both appropriate and valuable as a topic of discourse.

*C. Slightest Redeeming Social Importance: The Roth Standard*

On June 24, 1957, less than two weeks after Julber submitted *ONE*'s petition, the Supreme Court handed down its decision in *Roth v. United States*, sealing Samuel Roth's fate while attempting to clarify the landscape of governmental regulation of obscenity. The Court upheld Roth's conviction, but in doing so redefined the rules by which federal authorities could limit speech through statutes like the Comstock Act. Writing for a six-Justice majority, William J. Brennan—a leader of the Court's liberal wing—refused to declare the Comstock Act unconstitutional. He acknowledged that “the First Amendment was not intended to protect every utterance” and that Congress was permitted to regulate obscenity, which “is not within the area of constitutionally protected speech or press.”<sup>302</sup> The images and words distributed by Roth were, in the Court's view, undoubtedly obscene. The publisher served out his sentence, remaining at Lewisburg until 1961.<sup>303</sup>

The Court's recognition of the federal government's ability to regulate obscenity set no new precedent. *Roth* was, however, novel in its redefinition of obscenity. Building upon changes in social mores and legal scholarship, Brennan offered a new model by which courts could determine whether or not material was obscene. Brennan's test for obscenity included attention to broader context: “whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest.”<sup>304</sup> However, the opinion qualified this test by focusing on the social value of contested material. Brennan wrote, “[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties” of the First Amendment.<sup>305</sup> In providing this modification, Brennan asserted that by definition, material with “the slightest redeeming

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302. *Roth v. United States*, 354 U.S. 476, 483–485 (1957).

303. GERTZMAN, *supra* note 276, at 219.

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

305. *Id.* at 484.

social importance” could not be considered obscene.<sup>306</sup>

Despite the conservatism of the day, Brennan stressed protection for the expression of ideas about issues central to the human condition, including sexuality. He declared, “sex and obscenity are not synonymous.”<sup>307</sup> There was significant merit in discussion of sexuality, Brennan argued: “Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.”<sup>308</sup> The powerful statement rebuked authorities and courts that policed “lasciviousness” without regard to the necessity of public conversation over issues of sexuality.

The new test took a middle road in the debate over obscenity and speech. While social conservatives and proponents of public morality argued for greater governmental capacity to regulate obscenity, free speech absolutists denied any federal authority to censor indecent content.<sup>309</sup> By steering clear of both extremes, Brennan authored a decision that attorneys and scholars have critiqued as complicated and unsustainable. Charles Rembar, who represented publishers of contested books in the 1960s, reflected that the *Roth* decision gave obscenity “an elaborate definition” that “was hailed as a victory by those bent on suppressing” obscene content because it disposed of the argument that obscenity was impossible to define and regulate.<sup>310</sup> Stanley Fleishman, who argued ten literary censorship cases before the Supreme Court beginning in the late 1950s, explained that to liberals, the decision “lightly brushed aside” the idea that “the obscenity laws invaded . . . free speech.”<sup>311</sup> Writing in the 1960s, Richard Kuh—an Assistant District Attorney of Manhattan who prosecuted several obscenity cases—underscored the vagueness of Brennan’s decision, arguing, “the question of ‘social importance’ in the area of obscenity is one on which no unanimity of thought can ever be anticipated.”<sup>312</sup> Historian Whitney Strub has called *Roth* a “conflicted opinion” that reflected “larger, deeper historical tensions within American sexual politics.”<sup>313</sup> Strub argues that

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306. *Id.*

307. *Id.* at 487.

308. *Id.*

309. In *Roth*, Justices Hugo Black and William O. Douglas filed a dissent arguing that all speech, including obscenity, fell under the First Amendment’s protection. The dissent, written by Douglas, declared, “The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience.” *Roth*, 354 U.S. at 513 (Douglas, J., dissenting).

310. CHARLES REMBAR, *THE END OF OBSCENITY: THE TRIALS OF LADY CHATTERLEY, TROPIC OF CANCER, AND FANNY HILL* 51 (1968).

311. Stanley Fleishman, *Censorship: The Law and the Courts*, 19 *LIBRARY TRENDS* 75 (1970).

312. RICHARD H. KUH, *FOOLISH FIGLEAVES? PORNOGRAPHY IN AND OUT OF COURT* 39 (1967).

313. STRUB, *OBSCENITY RULES*, *supra* note 14, at 182.

the ruling simultaneously provided “a green light . . . to punish and suppress obscenity” and “the go-ahead to ever more direct representations of sex.”<sup>314</sup>

*Roth* fundamentally changed the landscape of obscenity law, creating a new but ambiguous test for obscenity. With *ONE*'s petition already submitted, Julber and the rest of the staff had no way to tailor their argument to this new framework. The *ONE* petition, more nuanced than Samuel Roth's absolutist argument, did in fact contain logic consistent with Brennan's decision. Julber asserted that the magazine sought to “explain to the layman problems of human life that have plagued the human race through the centuries,” while Brennan wrote that sex was “a subject of absorbing interest to mankind through the ages” and “one of the vital problems of human interest.”<sup>315</sup> Julber and the editors could not be sure whether this shared emphasis on the potential value of discussing sexuality would convince the Court to hear *ONE*'s case. It was certain, however, that as the Justices worked through their caseload, they were equipped with a new standard by which to judge indecency.

#### *D. Inoffensive or Revolting? The Court's Consideration of ONE*

At the time that the Supreme Court encountered *One, Inc. v. Olesen*, the Justices were wrestling with *Roth*. Although the Court's process of scheduling is largely non-transparent, much about it can be gleaned from the papers archived by individual Justices in the years following their tenures. The Justices came across *One, Inc.* as early as June 1957, weeks before they handed down the *Roth* opinion. It is unclear whether they had already decided *Roth* at that time; if they had, the appearance of a case like *One, Inc.* likely demonstrated to the Justices the far-reaching implications of their landmark obscenity ruling. If they had not yet reached their conclusion in *Roth*, *One, Inc.* may have influenced that decision. Regardless, the court's ruling in *Roth* invited a broader legal debate over the meanings and applications of obscenity.

Despite initially encountering Julber's petition in June, the Justices delayed discussing it several times to allow a related case, *Sunshine Book Company v. Summerfield*, to reach the Supreme Court on appeal.<sup>316</sup> The *Sunshine* case centered on *Sunshine & Health*, a nudist publication that featured photographs of naked men, women, and children in a variety of non-sexual situations. Postal authorities deemed *Sunshine & Health* obscene; the publication challenged its classification in court, and as

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314. *Id.*

315. Petition for Writ of Certiorari, *One, Inc. v. Olesen*, No. Civil 18764-TC (S.D. Cal. 1956); *Roth*, 354 U.S. at 487.

316. Petitions for Certiorari (1957) (on file with Library of Congress, Harold H. Burton Papers, Box 293, Folder 15).

*ONE*'s staff filed their petition for certiorari, the editors of *Sunshine & Health* awaited a decision in their appeal to the United States Court of Appeals for the District of Columbia.<sup>317</sup> Unlike *ONE*, *Sunshine & Health* contained naked photographs, although its editors defended its social value, arguing that the publication helped to "advocate and explain nudism and the nudist mode of living."<sup>318</sup> Despite the differences between the two magazines, the Justices likely viewed *Sunshine* and *One, Inc.* as presenting parallel questions. When they voted to hold *ONE*'s case in order to consider the two together, they did so overwhelmingly; eight Justices favored the delay, with only Thomas Clark opposing the motion.<sup>319</sup> On October 19, 1957, the Court of Appeals for the District of Columbia Circuit upheld the postal censorship of *Sunshine & Health*. The Supreme Court, anticipating an appeal from the nudist magazine within days, scheduled a conference for *ONE*'s petition on January 3, 1958.<sup>320</sup>

In advance of the conference, several of the Justices asked their clerks to study the facts of the case and provide memoranda with details and analysis.<sup>321</sup> These memos, and the arguments they presented, reflected the larger debates over obscenity occurring in the legal field and in American society. A clerk for William O. Douglas—one of the Court's fiercest defenders of civil liberties—attempted to reframe the central issue at play. The clerk wrote, "There is no doubt in my mind that" the lower courts "applied a different standard to this magazine than it would have to a magazine portraying sexual relations between males and females."<sup>322</sup> The fundamental question of the case, the clerk argued, was "whether these people are entitled to express their thoughts and customs under the same standards that publishers of girly magazines operate."<sup>323</sup> Douglas's clerk—whose comments were not necessarily reminiscent of Douglas's own beliefs—offered a personal opinion that demonstrated the tension between social currents and philosophical dedication to civil liberties: "This case presents a very difficult problem to me. I am torn between the desire to cut

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317. THE ENCYCLOPEDIA OF CENSORSHIP 557 (Jonathon Green & Nicholas J. Karolides, eds., 2005).

318. *Sunshine Book Co. and Solar Union Naturisme, Inc. v. Summerfield*, 249 F.2d 114 (D.C. Cir. 1957).

319. Note on holding for *Sunshine* case in C.A. D.C. (on file with Library of Congress, Earl Warren Papers, Box 371).

320. Conference Notes (Jan. 3, 1958) (on file with Library of Congress, Harold H. Burton Papers, Box 294, Folder 2).

321. Supreme Court conferences are closed to the public and press, but clerks' memoranda provide a sense of the issues on which each Justice might have focused. Justices are not required to preserve their papers, and those who do can selectively choose which documents to archive. As a result, there do not exist memos regarding *ONE* in the collections of every Justice on the Court at the time.

322. Clerk Memo on *One, Inc. v. Olesen* (on file with Library of Congress, William O. Douglas Papers, Box 1187).

323. *Id.*

down on this sort of administrative censorship and the revulsion the magazine gives me. I suppose in the long run it is better to let the American people make the choice than a postmaster.”<sup>324</sup> Even critics of federal censorship struggled to separate their ideals from anti-gay bias and “revulsion” to homosexuality.

Justice Harold Burton—a Republican whom Harry Truman had appointed to the bench in a bipartisan gesture—also tasked one of his clerks with reviewing the *ONE* case. Burton’s clerk criticized the Ninth Circuit’s ruling, writing, “I am not sure CA 9 used a proper test. *Roth* makes it clear that the standard is the average person. . . . Twice CA 9 stated the standard in terms of ‘the morals of those whose minds are open to such influences.’”<sup>325</sup> Because the Ninth Circuit had issued its ruling prior to *Roth*, the clerk attempted to apply the new standard, opining, “I read the story and I do not think the normal person would find the book arousing.”<sup>326</sup> The clerk offered a frank assessment of *ONE* in relation to popular literature more generally, separating cultural disapproval of homosexuality from the Court’s mandate of dispassion:

I must say that I found it relatively inoffensive, far less offensive than the average ‘men’s’ magazine. I think the decision below is an example of the tyranny of the majority. . . . The court seems to feel that homosexuality is disgusting and therefore allusions to homosexual practices are disgusting and obscene. . . . I think *One* is no more descriptive of sexual practices than dozens of magazines. The fact that the practices differ from those of the ‘normal’ person should not make the magazine obscene. If the story in *One* is ‘calculated to promote lesbianism’ certain stories in *Woman’s Home Journal* are probably calculated to promote adultery.<sup>327</sup>

The clerk’s memo touched upon many of the arguments that *ONE*’s editors had been embracing for years. Notably, the memo decried anti-homosexual censorship as a form of “tyranny of the majority,” concurring with *ONE*’s long-held conviction that discussions of issues relevant to gays and lesbians should not be considered inherently obscene as a result of their connection to homosexuality.<sup>328</sup>

On January 3, 1958, the Justices gathered in the Supreme Court conference room, a wood-paneled chamber on the building’s first floor, where Chief Justice Earl Warren presided over a discussion of current and pending cases. At the meeting, they would decide whether to grant certiorari to *ONE* and consider the case in full, an action requiring the

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324. *Id.*

325. Clerk Memo on *One, Inc. v. Olesen* (on file with Library of Congress, Harold H. Burton Papers, Box 298, Folder 2).

326. *Id.*

327. *Id.*

328. *Id.*

votes of four Justices. They discussed in order of seniority, taking handwritten notes and sorting through the issues presented in *ONE*'s appeal. Burton reminded himself of the Court's new standard for obscenity as applied to *ONE*; he scrawled on a sheet of paper, "Obscenity protection—when taken as a whole have no other purpose except to stimulate homosexuality, OK."<sup>329</sup>

Each week, beginning in mid-June 1957, when Julber submitted *ONE*'s petition for certiorari, he checked the Supreme Court's calendar to see whether the Justices had taken up the case and set a date for oral arguments. From the start of the case, he consulted fellow attorneys who expressed pessimism in the judiciary's ability to rule in favor of a homophile publication. They told him the issue might have been "too hot to handle" or, perhaps worse, "not important enough to handle."<sup>330</sup> Julber, however, believed in the Supreme Court, remaining optimistic that Court would accept the case and vindicate *ONE*. Every week, from June through December, Julber checked the Court's calendar to find that certiorari had been neither granted nor denied in *One, Inc.* Well aware of the ease with which critics dismissed *ONE* and other homophile organizations, Julber later recollected, "no news was good news."<sup>331</sup> Still, as a young attorney less than a decade out of law school, Julber was eager for the opportunity to argue before the Supreme Court.<sup>332</sup> On January 13, 1958—five years after *ONE* published its first issue—the staff received word that the Court had made a decision regarding its case.

### *E. An End to the Sniping*

The January 13 announcement took *ONE*'s editors by surprise. The Court not only granted certiorari; the Justices also simultaneously decided the case, declining to schedule oral arguments or accept briefs from *ONE* and the Post Office. The Court issued the decision *per curiam*, a designation that expresses the opinion to be a collective one by the bench as a whole. The decision in *One, Inc. v. Olesen* consisted of a single line, citing only one prior opinion, with no dissents or concurrences filed: "The petition for writ of certiorari is granted and the judgment of United States Court of Appeals for the Ninth Circuit is reversed. *Roth v. United States*, 354 U.S. 476."<sup>333</sup>

By wordlessly reversing the lower court decisions, the Justices offered a

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329. Notes on 290, *One, Inc. v. Olesen* (on file with Library of Congress, Harold H. Burton Papers, Box 293, Folder 17).

330. Eric Julber, *ONE and the Supreme Court*, Speech at the ONE Midwinter Institute (Feb. 1, 1958) (on file with ONE Archives, ONE, Inc. Records, Box 81, Folder 13).

331. *Id.*

332. According to Jim Kepner, Julber obtained certification to argue before the Supreme Court in the spring of 1957 in case the Court accepted the case. "March 1957," *supra* note 290.

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

clarification of *Roth*, demonstrating how the new test for obscenity could be used in practice.<sup>334</sup> In citing *Roth*, the Court expressed that it did not need to provide further explanation; an understanding of *Roth* would reveal the logic used to decide *One, Inc.* Thus, while there is no written opinion in *One, Inc.*, the *Roth* citation reflects the Court's belief that the October 1954 issue of *ONE Magazine* could not be considered obscene under the new standard.<sup>335</sup>

The implications of the decision outright rejected many of the arguments advanced by the Post Office and accepted by the lower courts. According to the Supreme Court, *ONE* apparently did not appeal to the "prurient" interest, a repudiation of the Ninth Circuit's claim that "Sappho Remembered" constituted "cheap pornography," as well as the district court's belief that it was "lustfully stimulating to the average homosexual reader."<sup>336</sup> By rebuffing these ideas, the Court signaled that publications like *ONE* could discuss homosexuality, even in fictional contexts, without being labeled prurient.

The Court did more than declare that *ONE* was not pornographic. By reversing the classification of *ONE* as obscene, the Justices suggested that the magazine had a degree of "social importance." The publication served a social function to its readers. It provided them with an outlet that discussed homosexual life, a subject that involved, as Julber wrote in *ONE's* petition, "fundamental human problems."<sup>337</sup> The ruling affirmed this line of reasoning, implying that homosexual issues constituted what Brennan called in the *Roth* opinion "vital problems of human interest and public concern."<sup>338</sup> The lower courts dismissed *ONE* in part because they believed that the magazine had deviated from its mission of discussing the problems of homosexuality from "the scientific, historical and critical point of view."<sup>339</sup> The Supreme Court disagreed; through its content, from essays and editorials to fiction and poetry, *ONE* contributed to public conversation on subjects that were of social importance. In admonishing the Post Office, the Court vindicated a core tenet of *ONE*: that content related to homosexuality was not inherently obscene.

*Roth*, and by extension *One, Inc.*, rested on free speech.<sup>340</sup> Although the

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334. On the same day, the Court handed down a similar, one-sentence *per curiam* decision ruling in favor of *Sunshine & Health* magazine in its own postal censorship case. *Sunshine Book Co. v. Summerfield*, 255 U.S. 372 (1958).

335. While the Court did not hand down an extended written decision, it is possible that the Justices drafted opinions and dissents that were never published. However, historians have yet to find any such documents in the archived papers of the Justices.

336. *One, Inc. v. Otto K. Olesen*, No. Civil 18764-TC (S.D. Cal. 1956); *One, Inc. v. Otto K. Olesen*, 241 F.2d 772 (9th Cir. 1957).

337. Petition for Writ of Certiorari, *ONE, Inc. v. Olesen*, No. Civil 18764-TC (S.D. Cal. 1956).

338. *Roth*, 354 U.S. at 487.

339. *Supra* note 60.

340. *ONE's* editors would later acknowledge the auspicious timing of their case, given that the Court considered it in the wake of *Roth*. Jim Kepner recalled that the Supreme Court "had for several



Justices ruled in favor of *ONE*, they did partially reject the magazine's legal reasoning. In addition to arguing that *ONE* was simply not obscene, Julber invoked equal protection in the petition. By relying solely on *Roth* and offering no additional comment, the Court seemingly ignored the argument that *ONE* had been denied equal protection because it was targeted while other publications freely distributed similar materials. Ultimately, the Justices considered *ONE* on its own merits, evidently concluding that regardless of the status of other books and periodicals, "The Homosexual Magazine" did not constitute obscenity.

Because the decision was *per curiam* and the Court handed down no dissenting opinions, members of *ONE*'s staff would later interpret it as a unanimous ruling. However, the case faced more contention within the Court than the editors realized. In reality, while the Court issued *One, Inc.* as a collective, *per curiam* decision, the Justices voted in favor of *ONE* by a five-to-four margin in chambers.<sup>341</sup> They did not appear to vote along typical, ideological lines. Civil libertarian William Douglas voted in favor of *ONE*, as did Felix Frankfurter—a founder of the American Civil Liberties Union. Also voting to overturn the lower courts were moderates Thomas Clark and Charles Whittaker, along with conservative John Marshall Harlan II. William Brennan, who authored the *Roth* opinion, and fellow liberal Hugo Black voted against *ONE*. In doing so, they found common ground with Harold Hitz Burton—a Republican Senator from Ohio prior to his judicial tenure—and Chief Justice Earl Warren. However, the lack of a published opinion leaves the reasons for the Justices' votes unknown. In all likelihood, they simply disagreed on whether *ONE* was obscene under the *Roth* standard.<sup>342</sup> Four Justices, upon reviewing the October 1954 issue, may well have found that it appealed to the prurient interest and offered no social value. The split vote in *One, Inc.* demonstrates that while the ruling definitively rebuked the lower courts, there still existed voices rejecting the permissibility of homosexual writings. *ONE* was vindicated in the eyes of the law, but the status of homosexuality was far from settled in the court of public opinion.

Although the decision represented the culmination of *ONE*'s lengthy battle, the press paid little attention to the case. It lacked the drama of

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months been upsetting the apple carts of censors all over the country, requiring a much sharper definition of the concept of obscenity." James Kepner, *Homosexual Magazine Cleared by the Supreme Court*, 1 SEX & CENSORSHIP (1958).

341. The details of the vote only became public through the papers of William Douglas. Douglas began depositing the portion of his papers that included Supreme Court files in the Library of Congress in the mid-1970s, after he retired from the Court. *One, Inc. v. Olesen* votes (on file with Library of Congress, William O. Douglas Papers, Box 1184).

342. Hugo Black's vote is particularly confounding, as he was a staunch free speech absolutist and frequent ally of Douglas. He did adopt a somewhat narrower view of what constituted "speech," distinguishing it from "conduct." It is possible that he decided *One, Inc. v. Olesen* using this framework. For Black's views on what constituted speech, see his dissents in *Street v. New York*, 394 U.S. 576 (1968) and *Cohen v. California*, 403 U.S. 15 (1971).

most cases before the Court, with no meeting of opposing sides during a set of oral arguments before the Justices. Muted media coverage reflected the anticlimactic nature of *One, Inc.* The *Los Angeles Times* described the Court's decision in the *Sunshine & Health* case, but neglected to mention *ONE Magazine* at all.<sup>343</sup> The *New York Times* listed *One, Inc. v. Olesen* along with all decisions handed down on January 13, but did not include any details about the background of the case.<sup>344</sup> The reception of the decision among federal officials is unclear, but the Eisenhower administration responded with silence. It is possible, however, that the ruling had a direct effect on federal investigations of the magazine. The FBI, which had been monitoring *ONE* for years and had recently begun to focus on the publication's possible violations of obscenity law, had collected and reviewed copies of the magazine until late-1956. While the Bureau evidently ceased its official investigations of *ONE* in September 1956, J. Edgar Hoover had instructed agents to closely follow the developments of the case. As historian Douglas Charles argues, *ONE*'s Supreme Court victory "undercut . . . the FBI's strategy for silencing the homophile movement."<sup>345</sup>

Despite minimal attention from voices in media and government, the ruling did spark celebration by members and supporters of the homophile movement. *ONE*'s staff understood the decision as an affirmation of their publication's mission, recognizing that it could have significant impacts on their path forward. Two days after the ruling, on January 15, the editors met for a corporation meeting, which included a review of the decision and "considerable discussion on the implications of this for our further work."<sup>346</sup> Julber would later recall that for the staff, the event was a "cause for great jubilation."<sup>347</sup> The editors echoed this sentiment in print, running an editorial in February 1958 that celebrated "the glory of the January 13<sup>th</sup> decision."<sup>348</sup> The piece, written by Don Slater, proclaimed, "By winning this decision *ONE Magazine* has made not only history but law as well and has changed the future for all U.S. homosexuals."<sup>349</sup> The victory reinforced *ONE*'s role within the homosexual community, "to bring about understanding, acceptance, and status for the group."<sup>350</sup> Slater framed the decision as one that would have far-reaching implications for the homophile press at-large. "ONE Magazine no longer asks for the right to

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343. *Court Voids City Law on Union Aides*, L.A. TIMES, Jan. 14, 1958.

344. *United States Supreme Court*, N.Y. TIMES, Jan. 14, 1958.

345. Charles, *supra* note 181, at 263.

346. Minutes of Corporation Meeting (Jan. 15, 1958) (on file with ONE Archives, ONE, Inc. Records, Box 2, Folder 8).

347. Julber, *supra* note 330.

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

349. *Id.*

350. *Id.*

be heard; it now exercises that right,” he wrote.<sup>351</sup> The ruling “further requires that homosexuals be treated as a proper part of society free to discuss and educate and propagandize their beliefs with no greater limitations than for any other group.”<sup>352</sup>

The Supreme Court’s action became a concrete component of *ONE*’s own identity and mythology, as the staff used it in fundraising and promotional materials. In the weeks following the ruling, *ONE* sent a letter to former subscribers explaining that “The biggest news of all has just come to us. . . . The United States Supreme Court has, once and for all, put an end to the sniping at *ONE* by trigger-happy postal officials, and has unanimously declared *ONE Magazine* not obscene!”<sup>353</sup> Fundraising appeals referencing the case continued in subsequent months. By October, the staff concluded that 1958 may have been “our best year, starting with our historic SUPREME COURT victory over Postal censors.”<sup>354</sup> *ONE* consciously framed itself as a victim of injustice that achieved success against overwhelming opposition. In December 1958, the editors retold their improbable story to former subscribers, writing that while critics claimed, “It can’t go thru the mails,” the Supreme Court “ruled that *ONE* was not obscene and was mailable.”<sup>355</sup> Such language remained prevalent even as years passed. In a fundraising letter written in mid-1959, the staff struck a triumphant tone, remembering how “the magazine has grown and won approval from the U.S. Supreme Court” despite having “no financial backing.”<sup>356</sup>

Even as some staff members advocated for a shift away from publishing and an increased focus on educational programming, the Supreme Court battle still loomed large in the organization’s collective memory. At a speech during the 1959 Midwinter Institute conference, Jim Kepner—one of the group’s most vocal advocates of expanding beyond publishing—explained that while the magazine was “far from being our only or even our chief interest,” it was nonetheless the vehicle that delivered the organization’s most visible and concrete victory for the larger homophile movement.<sup>357</sup> *ONE Magazine*, Kepner said, was “the project that won first for American homosexuals their ‘charter’ from the US Supreme Court—

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351. *Id.*

352. *Id.*

353. Letter to Former Subscribers (1958) (on file with ONE Archives, ONE, Inc. Records, Box 16, Folder 35).

354. Request for contributions (Oct. 1958) (on file with ONE Archives, ONE, Inc. Records, Box 16, Folder 35).

355. Letter to Former Subscribers (Dec. 12, 1958) (on file with ONE Archives, ONE, Inc. Records, Box 16, Folder 35).

356. Fundraising letter (1959) (on file with ONE Archives, ONE, Inc. Records, Box 16, Folder 26).

357. James Kepner, Rough Draft of Talk at Midwinter Institute (1959) (on file with ONE Archives, ONE, Inc. Records, Box 2, Folder 9).

recognizing the rights of a homosexual group to publish what they think about homosexuality.”<sup>358</sup>

That the magazine’s editors celebrated *One, Inc. v. Olesen* as a successful victory in their struggle for civil rights—and even as a homosexual charter—indicates the degree to which the case became a central cause for homophile activists. It ceased to be a procedural hurdle or an issue of legal technicality. By defeating the Post Office at the Supreme Court, *ONE* did more than liberate itself from fear of federal censorship. The case came to represent a battle over the very definition of obscenity and its relationship to homosexuality. *ONE* engaged in a debate over the fundamental nature of homosexual speech, successfully advocating for the dissociation of homosexuality and indecency.

#### CONCLUSION

In August 1958, seven months after the Supreme Court’s decision in *One, Inc. v. Olesen*, *ONE* ran an essay titled, “I am Glad I am a Homosexual,” written by William Lambert. “Like the rest of my brothers and sisters I am glad to be a homosexual, proud of it,” Lambert wrote.<sup>359</sup> Beginning in the 1960s, gay liberation groups and gay pride organizations tended to view themselves as the first genuine gay rights warriors, while they regarded the homophiles of the 1950s as conservative, assimilationist actors.<sup>360</sup> Historians, too, have often given *ONE Magazine* short shrift, treating it briefly or inaccurately, and discussing *One, Inc. v. Olesen* only in passing.<sup>361</sup> But, as Lambert’s statement of pride demonstrates and as this article has argued, the case and the magazine were far from minor incidents in the history of the movement.

At its founding, *ONE* did not envision itself as a defender of free speech. It was instead concerned with civil rights and social services. Only over time did the staff begin to accept as its cause the battle over obscenity. In its struggle against postal censorship, the magazine became a major actor in the debate over homosexual speech, vehemently advocating for a decoupling of homosexuality and obscenity. *ONE* navigated significant legal hurdles first as an act of necessity, and then as a statement of defiance. By overcoming the obstacle of obscenity law, *ONE* helped to usher in the era of gay pride.

In defeating its classification as obscene, the magazine laid the

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358. *Id.*

359. Hollister Barnes, *I am Glad I am a Homosexual*, *ONE*, Aug. 1958. Lambert occasionally wrote under the pseudonym Hollister Barnes.

360. DONN TEAL, *THE GAY MILITANTS* 38 (1971).

361. Inaccurate depictions of *ONE* exist in scholarly and popular works. Leila Rupp, a gender historian, and Neil Miller, a journalist and nonfiction author, both describe *ONE* as a publication of the Mattachine Society. RUPP, *supra* note 36, at 162; NEIL MILLER, *OUT OF THE PAST: GAY AND LESBIAN HISTORY FROM 1869 TO THE PRESENT* 335 (1995).

foundation for the positive rhetoric and expanded gay press of the 1960s. Historians have understood the Court's decision as one that provided gay organizations with constitutional protections to publish more freely.<sup>362</sup> The realization of these protections is reflected in the growth of the gay press in the years following the case. Although gay publishing exploded in the aftermath of the Stonewall Riots in 1969, the early to mid-1960s saw the founding of a number of prominent homosexual periodicals. Between *One, Inc.* and Stonewall, the number of American homosexual periodicals increased steadily.<sup>363</sup> In 1964, activists in San Francisco began publishing *Vector*. In 1965, a Philadelphia homophile group created *Drum*, while the Washington, D.C., chapter of the Mattachine Society established *Homosexual Citizen*. And in 1967, a radical gay pride group in Los Angeles started printing *The Advocate*, a periodical that continued to print into the twenty-first century.<sup>364</sup>

For many of the people deeply involved in *ONE*, the legal battle stands as the magazine's enduring legacy. Editor Jim Kepner wrote that the Supreme Court's action gave "the green light for open gay literature."<sup>365</sup> Lambert similarly argued that the "millions of persons reading books, seeing plays and movies which frankly treat homosexuality" may have "never heard of *ONE*," but they nonetheless "owe to *ONE*'s legal enlargement of the *Roth* doctrine the freedom they now enjoy."<sup>366</sup>

*ONE*'s legacy lasted; the magazine did not. In the 1960s, as the gay rights movement grew and changed, *ONE* struggled with its own organizational identity. Early in the decade, the staff at *ONE, Inc.* fell into a debate over the group's primary focus. Led by Don Slater, some staff supported continued emphasis on publishing. Others, led by Lambert, advocated for a shift towards educational programming. In 1965, *ONE, Inc.* split in two.<sup>367</sup> The last issue of the magazine appeared in 1967, when the battle between the two factions ended with a settlement. Lambert—then known as Dorr Legg—gained the rights to the *ONE* name. He pushed resources into the organization's educational division, the Institute for

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362. These are often minor arguments in larger works, but historians who address *One, Inc. v. Olesen* have nonetheless been consistent in their assertions that the case gave legal protection to homosexual publications. See D'EMILIO, *supra* note 6, at 115; ESKRIDGE, *supra* note 14, at 96; Ball, *supra* note 14, at 290. This article has gone further by looking closely not only at the case itself but also at *ONE*'s archives and at FBI files related to the magazine. These sources help to reveal exactly how and why *ONE*'s legal battle was waged.

363. Elizabeth A. Armstrong & Suzanna M. Crago, *Movements and Memory: The Making of the Stonewall Myth*, 71 AM. SOC. REV. 731 (2006).

364. Rodger Streitmatter discusses the establishment and philosophy of each of these and other publications in his chapters on the 1960s. See RODGER STREITMATTER, UNSPEAKABLE: THE RISE OF THE GAY AND LESBIAN PRESS IN AMERICA 51-115 (1995).

365. James Kepner, "A Brief History of the American Gay Movement" (1994) (on file with ONE Archives, Jim Kepner Papers, Box 23, Folder 16).

366. Dorr Legg, "Society and the Homosexual" (on file with ONE Archives, ONE, Inc. Records, Box 1, Folder 25).

367. Alfred Craig, '*ONE*' Becomes Two; *Homosexuals Split*, L.A. FREE PRESS, June 18, 1965.

Homophile Studies. Slater, forced to abandon ONE, Inc., founded a new organization, the Homosexual Information Center. Slater used the Center to published *Tangents*, a magazine he had begun in 1965 and that he envisioned as the spiritual successor to *ONE*. *Tangents* folded in early 1970.<sup>368</sup> An attempt by Lambert and Kepner to revive *ONE Magazine* in 1972 was met with failure.<sup>369</sup>

By the late 1960s, the increasingly militant movement for gay rights began to cast aside the achievements of the homophiles of the 1950s. In 1968, a conference of American gay rights organizations met in Chicago and adopted the slogan “Gay is Good.” Frank Kameny—the East Coast homophile leader who would later critique the 1950s movement for its blandness—explained that “Gay is Good” was inspired by the African American civil rights movement and “in obvious parallel to the Negroes’ ‘Black is Beautiful.’”<sup>370</sup> But, even if unconsciously, Kameny and other activists of his era also built on the rhetorical and legal work of *ONE*. Discussing “Gay is Good,” historian John D’Emilio remarked that such a statement “would have been unthinkable a decade earlier.”<sup>371</sup> Yet, ten years prior to the emergence of “Gay is Good,” *ONE Magazine* had printed “I am Glad I am a Homosexual,” Lambert’s unambiguous expression of pride in his sexuality.

Often lacking a connection to younger, more militant activists, the homophiles of the 1950s struggled to find their place in the movement that emerged in the 1960s. Kepner was among the few exceptions. He remained involved with Lambert’s *ONE*, protecting and expanding the organization’s library. He acted as the gay rights movement’s historian, becoming a steward of books, archives, and documents. Kepner served on the boards of a range of institutions, from the Metropolitan Community Church—a set of Protestant congregations that developed outreach programs for homosexuals—to a short-lived and aggressive gay group called Personal Rights in Defense and Education. He wrote extensively, contributing articles to new gay publications, including *The Advocate*.<sup>372</sup>

All the while, Kepner continued building a library of scholarship, clippings, and archival materials on the homophile movement. In 1971, he established the Western Gay Archives. He moved the project out of his apartment and into a commercial space in Hollywood, renaming it the National Gay Archives, and then the International Gay Archives. In 1994, after Lambert’s death, Kepner merged his archives with what remained of *ONE*, creating the *ONE National Gay & Lesbian Archives*. Between 2000

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368. STREITMATTER, *supra* note 364, at 112.

369. C. Todd White details the full saga of the organization’s split. See WHITE, *supra* note 59, at 93–199. For the details of the settlement between the factions see *id.* at 173.

370. KAMENY, *supra* note 4, at 165.

371. D’EMILIO, *supra* note 6, at 199.

372. BULLOUGH, *supra* note 48, at 124–34.

and 2010, the Archives came under the care of the University of Southern California—Slater’s alma mater. The library, including the internal records of *ONE Magazine*, moved to a permanent location just off the University Park campus, two miles from *ONE*’s original office on South Hill Street.<sup>373</sup>

Eric Julber continued to practice law in California. After his work with *ONE*, he drifted away from gay rights causes. He developed a specialty in maritime law, and in the 1970s became an advocate for greater accessibility to America’s parklands. In 1971, Julber testified before the Senate Committee on Parks and Recreation, defending the rights of the most vulnerable Americans to access the nation’s wilderness.<sup>374</sup> In his decades of legal work and activism, he never argued before the United States Supreme Court.

*One, Inc. v. Olesen* placed homosexuality outside the definition of obscenity, even as the Supreme Court continued to struggle with the relationship between free and indecent speech. In 1966, the Court modified the *Roth* test, explaining that for material to be considered obscene, it must be “patently offensive,” in addition to appealing to the prurient interest and lacking social value.<sup>375</sup> The obscenity standard was further refined in 1973, when the Court’s opinion in *Miller v. California* replaced *Roth*’s “social value” language, instead explaining that obscene content “lacks serious literary, artistic, political, or scientific value.”<sup>376</sup> On the same day that the Court handed down the *Miller* decision, it ruled on *Paris Adult Theatre I v. Slaton*, applying the new obscenity standard to a case involving adult-only theaters showing pornographic films. William Brennan, whose majority opinion in *Roth* initiated the Court’s foray into obscenity law, dissented in *Paris Adult Theatre* and rejected the standard that he had helped to create in 1957:

I am convinced that the approach initiated 16 years ago in *Roth v. United States* . . . cannot bring stability to this area of law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach.<sup>377</sup>

Brennan advocated for a more absolutist approach to free speech, conceding that no perfect answer to the question of obscenity existed, and that such an answer would likely never emerge.<sup>378</sup>

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373. *History*, ONE ARCHIVES AT THE USC LIBRARIES, [one.usc.edu/about/history](http://one.usc.edu/about/history).

374. Eric Julber, *Let’s Open Up Our Wilderness Areas*, 100 READER’S DIGEST 125 (1972).

375. *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966).

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

377. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73–74 (1973).

378. For further exploration of how the Court has dealt with obscenity after *Roth*, see HIXSON, *supra* note 14.

The status of obscenity remained ambiguous well into the twenty-first century, as politicians continued to debate the government's proper role in regulating indecency. In 2011, Attorney General Eric Holder closed the Obscenity Prosecution Task Force, a unit established by the Department of Justice in 2005 to enforce existing obscenity law against Internet pornography.<sup>379</sup> Conservatives, however, remained committed to regulating the obscene. In 2012, Orrin G. Hatch, a Republican Senator from Utah, authored an article in the *Stanford Law & Policy Review*, arguing for federal enforcement of anti-obscenity statutes because "pornography and obscenity harm communities, individuals, and society."<sup>380</sup> Hatch became the president pro tempore of the Senate in 2015 and remained resolute on the issue. In January 2017, during the Senate Judiciary Committee's hearings regarding the confirmation of Jeff Sessions as Attorney General, Hatch asked Sessions whether he would consider reestablishing an obscenity unit within the Justice Department, and whether he believed that federal obscenity laws should be "vigorously" enforced.<sup>381</sup> "Those laws are clear," Sessions responded, "and should be continued to be effectively and continuously prosecuted."<sup>382</sup> Many questions about obscenity in the digital era remain unanswered. Whether homosexuality itself is obscene is not among them.

During the later decades of the twentieth century, gay rights activists built on the work of *ONE*, using the expanded gay press to communicate and organize. In the 1980s and 1990s, the gay rights community faced the challenge of AIDS, a disease perceived to be linked to homosexuality. Despite evidence that AIDS affected individuals of all sexual orientations, the stigma of the disease as a "gay plague" persisted, and researchers in the early 1980s often referred to it as gay-related immunodeficiency.<sup>383</sup> Groups founded by gay activists, such as ACT UP and Gay Men's Health Crisis, advocated and provided services for all people with AIDS. Early on, these activists communicated primarily through gay newspapers, which had proliferated freely during the 1970s thanks to the protection offered by *One, Inc.*<sup>384</sup>

During the twenty-first century, lesbian, gay, bisexual, and transgender

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379. Josh Gerstein, *Holder Accused of Neglecting Porn*, POLITICO, Apr. 16, 2011.

380. Orrin G. Hatch, *Fighting the Pornification of America by Enforcing Obscenity Laws*, 23 STAN. L. & POL. REV. 17 (2012).

381. *Attorney General Nominee Jeff Sessions Testifies* (Washington, D.C., 2017), www.c-span.org.

382. *Id.*

383. Lawrence K. Altman, *New Homosexual Disorder Worries Health Officials*, N.Y. TIMES, May 11, 1982.

384. Historian Jennifer Brier explores AIDS activists' use of the gay press in the early 1980s. She argues that "writer-activists . . . created a conversation about the possibilities for queer community and queer politics among people thinking about and studying AIDS." JENNIFER BRIER, INFECTIOUS IDEAS: U.S. POLITICAL RESPONSES TO THE AIDS CRISIS 14 (2009).



activists achieved significant political and legal victories. In advocating for civil rights, LGBT movements have shifted between emphases on privacy and equality. In 2003, the Supreme Court decided *Lawrence v. Texas*, striking down anti-sodomy laws as unconstitutional following decades of protest by gay organizations.<sup>385</sup> In the 1950s, when sodomy was illegal in every state, *ONE*'s editors used their platform to publicly advocate for an end to the statutes that criminalized homosexual acts. By the early 2000s, such laws still existed in thirteen states.<sup>386</sup> Writing for the Court's majority in *Lawrence v. Texas*, Justice Anthony Kennedy declared anti-sodomy laws to be violations of privacy and liberty as protected by the Constitution.<sup>387</sup> He framed the decision as one informed by changing times. Each generation "can see that laws once thought necessary and proper in fact serve only to oppress," Kennedy argued.<sup>388</sup> "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."<sup>389</sup>

When LGBT activists turned their attention to the issue of same-sex marriage, they departed from claims of privacy and invoked an argument based on equality. This shift echoed *ONE*'s legal strategy in challenging obscenity law. Rather than asserting obscenity laws to be unconstitutional breaches of free speech, *ONE* claimed that the application of such laws was improper, thereby denying the editors equal protection and due process. In 1958, the Justices neglected to rule on the question of equality, instead offering a redefinition of obscenity. Nearly sixty years later, in 2015, the Court decided *Obergefell v. Hodges*, in which it held that the Equal Protection and Due Process Clauses of the Fourteenth Amendment guaranteed same-sex couples the right to marry.<sup>390</sup> Once again writing for the majority, Kennedy proclaimed state laws prohibiting same-sex marriage to be "in essence unequal."<sup>391</sup> Homosexual couples "ask for equal dignity in the eyes of the law," he wrote.<sup>392</sup> "The Constitution grants them that right."<sup>393</sup>

The decades since *One, Inc. v. Olesen* demonstrate the evolving nature of the gay rights movement. Its challenges, goals, and rhetoric have shifted with each generation. *ONE Magazine* played a crucial role in building the foundation for the dynamic movement that followed it. It helped to propel gay rights advocacy forward by overcoming censorship

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385. 539 U.S. 558 (2003).

386. ESKRIDGE, *supra* note 197, at 297.

387. *Lawrence*, 539 U.S. at 579.

388. *Id.*

389. *Id.*

390. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

391. *Id.*

392. *Id.* at 2609.

393. *Id.*

and contributing to the legal disassociation of homosexuality and obscenity. In clashing with the federal government, *ONE* revealed obscenity law to be a fundamental obstacle standing in the way of the homophile movement. The magazine's entry into the debate over homosexual speech was an incidental one. Its eventual willingness to battle obscenity laws reflected a recognition that for homosexuals to fight for civil rights in the years to come, they first needed to secure the ability to speak and publish freely. *ONE*'s editors operated under the looming threat of censorship, organizing and publishing in the face of fear. Undeterred, they demanded a voice, with hope that the country would listen.