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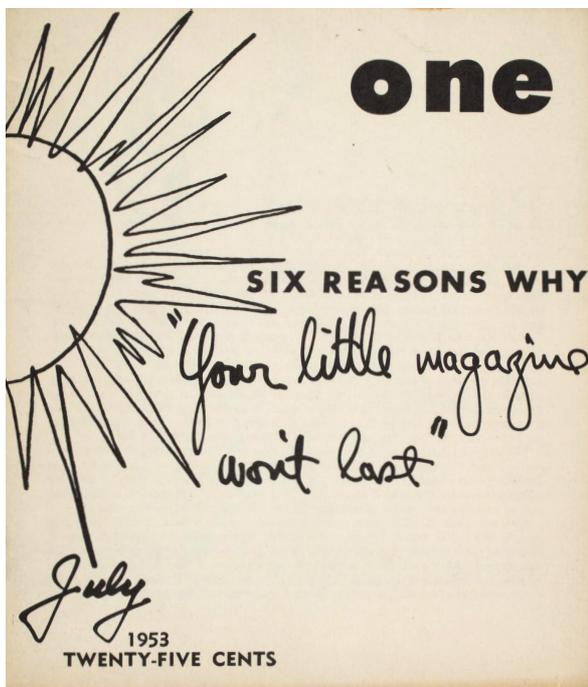
**“You
Can’t
print
it!”**

—ONE’S

Legal

Counsel





The Supreme Court Case That Dared Not Speak Its Name

BY BOB WOLFE

NOT SURPRISINGLY, given Los Angeles' problematic legacy of historic preservation, the site of an "unprecedented legal victory that allowed the gay press to blossom"¹ is now a bleak parking lot in the heart of the city. No plaque marks the spot. But its significance merits memorialization for a U.S. Supreme Court decision that is "arguably *the* seminal gay rights case in America."² That decision "'put gay people on the path to freedom."³

Blanchard Hall, at 232 S. Hill Street, was built in 1905 to house studios for musicians, artists and writers.⁴ A half century later, it had become quite rundown, housing garment sweatshops and other low-paying tenants. In late 1953, Dale Jennings, editor-in-chief of the first openly gay magazine in the U.S., moved the struggling publication's offices into cramped space on the third floor.⁵

1. Joyce Murdoch and Deb Price, *Courting Justice: Gay Men and Lesbians v. the Supreme Court*, New York: Basic Books, 2001, 27.

2. Jonathan Rauch, "The Unknown Supreme Court Decision That Changed Everything for Gays," *Washington Post*, Feb. 5, 2014.

3. David G. Savage, "Supreme Court Faced Gay Rights Decision in 1958 Over 'Obscene' Magazine," *L.A. Times*, Jan. 11, 2015, A1.

4. "Blanchard Hall Is To Be Enlarged," *L.A. Herald*, June 12, 1904, pt. II, 1.

5. C. Todd White, *Pre-Gay L.A.: A Social History of the Movement for Homosexual Rights*, Urbana: Univ. of Illinois Press, 2009, 52.

The magazine, simply named *ONE*, made its mark on history through the eponymous U.S. Supreme Court opinion, *ONE, Inc. v. Olesin* (1958) 355 U.S. 371. But the mark seems to have been written in invisible ink.

Here is the decision in full:

PER CURIAM [¶] The petition for writ of certiorari is granted and the judgment of the United States Court of Appeals for the Ninth Circuit is reversed. [Citation.]

There was no oral argument, no discussion of facts or law, no author, no concurrences, no dissents.⁶

Fittingly, the story of how this gay rights victory was achieved is as bizarre as its obscurity. "It is in many ways astounding that the Court, in 1958, was willing to recognize that a magazine dedicated to the needs and interests of lesbians and gay men had sufficient social value — despite containing some sexual content — to reverse the lower court's finding of obscenity."⁷

Strange that a landmark case about getting out of the closet has been so firmly stuck in one.

January–March 1952: The "Homosexual Trap"

The antecedents of this Supreme Court decision occurred at two public bathrooms at Echo Park and MacArthur Park, several miles from downtown L.A. During much of the twentieth century, gay men had few outlets other than such places to meet like-oriented people.⁸

Anti-homosexual policing tactics relied on ongoing surveillance of public facilities by plainclothes vice squad officers, reasoning if lawmen "watch enough people long enough some malum prohibitum acts will eventually be discovered."⁹ "After World War II, homosexual arrests — including those for sodomy, dancing, kissing or holding hands — occurred at the rate of one every ten minutes, each hour, each day, for fifteen years. In sum, one million citizens found themselves persecuted by the American state for sexual deviation."¹⁰

In January 1952, plainclothes police detective Ted Porter was assigned to the Echo Park bathroom as a decoy to trap homosexuals. He reportedly encountered five Latino "park bandits," who attempted to steal his wallet, badge

6. *ONE, Inc.*, *supra* 355 U.S. 371. By contrast, California does not permit such summary reversals. "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." (Cal. Const., Art. VI, § 14.)

7. Carlos A. Ball, "Obscenity, Morality, and the First Amendment: The First LGBT Rights Cases Before the Supreme Court" (2015) 28 *Columbia J. of Gender & Law* 1, 49.

8. Eric Cervini, *The Deviant's War: The Homosexual vs. the United States of America*, New York: Farrar, Straus & Giroux, 2020, 7.

9. *Bielicki v. Superior Court* (1962) 57 Cal.2d 602, 609 [overturning conviction for oral sex in a public toilet because of hidden police viewing of bathroom stalls]. See Anna Lvovsky, *Vice Patrol: Cops, Courts & the Struggle Over Urban Gay Life Before Stonewall*, Chicago: Univ. of Chicago Press, 2021, 2.

10. Cervini, *The Deviant's War*, 7–8.

U.S. history, at which 22 Latino defendants were jointly tried following the death of a teenager near a popular southeast L.A. swimming hole.²¹

Jennings and Shibley decided to admit that Jennings was gay — quite an admission to make in open court in 1952 — but deny that he acted in a lewd or dissolute manner.

The door to this novel strategy — to focus on conduct rather than status — was first opened by a landmark California Supreme Court decision the previous year. In *Stoumen v. Reilly*, the state revoked the liquor license for San Francisco's Black Cat bar based on police testimony that "many of the patrons of the Black Cat were homosexuals and that it was reputed to be a 'hangout' for such persons." Reversing the judgment, the Supreme Court unanimously held that homosexuals had as much right to patronize public establishments as other person so long as they "are not committing illegal or immoral acts . . ."²²

Significantly, Martin and Porter's credibility was called into question when the two officers were arrested and suspended from police service in April 1952 for assaulting Castellanos.²³

Jennings' trial began in mid-June 1952 and lasted 10 days. In his opening statement, attorney Shibley aggressively sought to turn the tables, identifying Martin as "the only true pervert in [the] courtroom." Shibley reminded the jurors that being gay did not make one guilty, and that the same presumption of innocence applied to Jennings as to Martin and Porter.²⁴ "The Castellanos case didn't prove Jennings's innocence, but the charges against Martin and Porter, and the specter of their suspension from the police force, worked in Shibley's favor. In entrapment trials, police testimony was considered unimpeachable; Shibley shook that assumption on day one."²⁵

21. Shibley "locked horns" with Superior Court Judge Charles Fricke, who repeatedly and unfairly rebuked him in front of the jury and refused to allow attorney-client consultations during trial, among other abuses of process. The convictions were reversed in a landmark appeal. *People v. Zamora* (1944) 66 Cal.App.2d 166. Shibley later represented Sirhan Sirhan, found guilty of first-degree murder in the assassination of Sen. Robert F. Kennedy. *People v. Sirhan* (1972) 7 Cal.3d 710.

22. *Stoumen v. Reilly* (1951) 37 Cal.2d 713, 715–16. "The separation of status from conduct . . . permitted [courts] to start recognizing the rights of sexual minorities as 'human beings,' which was the term used by the *Stoumen* court to refer to the Black Cat's patrons." Carlos A. Ball, *The First Amendment and LGBT Equality: A Contentious History*, Cambridge: Harvard Univ. Press, 2017, 63–64.

23. "Formal Charges Placed Against Two Policemen," *L.A. Times*, Apr. 16, 1952, A3.

24. Jennings, "To Be Accused Is To Be Guilty," URL to *ONE Magazine* *supra* 13.

25. Peyton Thomas, "Ordinary Person, Wild Radical" (2018) 80 *The Atavist Magazine* Act IV, available at <https://magazine.atavist.com/ordinary-person-wild-radical-mattachine-society-lgbt/> [as of Sept. 7, 2022].

Shibley's approach, although risky, paid off. After 40 hours of deliberation (most of it spent trying to convince the recalcitrant foreman), 11 of the 12 jurors voted to acquit. Several weeks later, the trial judge granted the prosecution's motion to dismiss.²⁶

January 1953: ONE is Born

Despite a concerted publicity effort by the Mattachine Society, no newspaper, radio or television covered Jennings' trial or his subsequent victory. Jennings and his circle of supporters concluded that they had to address this silence through public speech of their own.²⁷

Their chosen medium? A monthly magazine, frankly and provocatively addressing issues of concern to the homosexual community, including politics, short fiction, poetry, science, law and legislation. "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* . . ."²⁸

The name, *ONE*, came from Scottish writer Thomas Carlyle: "The mystic bond of brotherhood makes all men one." Jennings served as *ONE*'s editor-in-chief and primary contributor. The magazine's first issue appeared in January 1953. It included Jennings' own account of his arrest and trial, as well as a detailed discussion of the law of entrapment.²⁹

On November 1, 1953, *ONE* mustered sufficient resources to move into the rundown Blanchard Hall in downtown L.A., using donated furniture and volunteer employees. "The office, with its beat-up creaky wooden floors and its ceiling-high orange-crate bookshelves, was as shabby as the neighborhood."³⁰

By the end of 1953, *ONE* had distributed nearly 30,000 issues throughout the country to newsstand purchasers (at a cost of 50 cents per issue) and to paid mail subscribers (\$2.50 per year, or \$3.50 for mailings in sealed envelopes with no return address).³¹ The *ONE* editors were

26. *Ibid.* In a separate jury trial, Martin and Porter escaped any criminal liability for beating Castellanos. "Charges Against Officer Dropped," *L.A. Times*, Jul. 8, 1952, A7. A police board of rights disciplined the two men for excessive force and false reports, but the punishment was relatively mild: 30 days suspension without pay for Martin and 90 days for Porter, followed by a return to duty. "Policemen Found Guilty of Using 'Undue Force,'" *L.A. Times*, Jul. 2, 1952, A3.

27. White, *Pre-Gay L.A.*, 29–38.

28. Briker, "The Right to Be Heard," *supra* 31 *Yale J. of Law & the Humanities* 49, 53.

29. Jennings, "To Be Accused Is To Be Guilty," URL to *ONE Magazine* *supra* 11.

30. Lillian Faderman and Stuart Timmons, *Gay L.A.*, Berkeley, Univ. of Calif. Press, 2009, 117.

31. Briker, "The Right to Be Heard," *supra* 31 *Yale J. of Law & the Humanities* 49, 66.

unabashedly fearless and trailblazing in their articles and editorials, offering cutting-edge discussion and debate.³²

August 1953–October 1953: *ONE* is Stillborn

Given its reliance on mail subscriptions, *ONE* was particularly concerned about running afoul of the Comstock Act of 1873, which barred from the U.S. mail “lewd, lascivious, obscene or filthy” publications.³³ For that reason, and despite a tight budget, *ONE* hired a newly admitted attorney, 29-year-old Eric Julber, on a \$75 monthly retainer to provide legal and editorial advice.

Jennings described Julber as a “professionally prudish attorney who looks askance at the mildest bawdiness.” Aptly so: Julber warned against cheesecake art, erotic photographs, promiscuous language (“orgasm,” “excitingly” and “physique”) and prurient descriptions of physical contact.³⁴ “But what the magazine lacked in raciness, it made up for in audacity.”³⁵

ONE’s August 1953 issue illustrates this tightrope. The cover story posed the then-unthinkable question: “Homosexual Marriage?” The accompanying article did not sugarcoat the “staggering” subject matter, calling it “one of the most important which *ONE* has published.” Still, following Julber’s guidance, the article framed homosexual marriage as promoting a societal good — reduced promiscuity — rather than solely encouraging gay sex. “What a logical and convincing means of assuring society that [homosexuals] are sincere in wanting respect and dignity?” it argued.³⁶

Hardly the stuff of pornography. Nonetheless, Los Angeles postal inspectors confiscated the August 1953 mailings pending further review by the solicitor general in Washington, D.C., as the postmaster general’s attorney. “Whether the postmaster truly felt that the magazine was obscene or whether he was rattled by the idea that two people of the same gender could form long-term and healthy relationships is unclear.”³⁷

Although postal officials released the issue for mailing three weeks later, *ONE*’s editorial board did not feel thanks were in order. The October 1953 cover read,

ONE is not grateful. *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.³⁸

In March 1954, Jennings resigned as *ONE* editor following internal complaints that he had been too “bossy and headstrong,” in what author C. Todd White called a “closed-door coup.” Julber continued his retainer relationship as *ONE*’s counsel.³⁹

By the end of 1954, *ONE*’s national circulation numbers neared some 60,000 copies. But with increased circulation came heightened scrutiny. Wisconsin Sen. Alexander Wiley, who chaired the Senate Foreign Relations Committee, was outraged by what he saw when leafing through the March 1954 issue of *ONE* at a New York City newsstand. He demanded that Postmaster General Arthur Summerfield ban mailings of this “sexually perverse” publication.⁴⁰

Despite Wiley’s command, *ONE*’s editors believed the magazine could successfully maneuver its way through these suffocating legal restrictions. Julber’s lead article in the October 1954 issue, under the cover title “You Can’t Print It!,” took the guardedly upbeat view that a homosexual magazine “can become an accepted institution in American literary life (and this seems to be happening).”⁴¹

Unfortunately this optimism proved to be misplaced, and the cover title, “You Can’t Print it!,” all too prescient. On October 20, 1954, L.A. Postmaster Otto K. Olesen notified *ONE* that the post office was sequestering all mailed copies of the October 1954 issue as obscene.⁴²

Postmaster Olesen’s objection? One of the issue’s short fictional stories, “Sappho Remembered,” told of a 20-year old woman who dropped her male boyfriend (“a nice young man, good job, good prospects”) for her older lesbian lover, a nightclub singer. To make matters worse, the story had a happy ending, with the [young woman] exclaiming, “I don’t love him . . . like I do you.”⁴³

32. *Id.* 63–64; see also White, *Pre-Gay L.A.*, 48.

33. 18 U.S.C. § 1461.

34. Briker, “The Right to Be Heard,” *supra* 31 *Yale J. of Law & the Humanities* 49, 71–73, 88.

35. Jim Burroway, “Fifty Years Ago, A Supreme Court Victory” (2008) 15 *Gay & Lesbian Review Worldwide* 6.

36. E.B. Saunders, “Reformer’s Choice” (Aug. 1953) 1 *ONE* 10–12, available at <http://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/ONE/ONE-5308-compressed.pdf> [as of Sept. 7, 2022].

37. White, *Pre-Gay L.A.*, 48.

38. “ONE Is Not Grateful” (Oct. 1953) 1 *ONE* cover page, available at <http://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/ONE/ONE-5310-compressed.pdf> [as of Sept. 7, 2022].

39. White, *Pre-Gay L.A.*, 58, 61.

40. Charles, *Hoover’s War on Gays*, 180–181; Wiley’s concerns dovetailed with those of Wisconsin’s junior senator, Joseph McCarthy, who embarked on a crusade to link homosexuality with Communism. Jason M. Shepard, “The First Amendment and the Roots of LGBT Rights Law” (Apr. 2020) 26 *Wm. & Mary J. Race, Gender & Soc. Just.* 599, 618.

41. Eric Julber, “The Law of Mailable Material” (Oct. 1954) 2 *ONE* 6, available at <http://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/ONE/ONE-5410-compressed.pdf> [as of Sept. 7, 2022].

42. Briker, “The Right to Be Heard,” *supra* 31 *Yale J. of Law & the Humanities* 49, 90.

43. Jane Dahr, “Sappho Remembered” (Oct. 1954) 2 *ONE* 9–15, available at <http://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/ONE/ONE-5410-compressed.pdf> [as of Sept. 7, 2022].

Also objectionable was a satiric poem, “Lord Samuel and Lord Montague,” which rhymingly mocked the recent arrest of several British aristocrats on morals charges, e.g.: “Some peers are seers but some are queers — And some boys WILL be girls.”⁴⁴

1955–1957: ONE Suits Up

The post office’s action hit *ONE* at a financially precarious time. Although Julber agreed to represent the magazine pro bono, its available funds had dwindled to less than \$27. Julber delayed filing a lawsuit in federal district court until September 1955, when *ONE* was able to raise sufficient money to cover initial filing fees and court costs.⁴⁵

The lawsuit was assigned to newly appointed Federal District Court Judge Thurmond Clarke and came to trial in mid-January 1956, with the parties agreeing to resolve the matter by reciprocal summary judgment motions.

Before his federal appointment, Judge Clarke served as a state court judge. In December 1945, in the famous “Sugar Hill” case, then Superior Court Judge Clarke issued one of the first rulings anywhere in the U.S. invalidating restrictive covenants. The decision allowed famed Black defendants, blues singer Ethel Waters and actresses Hattie McDaniel and Louise Beavers, to remain in their homes.

As he wrote, “It is time that members of the Negro race are accorded, without reservations or evasions, the full rights guaranteed them under the 14th Amendment to the Federal Constitution. Judges have been avoiding the real issue too long.”⁴⁶

Regrettably, Judge Clarke did not similarly distinguish himself with respect to public discussions about homosexuality. In March 1956, Clarke issued his ruling in favor of suppressing *ONE*’s October 1954 issue because, he concluded, “Sappho Remembered” is “lustfully stimulating to the average



Eric Julber, photo ca. 1957, when Julber filed his cert petition with the U.S. Supreme Court.

homosexual reader.” Judge Clarke ordered *ONE* to pay the government’s costs: \$20.⁴⁷

In the meantime, high-ranking FBI officials were incensed by an article, “How Much Do We Know About the Homosexual Male?” in *ONE*’s November 1955 issue.⁴⁸ The article, written under the pseudonym “David Freeman,” suggested that homosexuals occupied the highest echelons in society, including the media, diplomatic corps, and “key positions” within the oil and gas industry as well as the FBI. The article highlighted the FBI linkage with the snarky parenthetical, “(it’s true!)”⁴⁹

FBI chief J. Edgar Hoover was fiercely protective of the bureau’s reputation and “especially sensitive toward, and sought retribution against, anyone suggesting . . . gays worked in the FBI.” In light of the Freeman article, Hoover scrawled “I concur” to a message by associate director Clyde Tolson that the bureau “should take this crowd on.”⁵⁰

In January and February 1956, at Hoover’s express directive, two “mature and experienced” FBI agents made unannounced visits to *ONE*’s office in Blanchard Hall. *ONE*’s business manager was present each time, but he refused to identify himself or the pseudonymous Freeman, or to answer any question about the article and its reference to homosexuals within the FBI. The unnamed manager (who was actually W. Dorr Legg, also known as “William Lambert”) referred all further inquiries to attorney Julber. The agents specifically warned the “strictly no good” Lambert/Legg “that ‘the FBI would not tolerate any such baseless statement in this or any other publication.’”⁵¹

The FBI thereupon redoubled its investigation through its “Sex Deviates” program, enlisting informants, covert surveillance, neighbor and former employer interviews and other techniques to unearth information about the magazine, its staff and associates (particularly Freeman, Lambert/Legg and Julber), and how the publication was financed, printed and mailed.⁵²

Ultimately, the FBI reasoned, the best way to shut down *ONE* was by a criminal prosecution for obscenity, which it optimistically recommended to the Justice Department, arguing, “We may well be able to make such a move should the pending appeal of the

44. “Lord Samuel and Lord Montague” (Oct. 1954) 2 *ONE* 18, available at <http://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/ONE/ONE-5410-compressed.pdf> [as of Sept. 7, 2022]. Another example: “And if you wish to Pick a Dilly / When you’re strolling out at night / Just make sure it’s not a ‘Lilly’ / Or a male transvestite.” *Id.* 19.

45. Briker, “The Right to Be Heard,” *supra* 31 *Yale J. of Law & the Humanities* 49, 93.

46. “Negro Owners Win Contest on Occupancy,” *L.A. Times*, Dec. 4, 1945, A1. In another watershed order, Judge Clarke declared California’s 37-year-old Alien Land law unconstitutional because it was “directed solely against persons of Japanese ancestry because of race.” “Calif. Alien Land Law Ruled Illegal,” *L.A. Daily News*, Mar. 16, 1950, 54. The California Supreme Court affirmed the judgment. *People v. Masaoka* (1952) 39 Cal.2d 883.

47. Murdoch, *Courting Justice*, 33; Briker, “The Right to Be Heard,” *supra* 31 *Yale J. of Law & the Humanities* 49, 96.

48. Charles, *Hoover’s War on Gays*, 153, 181–82.

49. David L. Freeman, “How Much Do We Know About the Homosexual Male?” (Nov. 1955) 3 *ONE* 5, available at <http://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/ONE/ONE-5511-compressed.pdf> [as of Sept. 7, 2022].

50. Charles, *Hoover’s War on Gays*, 182–83. “It is already illuminating that Hoover’s not fitting cultural expectations of masculinity inspired curiosity about his own sexuality (and he always quickly and quietly, but unsurprisingly, had such speculation quashed).” *Id.* 9.

51. *Id.* 183–84.

52. *Id.* 184–85.

magazine against postal authorities be found in favor of the Government.”⁵³

This bullishness was borne out by the U.S. Ninth Circuit Court of Appeals, which heard argument in November 1956 and issued a unanimous opinion in February 1957 affirming that *ONE*'s October 1954 issue was “obscene.”

Nevada Federal District Court Judge John Rolly Ross, sitting by designation, authored the opinion for the three-judge panel. As he saw it, the mere mention of a “young girl [who] gives up her chance for a normal married life to live with the lesbian” amounted to “cheap pornography calculated to promote lesbianism.” The presence or absence of explicit sexual references was irrelevant.⁵⁴

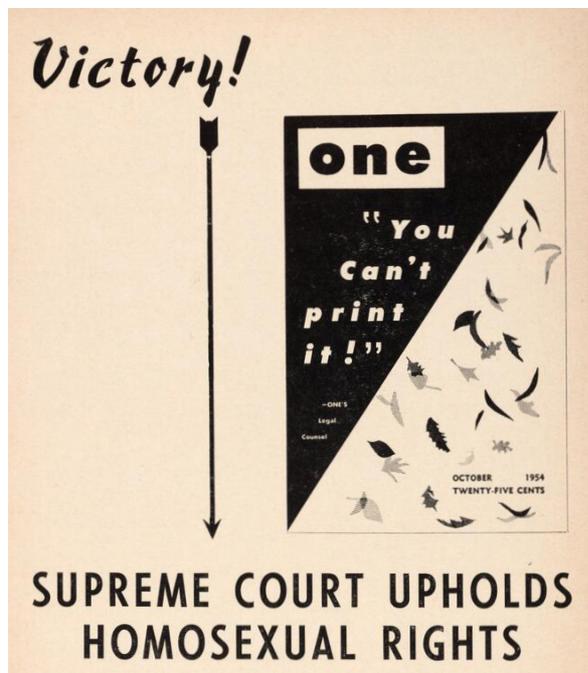
Applying a similar test concerning the effect on an ordinary reader, Judge Ross found only “filthy language” in the poem “Lord Samuel and Lord Montague.” The poem “contains a warning to all males to avoid the public toilets while Lord Samuel is ‘sniffing round the drains’ of Piccadilly (London),” Ross wrote. He deemed the poem “dirty, vulgar and offensive to the moral senses.”⁵⁵

January 1958: A Silent Victory

Faced with the Ninth Circuit’s unsparing language about “cheap pornography,” *ONE* saw no alternative but to petition the nation’s highest court, however uncertain the outcome. As it editorialized:

Appeal costs are heavy and the course is hazardous, but the issues at stake are enormous. . . . 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? Will homosexuality come to be regarded as an accepted form of socio-sexual behavior? . . . [The answers] hinge on the outcome of *ONE*’s appeal to the United States Supreme Court.⁵⁶

Julber, again acting pro bono, filed *ONE*’s certiorari petition in June 1957, asking the U.S. Supreme Court to determine whether “the mere depiction of homosexuals or homosexual problems in literature is ‘lustful’ or ‘stimulating’ in such a manner as to render the literary work ‘obscene.’ . . . [T]he question of the depiction or consideration of the problems raised by homosexuality among our population has never been considered by this Court or any Court of Appeals”⁵⁷



Within two weeks after the filing of *ONE*’s petition, the high court issued its decision in another pending case concerning the legal standards for obscenity under the Comstock Act. In the course of affirming the conviction of 64-year-old publisher Samuel Roth for mailing pornographic photographs, the court, in an opinion authored by Justice William Brennan, redefined the test for obscenity by focusing upon whether the challenged materials had even “the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion,” and concluded that “sex and obscenity are not synonymous.”⁵⁸

On January 13, 1958, the Supreme Court took up and decided *ONE*’s petition in one fell swoop. The court simultaneously granted certiorari and issued a *per curiam* decision, without seeking merits briefing or oral argument. The “decision” consisted of the disposition — “Reversed” — and a citation to *Roth v. United States*, without further explanation.⁵⁹

Despite its brevity, the import was clear: It allowed *ONE* to publicly discuss the role of sexual minorities in society “even if most Americans deemed same-sex sexual relationships and conduct to be morally reprehensible.”⁶⁰ The magazine’s unprecedented win “was a turning

53. *Id.* 193.

54. *ONE, Inc. v. Olesen* (9th Cir. 1957) 241 F.2d 772, 777.

55. *Ibid.*

56. “*ONE* & the U.S. Postoffice” (Mar. 1957) 5 *ONE* 19, available at <http://www.houstonlgbthistory.org/Houston80s/Asorted%20Pubs/ONE/ONE-5703-compressed.pdf> [as of Sept. 7, 2022].

57. Petition for Writ of Certiorari, *ONE, Inc. v. Olesen*, 1, 6, available at <https://mattachinesocietywashingtondc.files.wordpress.com/2020/05/16.3-appeals-petition-for-a-writ-of-certiorari-to-the-us-court-of-appeals.pdf> [as of Sept. 7, 2022].

58. *Roth v. United States* (1957) 354 U.S. 476, 484, 487.

59. The *per curiam* decision originally was thought to have been unanimous, but Justice William O. Douglas’ personal files subsequently revealed a narrower 5–4 vote, with Justices Clark, Douglas, Frankfurter, Harlan and Whittaker in the majority. Chief Justice Warren and Justices Black, Brennan and Burton would have denied certiorari. Briker, “The Right to Be Heard,” *supra* 31 *Yale J. of Law & the Humanities* 49, 113.

60. Ball, “Obscenity, Morality, and the First Amendment,” *supra* 28 *Columbia J. of Gender & Law* 1, 49.

point for homosexual America that would be crucial to the gay movement that was to come: No homosexual publication could ever again be declared obscene merely because it was about homosexuality.”⁶¹

The significance was not lost on *ONE*. “Victory!” trumpeted an article in the February 1958 issue, “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. Never before have homosexuals claimed their rights as citizens. . . . *ONE Magazine* no longer asks for the right to be heard; it now exercises that right.”⁶²

Both the Post Office and the FBI recognized the sea change resulting from the Supreme Court’s action. “On March 31, 1958, Hoover told his L.A. office that, because of the court’s ruling and the Justice Department’s refusal to prosecute, there was no need to keep sending him *ONE*. If the Supreme Court had not protected *ONE*, Hoover and Tolson likely would have found a way to put it out of business.”⁶³

The Supreme Court decision went unnoticed in the mainstream media. The *New York Times* January 14 issue simply listed the case name, without explanation, among 30 other Supreme Court dispositions. The *L.A. Times*, *ONE*’s hometown newspaper, never mentioned the decision until a retrospective piece in 2015 — 57 years after the event.⁶⁴

ONE’s Number is Up: Aftermath

In May 1962, *ONE* was evicted from Blanchard Hall due to earthquake risk. The magazine moved a few miles to the west to 2256 Venice Blvd, just south of today’s Koreatown.⁶⁵

Three years later, a legal struggle of a different kind ultimately did in *ONE* as a magazine. In 1965, *ONE*’s staff broke into factions in a bitter dispute over the organization’s goals. Litigation ensued, ultimately resolved by a settlement.⁶⁶ *ONE* split into two separate organizations, each of which continues to gather and disseminate archival material today.⁶⁷

The magazine itself ceased publishing in 1967. By that time, it is estimated to have distributed more than 500,000 copies, widely shared in social networks and among friends. Historians regard the publication as “the most visible, widely read gay and lesbian publication in the United States” during an “acutely repressive” period for that community.⁶⁸

Eric Julber continued to actively practice law until he retired in 2010 at age 85, although never again in the area of LGBTQ rights. As he later explained, “[I]’m not gay. Never have been. Really, my only association with them has been in this case.”⁶⁹

Dale Jennings went on to a career as a successful writer with three published novels. One of his books, the *The Cowboys*, was made into a film in 1972, with John Wayne and Bruce Dern. Jennings died of respiratory failure in May 2000 at 82. The *New York Times*’ obituary lauded his “courage” at the lewd-vagrancy criminal trial for making him a “permanent icon — and the infant movement’s first hero. . . . No one had ever been known to fight such a charge.”⁷⁰

In the years since Jennings’ arrest and trial, the California Supreme Court has gradually expanded the protections for gay men and women against vague and discriminatory laws that, as Jennings learned, depended

in the world.” “About *ONE*,” <https://www.onearchives.org/about/> [as of Sept. 7, 2022]. The Homosexual Information Center (HIC) “was founded in the late 1960s by the Tangent Group, which in 1965 formally split from *ONE*, Incorporated . . .” Its archives are housed at California State University, Northridge. Online Archive of California, “Guide to the Homosexual Information Center Subject Files Collection,” https://oac.cdlib.org/findaid/ark:/13030/tc8765gnz/entire_text/ [as of Sept. 7, 2022].

68. Craig M. Loftin, *Masked Voices: Gay Men and Lesbians in Cold War America*, Albany: SUNY Press, 2012, 18, 20.

69. Mason Funk, “Full Interview Transcript With Eric Julber” (Jan. 21, 2015), <https://theoutwardsarchive.org/subjectdetail/eric-julber> [as of Sept. 7, 2022]; see also Briker, “The Right to Be Heard,” *supra* 31 *Yale J. of Law & the Humanities* 49, 119. Julber did gain some notoriety in a civil rights case that occupied a different lane. In March 1976, Julber brought a state court lawsuit against the California Department of Transportation and its new director, Adriana Gianturco, for setting aside the two fast lanes on the Santa Monica Freeway (the so-called “Diamond Lane”) for bus and carpool use. Julber alleged an unlawful taking of his private property rights “by the state’s attempt to force him to share his 1973 Alfa Romeo with other persons without paying him compensation.” Ray Hebert, “Suit Seeks to Stop Diamond Lane Project,” *L.A. Times*, Mar. 30, 1976, C1. After “nearly five months of turmoil,” Caltrans halted the project following an injunction issued by federal judge Matt Byrne in a separate environmental lawsuit (not involving Julber). Ray Hebert, “Diamond Lane Goes Out Like a Lamb,” *L.A. Times*, Aug. 14, 1976, B1.

70. Dudley Clendinen, “William Dale Jennings, 82, Writer and Gay Rights Pioneer,” *N.Y. Times*, May 22, 2000, B7. When told in January 1958 of the U.S. Supreme Court ruling, Jennings had reacted, “Look, don’t joke. The year 2000, yes. But not today . . . I’m supposed to be an old man before this happens!” Murdoch, *Courting Justice*, 47.

61. Faderman, *Gay L.A.*, 120.

62. “Victory! Supreme Court Upholds Homosexual Rights” (Feb. 1958) 6 *ONE* 16–17, available at <http://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/ONE/ONE-5802-compressed.pdf> [as of Sept. 7, 2022].

63. Murdoch, *Courting Justice*, 49–50; see also Charles, *Hoover’s War on Gays*, 199.

64. “United States Supreme Court,” *N.Y. Times*, Jan. 14, 1958, 54; Savage, “Supreme Court Faced Gay Rights Decision in 1958,” *supra* *L.A. Times*, A1.

65. “*ONE Magazine*’s New Office,” <https://one.usc.edu/story/one-magazines-new-office> [as of Sept. 7, 2022]; see also White, *Pre-Gay L.A.*, 110–111.

66. White, *Pre-Gay L.A.*, 133, 136–174.

67. ONE Archives Foundation describes itself as “the independent community partner that supports ONE National Gay & Lesbian Archives at the University of Southern California (USC) Libraries, the largest repository of [LGBTQ] materials

“upon the moral views of the judge or jury”⁷¹ “The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities.”⁷²

This slow but inexorable movement reached its apo-gee in the California Supreme Court’s decision recognizing a state constitutional right to gay marriage.

California has repudiated past practices and policies that were based on a once common viewpoint that denigrated the general character and morals

of gay individuals, and at one time even characterized homosexuality as a mental illness rather than as simply one of the numerous variables of our common and diverse humanity. This state’s current policies and conduct regarding homosexuality recognize that gay individuals are entitled to the same legal rights and the same respect and dignity afforded all other individuals⁷³

What the California Supreme Court made possible in 2008 had been advocated in *ONE*’s gay marriage issue 55 years earlier. If the struggles by sexual minorities to gain equal rights have a historical locus, the likeliest candidate is the parking lot on South Hill Street in downtown L.A. ★

71. *Pryor v. Municipal Court*, *supra* 25 Cal.3d 238, 256–57 [acknowledging discriminatory enforcement of California’s lewd-dissolute statute]; *see also Vallerga v. Dept. of Alcoholic Beverage Control* (1959) 53 Cal.2d 313 [invalidating statute allowing liquor license revocation for taverns serving “sexual perverts”]; *Bielicki v. Superior Court*, *supra* 57 Cal.2d 602 [recognizing personal privacy rights of public bathroom occupants]; *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 [homosexual conduct does not in itself necessarily constitute immoral conduct or demonstrate unfitness to teach]; *People v. Triggs* (1973) 8 Cal.3d 884 [overturning conviction based on clandestine observation of doorless toilet stall].

72. *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 488 [barring discrimination by public utility against gay job applicants].

BOB WOLFE, an appellate attorney, is a board member of the Calif. Supreme Court Historical Society, Public Counsel, the L.A. Metro Community Advisory Council and Hillel at UCLA. He most recently authored “California’s Early Battle with ‘Birtherism’: D.W. Griffith, the NAACP, the Ku Klux Klan and the Courts,” (Fall/Winter 2021) *CSCHS Review*, 2–13. Bob occasionally leads legal history walking tours of downtown L.A.

73. *In re Marriage Cases* (2008) 43 Cal.4th 757, 821–22.

The Keeper of Los Angeles’ Lost Buildings

DOWNTOWN LOS ANGELES today is thick with the glass and steel towers typical of other urban centers. But look closely and you might also find stories of buildings now gone.

Bob Wolfe, appellate attorney and CSCHS Board member, is also an architectural archeologist, unearthing and illuminating the role of those lost buildings in L.A.’s legal history. Although Blanchard Hall (right) no longer stands, from 1953 to 1962 it housed the offices of *ONE Magazine*, which, as Bob documents, was the subject of a 1958 U.S. Supreme Court summary disposition regarded as pivotal to the eventual legal recognition of gay rights.

Bob discovered *ONE*’s story as he put together the most recent in his series of legal history “walking tours.”¹ For two decades, Bob has led Public Counsel’s staff, volunteers and board members around downtown Los Angeles. Last year’s tour, online,² focused on cases that originated in the buildings surrounding downtown’s Pershing Square.

In October, Public Counsel, the nation’s largest provider of pro bono legal services, recognized Bob’s work with one of its Pro Bono Awards. “Bob has crafted deeply researched CLE trainings and walking tours,” the group noted, “specifically designed to educate the legal community about important geographical sites and events in Los Angeles that are linked to our city’s history of racism and evolving system of justice.”

— Molly Selvin, *CSCHS Review* Editor



Blanchard Hall, 232 S. Hill Street, 1910. (Public domain)

1. Portions of those tours have been published in this publication. *See* Bob Wolfe, “A Legal Site-Seeing Tour of Downtown Los Angeles, Part 1” (Fall/Winter 2017) *CSCHS Newsletter* 1–6, 25; Bob Wolfe, “A Legal Site-Seeing Tour of Downtown Los Angeles, Part 2” (Spring/Summer 2018) *CSCHS Newsletter* 15–22; Bob Wolfe, “A Legal Site-Seeing Tour of Downtown Los Angeles, Part 3” (Fall/Winter 2019) *CSCHS Newsletter* 10–17.

2. www.dropbox.com/s/ig5lyz1g5a7gj9el/LawWalk-PershingSquare-2022-07.08.mp4?