

## IF OBSCENITY WERE TO DISCRIMINATE

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In her thoughtful essay, *When Obscenity Discriminates*,<sup>1</sup> Professor Elizabeth Glazer argues that First Amendment obscenity doctrine, as it relates to portrayals of gay and lesbian sex (“gay sex”), violates the Equal Protection Clause of the U.S. Constitution, and, somewhat paradoxically, the First Amendment itself. More specifically, Professor Glazer appears to make a three-pronged argument. First, current obscenity doctrine leaves open the possibility that, in application, juries or judges might find gay sex portrayals obscene simply because they involve same-sex acts (as opposed to obscene acts). Second, this possibility in turn encourages censorship of sexual expression involving gay sex by private actors. Finally, in view of the Court’s decision in *Lawrence v. Texas*,<sup>2</sup> the obscenity doctrine violates the Equal Protection Clause by causing such private discrimination, and also violates the First Amendment because such discrimination is directed against the viewpoint that gay sex is equally as acceptable as heterosexual sex.

While Glazer’s thesis is creative and provocative, she does not address critical legal and empirical problems with her argument. The first is the notion that existing constitutional doctrine of the U.S. Supreme Court can itself be unconstitutional because it might be applied in a manner that violates other constitutional doctrines. While such *applications* of a doctrine might be unconstitutional if they were to occur, that does not render the doctrine itself unconstitutional. The next problem is her idea that potential unconstitutional applications of a doctrine that purportedly encourage private actors to discriminate render the doctrine itself unconstitutional. If solely private actors commit the ultimate discrimination, then there is no state action to support a claim of constitutional violation.

Finally, there are significant empirical deficiencies with Glazer’s argument. She concedes there is little evidence that juries or judges actually apply the obscenity doctrine against gay sex portrayals in a discriminatory manner. Thus, she bases her claims of constitutional violation on alleged

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<sup>1</sup> Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379 (2008) (link).

<sup>2</sup> 539 U.S. 558 (2003) (holding that adults have a substantive due process right to engage in consensual sex with members of the same sex in the privacy of their own homes) (link).

discrimination by private parties. But even here, Glazer attempts to make a case of private discrimination by focusing on the actions of just two private entities—the Motion Picture Association of America (MPAA) and Google—where her “proof” of discrimination involves highly anecdotal or limited information, which fails to establish anything definitive. Moreover, Glazer provides no evidence to tie the allegedly discriminatory behavior of these two entities to the obscenity doctrine, relying instead on bare assertions that the doctrine’s treatment of gay sex portrayals causes such “collateral effects.”<sup>3</sup>

This Essay develops these criticisms of Professor Glazer’s essay. Part I discusses the lack of a sound legal or empirical basis for arguing that the obscenity doctrine is unconstitutional due to its claimed discriminatory collateral effects. Part II examines Glazer’s argument as it might properly have been made: that if the discriminatory application of the obscenity doctrine against gay sex portrayals were to become an issue, the demands of a principled and coherent jurisprudence would require the Court to revisit that doctrine in light of *Lawrence* to clarify that the gay or lesbian nature of such portrayals is not a constitutional basis for deeming expression to be obscene. I conclude that Glazer would have a strong argument in this regard, but one that relies primarily on basic equal protection and First Amendment principles rather than on any changes wrought by *Lawrence*.

## I. OF DISCRIMINATION AND EMPIRICAL SUPPORT

### A. *The State Action Requirement for Constitutional Violations*

Three basic interpretations of Professor Glazer’s thesis appear possible, as suggested by the following statements she makes, respectively, in her introduction and in her conclusion: “Part IV elaborates the obscenity doctrine’s discrimination against gays and lesbians on both equal protection and First Amendment grounds;”<sup>4</sup> and “The collateral effects of the obscenity doctrine’s current application have discriminated against gays and lesbians. Further, by so discriminating, the collateral effects of the doctrine have violated the Equal Protection Clause and the First Amendment itself.”<sup>5</sup>

The first possible interpretation, based on the statement from her introduction,<sup>6</sup> is that Professor Glazer believes the obscenity doctrine, and in

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<sup>3</sup> To be sure, in her Essay, Professor Glazer also appears to make a normative argument about the influence of the law on societal norms and how a potential reading of the obscenity doctrine to permit same-sex discrimination might undesirably encourage private actors to discriminate against content involving gay sex (and perhaps against gays and lesbians generally). Such an argument would certainly be defensible on social and legal *policy* grounds, but it is not the one on which Glazer chooses to make her principal stand.

<sup>4</sup> Glazer, *supra* note 1, at 1386.

<sup>5</sup> *Id.* at 1433.

<sup>6</sup> See *supra* note 4 and accompanying text.

particular the three-part test set out by the Court in *Miller v. California*,<sup>7</sup> is unconstitutional in light of *Lawrence*.<sup>8</sup> But it is unusual to argue that a current doctrine of the Court interpreting the First Amendment violates contemporaneous constitutional doctrines that interpret the same or other Amendments.<sup>9</sup> The Court presumably formulates its doctrines with others in mind, and while there might at times be unresolved tensions and inconsistencies among them, to select one of them and label it unconstitutional seems jurisprudentially incorrect. If perceived tensions between *Lawrence* and *Miller* were put squarely to the Court, it might choose the former as requiring modification rather than the latter (versus the other way around, as Glazer would have it). The point is that any tensions and uncertainties that might exist between new and old doctrines do not create an unconstitutional doctrine (or more appropriately a *non-constitutional* doctrine) until the Court identifies one as no longer constituting good law.

The second possible interpretation of Glazer's thesis, based on the statement from her conclusion referenced above,<sup>10</sup> is that alleged *applications* of the obscenity doctrine by juries and judges in a way that discriminates against portrayals of same-sex acts (i.e., an assertion of discriminatory enforcement or, at the least, disparate impact) are unconstitutional. But Glazer appears to disclaim such an argument by virtue of her repeated assertions that modern obscenity prosecutions are relatively rare, and that the obscenity doctrine is in "disuse"<sup>11</sup> and has "disappear[ed] from courts' dockets."<sup>12</sup>

Perhaps this is why Glazer focuses on alleged "collateral effects" of the obscenity doctrine on private actors. She seems to argue principally that the unconstitutionality she asserts derives from the fact that the doctrine leaves open the *possibility* of discriminatory applications of the facially-neutral

<sup>7</sup> 413 U.S. 15, 24 (1973) ("(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value") (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)) (link).

<sup>8</sup> See Glazer, *supra* note 1, at 1419–33.

<sup>9</sup> It is also an unusual argument because the *Miller* test is facially-neutral on the subject of homosexuality; in providing criteria for what sexual expression is obscene or not, it makes no distinctions whatsoever between heterosexual and homosexual sex acts. See *supra* note 7.

<sup>10</sup> See *supra* note 5 and accompanying text.

<sup>11</sup> Glazer, *supra* note 1, at 1382.

<sup>12</sup> *Id.* at 1383; see also *id.* at 1382, 1384, 1402–04, 1432–33. Professor Glazer appears to be correct about the dearth of modern obscenity prosecutions. See generally, e.g., Jason Krause, *The End of the Net Porn Wars*, A.B.A. J., Feb. 2008 (discussing the decline of federal obscenity prosecutions). Nevertheless, she suggests that the doctrine had earlier been applied against gay sex in a discriminatory manner by certain appellate courts—including the United States Supreme Court. See Glazer, *supra* note 1, at 1399–1402. However, none of the "evidence" for this proposition that Glazer cites—the appellate court opinions and remarks by Professor William Eskridge—truly support it. See *infra* note 19 and accompanying text.

*Miller* test,<sup>13</sup> which in turn induces private actors to discriminate against gay content.<sup>14</sup> If, however, Glazer is arguing that the obscenity doctrine itself is unconstitutional because of possible unconstitutional applications of it, this simply does not fly. The application of a constitutional doctrine in a way that violates other constitutional provisions does not make the doctrine itself unconstitutional. One would have to argue, as Glazer does not, that the doctrine itself is unconstitutionally vague because it admits of unconstitutional applications—an argument that would be subject to the same objections lodged above that one constitutional doctrine of the Court cannot violate another one of its contemporaneous doctrines.

But Professor Glazer takes her argument even further, arguing that the obscenity doctrine is unconstitutional because potential discriminatory applications of it by juries or judges has the collateral effect of inducing actual discrimination by private parties. This creates an additional problem. Where is the state action necessary to support a constitutional violation if the doctrine itself is not unconstitutional, there are no unconstitutional applications of it by government actors, and any actual discrimination is committed by private parties?<sup>15</sup> Of course, the only way for Glazer to properly make this argument is to demonstrate how those private parties themselves can qualify as state actors under the exceptions to that doctrine recognized by the Court.<sup>16</sup> However, she raises this issue solely as to one private actor she discusses but promptly abandons it, stating simply that “with respect to an assessment of the obscenity doctrine’s collateral effects, it is unnecessary to determine the status of the MPAA.”<sup>17</sup> But why is this so? Especially if one is going to later conclude, as noted above, that “the collateral effects of the doctrine have violated both the Equal Protection Clause and the First Amendment itself.”<sup>18</sup> The bottom line is that unless Professor Glazer can demonstrate how the MPAA or Google can be considered to be state actors (which seems highly unlikely), any reliance on their alleged discrimination against gay content to prove a constitutional violation, even if it was somehow induced by the obscenity doctrine, is misplaced.

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<sup>13</sup> The *Miller* test is facially neutral in the sense that it does not make sexual orientation the basis for determining what expression is obscene. See *supra* note 7.

<sup>14</sup> See Glazer, *supra* note 1, at 1432–33 (“The [obscenity] doctrine’s refusal to distinguish between sex and sexual orientation has left open the possibility that content can be classified as obscene because it is either more naked, or, in the alternative, because it is more gay.”).

<sup>15</sup> See, e.g., ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 6.4.1 (3d ed., 2006) (“The Constitution . . . generally does not apply to private entities or actors.”).

<sup>16</sup> See, e.g., *id.* § 6.4.4.1 (discussing the “public functions” and “entanglement” exceptions).

<sup>17</sup> Glazer, *supra* note 1, 1405. Glazer then proceeds to discuss the significant influence the MPAA has on the distribution of movies but never relates that discussion back to the recognized exceptions to the state action doctrine. See *id.* at 1405–08.

<sup>18</sup> *Id.* at 1433.

### B. Empirical Problems

Assuming Professor Glazer could make a tenable argument that the collateral discrimination she describes provides the basis for a constitutional violation, the evidence she presents for such discrimination is unpersuasive. To begin, although not absolutely vital to her argument since she focuses on the *possible* discriminatory application of the obscenity doctrine as fostering collateral discrimination, it is noteworthy that Glazer provides little evidence that juries or judges discriminate against gay sex portrayals in the first place. Although she discusses a couple of state appellate court cases where gay sex portrayals were held to warrant obscenity-related convictions, Glazer does not actually claim that these decisions (much less the underlying convictions) were the product of bias against same-sex acts.<sup>19</sup> Indeed, she forthrightly concedes that “an honest account of the obscenity

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<sup>19</sup> See *id.* at 1400–01. And nor would an examination of those decisions support such an assertion. See *Tipp-It, Inc. v. Conboy*, 596 N.W.2d 304 (Neb. 1999) (no reference by court in its *Miller* analysis to homosexuality being the basis for a finding of obscenity); *State v. Millville Video, Inc.*, No. CA99-10-179, 2000 Ohio App. LEXIS 4192 (Ohio Ct. App. Sept. 18, 2000) (videotape of acts between both homosexual and heterosexual couples deemed to meet the *Miller* guidelines with specific emphasis on the sadomasochistic nature of the acts rather than the same-sex nature). Glazer also cites to certain Supreme Court decisions and Professor William Eskridge’s remarks on them to suggest that the obscenity doctrine had been applied in a discriminatory manner against gay sex in the past. See Glazer, *supra* note 1, at 1400–01. However, these citations do not support such a proposition. None of the decisions Glazer relies on indicate that the Court found materials to be obscene because of their homosexual nature, and Professor Eskridge’s statements claiming such discrimination are either bare assertions or are not supported by the cases he relies upon. Compare William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1036–39 (2005) (citing and discussing *Miller v. California*, 413 U.S. 15 (1973) (link), and *Ward v. Illinois*, 431 U.S. 767 (1977) (link)) with *Miller*, 413 U.S. at 18 (in a case involving various heterosexual and homosexual images, the Court does not even acknowledge the homosexual nature of the images much less make that a basis of its decision) and *Ward*, 431 U.S. at 773 (in a case involving sadomasochistic materials, the Court did not reveal whether they involved heterosexual or homosexual acts, much less make their homosexual nature a basis of its affirmation of the lower courts’ findings of obscenity).

It should be noted that in *Tipp-It*, 596 N.W.2d at 312, the Nebraska obscenity statute at issue in that case did label homosexual acts as one among other types of acts, including “sexual intercourse,” that could qualify as being obscene (were it to meet other parts of the *Miller* test). However, as noted above, the court essentially ignored this fact when applying that test to find that three gay images among twenty-two displayed in a gay bar were obscene. See *Tipp-It*, 596 N.W.2d at 307, 312–15. One might argue that, by singling out “homosexuality” for potentially obscene treatment, the law itself constitutes evidence of the type of discrimination against gay sex claimed by Glazer. However, Glazer herself does not make this argument, presumably for two reasons. First, the Nebraska law, by including “sexual intercourse” and “prolonged physical contact with a person’s clothed or unclothed genitals,” appeared to be taking a “shotgun” approach to defining sexual acts that could qualify as obscene if they were sufficiently prurient and offensive. See *Tipp-It*, 596 N.W.2d at 312. Accordingly, the law did not appear to be discriminating against gay sex as such. Second, Glazer represented to this author that her research on laws defining what sexual acts could qualify as obscene under *Miller* revealed that they generally did not single out homosexual acts. E-mail from Elizabeth M. Glazer, Associate Professor of Law, Hofstra University School of Law, to Barry P. McDonald, Associate Professor of Law, Pepperdine University School of Law (May 30, 2008, 9:08 a.m. PST) (on file with author).

doctrine's history must reflect the fact that not all cases involving depictions of homosexuality have ended badly.<sup>20</sup>

Nonetheless, Glazer concludes that “[o]bscenity’s past and present suggest that the doctrine has failed to distinguish between content that is obscene because it contains too much sex, and content that is obscene because it contains representations of gays and lesbians.”<sup>21</sup> Although the little evidence Glazer sets forth could “suggest” virtually anything, it certainly does not establish a pattern of discrimination against gay sex portrayals in the application of the obscenity doctrine by juries and judges.<sup>22</sup> She appears to concede this by noting repeatedly that modern obscenity prosecutions are few and far between,<sup>23</sup> and by focusing on alleged collateral effects of such discrimination instead of that discrimination itself (despite the fact that the latter, of course, would have provided a much stronger basis for Glazer’s constitutional claims).

As for those discriminatory collateral effects, the evidence here is just as weak as the evidence supporting Professor Glazer’s allegations of discrimination by the courts. Glazer focuses on the actions of two private parties to make her case: the MPAA and Google. With respect to the MPAA, the evidence of its discrimination against gay content *because of its gay nature* consists mainly of anecdotal statements of film industry “insiders” and very general comparisons of the ratings received by films containing heterosexual sex scenes versus those containing gay sex scenes.<sup>24</sup> Once again, Glazer forthrightly concedes that “[i]t is surely possible that the MPAA rated the films whose scenes this section highlights with a particular rating for reasons other than the sexual orientation of its characters.”<sup>25</sup>

As to Google, Professor Glazer ran searches of the phrase “having sex” on *Google Images* using three different *SafeSearch Filtering* programs Google offers to “exclude[] most explicit images from Google Image Search Results”<sup>26</sup>—a “strict” filtering option, a “moderate” filtering option, and no filtering at all. She asserts that of the *first* twenty images her searches returned, the strict setting returned four depicting sex (all four involving heterosexuals), the moderate setting returned eight depicting sex (all eight involving heterosexuals), and the no filtering setting returned twelve depicting sex (eight involving heterosexuals and four involving homosexuals). From these results, Glazer suggests that Google has a “Gay Filter,” as the heading of her section asserts. Putting aside the puzzling silence on what *all* of her search results returned (and not just the first twen-

<sup>20</sup> Glazer, *supra* note 1, at 1401.

<sup>21</sup> *Id.* at 1402.

<sup>22</sup> See *supra* notes 12 & 19 and accompanying text.

<sup>23</sup> See Glazer, *supra* note 1, at 1382, 1384, 1402–04, 1432–33.

<sup>24</sup> See *id.* at 1408–11.

<sup>25</sup> *Id.* at 1408.

<sup>26</sup> *Id.* at 1410 n.206 (omission in original).

ty),<sup>27</sup> all Glazer has shown is that a particular search on one of Google's numerous search engines, using different settings of its filtering software, returned homosexual sex images solely under the unfiltered option while returning some heterosexual sex images under all of the filtering options. While it is possible that Google's filtering software screens out gay sex content, it is also possible that these results can be accounted for by a number of other plausible explanations—such as the possibility that the homosexual images searched by Google's engine were more explicit than the heterosexual images it searched (a major feature targeted by the filters). But in any event, Glazer candidly concedes that it is impossible to know whether Google Image's complex software algorithms are designed to filter gay sex content.<sup>28</sup>

To be sure, Glazer openly disclaims any intent to have this one search “experiment,” or her discussion of MPAA film ratings, establish with any certainty that either Google or the MPAA discriminate against gay sex content because of its gay nature.<sup>29</sup> But at the same time she makes several statements to the effect that she is “offering and analyzing data that seek to demonstrate [systematic] biases against homosexual content in two major media,”<sup>30</sup> and also argues generally that the obscenity doctrine *is in fact* unconstitutionally producing discriminatory collateral effects—presumably on the basis of her MPAA and Google “data” since she offers no other evidence of such discrimination. Glazer cannot have it both ways. Either she must construct an argument that is consistent with the notion that her “evidence” of collateral discrimination is, at best, suggestive despite its highly speculative nature, or she must produce sounder and more comprehensive evidence of such discrimination on which to base her claims of constitutional violation.

Finally, and even more problematically, Glazer offers no evidence that, even if some important private actors discriminate against gay sex content because of its gay nature, *they are doing so as a result of anything the obscenity doctrine has to say on that matter.*<sup>31</sup> As noted earlier, that doctrine

<sup>27</sup> Of course, the exclusion of the remaining images completely distorts any statistical inferences Glazer attempts to draw, even at this very crude level of empirical analysis.

<sup>28</sup> *See id.* at 1409 (“[S]ome search engine algorithms are so complicated that determining why a computer made a particular decision to filter some content, but not other content, may be impossible.”).

<sup>29</sup> *See id.* at 1402, 1403, 1408, 1409, 1411.

<sup>30</sup> *Id.* at 1403; *see also id.* at 1404, 1405, 1407.

<sup>31</sup> Once again, the closest Professor Glazer comes to providing such evidence are some unsupported assertions by Professor William Eskridge that the vagueness of the *Miller* framework has caused discrimination against gay sex content. *See id.* at 1404 & nn.173–74. Although in the passage relied on by Glazer, Eskridge asserts that “after *Miller v. California*[, 413 U.S. 15] (1973) some communities banned lesbian or gay romances as well as oral and anal sex,” he provides no citations to support that assertion and, most importantly, no evidence linking such actions, even if they were motivated by an anti-homosexual animus, to the *Miller* decision (particularly since *Miller* involved heterosexual and homosexual *pornography*, and not the regulation of “romances” or physical sex acts themselves). *See WILLIAM N. ESKRIDGE, GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 202–04 (2002).

is neutral on the issue of whether the homosexual nature of sexual expression makes it more or less obscene. Thus, Glazer is forced to argue that the mere *possibility* that juries or judges will discriminate in applying the *Miller* test encourages private actors to treat gay sex portrayals more restrictively than heterosexual ones. To state the argument is to reveal its tenuousness. Even assuming enough private actors are aware of one obscure aspect of a concededly “disused” legal doctrine, to create the “implicit yet pervasive”<sup>32</sup> societal discrimination Glazer alleges, it is a much further stretch to infer discriminatory causation from it. It seems much more plausible that if actors like the MPAA and Google engage in such discrimination, it simply stems from their independent determinations (however much Glazer would argue they were misplaced) that gay sex content is particularly inappropriate for minors (in the case of the MPAA “R” ratings, which Glazer claims discriminatorily excludes such content),<sup>33</sup> or for both minors and adults that might be using Google Images in its normal default setting of a “moderate” filtering option.<sup>34</sup> This is especially true considering that, as private actors, neither the MPAA nor Google need to concern themselves about claimed constitutional violations from treating gay sex content differently than heterosexual sex content. It is not as if they need legal cover to discriminate, assuming they actually do, by relying on obscenity doctrine to claim that gay sex portrayals are inherently obscene and, thus, can or should be more heavily restricted.

In sum, although Glazer’s arguments regarding the obscenity doctrine’s unconstitutionality are creative, unless she can lay a firmer foundation for state action and the empirical claims she makes, those arguments would be substantially strengthened by recasting them into less ambitious—but no less productive from her viewpoint—claims that I will discuss in Part II.

## II. THE *LAWRENCE* EFFECT

Professor Glazer makes two arguments as to why *Lawrence* renders the obscenity doctrine unconstitutional. First, from an equal protection standpoint, that decision lays down a “broad equality principle” mandating “that the obscenity doctrine cannot weigh one’s sexual minority status when implementing the *Miller* test.”<sup>35</sup> Second, from a First Amendment perspective, because the *Lawrence* Court’s attitude towards gay sex shifted from viewing it as a disfavored subject to a viewpoint that sees it as “simply another way that individuals might engage in sex . . . , obscenity’s discrimination against gays and lesbians constitutes a constitutionally impermissible view-

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<sup>32</sup> See Glazer, *supra* note 1, at 1385 (“The collateral effect of failing to distinguish gay and lesbian content from obscenity has been an implicit yet pervasive sanctioning of the censoring of gay content.”).

<sup>33</sup> See *id.* at 1404–08.

<sup>34</sup> See *id.* at 1410–11.

<sup>35</sup> *Id.* at 1419.



point-discriminatory restriction on speech.”<sup>36</sup> Since I have already argued that Glazer’s claims of unconstitutionality go too far, I will take the liberty of recasting these arguments as more modest claims that the obscenity doctrine needs to be modified in light of *Lawrence* in order to achieve a principled and coherent constitutional jurisprudence as it relates to the Court’s treatment of gay sex (including expressions of it). Presumably, the modification urged by her would be one making clear that the gay nature of sex portrayals is an illegitimate factor for juries or judges to consider in applying the *Miller* test.

I conclude that Glazer’s equal protection argument has some merit to the extent it suggests that such a modification would be warranted if the issue of obscenity discrimination against gay sex portrayals were demonstrated to be a real problem. But unlike Glazer, I see this as an issue of the interplay of basic equal protection and First Amendment principles—and specifically the prohibition against content discrimination—rather than an extension of equal protection principles from *Lawrence*. I also conclude that Glazer’s First Amendment viewpoint discrimination argument misconceives the nature of that doctrine, its application in this context, and the relevance of *Lawrence* to this issue. Instead of arguing that obscenity discrimination against gay sex portrayals would constitute impermissible viewpoint discrimination pursuant to changes wrought by *Lawrence*, Glazer would do better to rest her argument squarely on the content discrimination principles I discuss in Part A below.

#### A. *Of Lawrence, Equal Protection and First Amendment Principles*

With respect to her equal protection argument, in what Glazer concedes is a “broad interpretation” of *Lawrence*, she argues that the decision stands for the proposition that homosexual persons have an “equal right . . . to life, liberty and the pursuit of happiness.”<sup>37</sup> As translated into the domain of assessing the constitutionality of restrictions on sexually-explicit expression, Glazer argues that this principle demands the Court alter the *Miller* test to prevent any “conflation of sex and sexual orientation.”<sup>38</sup> Glazer’s argument essentially raises the question of whether the Court would determine that such a modification to, or clarification of, the *Miller* test was called for in light of *Lawrence*.

*Lawrence* was a substantive due process decision where the Court held that the state lacks a sufficient interest to punish consensual sexual activity between homosexual adults conducted in the privacy of the home.<sup>39</sup> *Miller* and its companion case of *Paris Adult Theatre I v. Slaton*,<sup>40</sup> on the other

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<sup>36</sup> *Id.*

<sup>37</sup> *See id.* at 1416 n.247 (internal quotation marks omitted).

<sup>38</sup> *Id.* at 1422.

<sup>39</sup> *Lawrence v. Texas*, 539 U.S. 558, 564–79 (2003) (link).

<sup>40</sup> 413 U.S. 49 (1973) (link).

hand, addressed a state's ability to prohibit, consistent with the First Amendment, the *public* distribution or movie theatre exhibition of pornographic media. The Court justified its rulings that the state could so prohibit materials adjudged to be obscene under the *Miller* test by reference to the protection of minors, the sensibilities of unwilling viewers, and, in the case of movie theatre exhibitions where exposing minors or unwilling viewers might not be a problem, the right "to maintain a decent society."<sup>41</sup> In other words, with respect to materials that, in the words of *Miller*, are considered by an average person of a community to be designed to appeal to a prurient or lascivious interest in sex and contain "patently offensive" depictions of it,<sup>42</sup> both individual and societal interests in avoiding exposure to, or having the community affected by, public dealing in them outweighs an individual's right to distribute or receive them. Most pertinently, the *Miller-Paris Adult Theatre* framework grants members of a given community a qualified right to say what sexual materials are unduly lascivious and offensive when they enter public channels of distribution,<sup>43</sup> while *Lawrence* says that the public has an insufficient interest in making similar determinations about intimate sexual acts that take place in private.<sup>44</sup>

The question that follows is whether *Lawrence* places constraints on a community's ability, in exercising its qualified right to control public dealings in extremely offensive materials, to define portrayed sex acts as unduly lascivious and offensive at least in part because they involve homosexual conduct. One response might be that if a given community is allowed to determine for itself what materials are too lascivious and offensive to be traded publicly, it is difficult to see why, if gay sex portrayals are inherently lascivious and offensive in its eyes (perhaps because there is a very low incidence of it within that community and it is viewed as "abnormal"), it should not be allowed to make that determination. Under *Miller*, the argument would go, such judgments are allowed to be inherently subjective and

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<sup>41</sup> *Id.* at 59–60 & n.10, 69 (internal quotation marks omitted). The Court in *Paris Adult Theatre* also implied that the preservation of public morality and the prevention of antisocial conduct were additional grounds for banning the public distribution of obscene materials. *See id.* at 57–62. And, of course, the Court assesses all of these interests in relation to its view that obscene "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Miller v. California*, 413 U.S. 15, 20–21 (1973) (internal quotation marks and citations omitted) (link).

<sup>42</sup> *Miller*, 413 U.S. at 24–25.

<sup>43</sup> I say "qualified" because before a work can be deemed legally obscene, a judge must, under *Miller*'s third prong, also find that it, taken as a whole, lacks serious value. *See id.* This prong has been interpreted to require as a reference a national standard, as opposed to the standards of a given community. *See* CHEMERINSKY, *supra* note 15, § 11.3.4.2. Accordingly, this prong effectively prevents a community—especially a conservative one—from finding materials obscene that the nation generally would say had some serious artistic or literary value.

<sup>44</sup> Accordingly, the analog to *Lawrence* in the obscenity arena is not *Miller* or *Paris Adult Theatre*, but rather the Court's decision in *Stanley v. Georgia*, 394 U.S. 557 (1969) (link), where it held that the mere *private* possession of obscene materials could not be criminalized consistent with the First Amendment.

democratic, and *Lawrence* does not change that basic proposition as to public dealing in pornographic materials. On the other hand, it could be argued that the respect and dignity owed to the personal decisions of gays and lesbians about their private sexual conduct extend equally to the commercial (in most cases) production, distribution, or consumption of gay pornography, even within a community that does not generally accept such homosexual practices. Further, the argument would continue, if a community tolerates a certain level of heterosexual pornography, then should it not be forced to accept a similar level of gay sex pornography as well? Does it, in light of *Lawrence*, unconstitutionally demean gays and lesbians by permitting the former but criminalizing the latter?

As mentioned above, *Lawrence* was a substantive due process case while the most appropriate claim here is one of equal protection as to First Amendment rights—i.e., the ability to distribute or receive gay sex expression “on a par” with heterosexual sex expression. It should be noted, however, that *Lawrence* did contain strong overtones that, at least as to the issue of private, consensual adult sex, gays and lesbians were entitled to equal protection with respect to criminal laws seeking to regulate such conduct.<sup>45</sup> Does such a principle extend into the realm of “determining obscenity?” As a basic question of equal protection law, the Court’s decision in *Romer v. Evans*<sup>46</sup> appears to be the most apposite case. There the Court declined to treat sexual orientation as a suspect classification warranting the application of formal heightened scrutiny to alleged discrimination against gays and lesbians, but did apply a form of “heightened” rational basis review to hold that laws imposing special disabilities on gays and lesbians were generally illegitimate—and in particular when such laws appear to have been motivated by nothing but animus towards those groups.<sup>47</sup>

Does the “obscenity discrimination” claimed by Professor Glazer run afoul of this principle? This is debatable. As noted earlier, the *Miller* test does not single out gays or lesbians for disfavored treatment—any discrimination of the sort at issue here would be a case-by-case determination by juries or judges about lasciviousness and offensiveness. However, one could argue that if a jury or judge were to single out gay content for obscene treatment simply because of its gay nature, this would be imposing a special disability on gays or lesbians. But would such discrimination be the result of a bare animus towards those groups? Is offensiveness the same thing as animus? Certainly not in all cases. One can be offended by things people do without disliking or hating them as well. Similar reasoning applies to determinations about prurience. Nonetheless, there is certainly some tension between the *Romer* principle and such discrimination.

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<sup>45</sup> See *Lawrence v. Texas*, 539 U.S. 558, 574–75 (2003) (link).

<sup>46</sup> 517 U.S. 620 (1996) (link).

<sup>47</sup> See *id.* at 631–32.

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In any event, it appears that a different line of equal protection principles—based not on the suspect status of the differential treatment of gays and lesbians but instead on whether alleged discrimination unduly interferes with the exercise of a fundamental right—may be more pertinent to this issue. The Court has held that when the differential treatment of groups impairs unduly the exercise of a fundamental right, that treatment is subjected to strict scrutiny and generally held to be unconstitutional.<sup>48</sup> This raises the question of whether the alleged discrimination in “determining obscenity” may be said to unduly impair the exercise of a fundamental right. In *Lawrence*, the Court declined to characterize the right to engage in private, consensual sex acts as a fundamental right, although it treated the asserted liberty interest as one deserving of an unspecified form of heightened scrutiny.<sup>49</sup> As noted earlier, the liberty interest being asserted in the obscenity context implicates First Amendment concerns: the right to distribute and receive gay sex content on a par with heterosexual sex content. Does such an interest implicate fundamental rights?

Certainly the Court has held that the right to send or receive *protected* expression is a fundamental liberty interest under the First Amendment. And even with respect to *making determinations* about the protected or unprotected status of pornographic materials, at least in the prior restraint context, the Court has held that substantial First Amendment interests are implicated—for example, placing the burden of proof and other procedural burdens on a state censor as to whether pornographic films are obscene.<sup>50</sup> Thus it seems that the Court would also be likely to treat the “determining obscenity” problem in the subsequent punishment context as also implicating important First Amendment interests. Assuming this to be the case, then, would the Court also believe that the alleged obscenity discrimination against gay sex portrayals unduly interferes with such First Amendment rights?

To answer this question, we must look to the central First Amendment principle disfavoring content discrimination by the state, which rests largely upon equal protection principles in any event (thus demonstrating that these two bodies of law overlap to a significant extent).<sup>51</sup> Of course, when the government discriminates against *protected* expression on the basis of its content, the Court normally applies strict scrutiny and holds the discrimination to be unconstitutional (the basic idea being that it is not the government’s place to judge the worth or value of various expression).<sup>52</sup> When such discrimination occurs with respect to *unprotected* expression, the

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<sup>48</sup> See CHEMERINSKY, *supra* note 15, § 10.1.

<sup>49</sup> See *Lawrence*, 539 U.S. at 564–79.

<sup>50</sup> See, e.g., *Freedman v. Maryland*, 380 U.S. 51, 57–59 (1965) (link).

<sup>51</sup> See, e.g., *Police Dep’t v. Mosley*, 408 U.S. 92, 94–95 (1972) (link).

<sup>52</sup> This principle against content discrimination is consistent with the Court’s treatment, in the basic equal protection context of differential classifications that impair the exercise of a fundamental right. See CHEMERINSKY, *supra* note 15, § 10.1.

Court in *R.A.V. v. City of St. Paul*<sup>53</sup> essentially followed the same approach with the exception of recognizing that content discrimination that does not present a “significant danger of idea or viewpoint discrimination”<sup>54</sup> is generally unobjectionable. But what about content discrimination that occurs *within the process* of determining whether certain expression is protected or unprotected under standards defined by the Court? Of course this very process inherently involves content discrimination, but the question here is whether the “second-level” content discrimination that would occur if a jury or judge were to determine that sex materials were unduly lascivious or offensive because of their homosexual nature would offend the principle against content discrimination generally.

As to this question, we might look at the extent to which such secondary content discrimination would implicate the concerns animating the general content discrimination prohibition, as well as the extent to which such secondary discrimination might be justified by the reasons that have traditionally permitted an exception to the general prohibition as to obscene content. Although the Court and commentators have asserted different justifications for generally disfavoring content discrimination by the government,<sup>55</sup> I have argued previously that the principal one is a concern that the government would engage in such discrimination to censor views, ideas, or information for illegitimate reasons<sup>56</sup>—in this case, suppressing gay sex content out of mere distaste or animus instead of attempting to mitigate harms from it the government can legitimately seek to address.

But what is that harm in the context of obscenity regulation? As discussed earlier, the Court allows publicly distributed pornographic content to be discriminated against on the basis of the level of its lasciviousness and offensiveness. Those reasons have to do with the low “truth” value of extreme pornographic material and its potential harm to societal interests in shielding youths, adults and the greater community from conduct and materials that threaten society’s interests in preserving minimum levels of decency and morality.<sup>57</sup> This raises the question of whether gay sex content implicates these concerns to a significantly greater degree than similarly pornographic heterosexual content. In other words, would a jury or judge act legitimately in censoring gay sex content because of these concerns while giving a “pass” to heterosexual fare that was similar, or even “worse,” in terms of lasciviousness or offensiveness? It seems not. Smut is smut, and in terms of the obscenity-related harms the government can legitimately seek to address, it appears to make little difference whether such materials

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<sup>53</sup> 505 U.S. 377 (1992) (link).

<sup>54</sup> *Id.* at 388.

<sup>55</sup> See, e.g., Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1349 n.3, 1389–94 (2006).

<sup>56</sup> *Id.* at 1348–49 & n.3.

<sup>57</sup> See *supra* note 41 and accompanying text.

involve heterosexual or same-sex actors. In this context, there would also be a significant risk that such discrimination might frequently be based on a mere distaste or animus towards gay or lesbian behavior versus a legitimate concern about harms that might be caused by the public distribution of obscene material generally.

Accordingly, there is a strong argument that equal protection and First Amendment principles prohibit the sort of claimed discrimination in applying obscenity doctrine which concerns Professor Glazer. Thus, if this became an issue for the Court, it very well might be willing to modify the *Miller* test to clarify that the homosexual nature of a gay sex portrayal is not a legitimate factor for a jury or judge to consider in determining whether it was unduly lascivious or offensive under that test. However, in my view, such a clarification has less to do with *Lawrence* and more to do with the application of basic equal protection and First Amendment principles to this relatively narrow point of law.

### B. *Of Lawrence and Viewpoint Discrimination*

Professor Glazer also argues that *Lawrence* marked a transformation in the Court's attitude towards gay sex, from viewing it as a questionable subject (e.g., an "odd" practice) to a viewpoint that it is just another way for people to have sex. And "[o]nce homosexuality so transforms, discrimination against content in light of its homosexuality" constitutes viewpoint discrimination in violation of the First Amendment.<sup>58</sup> Glazer's underlying premise is that if the Court viewed the alleged discrimination against gay sex portrayals as mere subject matter discrimination it might not violate that Amendment since the Court has been inconsistent in its views as to whether the content discrimination principle prohibits subject matter discrimination. On the other hand, she argues, the Court has been clear that viewpoint discrimination violates that principle.

Setting aside the issues of whether the Court truly had or has such views about gay sex and whether such a transformation occurred in *Lawrence* (both of which seem highly debatable), this argument is problematic for another reason. Assuming one could equate the Court's attitude towards gay sex conducted in private with the commercial production and distribution of gay pornography (another proposition that seems highly debatable), under First Amendment doctrine whether the Court itself views certain expression as merely pertaining to a subject or also embodying a viewpoint is largely irrelevant. The question is whether, in the context in which it occurred, the *government actors that allegedly discriminated* against certain expression did so because of its subject matter or because of viewpoints it may have reflected. Accordingly, with respect to Glazer's alleged discrimination, the question would be whether juries or judges purportedly finding gay sex portrayals to be unduly lascivious or offensive because of their gay

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<sup>58</sup> See Glazer, *supra* note 1, at 1425.

nature, were doing so because they were hostile to the basic notion of homosexual sex or because they were hostile to a perceived viewpoint reflected in such content that gay pornography was just as acceptable as heterosexual pornography. It would likely be some of both. So it is not clear that it matters whether such discrimination is characterized to be on the basis of subject matter or viewpoint. But even if it were mere subject matter discrimination, I cannot agree with Glazer's premise that there is a significant question as to whether it would violate the content discrimination principle. Unlike the older cases on which Glazer bases her argument,<sup>59</sup> in recent decades the Court has been fairly clear that subject matter discrimination by the government is equally as problematic as viewpoint discrimination even if it reserves its strongest rhetoric for the latter: "Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation."<sup>60</sup>

Ultimately, then, as discussed in Part II.A., I agree with Professor Glazer's thesis to the extent it suggests there is a strong argument that gay sex obscenity discrimination by juries or judges, were it to exist, would constitute impermissible content discrimination. But I part ways with her argument that *Lawrence* affects this calculus due to a purported shift in the Court's attitude towards gay sex. In my view, *Lawrence* has little relevance to this issue. Finally, even if that decision was relevant, Glazer's argument regarding viewpoint discrimination ignores the complexities, discussed above, that such alleged discrimination would be occurring within a process that inherently calls for content discrimination by government actors. This would not be an issue, as Glazer seems to portray it by her heavy reliance on *R.A.V.*,<sup>61</sup> of content discrimination within a category of expression that had already been determined to lack First Amendment protection.

## CONCLUSION

In her essay, Professor Glazer makes a creative and intriguing argument that the obscenity doctrine is unconstitutional because of the discriminatory collateral effects it purportedly generates. While this Essay has discussed several legal and empirical problems with this argument, it has concluded that her core insight—that the *Miller* obscenity test should be applied in a manner that is neutral as to the sexual orientation of the perti-

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<sup>59</sup> See *id.* at 1391–93 (discussing cases from the 1970s when content discrimination principle was first emerging). Many of the cases examined by Glazer also involved the government regulating speech in special capacities—such as postmaster, property proprietor, or the military—where greater content discrimination is generally allowed by the Court (and especially on the basis of subject matter categories) as opposed to when the government regulates speech in its capacity as general sovereign. See McDonald, *supra* note 55, at 1350 & n.5.

<sup>60</sup> Hill v. Colorado, 530 U.S. 703, 723 (2000) (link).

<sup>61</sup> See, e.g., Glazer, *supra* note 1, at 1394–96, 1430–32.

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ment actors—appears to have substantial support in basic principles of the Court’s equal protection and First Amendment jurisprudence.