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The Politics of the Possible: Reflections on a Decade at CUNY School of Law

Ruthann Robson
CUNY School of Law

THE POLITICS OF THE POSSIBLE: PERSONAL REFLECTIONS ON A DECADE AT THE CITY UNIVERSITY OF NEW YORK SCHOOL OF LAW

Ruthann Robson†

Pragmatism. Realism. Practicality. Necessary qualities for the practice of law, for the practice of life.[1] Yet too often such pronouncements are mere excuses for cowardice, for shallowness, for laziness. We circumscribe possibilities — for ourselves and for others — with justifications that we are being pragmatic, realistic, practical. We conveniently ignore any inkling we might have that our construction of the "possible" is freighted with our political, not to mention personal, histories. We may even begin to believe that idealism, imagination, and utopian urges are adolescent. We may counsel others, and ourselves, to be "mature."

The City University of New York (CUNY) School of Law and myself may both be considered mature: CUNY is now past its fifteenth year and I am now past my fortieth. There is certainly an awareness of the fragility of life.[2] This essay, however, is a reminder

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† Professor of Law, City University of New York School of Law. The author wishes to express her appreciation to Pavita Krishnaswamy for her research assistance, the editors and staff of the law review for their invitation to write this piece, and the CUNY community, past and present, for making the writing of this article possible, in many ways.

[1] I am using pragmatism and realism in their generic rather than legal senses, although certainly legal realism and legal pragmatism have relevance. Legal realism was a legal movement of the 1920s and 1930s composed of American law teachers and lawyers who studied the operation of law and society, rather than its abstract conceptualization. The roots of realism are founded chiefly in pragmatism, a philosophical method which considers the effects and practical consequences of action, rather than the principle or rule involved in a given case. The intellectual origins of realism have been attributed to the pragmatism of Oliver Wendell Holmes, Jr., the sociological jurisprudence of Roscoe Pound, and the skepticism of Karl Llewellyn and Jerome Frank. The legal realists sought to replace legal formalism, or the case method and scientific approach to law, with social methods and psychological analysis, to achieve the proper social policy. Legal realism has been responsible for innovations in legal education and a developing alliance between legal theory and empirical analysis. Pragmatism is generally considered a philosophy advocating an approach or methodology with no absolute principles and standards. Instead, a proposed action is evaluated in terms of its practical consequences. Under this theory, fundamental truth is relative to what works out in practice.

See GERRY W. BEYER & KENNETH R. REDDEN, MODERN DICTIONARY FOR THE LEGAL PROFESSION 490, 635 (1993).

[2] The law school community has confronted mortality many times, but perhaps most tragically when an automobile accident in South Africa resulted in the death of

of the virtues of immaturity. We continue to need our idealism, our inventiveness, and our adolescent utopian urges. We must be wary that we do not "grow conservative with age."[3] We must remember the possibilities of radical change and progressive reform in these spectacularly unradical and unprogressive times.

Given the present political and cultural environment, it is easy to allow the range of what we theorize as possible to become constricted. Teaching, doing scholarship, and engaging in community work at CUNY School of Law is an antidote to narrowness. One of my reasons for choosing to come to CUNY School of Law in 1990 (and to leave, at least to my mind, the much more hospitable climate of the San Francisco Bay area) was my perception that CUNY would challenge me to broaden my own perceptions of political lawyering and legal scholarship. At other law schools at which I interviewed, it quickly became obvious that I would be a singular token, at worst or a member of a liberal minority, at best. Although there is certainly an argument to be made for choosing to teach at such a school — I had benefited enormously from the lone progressive professor at the conservative law school I attended — I selfishly selected to come to a place which would never allow me to become complacent in my politics. I wanted not only to push others, but to be pushed myself.

For some, the fact that I had any offers to teach was astounding. Reputable legal academics whose work I admired counseled me that I was committing academic suicide by doing scholarship on lesbian legal issues. They advised me to write about something "safe" and then when I received tenure, it would be "possible to do what you want."

I was not that patient.

Yet I did think about tenure. I was not so naïve to believe that

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two of our professors: our former dean, Haywood Burns, and a criminal clinician, M. Shanara Gilbert. During my first semester at CUNY, Denise Carter-Bennia suffered an untimely death. During the last few years, several members of our community, including myself, faced life-threatening illnesses.

[3] Interestingly, this famous statement from Elizabeth Cady Stanton was made in her musings about marriage:

> How this marriage question grows on me. It lies at the very foundation of all progress. I never read a thing on this subject until I had arrived at my present opinion. My own life, observation, thought, feeling, reason, brought me to the conclusion. So fear not that I shall falter. I shall not grow conservative with age. I feel a growing indifference to the praise and blame of my race, and an increasing interest in their weal and woe.

2 ELIZABETH CADY STANTON AS REVEALED IN HER LETTERS, DIARY, AND REMINISCENCES 83 (Theodore Stanton & Harriet Stanton Blatch eds., 1922).

any institution that would hire me would necessarily find the subject matter of my scholarship palatable. After all, I was then enrolled in a L.L.M. program for which I had submitted a proposal based entirely on lesbianism and had not only been accepted but awarded a generous scholarship, only to find on my arrival that my work was described in publications as "women's issues," my advisor was unable to utter the word lesbian, and the graduate studies chair frequently mistook any identifiable lesbian (even if they were not enrolled in the law school) for me. But CUNY seemed to embody a substantive progressivism. Besides, no one flinched during the interview.

"It will not be possible to write there," one of my self-appointed advisors announced when she learned of my decision to come to CUNY. She told me that I would never write anything again, that I would quickly be burned out, and that although CUNY might "sound good," the reality was far different. I was reminded of the consternation of the federal appellate judge for whom I clerked when he learned I was taking a job at legal services: it would not be possible to write, I would quickly be burned out, and legal services was not a realistic or practical choice. I did not listen to the judge either.

My well-meant advisor's perception of what was possible was shaped by her conceptions of the demands of teaching at CUNY and the emphasis on collaborative work. While the popularity of collaborative teaching has diminished in recent years, it is still true that at CUNY we teach more and meet more than our colleagues at other schools.[4] Perhaps strangely, I have often found that teaching and even meetings have nurtured my scholarship. Certainly, there is the issue of time constraints: hours spent preparing for class are hours not spent writing. Nevertheless, preparing different courses has provided me with a breadth and depth of knowledge I would not otherwise have acquired. Moreover, there is something

[4] Our teaching methodologies mean that we not only spend more time in the classroom and in individual conferences, but we spend more time grading, giving feedback, and writing evaluations.

In terms of meetings, both regarding teaching and governance, our load is also more substantial. As chair of the Professional Development Committee one year, I sought to determine what a reasonable committee meeting load would be. Part of this attempt consisted of fact gathering to determine if there was a norm at other law schools. Putting out calls on various list-servs, I realized that this issue did not concern most colleagues and that they spent substantially less time in meetings. I also learned, however, that many of my colleagues, especially minorities, including women, had complaints about being excluded from the committee process. They wanted to spend more time in meetings, which meant having access to power.

about teaching itself — the struggle to make complex material understandable and then to probe at its complexities — that parallels good legal scholarship.

I did receive tenure — with legal scholarship brandishing the term "lesbian" prominently in the title — and not once did I hear a disparaging word about the subject matter of my work. About a month afterwards, I was in my office filing materials, including some related to my tenure application, when it struck me that now I could write anything I wanted. I was free! My possibilities were limitless. Whatever euphoria I felt was short-lived, however, as I admitted that I had already been writing whatever I wanted. Indeed, I felt slightly disappointed, realizing that my new-found freedom was not newly found at all.

In the decade since I arrived at CUNY and the seven years since I have been tenured, the circumstances of sexual minority law professors has certainly improved. There are many untenured colleagues at other institutions writing exciting legal scholarship about sexual minority issues. Yet often these professors will share stories of being dismissed by their colleagues, being marginalized by their administrations, and being ostracized by their students. Furthermore, the improvement for sexual minorities in legal academia has not been uniform. This past semester, having been invited to apply for a visiting chair at another law school, I was thereafter told by a member of that faculty that there were "concerns" that the titles of my articles would make me a difficult "sell" to the funder of the chair. As I told this faculty member, it has been my experience that when one cites the fear of recrimination from an outside authority it is most often one's own problem, in this case homophobia, which is the issue. Yet these sincere faculty members believe they are not being homophobic, merely "realistic." By seeking to "protect" their school, they have limited the possibilities of it.

My career at CUNY is illustrative rather than unique. Each of my colleagues at CUNY could divulge similar experiences. We are often solicited for opportunities at other legal institutions, only to be marginalized or even rejected because our scholarship and politics make us a "difficult sell." Or we are paraded at conferences or symposiums, most often carefully "balanced" by someone with conservative views.

Not only legal academics, but law students also act cautiously and protectively. I am often requested by students at other institutions to visit their law schools and lecture on sexual minority issues.

This seems perfectly appropriate to me, but I balk at contributing more. For example, I have been requested on several occasions to conduct seminars or reading groups at other law schools for students interested in sexual minority issues. "We don't have anyone on our faculty doing lesbian and gay issues," such students beseech. When I ask these students why they did not attend CUNY, they often seem perplexed, as if I should understand their choice to attend a law school they view as more prestigious as their most "realistic" option.

The conservatism that is described as pragmatism and realism of some students is not limited to choices regarding legal education, but extends to choices regarding legal careers. CUNY graduates are overwhelmingly employed in the public interest field. Many of our graduates are working at jobs our Dean and the Alumni Office rightly describe as "fabulous": they are attorneys with renowned public interest organizations such as Center for Constitutional Rights, American Civil Liberties Union, Lambda Legal Defense and Education Fund, Asian American Legal Defense Fund, American Indian Law Alliance, Gay Men's Health Crisis, Lawyers Committee for Human Rights, Sanctuary for Families, and the Netherlands Institute for Human Rights. Yet for me, the daily and less glamorous work of public interest representing indigent persons in criminal prosecutions, welfare hearings, evictions, immigration, and domestic violence is equally vital. These positions are no longer trendy, if they ever were, but they provide not only the backbone but the flesh of the possibilities of progressive legal change.[5] When we venerate "grassroots," this is the work we mean, and it should be equally celebrated.

The dynamic that is exhibited by our faculty and students similarly applies to CUNY as an institution. Another law school's fear of offending a particular funder of a prestigious chair pales in comparison to CUNY's endurance of firestorms and public controversies threatening the school's very existence.[6] Some legal scholars

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[5] I continue to subscribe to this view despite the attempts to deradicalize legal services by restricting its funding with regard to procedures such as class actions, claims such as those involving abortion, and clients especially immigrants. For an overview and critique of the Legal Services Corporation's restrictions, *see* Symposium, *The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions*, 25 FORDHAM URB. L.J. 279 (1998).

[6] *CUNY Law Scaring Off Students*, N.Y. POST, Jan. 17, 1999, at 20 (contending that low enrollment at CUNY is due to low bar pass rate and quality of teaching); *Close CUNY Law School*, N.Y. POST, Jan. 19, 1999, at 28 (arguing that law school should be closed because it is "an academy for 60's-style activists"); *Murphy's Law at CUNY*, DAILY NEWS, Dec. 15, 1997, at 30 (claiming that CUNY Law School is a failing program

predicted in 1991 that CUNY Law School would "surely evolve into a mainstream local law school or disappear."[7] This prediction was premised on the authors' beliefs of "irreconcilable conflicts" among the school's efforts to reform legal education, an admission policy valuing diversity and underrepresented populations, and "the need to produce graduates who pass the bar."[8] In 2000, our efforts to reform legal education continue, our law students are the most diverse in the United States, and last year our graduates passed the New York bar examination, recognized as one of the most difficult in the nation, at a higher rate than law schools with more traditional curriculum, students, and pedagogy.[9]

Pedagogy is valued at CUNY to an unparalleled extent. From the law school's inception, pedagogy has been a matter for serious consideration and often idealism.[10] In her article on CUNY, then CUNY professor Joyce McConnell discussed the social justice mission of the law school. She identified the premises of our pedagogy as diversity, experiential learning, and equality within a structure of community.[11] The notion of experiential learning is applied to the pedagogy itself, so that we are constantly re-evaluating and reconceptualizing CUNY. For example, McConnell's article pointed to a problem with the reproduction of hierarchies in teaching assignments, so that white male professors taught predominantly in the large lecture rooms while men of color and all female professors predominantly taught in small classes, in what were then named "houses." Since being highlighted, that problem

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because of low bar pass rates); Alex Abram, *The Case Against CUNY Law*, DAILY NEWS, June 11, 1996, at 39 (arguing that the law school should be closed because of its poor track record in preparing students for the legal workforce, because it is a state subsidy, and because it fosters "an excessively politically correct climate"); Chris Franz, *Does CUNY Law Give Students False Hope?*, STATEN ISLAND REGISTER, June 25, 1996 (contending that CUNY's commitment to public interest is, among other things, misleading for students seeking careers in the legal world, because of bar pass rates and lack of job opportunities).

7 Matthew Steffey & Paulette Wunsch, *A Report on CUNY's Experiment in Humanistic Legal Education: Adrift Toward the Mainstream*, 59 UMKC L. REV. 155, 159 (1991).

8 *Id.* at 176.

9 *See* Victoria Rivkin, *Bar Pass Rates Drop for Most Area Schools*, N.Y. L.J. (Dec. 15, 1999) (reporting CUNY's bar pass rate as above that of Touro Law School and New York Law School).

10 *See, e.g.*, John M. Farago, *The Pedagogy of Community: Trust and Responsibility at CUNY Law School*, 10 NOVA L.J. 465 (1986); Charles R. Halpern, *A New Direction in Legal Education: The CUNY Law School at Queens College*, 10 NOVA L.J. 549 (1986); Howard Lesnick, *The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law*, 10 NOVA L.J. 633 (1986); Vanessa Merton, *The City University of New York Law School: An Insider's Report*, 12 NOVA L.J. 45 (1987).

11 Joyce E. McConnell, *A Feminist's Perspective on Liberal Reform of Legal Education*, 14 HARV. WOMEN'S L.J. 77, 88-94 (1991).

has not reoccurred in subsequent years. In fact, the entire concept of "houses," often considered foundational for CUNY, is one of the most debated aspects of our curriculum and pedagogy. In the past few years, we have experimented with changing course credit allocations, linking them to substantive courses taught by the same professor, moving between individual class simulations and year-wide simulations, and differing mixes of legal analysis, research, lawyering skills such as interviewing and negotiating, and oral arguments.

What were once called "houses," and then "offices," and now "lawyering seminars," continue to be a vital part of our program. When others exercise that most sincere form of flattery and imitate our programs, they appropriate the form rather than the substance, not sharing our commitment to the premises on which the form is based. For example, a lawyering seminar with a simulation on offers to buy and sell widgets is a very different enterprise than one with a simulation regarding civil remedies for police brutality. The acquisition of legal skills is arguably the same in both situations, but legal skills must be contextualized and challenged and incessantly interrogated. The question of justice cannot be bracketed.

In the large classroom, pedagogy and politics are also companions. Using as an example what I most frequently teach, constitutional law courses,[12] we do not simply engage in a pedagogy which criticizes the conservative politics of a particular Supreme Court opinion. Our pedagogy demands students construct arguments which have liberatory potential within the framework of the extant and often conservative doctrine. It also means engaging in a rigorous critique of the liberal opinions and exposing the timidity of such opinions. It also means discussing Congress, state legislatures, state constitutions, the administrative state, and local avenues, for the possibilities that such institutions possess. And it also means allowing law students — future attorneys, though they are — to

[12] At CUNY, our constitutional law curriculum is divided between the first semester required course of LEDP (Liberty, Equality and Due Process) which focuses on Fourteenth Amendment notions of equality, the second semester required course LFR (Law and Family Relations) which includes substantive due process and procedural due process, the third semester required course, Constitutional Structures, which concerns separation of powers and federalism, and Public Institutions, which covers the administrative state including procedural due process and the power of governmental agencies. We also have several electives, including classes on the First Amendment and the constitutional dimensions of foreign powers.

honor the possibilities of extra-legal activism directed at change including community solutions, protests, and individual initiatives.

The pedagogy and politics of CUNY is deeply dependent upon our students who embody CUNY's every possibility and often embody the very controversies addressed in the cauldron that is constitutional law. People of color constitute forty-one percent of our student population and this makes a tremendous difference when discussing cases such as *Plessy v. Ferguson,*[13] *Loving v. Virginia,*[14] *Korematsu v. United States,*[15] *Goss v. Lopez,*[16] and *Croson.*[17] I cannot imagine discussing *Bowers v. Hardwick*[18] without a visible sexual minority presence in the room. When school funding cases such as *Rodriguez*[19] or public benefits cases such as *Matthews v. Eldridge*[20] are the subject, many students have a palpable knowledge of what it means to have been educated in under-funded schools or to live on meager public benefit allotments. A colleague at another law school once expressed how difficult it was to teach the abortion cases when he realized it was very possible that one of the students in the class may have had an abortion. While that is true, and certainly an issue at CUNY given the fact that almost sixty percent of our students are women, I cannot help but be awed by the particularity of this professor's concerns.

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13 163 U.S. 537 (1896) (rejecting an equal protection challenge to Louisiana statute mandating separate but equal accommodations for white and black passengers on railways).

14 388 U.S. 1 (1967) (declaring Virginia's miscegenation law unconstitutional).

15 323 U.S. 214 (1944) (upholding the exclusion of American citizens of Japanese ancestry from designated areas during World War II).

16 419 U.S. 565 (1975) (hearing required before suspension of students). While *Goss v. Lopez* may not seem to be a controversial case, it has resonance in my personal history. When I was a law student, my constitutional law professor made a remark criticizing the case to the effect that "those Puerto Rican kids didn't want to go to school anyway." I left the classroom and went to the Dean to complain. In the meeting that followed with the professor, the Dean, and myself, the professor apologized by saying "I'm sorry, but I never knew Robson was a Puerto Rican name." When I told him I was not, in fact, Puerto Rican, he was perplexed as to the rationale for my taking offense at his remark. This incident serves to remind me that even seemingly noncontroversial cases can be controversial as well as that the embodiment of minorities is not the only issue.

17 Richmond v. J.A. Croson, 488 U.S. 469 (1989) (past societal racial discrimination does not justify the use of racial preferences or affirmative action).

18 478 U.S. 186 (1986) (upholding Georgia's criminal sodomy statute because the due process clause does not encompass homosexual sodomy).

19 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (rejecting a challenge to Texas' funding of school districts because it distinguished between poor and rich neighborhoods).

20 424 U.S. 319 (1976) (pretermination hearing unnecessary for disability benefits).

Furthermore, CUNY students are not simply embodiments of a certain ideal, but are thoughtful individuals with disparate viewpoints. This is often manifested in student group formations: one year there were two distinct sexual minority groups and three different women's law organizations. In the classroom, controversies are also aired. For example, in a critique of the use of "high crime areas" in Fourth Amendment doctrine[21] as a cipher for communities of color, some students of color agreed with the critique, but others vehemently argued that the state has a responsibility to enforce the law everywhere, including their communities. "We are entitled to live in safe neighborhoods too," one student protested, altering any simplistic analysis of the problem.

Thus, on a doctrinal and theoretical level we grapple with the possibilities of progressive legal change. Within CUNY, our most valiant internal struggles have been over the contours that our possibilities might take. While others within our community would certainly express it differently, for me these controversies center around reconciling our commitment to anti-elitism with our commitment to providing the very best for those who have traditionally been excluded from the law, not only as legal professionals but as clients seeking redress. Most divisive have been our grade changes as we gradually moved from a mastery system in which every student eventually passed, to a rigorous pass/fail system, to a four-tiered system which added "high pass" and "low pass," to our present multi-tiered letter grade system. There were a few voices

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[21] A recent example of the problem with "high crime area" in Fourth Amendment jurisprudence is Illinois v. Wardlow, 528 U. S. 119 (2000), in which the Court held that although an individual's presence in a high crime area is not without more a sufficient reasonable articulable suspicion necessary to support a stop under Terry v. Ohio, 392 U.S. 1 (1968), the high crime area is certainly relevant, and when combined with "unprovoked flight" is sufficient to support a Terry stop.

The high crime area issue was locally explosive in United States v. Bayless, 913 F. Supp. 232 (S.D.N.Y. 1996) in which District Judge Baer held that being in a high crime area of New York City was insufficient to raise a reasonable suspicion under Terry, even when coupled with other facts such as a late hour, a car with out of state plates, duffel bags, and flight from police who would be recognized by members of the community as "corrupt, abusive, and violent." *Id.* at 242. The opinion was widely criticized, including in an editorial in The Wall Street Journal which posed the question: "Aren't the mostly minority residents of Amsterdam Avenue and 176th Street, where the incident took place, entitled to the same level of protection as the mostly white residents 100 blocks south on Amsterdam in the heart of New York's Yuppiedom?" Editorial, *The Drug Judge*, WALL ST. J., Jan. 26, 1996, at A10. On a rehearing granted by Judge Baer, the government produced the second officer who observed the events leading to the stop, as well as his report, and Judge Baer reversed himself on credibility issues and upheld the Terry stop. United States v. Bayless, 921 F. Supp. 211 (S.D.N.Y. 1996).

within the community that were heard to argue for "realism" and accommodation to outside forces, including our increasingly conservative Board of Trustees and Board of Regents, but the vast majority of us reached our various conclusions based upon our individual perspectives about the best course for our (future) students and their future clients.

Less contentious has been the establishment of the law review itself, at this point not recognized as an official publication of the law school, but accorded status only as a club, as are all of the other twenty-five student organizations. When some students first proposed a law review, the proposal was viewed with suspicion that it would promote hierarchies. I should confess that my own hesitancies when approached to be the advisor were less about hierarchy and more about the practical and the realistic. How could a law review establish itself without institutional support?

I agreed to be the faculty advisor despite my misgivings that the task of establishing a law review at CUNY was impossible. Given my adventures regarding predictions about my own legal career, as well as my previous experiences before I even had an inkling regarding law school, I would be foolish to attempt to circumscribe possibilities for others. This is especially true for CUNY students whose resilience, determination, and resourcefulness I witness on a daily basis. One experience which has deeply marked me has been with my independent study students. Most, although not all, seek to develop a paper submitted for Law and Sexuality into a law review article. A number of them succeed,[22] but what fascinates me is the comparison between those who do succeed and those who do not. The successful ones are not necessarily the ones with the most overt initial enthusiasm, the best topics or initial papers, the highest grades or most developed writing skills, or the greatest external support system. They are simply the ones who persist, as the students forming the law review persisted, and as the students editing this sixth issue have persisted.

As CUNY must persist. I sometimes feel as if my past decade at

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22 Nicole Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69 (1998); Matthew Carmody, *Mandatory HIV Partner Notification: Efficacy, Legality, and Notions of Traditional Public Health*, 4 TEX. F. CIV. LIBERTIES & CIV. RTS. 107 (1999); Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy & Liability*, 8 B.U. PUB. INT. L.J. 219 (1999); Rachel Haynes, *Bisexual Jurisprudence: A Tripolar Approach to Law and Society*, 5 MICH. J. GENDER & L. 229 (1999); Margaret McIntyre, *Sex Panic or False Alarm? The Latest Round in the Feminist Debate over Pornography*, 6 UCLA WOMEN'S L.J. 189 (1995); Colleen A. Sullivan, *Kids, Courts & Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems*, 6 J.L. & SEXUALITY 31 (1996).

CUNY is reminiscent of the decade in which I was born, the 1950s. Doing work on a legal history of sexual minorities, I discovered the radicalism of many persons during the Cold War era. For example, in 1951, the dearth of advocacy on behalf of sexual minorities led to the founding of the Mattachine Society by several men, including Harry Hay, Bob Hull, Chuck Rowland, and Dale Jennings. A few years later, partially inspired by the model of the local chapter of the Mattachine Society and reacting to its male-centeredness, the Daughters of Bilitis was founded in San Francisco by several women, including Del Martin and Phyllis Lyon.[23] Both organizations had legal goals, including the elimination of statutes criminalizing same-sex activities, as well as political and social purposes.

These organizations provide instructive models because they were not immune from the conservative currents of their times, despite their radical beginnings.[24] Nevertheless, the more radical members persisted with many actions and activities, including publishing the magazine ONE, an issue of which was seized by the Postmaster of Los Angeles in 1954 for obscenity and thereafter litigated contentiously until ONE's attorneys prevailed in the United States Supreme Court.[25] Additionally, the radical notion of a civil rights

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[23] Understanding the need for secrecy, both organizations took their names from rather obscure sources. The mattachine is a medieval masked and wandering performer and "Songs of Bilitis" is a poem by Pierre Louys about Bilitis, who supposedly lived on the Isle of Lesbos at the time of Sappho. JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970, 67, 102 (1983).

[24] Several of the Mattachine Society's founders were steeped in the politics and traditions of the Communist party, originally leading to an organizational scheme modeled on Communist cells and influenced by Marxist ideologies. *Id.* at 63. Yet by 1953 the new leadership was cooperating with the FBI, releasing pamphlets that proclaimed that the Mattachine Society was opposed to Communism, and proposing resolutions that members would be required to sign national loyalty oaths and be subject to investigations for Communist party membership. *Id.* at 75-86. Although the resolutions were defeated, the Society had taken a decidedly conservative turn.

[25] When the magazine was seized, ONE, Inc., the separate organization responsible for the magazine, brought suit in federal court arguing that the magazine was not obscene. The trial judge ruled that the magazine was subject to seizure as obscene and ONE, Inc. appealed. In ONE, Inc. v. Olesen, 241 F.2d 772, 777 (9th Cir. 1957), the Court of Appeals for the Ninth Circuit concluded that the magazine was "obscene and filthy." The court rejected the argument that the magazine was published for the purpose of dealing with homosexuality from a "scientific, historical and critical point of view" by focusing on several selections. In one, a three-page piece of fiction entitled "Sappho Remembered," the court recounted the story of a lesbian's influence "on a young girl only twenty years of age" who was struggling between a "normal married life with her childhood sweetheart" and life with the lesbian. According to the court, the selection was "nothing more than cheap pornography calculated to promote lesbianism" and fell "far short of dealing with homosexuality from the scientific, historical and critical point of view." The court concluded that the magazine was

trial on the issue of sexual activity was put into practice, garnering another legal success.[26]

Thus, while we often think of the decade of the 1950s as one of unremitting conservatism, there were organizations and individuals who maintained a radical attitude. Despite their particular failings, it was their unique perspective of the possible that provided a foundation for the advancements which would follow. The founders of the Mattachine Society might have found it inconceivable that there would one day be a United States Supreme Court case recognizing a modicum of "homosexual" rights,[27] or that an important case before the Court this term involves discrimination against gay men by the Boy Scouts of America.[28] But they would probably recognize that they laid the foundation for the edifice that is now sexual minority rights — and they would justly criticize it for its failures.[29]

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therefore not mailable, and further rejected the constitutional arguments of denial of due process and equal protection raised by ONE, Inc.

The lawyers for ONE, Inc. filed a petition for certiorari in the United States Supreme Court. In ONE, Inc. v. Olesen, 355 U.S. 371 (1958), the court granted the petition and reversed the Ninth Circuit Court of Appeals in a one-line opinion. The court simply cited Roth v. United States, 354 U.S. 476 (1957), the case which had recently changed the standard for obscenity from the one that the courts had applied to find the issue of ONE obscene to a requirement that "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* At 489. Whether or not the by-then four-year-old issue of the magazine was obscene under the Roth test was apparently never decided by the courts.

26 As historian John D'Emilio recounts, the Mattachine Society was involved in what is probably the first self-consciously political trial raising the issue of homosexuality. Dale Jennings, one of the founders of the Mattachine Society, was arrested in a park during what was most likely a fairly routine undercover operation. Rather than simply pleading guilty to the charge of lewd behavior, Jennings was convinced by other Mattachine Society founders to use the trial as an opportunity for education. In Mattachine discussion groups, in leaflets, and in futile press releases, the focus was on law enforcement actions in entrapment rather than on Jennings' guilt or innocence, thus recasting the issue as one of "civil rights." The Society hired a well-known radical lawyer, George Shibley, whose closing argument at trial detailed the injustices accorded to homosexuals in society. The jury deliberated for thirty-six hours, but reported it was deadlocked, with only one juror having been in favor of a guilty verdict. Rather than retry the case, the district attorney dropped the charges. JOHN D'EMILIO, *Dreams Deferred: The Birth and Betrayal of America's First Gay Liberation Movement, in* MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY 17, 30-31 (1992).

27 Romer v. Evans, 517 U.S. 620 (1996).

28 Boy Scouts of America v. Dale, 120 S.Ct. 2446 (2000).

29 As Harry Hay, one of the radical founders of the Mattachine Society, declared to historian John D'Emilio who was writing in the late 1970s, the gay movement should not lose its most revolutionary visions in the quest for what he called the "chimera of gay civil rights." Hay disavowed the "middle class parlors of the Gay Democratic

Similarly, we at CUNY cannot know the contents of legal progressivism in the next decades. Yet I think we can be confident that we are doing foundational work. As long as we refuse to narrow our perspectives of what is possible, we will persist in our politics, our pragmatism and practicality.

Clubs" in favor of new "chemistry," "incandescence," and "dreams." JOHN D'EMILIO, *Dreams Deferred, supra* note 26, at 55.