

HOMOSEXUALITY AS CONTAGION: FROM *THE WELL OF LONELINESS* TO THE BOY SCOUTS

*Nancy J. Knauer**

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* Professor of Law, The James E. Beasley School of Law, Temple University. I would like to thank Caroline J. Lindberg and Francine Tischner for their insightful comments on earlier drafts. In addition, I would like to thank Melynda Rowland for her research assistance.

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I. INTRODUCTION

In 1998, a consortium of pro-family organizations ran a series of full page advertisements featuring testimony by self-described “ex-gays” designed to expose the truth about homosexuality: “nurture, not nature, is the real cause of homosexual behavior.”¹ In addition to offering hope to those currently struggling with homosexuality, the advertisements had a clearly articulated political goal—to undercut the construction of sexual orientation as a valid category for civil rights protection.² They also illustrate that the controversy over gay rights is, at base, a struggle over the definition and the meaning of homosexuality—over the very nature of same-sex desire.

In the political arena, there are currently two central and competing views of homosexuality. Pro-family organizations, working from a contagion model of homosexuality, contend that homosexuality is an immoral, unhealthy, and freely chosen vice.³ Many pro-gay organizations espouse an identity model of homosexuality under which sexual orientation is an immutable, unchosen, and benign characteristic.⁴ Both pro-family and pro-gay organizations believe that to define homosexuality is to control its legal and political status.⁵

1. CitizenLink, *In Defense of Free Speech*, at <http://www.family.org/cforum/research/papers/a0002800.html> (last modified Sept. 15, 1998) (advertisement). For a description of the advertising campaign, see Laurie Goodstein, *The Architect of the ‘Gay Conversion’ Campaign*, N.Y. TIMES, Aug. 13, 1998, at A10; Frank Rich, *Lott’s Lesbian Ally*, N.Y. TIMES, July 22, 1998, at A19.

2. For example, the advertisement entitled *In Defense of Free Speech* lists several essential truths about homosexuality that appear to be designed to counter claims that sexual orientation qualifies as a suspect classification for purposes of constitutional protections because sexual orientation is an immutable trait and homosexuals are a disadvantaged minority. See CitizenLink, *In Defense of Free Speech*, at <http://www.family.org/cforum/research/papers/a0002800.html> (last modified Sept. 15, 1998) (advertisement). These claims are as follows: i) homosexuality is not genetic; ii) homosexuals can change; iii) homosexual activists have promoted homosexuality under pretexts, iv) homosexuals possess “raw political power”; and v) homosexuality is a sin. See *id.* For a discussion of the requirements for suspect classification, see *infra* note 351 and accompanying text.

3. See *infra* Part III (discussing the contagion model of homosexuality).

4. See *infra* Part II (depicting the identity model of homosexuality).

5. This Article uses the term “pro-family” to describe conservative political organizations with anti-gay policies. Instead of referring to the groups as “anti-gay,” it uses the term that the groups use to describe themselves. It therefore tries to avoid the anti-choice/pro-life rhetoric over-characterization that can intrude when writing about politically-charged issues. This Article also does not use quotation marks around terms such as “pro-family” or “ex-gay” to indicate the Author’s skepticism regarding the appropriateness or accuracy of the terms. Pro-family literature consistently puts the word gay in quotation marks. Recent court decisions dealing with sexual orientation have also placed words used by the litigants to describe themselves or their relationships in quotation marks. See, e.g., *Shahar v. Bowers*, 114 F.3d 1097, 1099, 1100-01, 1103, 1105-07 (11th Cir. 1997) (using quotation marks around “marriage” or “married” when referring to Shahar’s

This sometimes bitter debate regarding the nature of same-sex desire might seem like an exceedingly contemporary development.⁶ However, the ex-gay media blitz represents only the latest skirmish in a long-standing battle for ontological hegemony. Over seventy years ago, an opening salvo was launched in the 1928 obscenity trials of Radclyffe Hall's novel, entitled *The Well of Loneliness* ("*The Well*").⁷ The novel detailed the life and loves of Stephen Gordon, a female invert, for whom same-sex desire was depicted as an innate, God-given, and potentially noble characteristic.⁸ Building on the congenital inversion theories of the early sexologists, Richard von Krafft-Ebing and Havelock Ellis, Hall constructed the first popular articulation of a positive lesbian identity and argued, without apology, for the invert's "right to love."⁹ Thus, in *The Well*, female inverts are not only subjects—they are juridical subjects. Hall uses a clearly articulated rights discourse throughout the book as her characters assert their "right to love" and long for the right to "protect"—i.e., marry their partners.¹⁰

Upon publication, *The Well* encountered a hostile counter-narrative of homosexuality as contagion, resulting in sensational obscenity trials on both sides of the Atlantic Ocean.¹¹ Courts in New York and London adjudged *The Well* obscene under the prevailing "*Hicklin* rule," finding that it had the tendency "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort might fall."¹² Although the New York decision was overturned on appeal, *The Well* remained banned in Great Britain until 1949.¹³ The media coverage generated by the trials and the attendant moral panic assured *The Well* a position as the most influential lesbian novel of the

religious commitment ceremony). In each of these contexts, the use of quotation marks demeans the term in question.

6. The anti-gay activities of pro-family organizations are often characterized as a backlash against the recent successes of the gay and lesbian movement. Didi Herman, who has conducted a comprehensive study of the anti-gay policies and activities of pro-family organizations, rejects that these activities represent a "backlash." See DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT 195* (1997). Instead, Herman describes it as a "paradigmatic movement for social change." *Id.*

7. RADCLYFFE HALL, *THE WELL OF LONELINESS* (First Anchor Books ed. 1990) (1928).

8. See generally *id.*

9. *Id.* at 204.

10. See *id.* at 153.

11. For a discussion of the trials, see *infra* Part IV.

12. *Regina v. Hicklin*, L.R. 3 Q.B. 360, 369 (1868).

13. For a discussion of the New York and London trials, see *infra* Part IV.

twentieth century¹⁴ and marked the controversy as a water shed in the development of lesbian identity.¹⁵

The controversy over *The Well* was also a water shed in the evolution of anti-gay rhetoric. As one of the earliest examples in Anglo-American jurisprudence of the battle between the contagion and identity models of homosexuality, the trials and the larger socio-legal response provide an important link in our understanding of the continuing cultural regulation of the expression of same-sex desire. In particular, they underscore the resilience of the contagion model—the arguments used to suppress *The Well* are strikingly similar to those used today to silence positive images of same-sex desire, relationships, and identities in a

14. Despite what many have considered its melodramatic and mawkish prose, there is little question that *The Well of Loneliness* (“*The Well*”) was indeed the most influential lesbian novel of the past century. For decades, *The Well* remained the only widely available book dealing with lesbianism. See LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* 173 (1991). Countless personal stories attest to the impact that *The Well* had on women from the late 1920s until the 1970s. See REBECCA O’ROURKE, *REFLECTING ON THE WELL OF LONELINESS* 114-42 (1989) (including the results of surveys regarding the impact of *The Well* on individual women); see also Anngel Delaney, *The Story Of Ruth: A 100-Year-Old Lesbian*, at http://content.gay.com/channels/news/bhm_ellis_000202.html (last visited July 9, 2000) (quoting Ruth that when she read *The Well* in 1928 “it put me wise to some things”). In 1999, Publishing Triangle, an association of gay men and lesbians in publishing, ranked *The Well* seventh on a list of the *100 Best Lesbian and Gay Novels*. See Robert Plunket, *100 Best Gay Books*, *THE ADVOCATE*, June 22, 1999, at 119.

15. There is a considerable body of scholarship which focuses on the role of *The Well* in the formation of lesbian identity and attempts to grapple with the legacy of the masculinity of both Radclyffe Hall and her protagonist, Stephen Gordon. Writing in 1984, Esther Newton summarized the reaction of feminist scholars in her now-classic essay, *The Mythic Mannish Lesbian: Radclyffe Hall and the New Woman*. See Esther Newton, *The Mythic Mannish Lesbian: Radclyffe Hall and the New Woman*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* 281 (Martin Bauml Duberman et al. eds., 1989) [hereinafter *HIDDEN FROM HISTORY*]. Newton explained “[e]mbarrassed by Radclyffe Hall but unable to wish her away, sometimes even hoping to reclaim her, our feminist scholars have lectured, excused, or patronized her.” *Id.* at 282. In particular, lesbian feminists disliked *The Well* on two points: first, the congenial theories perpetuated the notion of the mannish lesbian, and second, it was too apologetic—too guilt ridden. For example, the groundbreaking 1972 book, *Lesbian Women*, acknowledged *The Well* as the “Lesbian Bible,” but quickly disclaimed its veracity. See DEL MARTIN & PHYLLIS LYON, *LESBIAN / WOMAN* (20th ed. 1991). The authors wrote: “Unfortunately, to the uninitiated the book perpetrated the myth of the Lesbian as a pseudo-male, and many young women . . . emulated the heroine, Stephen Gordon, only to find out that their lovers . . . were not looking for a male substitute. For lesbians are women who are attracted to women.” *Id.* at 22. Later feminists refigured Hall/Gordon as a trope necessary to instill the “new woman” with sexual agency. See Carroll Smith-Rosenberg, *Discourses of Sexuality and Subjectivity: The New Woman, 1870-1936*, in *HIDDEN FROM HISTORY*, *supra*, at 264. Contemporary accounts that have come at a time of increasing interest in butch/femme identities and gender difference within same-sex relationships have recast Hall/Gordon as an example of female masculinity. See JUDITH HALBERSTAM, *FEMALE MASCULINITY* 75-110 (1998).

wide variety of contexts including education, public employment, and government-funded programs.¹⁶

Indeed, the objections to *The Well* expressed in 1928 in editorials, court decisions, and other official commentary articulate the six maxims of the contagion model of homosexuality that pro-family activists continue to advance to this day and that continue to inform a wide range of policy choices and judicial decisions. First and foremost of these maxims is that homosexuality is a freely chosen vice, not a valid medical or scientific category.¹⁷ Accordingly, homosexuals cannot excuse their behavior by claiming that they are “born that way.” Second, homosexuals prey on innocent victims.¹⁸ This is especially dangerous because “normally sexed” individuals, particularly children or young adults, are very easily lured into experimenting with homosexual practices, thereby accounting for homosexuality’s contagious quality.¹⁹ Third, homosexuals have no shame and insist on flaunting their depravity in public.²⁰ Fourth, the demands of homosexuals extend beyond mere tolerance.²¹ Fifth, this is a battle to the end for the future of society.²² Lastly, because homosexuality can so easily infect normal people, particularly children, any public image of homosexuality that is

16. For a discussion of the contemporary modes of silencing expressions of same-sex desire, see *infra* Part V.G.

17. See *infra* Part IV.C.1.

18. See *infra* Part IV.C.2.

19. The contagion and identity models, respectively, reflect what Eve Kosofsky Sedgwick terms the universalizing and minoritizing aspects of homosexuality. See EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET 1* (1990). The universalizing perspective of the contagion model mandates that homosexuality must be contained because everyone is in some way capable of same-sex desire. See *id.* at 84. The minoritizing response of the identity model asserts that the fear of contagion is unfounded because homosexuality only affects a discrete portion of society who is “born that way.” See *infra* note 331 and accompanying text. Each side, in its attempt to prove that its understanding of homosexuality is the correct one, has embraced multifarious scientific studies asserting that homosexuality either is or is not hard-wired. See *infra* note 331 and accompanying text. However, the focus on whether homosexuals are “born that way” misses the most potent portion of the contagion model, namely that homosexuality is an immoral, unhealthy vice. This primary assertion of the immorality of same-sex desire does not necessarily fall or rise on account of the gay gene. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 517 (1994) (explaining that “[a]nti-gay essentialism holds that homosexual orientation is fixed, immutable, and normatively bad or sick”).

The contagion model could just as easily adopt a minoritizing view that continues to perceive homosexual acts as immoral and to recommend that homosexuality be repressed. The identity model, however, runs the risk of basing its very claim for the morality of same-sex desire on a gene that may never materialize because it lacks a compelling statement as to the morality of same-sex desire, regardless of the genetic predisposition of the parties involved.

20. See *infra* Part IV.C.3.

21. See *infra* Part IV.C.4.

22. See *infra* Part IV.C.5.

not negative—including simply the presence of an openly gay individual, such as an assistant Scout Master or a teacher—sends a dangerous message that must be forbidden, silenced, and repressed.²³

This decidedly contemporary reading of *The Well* stands in contrast to much of the existing commentary on both *The Well* and its eccentric author. Although commentators routinely point to the trials as a defining moment in the development of modern lesbian identity, often comparing them to the Oscar Wilde trials of a generation earlier,²⁴ there is relatively little written about the role of the trials as a direct legal intervention in identity formation. The most detailed discussions of the trials are usually relegated to a chapter or two in the handful of biographies of Hall²⁵ where, depending upon the viewpoint and/or historical context of the author, the trials are explained by reference to the prevailing prudery, misogyny, or homophobia of the time.²⁶

Today, obscenity laws no longer stop the publication of lesbian romance novels, but state-mandated or state-enforced spheres of silence continue in numerous areas and play an important role in the ongoing

23. See *infra* Part IV.C.6. For a discussion of the expressive nature of an openly gay individual. See Nancy J. Knauer, “Simply So Different”: *The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale*, 89 KY. L.J. (forthcoming Summer 2001).

24. See, e.g., HALBERSTAM, *supra* note 15, at 98 (stating that the trials “are to lesbian definition what the trials of Oscar Wilde were to gay male definition”). There were significant differences between the two sets of trials—not the least of which was the passage of thirty-three years. Wilde was charged with “gross obscenity” after pursuing an improvident libel suit. See *id.* Hall was never on trial and never under threat of loss of her liberty. See *id.* Unlike Wilde, Hall acknowledged her homosexuality and indeed used it as proof of her authority to write *The Well*. See MICHAEL BAKER, *OUR THREE SELVES: THE LIFE OF RADCLYFFE HALL* 247-49 (1985).

25. There are five biographies of Hall and one of her partner, Lady Troubridge. See BAKER, *supra* note 24. The biographies include: SALLY CLINE, *RADCLYFFE HALL: A WOMAN CALLED JOHN* (1997); LOVAT DICKSON, *RADCLYFFE HALL AT THE WELL OF LONELINESS: A SAPPHIC CHRONICLE* (1975); RICHARD ORMROD, *UNA TROUBRIDGE: THE FRIEND OF RADCLYFFE HALL* (1984); DIANA SOUHAMI, *THE TRIALS OF RADCLYFFE HALL* (1999); UNA, *LADY TROUBRIDGE, THE LIFE OF RADCLYFFE HALL* (1963). Vera Brittain wrote a book dealing primarily with the trials that contains some biographical information. See VERA BRITAIN, *RADCLYFFE HALL: A CASE OF OBSCENITY?* (1969); see also TERRY CASTLE, NOËL COWARD & RADCLYFFE HALL: *KINDRED SPIRITS* (1996) (comparing the seemingly parallel existence of Hall and male homosexual Noël Coward in early twentieth-century Britain). There are numerous scholarly articles written on both Hall and *The Well*. One of the most influential is Esther Newton’s *The Mythic Mannish Lesbian: Radclyffe Hall and the New Woman*. See Newton, *supra* note 15, at 281-93.

26. For example, biographer Diana Souhami seems to credit all three of these. Early in her *Introduction*, she noted that the result would have been different “[i]n a more adult society.” SOUHAMI, *supra* note 25, at xx. Later in the biography, Souhami criticized the officials at the London trials on account of “their homophobia, their quangos of self-interest, their twisting of the judicial system, [and] their repressive views of women.” *Id.* at 223.

regulation of same-sex desire.²⁷ These areas are not merely remnants of intolerance left over from a less enlightened time; rather they are hotly contested political sites where opposing understandings of homosexuality vie for supremacy.²⁸

The fear engendered by the contagion model of homosexuality has resulted in the enactment of more specifically anti-gay laws than ever before,²⁹ despite the relative successes of the contemporary gay and lesbian movement in obtaining anti-discrimination laws,³⁰ the repeal of sodomy laws,³¹ and the recognition of same-sex relationships and the families they produce.³² Despite decades of gay and lesbian visibility and activism, the contagion model continues to inform the development of public policy at the highest levels of government. Its impact on congressional action is evidenced most clearly by the 1992 congressional "Gays in the Military" debate³³ and the 1996

27. Just because the criminal obscenity laws will not ban the book, however, does not mean that the book will be available on the shelf of the public library or be included in a high school English curriculum. For a discussion of curricular restrictions regarding homosexuality, see *infra* Part V.C.3.a.

28. In this regard, it is important to note that the contagion model is not a fringe political view that only animates talk radio banter, hate crimes, and other isolated incidents of animus. The model maintains a strong appeal for both voters who demand a halt to the homosexual encroachment on traditional values and institutions, and for legislators who are eager to take up arms in the "culture war." For a discussion of the "culture war," see *infra* Part V.F.

29. See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 205 (1999).

30. Currently, eleven states and many municipalities extend non-discrimination protections on account of sexual orientation. The Lambda Legal Defense and Education Fund maintains a state-by-state breakdown of these laws on its Web site. See Lambda Legal Defense and Education Fund: Anti-Discrimination Page, at <http://www.lldf.org> (last modified Aug. 30, 2000).

31. Currently, sixteen states have sodomy laws. See *infra* note 352. This number is down from twenty-four states and the District of Columbia in 1986 when the United States Supreme Court decided *Bowers v. Hardwick*. See *Bowers v. Hardwick*, 478 U.S. 186, 193-94 (1986). For a discussion of the current state of sodomy laws, see *infra* note 352 and accompanying text.

32. Vermont is the first state to recognize "civil unions" between same-sex couples. See VT. STAT. ANN. tit. 15, §§ 1201-1207 (Supp. 2000). According to the Human Rights Campaign, fifty-five states and municipalities have domestic partnership registries. See *States and Municipalities with Domestic Partner Registries*, Human Rights Campaign, at http://www.hrc.org/worknet/asp_search/results_covered.asp?W=3 (last visited Nov. 11, 2000). In addition, ninety-four state and local governments offer domestic partnership health benefits. *State & Local Governments that Offer Domestic Partner Health Benefits*, Human Rights Campaign, at http://www.hrc.org/worknet/asp_search/results.asp?sKey=List&List=IV&t=DP (last visited Nov. 11, 2000). The benefits attached to the municipal domestic partnership ordinances are limited to municipal rights and largely inure to the benefit of municipal employees. See Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337, 341 (1998).

33. For a discussion of the "Gays in the Military" debate, see *infra* text accompanying notes 357-67.

congressional debate over the Defense of Marriage Act (“DOMA”).³⁴ It also serves as the theoretical underpinning of numerous judicial decisions, most recently the United States Supreme Court decision, *Boy Scouts of America v. Dale*.³⁵ It is the reason why the state cannot give its imprimatur to same-sex relationships or protect the coming out speech of employees, tenants, or Scout Masters.³⁶ And, in its most populist form, the contagion model has found expression in numerous anti-gay citizen initiatives from Oregon to Maine.³⁷

This Article identifies the controversy over *The Well* and the present-day activities of pro-family organizations as two points in history where the identity and contagion models of homosexuality have struggled for dominance. Part II of this Article examines the medico-scientific model of homosexuality advanced by the early sexologists and explains how Hall incorporated that model into her appeal for recognition on behalf of congenital inverts. It illustrates Hall’s instrumental use of the novel to argue for social change and her creation of an identity model of homosexuality that, although grounded in science, included a highly developed sense of group identity, duty, and responsibility. Part III discusses the moral outrage against *The Well* and develops a side-by-side comparison of Hall’s understanding of homosexuality and that of the contagion model, as expressed in a 1928 editorial calling for the suppression of *The Well*. Part IV then shows how the legal proceedings against *The Well* adopted and reinforced the contagion model. It also illustrates how the surrounding media coverage inscribed the notion of homosexuality as contagion in the cultural imagination. Part V resituates the contagion model in contemporary society and offers another side-by-side comparison, this time of the 1928 version of the contagion model and its present day successor. Using the policy writings of one selected pro-family organization, the Family Research Council (“FRC”), Part V tracks the current iterations of the contagion model with that of the identity model advanced by pro-gay activists. It shows how the contagion model continues to inform legislative and judicial decision-making and how the state continues to silence expressions of same-sex desire through a variety of means that fall short of direct censorship. A brief conclusion suggests that an

34. For a discussion of the debate over the Defense of Marriage Act (“DOMA”), see *infra* text accompanying notes 342-47.

35. 120 S. Ct. 2446 (2000).

36. For a discussion of the perceived expressive power of the state, see *infra* note 518.

37. See *infra* text accompanying notes 526-27 (discussing a number of citizen ballot initiatives).

identity model of homosexuality will never respond fully to the fear generated by the contagion model because it can never account for the “girl who, herself being normal, [gives] her love to an invert.”³⁸ The only effective challenge to the contagion model is the assertion of the inherent morality of same-sex desire.

II. *THE WELL OF LONELINESS* AND THE MEDICO-SCIENTIFIC MODEL OF HOMOSEXUALITY

The early sexologists, such as Krafft-Ebing and Ellis, advanced a medico-scientific model of homosexuality and, some would argue, in so doing created the modern homosexual.³⁹ They established, through scientific observation, that “contrary sexual feeling,” or inversion, is a natural, if not normal, biological variation.⁴⁰ They further asserted that for some individuals who experienced same-sex desire, such desire was the result of a congenital predisposition.⁴¹ This represented a radical departure from the then-prevailing view of same-sex desire which focused not on the individual, but on the acts themselves, which were

38. HALL, *supra* note 7, at 406.

39. See 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 43 (Robert Hurley trans., 1978). Foucault asserted, in what Eve Kosofsky Sedgwick has called “an act of polemical bravado,” that the modern homosexual was born in 1870. See SEDGWICK, *supra* note 19, at 44. Foucault tied the date of birth to the process of naming and categorization conducted by the early sexologists. He stated that:

[T]he psychological, psychiatric, medical category of homosexuality was constituted from the moment it was characterized—Westphal’s famous article of 1870 on “contrary sexual sensations” can stand as its date of birth—less by a type of sexual relations than by a certain quality of sexual sensibility, a certain way of inverting the masculine and the feminine in oneself The sodomite had been a temporary aberration; the homosexual was now a species.

FOUCAULT, *supra*, at 39 (footnote omitted). For a further discussion of Foucault’s treatment of the early sexologists and their role in identity formation, see *infra* text accompanying notes 83-96.

40. Karl Westphal, a German physician, is credited with writing the first medical article on homosexuality or what he referred to as “*contrary sexual feeling*.” See JENNIFER TERRY, *AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY* 36, 45 (1999). Krafft-Ebing used the term “contrary sexual instinct.” See R. VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS: A MEDICO-LEGAL STUDY* 187 (Charles Gilbert Chaddock trans., F.A. Davis Co., 7th ed. 1920) (1892). The term homosexuality is thought to be coined by Karoly Maria Benkert in an 1868 letter to the German sexologist and homosexual, Karl Heinrich Ulrichs. See TERRY, *supra*, at 40; see also *infra* note 99 and accompanying text (discussing the first public/political deployment of the term, also by Benkert, in 1869). Throughout this Part the terms “contrary sexual feeling,” inversion, and homosexuality are used to express the general concept of same-sex desire. However, “contrary sexual feeling” is used to denote a contrary feeling without any further identity classification. Inversion is used most often when discussing either the views of the sexologists or Hall’s own beliefs regarding inversion.

41. See *infra* Part II.A.

considered sinful, immoral, depraved, and, in some instances, criminal.⁴²

The medico-scientific model of homosexuality lost currency by the middle of the twentieth century, giving way to psychoanalytic models that dominated the 1950s and 1960s, and the liberation models that emerged immediately after Stonewall, emphasizing choice, autonomy, and individual freedom.⁴³ However, it has reappeared in recent years, repackaged as a strong statement of identity and immutability, grounded in genetics. From a legal standpoint, this may provide the basis for suspect classification for constitutional purposes.⁴⁴ Rhetorically, it seems the perfect response to the contagion claims because if homosexuality is inborn, then one could not catch same-sex desire any more than one could catch green eyes.

The sexologists, however, never asserted that every individual who engages in same-sex activity was “born that way.” Their burgeoning taxonomic world was much more complicated than that. The sodomite who was defined only by reference to his sex act was not simply replaced by the congenital invert.⁴⁵ Rather, the sexologists identified three general types of individuals, each of whom engaged in same-sex sex acts and each of whom was subject to further classifications and gradations: (1) the congenital (or true) invert; (2) the person suffering from acquired inversion; and (3) the occasional libertine.⁴⁶ Thus, from its initial articulation, the medico-scientific model of homosexuality confirms (or at least in no way dispels) the second maxim of the contagion model, namely that true homosexuals prey on innocent victims—i.e., individuals who are not “born that way.”⁴⁷

42. See FOUCAULT, *supra* note 39, at 42-43.

43. The psychoanalytic model of homosexuality “understood homosexuality not in terms of a hereditary or congenital defect that manifested itself in sexual inversion but as *perversions* of the normal sex drive caused by the stresses and strains of psychosexual development.” TERRY, *supra* note 40, at 56. The liberation model conceptualized the oppression of same-sex desire as necessary to reinforce sex roles and sought freedom for individuals to define their own sexuality unhindered by repressive labels and categories. See ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* 30-43 (1996).

44. For many individuals, ascribing a biological root to their sexuality reflects their life experience. See Halley, *supra* note 19, at 526-28. However, a biological root or immutability also strengthens the argument that sexual orientation should be a suspect classification for purposes of constitutional jurisprudence. See *infra* notes 351 and accompanying text (discussing the standards for suspect classification necessary to trigger a higher level of constitutional scrutiny).

45. Foucault suggested this replacement when he wrote: “Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphroditism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.” FOUCAULT, *supra* note 39, at 43.

46. For a discussion of the three different types of individuals, see *infra* text accompanying notes 56-57.

47. See *infra* Part IV.C.2.

Despite its admittedly partial reach, many who considered themselves congenital inverts, including Hall, believed that this new science held considerable liberatory value. It side-stepped religious proscriptions against homosexual acts by asserting science as the privileged site of sexual knowledge, and it potentially removed homosexuality from the realm of the criminal because one should not be punished because of one's nature.⁴⁸ Hall believed that if this information, which at the time was largely restricted to medical or legal texts, were accessible to the general public,⁴⁹ it would inspire "dignity and courage" among inverts and bring "normal men and women of good will . . . to a fuller and more tolerant understanding of the inverted."⁵⁰ It was for this reason that she decided to write *The Well*, but in the end, Hall's reliance on science to change the cultural understanding of homosexuality did not protect her novel from charges of obscenity.⁵¹ The medico-scientific model of inversion remained controversial and highly contested, and it never became accepted as the dominant discourse on homosexuality, even among those with "contrary sexual feelings."⁵²

48. See *infra* Part II.A.2.

49. Hall believed that the silence surrounding inversion was the greatest enemy of the invert, and she wanted to make the sexologists "accessible to the general public who did not have access to technical treatises." TROUBRIDGE, *supra* note 25, at 81. At the time, many of what were considered the more salacious passages of the sexologists' writing were printed in Latin. See, e.g., KRAFFT-EBING, *supra* note 40, at 191, 196.

50. Letter from Radclyffe Hall, author of *The Well of Loneliness*, to Gorham Munson, literary scholar (June 2, 1934), at <http://www.datalounge.net/network/pages/lha/pblct/intrhall.htm> (last visited Jan. 24, 2001). By the time *The Well* was published in 1928, sexologists had been studying, naming, and classifying "contrary sexual feeling" for over fifty years. In 1928, when Radclyffe Hall sent her manuscript of *The Well* to her publisher, she described it as a first and promised that "no-one was better qualified to write the subject in fiction than an experienced novelist like [herself] who was actually one of the people about whom she was writing." *Id.* At the time, Hall was an accomplished British novelist and was aware that her decision to write a novel on inversion could "shipwreck" her career. See TROUBRIDGE, *supra* note 25, at 82.

51. See *infra* Part IV.

52. Hall's strong identification with the sexologists also has been the source of enduring criticism, starting with some of her contemporaries for whom congenital theories did not carry the same level of explanatory appeal. Beginning in the 1970s, historians and theorists operating under a liberation model of homosexuality and lesbian-feminist scholars labeled Hall's characterization of lesbianism as disempowering, misogynistic, and homophobic. For example, Lillian Faderman's groundbreaking book, *Surpassing the Love of Men: Romantic Friendship and Love Between Women from the Renaissance to the Present*, contains a chapter on the work of the early sexologists in the section entitled *The Rise of Antifeminism*. See LILLIAN FADERMAN, *SURPASSING THE LOVE OF MEN: ROMANTIC FRIENDSHIP AND LOVE BETWEEN WOMEN FROM THE RENAISSANCE TO THE PRESENT* 233 (1981). Faderman chides Hall for creating "a pathetic picture of creatures who begged only for pity and understanding" rather than "arguing that women chose to be lesbians for good reasons." *Id.* at 320-22. Faderman concludes that "*The Well* has had generally such a devastating effect on female same-sex love . . . because its writer fell into the congenitalist trap." *Id.* at 323.

A. *The Early Sexologists*

During the late nineteenth century when science turned its attention to sexuality, “contrary sexual feelings” or inversion was only one of many different aspects of human sexual expression that became the subject of empirical study.⁵³ Not content simply to chart the contours of human sexuality, the sexologists asserted that the truths they discovered should be used to inform (or even control) legal and other decisions concerning the regulation of sexuality.⁵⁴ Thus, the scientific theories developed for inversion were designed to be more than just descriptive. The elaborate classification schemes were diagnostic tools that were essential to questions of treatment, prevention, and sanction.

Central to the taxonomy of inversion was the assertion that an invert was a particular type of person who had a particular type of constitution. Among inverts, the sexologists made the further distinction between congenital and acquired homosexuality.⁵⁵ However, in no case was an invert simply someone who engaged in or desired to engage in homosexual acts. A true invert was greater than the sum of his sex acts.⁵⁶ The continued existence of the occasional sodomite meant that, even under the regime of the sexologists, for some individuals same-sex

Present day biographers openly mock Hall’s willingness to embrace the “oddball” theory of congenital inversion without acknowledging that Hall was actually embracing the science of her day. *See, e.g.,* SOUHAMI, *supra* note 25, at xix. These critics fail to see Hall as part of a long tradition of individuals with “contrary sexual feelings” who looked not only to science for explanations, but also to history where they have consistently mined the past for inspirational examples of same-sex desire. *See* SCOTT BRAVMANN, *QUEER FICTIONS OF THE PAST: HISTORY, CULTURE, AND DIFFERENCE* 4 (1997) (describing “queer fictions of the past as important social/cultural texts in the articulation of lesbian and gay identities and differences”). This scientific tradition includes the inverts who volunteered to take part in the hygiene studies in the 1930s, the homosexuals who enthusiastically received the results of the Kinsey Report and Evelyn Hooker’s studies in the 1950s, the gays who applauded the American Psychiatric Association’s (“APA”) decision in 1973, and the gay men and lesbians who now anxiously follow the search for the gay gene. *See* TERRY, *supra* note 40, at 178-79, 301-03, 357, 381, 387-88. This appeal to science is an attempt by contested subjects to secure meaning and certainty because of their conviction that to discover the “truth” about the nature of homosexuality is to control its status.

53. For example, in *Psychopathia Sexualis*, Krafft-Ebing also reported on the legal aspects of, *inter alia*, “[r]ape and lust-murder,” “[b]odily injury, injury to property, and torture of animals dependent on sadism,” “[n]ecrophilia,” and “[i]mmoral acts with persons in the care of others.” KRAFFT-EBING, *supra* note 40, at xiv.

54. *See infra* note 77 (quoting Krafft-Ebing’s views on legal regulation).

55. *See infra* text accompanying notes 61-63.

56. Krafft-Ebing noted “[p]erverse sexual acts, not dependent upon perversion” often arise in prisons, ships, boarding schools, and other same-sex environments. KRAFFT-EBING, *supra* note 40, at 188. He believed that such behavior was due largely to situational pressures. *See id.* This seems to contradict Foucault’s assertion that “[t]he sodomite had been a temporary aberration; the homosexual was now a species.” FOUCAULT, *supra* note 39, at 43. According to Krafft-Ebing, the sodomite was alive and well. *See id.*

desire remained independent from identity.⁵⁷

1. Krafft-Ebing and Ellis

Hall based her arguments primarily on the work of Krafft-Ebing and Ellis.⁵⁸ Both sexologists believed that sexual inversion often had a congenital basis, that there was a difference between a true invert and one with acquired homosexuality, and that individuals could experience varying degrees of “contrary sexual feelings.” Krafft-Ebing explained inversion as “a sexual instinct . . . which is the exact opposite of that characteristic of the sex to which the individual belongs,” resulting from “a process of development of the psycho-sexual character.”⁵⁹ Because desire for women belonged to men and desire for men to women, a woman who desired women was experiencing an inversion of desire or “contrary sexual feelings.”⁶⁰ The strict correlation between biological sex and object choice meant that for a woman to desire a woman was to feel like a man. Thus, the inversion is that of desire, but not necessarily gender performance. An invert acts as the opposite sex to the extent that her object choice belongs to the opposite sex, but an invert does not necessarily present as the opposite sex.

For purposes of therapy or prevention, it was important to differentiate between the congenital invert and the one for whom homosexuality was “acquired.” Congenital inversion occurs where the individual has always experienced “contrary sexual feelings,” whereas in the case of acquired inversion the individual originally has “normal” sexual feelings for the opposite sex, but inversion later develops as the “result of very definite injurious influences.”⁶¹ Krafft-Ebing considered

57. The relationship of identity to object choice is a central question in queer theory which notes that “a number of ambiguous circumstances cast doubt on the precise delimitations of homosexuality as a descriptive category” and, therefore, cast doubt on the (at least theoretical) legitimacy of the identity model. JAGOSE, *supra* note 43, at 7 (asking also “is the man who lives with his wife and children, but from time to time has casual or anonymous sex with other men, homosexual”).

58. Ellis provided a *Commentary to The Well* that was published in the book’s earlier editions. *See infra* note 101 (quoting the text of Havelock Ellis’ introductory commentary). Hall also incorporated Krafft-Ebing in the text of *The Well*. The protagonist turns to one of his books, most likely *Psychopathia Sexualis*, in order to learn about her nature. *See infra* text accompanying notes 91-95.

59. KRAFFT-EBING, *supra* note 40, at 187.

60. *See id.*

61. *Id.* at 187. Ellis provided considerably more information regarding the causality of this congenital predisposition. He hypothesized the existence of a “latent organic bi-sexuality in each sex” and rejected Ulrichs’ earlier notion of an intermediate sex as “simply unintelligible.” HAVELock ELLIS & JOHN ADDINGTON SYMONDS, *SEXUAL INVERSION* (1897), *excerpted in* NINETEENTH-CENTURY WRITINGS ON HOMOSEXUALITY: A SOURCEBOOK 100 (Chris White ed.,

congenital inversion to be “a functional sign of degeneracy”⁶² and speculated that acquired inversion also was due to a “predisposition” that “requires the influence of accidental exciting causes to rouse it from its slumber.”⁶³

For the congenital invert, Krafft-Ebing identified four distinct degrees of inversion, only the last two of which entail any cross-gender behavior.⁶⁴

1. *Psychical Hermaphroditism*—The characteristic mark of this degree of inversion of the sexual instinct is that, by the side of the pronounced sexual instinct and desire for the same sex, a desire toward the opposite sex is present; but the latter is much weaker and is manifested episodically only, while the homo-sexuality is primary, and, in time and intensity, forms the most striking feature of the *vita sexualis*.⁶⁵

2. *Homo-sexual Individuals, or Urnings*—Sexual desires and inclinations for persons of the same sex exclusively; but, in contrast with the following group, the anomaly is limited to the *vita sexualis*, and does not more deeply and seriously affect the character and mental personality.⁶⁶

3. *Effemination and Viraginity*—The psychical personality, especially in general manner of feeling and inclinations, is influenced by the abnormal sexual feeling. In this group, fully-developed cases in

1999). Ellis theorized that the sexual invert was a biological variation to the normal progression whereby:

[A]t conception the organism is provided with about 50 per cent. of male germs and about 50 per cent. of female germs, and that as development proceeds either the male or the female germs assume the upper hand, killing out those of the other sex, until in the maturely developed individual only a few aborted germs of the opposite sex are left.

Id. at 100-01.

62. KRAFFT-EBING, *supra* note 40, at 187.

63. *Id.* Krafft-Ebing wrote: “Those who hold to the opinion that the origin of homo-sexual feelings and instinct is found to be exclusively in defective education and other psychological influences are entirely in error.” *Id.* at 190 n.1. He continued:

An untainted male may be raised never so much like a female, and a female like a male, but they will not become homo-sexual. The natural disposition is the determining condition; not education and other accidental circumstances, like seduction. There can be no thought of contrary sexual instinct save when the person of the same sex exerts a psycho-sexual influence on the individual, and thus brings about libido and orgasm—*i.e.*, has a psychical attraction.

Id.

64. Unlike Krafft-Ebing, Ellis’ stamp of a true invert was a “distinct trace of masculinity” as opposed to the absence of sexual feelings toward men. *See* ELLIS & SYMONDS, *supra* note 61, at 97.

65. KRAFFT-EBING, *supra* note 40, at 230 (footnote omitted).

66. *Id.* at 255.

men are females in feeling; in women, males. This abnormality of feeling and of development of the character is often apparent in childhood.⁶⁷

4. *Androgyny and Gynandry*—Those individuals of contrary sexuality in whom not only the character and all the feelings are in accord with the abnormal sexual instinct, but also the skeletal form, the features, voice, etc.; so that the individual approaches the opposite sex anthropologically, and in more than a psychical and psycho-sexual way.⁶⁸

For Krafft-Ebing, object choice and gender performance were inextricably linked. As an individual progressed on the Krafft-Ebing scale from stage one to stage two, the strength of non-normative object choice increases to the point of exclusivity.⁶⁹ Stages three and four assume exclusive “contrary sexual feeling” and focus instead on the degree of cross-gender behavior.⁷⁰

The prognosis for an individual with “contrary sexual feelings” often depended upon whether the diagnosis was acquired or congenital inversion.⁷¹ Krafft-Ebing acknowledged the shortcomings of any therapeutic intervention for congenital inversion, although he still reported numerous case studies where hypnosis was used to stem “contrary sexual feelings.”⁷² On the other hand, he considered acquired inversion to be treatable.⁷³ In contrast, Ellis was highly critical of “those who are prepared to ‘cure’ the invert at any price.”⁷⁴ He also advised against pressuring an invert to marry—albeit not out of concern for her happiness. Rather, Ellis considered it unwise to “put into the invert’s

67. *Id.* at 279.

68. *Id.* at 304.

69. The Krafft-Ebing scale of congenital inversion gauges both strength of object choice and the degree of cross-gender performance, whereas, the later and better known Kinsey scale measures only object choice—i.e., the degree and strength of same-sex desire—on a scale of zero to six. *See* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 380-82 (2000). Zero represents exclusive opposite-sex attraction and six represents exclusive same-sex attraction. *See id.*

70. For example, today, a Krafft-Ebing stage four would probably earn a diagnosis of “gender dysphoria” which would be recognized as independent from object choice.

71. *See* Merl Storr, *Transformations: Subjects, Categories and Cures in Krafft-Ebing’s Sexology*, in *SEXOLOGY IN CULTURE: LABELLING BODIES AND DESIRES* 11, 21 (Lucy Bland & Laura Doan eds., 1998) (explaining that acquired inversion is “curable,” but less developed congenital inversion may be “treatable in its less developed forms”) [hereinafter *SEXOLOGY IN CULTURE*].

72. *See id.*

73. *See id.*

74. ELLIS & SYMONDS, *supra* note 61, at 103.

hands a power of reproduction.”⁷⁵ Although not an advocate of curing inversion, Ellis did believe that acquired homosexuality could be prevented by “sound social hygiene . . . [including] co-education.”⁷⁶

2. Liberatory Value of the New Science

The conviction that medicine could not cure nature—i.e., congenital inversion—had ramifications outside the question of what treatment, if any, was appropriate for inverts. Krafft-Ebing made a very strong case that legal reform in the area of sexual crimes must be informed by scientific advances.⁷⁷ Otherwise, he argued, law “is constantly in danger of passing judgment on individuals who, in the light of science, are not responsible for their acts.”⁷⁸ Specifically, on the condition of inverts and the law, Krafft-Ebing noted:

The majority of urnings are in a painful situation. On the one hand, there is an impulse toward persons of their own sex that is abnormally intense, the satisfaction of which has a good effect, and is natural to them; on the other, is public sentiment which stigmatizes their acts, and the law which threatens them with punishment. Before them lies mental despair—even insanity and suicide—at the very least, nervous disease; behind them, shame, loss of position, etc. It cannot be doubted that, under these circumstances, states of necessity and compulsion may be created by the unfortunate natural disposition and constitution. Society and the law should understand these facts. The former must pity, and not despise, such unfortunates; the latter must cease to punish them—at least, while they remain within the limits which are set for

75. *Id.* at 104.

76. *Id.* at 103.

77. Krafft-Ebing subtitled *Psychopathia Sexualis* as “a medico-legal study.” See KRAFFT-EBING, *supra* note 40. After exhaustively detailing an impressive array of sexual variations, Krafft-Ebing concluded his volume with a chapter on sexual crimes. See *id.* at 378-432. The headings of the last chapter listed the various sections of the German and Austrian criminal statutes which applied to each sex act or crime and made scientifically informed recommendations for legal reform. See *id.* As Krafft-Ebing explained in his *Preface*:

The importance of the subject for the welfare of society, especially forensically, demands, however, that it should be examined scientifically. Only he who, as a medico-legal expert, has been in a position where he has been compelled to pass judgment upon his fellow-men, where life, freedom, and honor were at stake, and realized painfully the incompleteness of our knowledge concerning the pathology of the sexual life, can fully understand the significance of an attempt to gain definite views concerning it.

Id. at iv.

78. *Id.* at 379. Krafft-Ebing urged that law take notice of advances in science, noting: “Law and Jurisprudence have thus far given but little attention to the facts resulting from investigations in psychopathology. Law is, in this, opposed to Medicine.” *Id.*

the activity of their sexual instinct.⁷⁹

These three assertions—homosexuality is natural, societal stigma harms the invert, and society should not punish someone for his nature—offered the self-conscious and reform-minded homosexual a framework to advance a program calling for tolerance and perhaps even recognition. The earliest homosexual political organization, the Scientific-Humanitarian Committee, founded in 1887 in Germany by Magnus Hirschfeld, based its call for the repeal of sodomy laws on the scientific theories of the sexologists.⁸⁰ The group asserted that from the scientifically recognized “fact” that inverts may not be responsible for their actions, it follows that they should not be held criminally responsible for the expression of their innate nature.⁸¹ Hall took this reasoning one step further when she argued that inverts also should be free of societal stigma.⁸²

3. Foucault and “Reverse Discourse”

No overview of the early sexologists is complete without a discussion of Foucault’s influential (and controversial) claims regarding the impact of the sexologists on the identity formation of the modern homosexual. First, Foucault claimed that the naming and classification of the homosexual by the sexologists actually created the modern

79. *Id.* at 410. This passage is from Krafft-Ebing’s recommendations on legal reform for sexual crimes. Throughout Krafft-Ebing’s discussion of legal reform, female inverts are relegated to a footnote and get a separate listing under “lesbian love.” *See id.* at 428. Under his discussion of inverts, Krafft-Ebing notes that female inversion is only of interest in Austria (because it was not criminalized in Germany), and it is not as common as male homosexuality. *See id.*

80. Although other German homosexual organizations later formed, the Scientific-Humanitarian Committee remained the dominant one and the dominant discourse remained that of congenital inversion. *See generally* JAMES D. STEAKLEY, *THE HOMOSEXUAL EMANCIPATION MOVEMENT IN GERMANY* (Ayer Co. 1993) (1975). The organization’s goal was the repeal of Section 175 of the Prussian Penal Code—i.e., the same section under which National Socialism would later condemn tens of thousands of men to castration or incarceration in concentration camps. *See id.* at 30. In 1914, the British Society for the Study of Sex Psychology distributed a pamphlet originally written by the Scientific-Humanitarian Committee in 1903. *See id.* at 32. The pamphlet echoed Krafft-Ebing’s claim that society cannot legislate against nature: “God, or Nature, has brought into being not only normal men and women but uranians . . . it is really too ridiculous to imagine that the process of nature can be abolished, or even appreciably restrained, by pen and paper enactments.” Scientific-Humanitarian Committee, *The Social Problem of Sexual Inversion, in WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS* 138, 140 (Mark Blasius & Shane Phelan eds., 1997).

81. Of course, Krafft-Ebing qualified his view on this issue by adding the proviso that inverts should not be punished “at least while they remain within the limits which are set for the activity of their sexual instinct.” KRAFFT-EBING, *supra* note 40, at 410.

82. *See* BRITAIN, *supra* note 25, at 48; DICKSON, *supra* note 25, at 9.

homosexual “as we know it.”⁸³ Second, Foucault theorized that the use by inverts of the sexologists’ work to argue for reform was an example of “reverse discourse,”⁸⁴ a process whereby the subjects of study appropriated the language of their observers and turned it into a positive identity. Lastly, Foucault credited the inversion theories with inextricably linking notions of cross-gender performance with same-sex object choice.⁸⁵ The first two claims are the most relevant to this discussion.

The most literal interpretation of Foucault’s claim about the effect of naming—i.e., homosexuals as a group only sprang into existence after scientists created the category in 1870—has been countered by an emerging historical consensus that group identification actually predated this elite naming.⁸⁶ Evidence of pre-existing homosexual subcultures is

83. See FOUCAULT, *supra* note 39, at 43 (stating that the “medical category of homosexuality was constituted from the moment it was characterized”). Sedgwick asserts that “[t]he historical search for a Great Paradigm Shift may obscure the present conditions of sexual identity” and takes issue with the notion of a unified view of homosexuality “as we know it today.” SEDGWICK, *supra* note 19, at 44 (emphasis omitted). Foucault’s assertion about the creation of the modern homosexual identity is the starting point in the ongoing essentialist/constructionist debate in gay/lesbian/queer scholarship. For a critique of both constructionist and essentialist positions, see EDWARD STEIN, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* 93-116 (1999).

84. FOUCAULT, *supra* note 39, at 101. Thus, the very process which created the term congenital invert and categorized him as degenerate—i.e., fallen from the genus—“made possible the formation of a ‘reverse’ discourse: homosexuality began to speak [o]n its own behalf, to demand that its legitimacy or ‘naturalness’ be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified.” *Id.*

Hall illustrated the importance of inverts speaking for themselves in *The Well* with a conversation between the protagonist, Stephen Gordon, and a gay male character who explains to Stephen that the general public will not read medical books and that even doctors do not know the “whole truth” because that can only be told by “one of ourselves.” See HALL, *supra* note 7, at 390.

85. Foucault asserted that homosexuality “was characterized . . . less by a type of sexual relations than by a certain quality of sexual sensibility, a certain way of inverting the masculine and the feminine in oneself.” FOUCAULT, *supra* note 39, at 43; see also SEDGWICK, *supra* note 19, at 45-47 (discussing Foucault’s views on inversion).

86. George Chauncey, in his study of gay male New York City, documented a self-aware subculture of gay men and argued that “the invert and . . . the homosexual . . . were not inventions of the elite but were popular discursive categories before they became elite discursive categories.” GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940*, at 27 (1994). In addition, historians have traced the creation of Molly Houses—an urban male homosexual subculture in London—to the late seventeenth century. See ALAN BRAY, *HOMOSEXUALITY IN RENAISSANCE ENGLAND* 81-103 (1988); RICTOR NORTON, *MOTHER CLAP’S MOLLY HOUSE: THE GAY SUBCULTURE IN ENGLAND 1700-1830*, at 9-13 (1992). A second major criticism of Foucault’s claim that the sexologists created the modern homosexual involves a healthy skepticism over whether elite, and relatively inaccessible, medical discourse could actually act as such a powerful “autonomous social force.” See George Chauncey, Jr., *From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance*, SALMAGUNDI, Fall 1982-Winter 1983, at 114, 115. Chauncey stated that a strict causal

not surprising given that the sexologists were empiricists who derived their theories from case studies of a presumably extant species.⁸⁷ Many of these early studies provide ample documentation not only of isolated individuals with “contrary sexual feelings,” but also individuals who shared well developed subcultural practices and allegiances.⁸⁸

A less literal interpretation of Foucault’s first claim might be that although the new science may not have actually created the homosexual, it did offer a systematic way for individuals to explain themselves and assert the naturalness of their feelings, in lieu of the otherwise idiosyncratic way that an individual would make sense of his non-normative sexuality.⁸⁹ Hall wanted to popularize the theories of the sexologists precisely because she believed that the medico-scientific model would give inverts insight as to their own nature and lead them to identify with the larger group of congenital inverts.⁹⁰ To this end, Hall illustrates the potential explanatory and ordering force of the medico-scientific model when her protagonist, Stephen Gordon, finds a book by Krafft-Ebing in her father’s study and first learns the true (and scientific) nature of her desire.⁹¹ Before she found the book, all Stephen knew was

link between the elite naming and the birth of identity “attribute[s] inordinate power to ideology as an autonomous social force [and] oversimplif[ies] the complex dialectic between social conditions, ideology, and consciousness which produced gay identities, and . . . belie the evidence of preexisting subcultures and identities contained in the literature itself.” *Id.*

87. This evidence is not necessarily inconsistent with the view that sexual identities are socially constructed.

88. For example, in several studies reported in Krafft-Ebing’s *Psychopathia Sexualis*, narrators refer to established meeting places for male homosexuals and feelings of group identity, such as the sense of comradeship a narrator reported when he was in the company of other “sisters.” Case 98 involved a thirty-year-old male physician who reported a public place where “male-loving men were accustomed to meet” and referred to men “who felt like me” as “sisters.” KRAFFT-EBING, *supra* note 40, at 198-99. Krafft-Ebing cited an older report that “saphism” is becoming “quite the fashion” and that “[t]he saphists [sic] have their places of meeting, recognize each other by peculiar glances, carriage, etc.” *Id.* at 430.

Terry noted that the classification scheme designed by the sexologists were based “on ideas generated within a growing subculture whose members offered medical authorities stories of their experiences, including their suffering.” TERRY, *supra* note 40, at 37. Her work raises the question of the extent to which the sexologists’ interactions with their objects of study or their own personal interest in homosexual emancipation influenced their descriptions.

89. This would be particularly true of individuals who did not have any subcultural support. The diaries of Anne Lister provide an example of an individual who made sense of her “contrary sexual feelings” in advance of the sexologists. *See generally* CLINE, *supra* note 25, at 42 (discussing Anne Lister’s diaries).

90. This sense of group membership laid the foundation for late twentieth-century identity politics, and perhaps in that way did create the modern homosexual. Despite skepticism over whether elite discourse acts as an autonomous social force, innumerable women throughout the 1930s, 1940s, 1950s, and 1960s were deeply affected by *The Well*. *See generally* O’ROURKE, *supra* note 14, at 114-42 (reporting the results of surveys of women who had read *The Well*).

91. *See* HALL, *supra* note 7, at 204.

that she loved another woman;⁹² once she reads the book, Stephen comes to understand that she is a congenital invert, that “there are so many of us,” and that she is God’s creation.⁹³ From her new found position as subject, she can denounce attempts to deny her “the right to love”⁹⁴ and assert that inverts are “entitled to their passions.”⁹⁵

This seems like a classic example of Foucault’s reverse discourse, and, indeed, many commentators have equated *The Well* with the potentially transformative value of reverse discourse.⁹⁶ Others, however, associate Hall so strongly with the new science that Hall is viewed almost as an honorary sexologist.⁹⁷ For these commentators, working largely from a liberation model of homosexuality, Hall’s project is considered exceedingly conservative.⁹⁸ Both characterizations start with the premise that the medico-scientific model was the dominant discursive category and that it was disempowering for those with “contrary sexual feelings” because, in addition to viewing desire as pathology, the sexologists did not speak either as homosexuals or for homosexuals.⁹⁹ Under the first view, Hall is a hero because she

92. Of course, Stephen knows that she is attracted to women—she just does not know that it makes her different. The elaborate understanding of what it means to be an invert is knowledge that is not immediately accessible to Stephen—indeed Hall’s stated purpose in writing *The Well* was to get this information to inverts who did not have access to scientific textbooks. See TROUBRIDGE, *supra* note 25, at 81. Stephen’s father and her governess, Puddle, both know what Stephen is. See HALL, *supra* note 7, at 204-05. Stephen, her mother, and just about everyone else knows that something is, if not wrong with Stephen, at least abnormal. For example, referring to Stephen, a neighbor remarks: “‘Good lord, it’s enough to make any man see red; that sort of thing wants putting down at birth, I’d like to institute state lethal chambers.’” *Id.* at 151. When Stephen defends her relationship with a married neighbor to her mother, Stephen asserts her “right to love,” but must do so without appeal to nature or nature’s God. *Id.* at 201. Stephen is compelled to confront her mother lest she let “this terrible slur upon her love” go unchallenged. *Id.* Stephen summons the “courage of that love to proclaim its right to toleration.” *Id.* As a result of this initial disaggregation of desire from identity, Stephen is angry because her mother tried to make her “ashamed of [her] love” and not of what she is. *See id.*

93. *See id.* at 204.

94. *Id.*

95. *Id.* at 299.

96. *See, e.g.,* O’ROURKE, *supra* note 14, at 110.

97. For example, Terry included Hall with Krafft-Ebing and Ellis when referring to authors of “certain well-known sexological texts.” TERRY, *supra* note 40, at 257. Faderman noted: “It was Radclyffe Hall, more than any other writer, who was responsible for bringing the congenitalists’ theories to popular fiction and thereby disseminating them widely years after they were no longer the most accepted theories among medical men.” FADERMAN, *supra* note 52, at 317; *see also* JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970*, at 21 (1983) (noting that “[b]y the 1930s Radclyffe Hall’s *The Well of Loneliness* was popularizing the medical model among its wide audience”).

98. *See, e.g.,* FADERMAN, *supra* note 52, at 321 (describing Hall as “an apologist for the invert”).

99. In addition, the notion that identity could be created independently of lived experience

subverted the dominant discourse; under the second view, Hall is complicit in the program to disempower homosexuals. However, both views misapprehend the status of sexology in 1928. In reality, it represented a relatively new counter-narrative to religious proscriptions and criminal prosecutions and, at times, the writings of the sexologists even ran into trouble with the obscenity laws.¹⁰⁰ Thus, when Hall attached her star to a relatively unstable and potentially obscene discipline, it made little difference whether she was trying to expound on its theories or subvert them.¹⁰¹ In either case, she was bound to run up

assumes that sexologists and homosexuals are groupings that do not overlap. To the contrary, Ulrichs, one of the first German sexologists, publicly declared his own homosexuality. See Dominick Vetri, *Almost Everything You Always Wanted to Know About Lesbians and Gay Men, Their Families, and the Law*, 26 S.U. L. REV. 1, 11 n.26 (1998). In addition, Ellis' wife, Edith, and his close friend Edward Carpenter were both homosexual. See SHEILA ROWBOTHAM & JEFFREY WEEKS, *SOCIALISM AND THE NEW LIFE: THE PERSONAL AND SEXUAL POLITICS OF EDWARD CARPENTER AND HAVELOCK ELLIS* 151 (1977). Krafft-Ebing acknowledges Ulrichs' contribution to the field when he writes in 1892 that thirty years earlier, Ulrichs called homosexuals "urnings" and "demanded nothing less than the legal and social recognition of this sexual love of the urnings as congenital and, therefore, as right; and the permission of marriage among them." KRAFFT-EBING, *supra* note 40, at 224.

As discussed above, the earliest studies of homosexuality were designed to serve as the basis for legal reform, and many of these studies were conducted by either homosexuals or those committed to the emancipation of homosexuals. See *supra* Part II.A.2. Indeed, the term "homosexual" first entered public discourse in an 1869 open letter to the Prussian Minister of Justice calling for the decriminalization of sodomy based on the notion that it was both innate and a matter of privacy. See Karoly Maria Benkert, *An Open Letter to the Prussian Minister of Justice*, reprinted in *WE ARE EVERYWHERE*, *supra* note 80, at 67. The letter was from a journalist, Karoly Maria Benkert, who later went by the name Kertbeny, and was in contact with Ulrichs. See *id.* For a discussion of the presumed liberatory value of the new science, see *supra* text accompanying notes 77-81.

100. In 1898, Ellis' major work on inversion, *Sexual Inversion*, was used as evidence to close a bookstore for selling obscene publications. See ELLIS & SYMONDS, *supra* note 61, at 66-67. The book itself was not charged with obscenity, but passages of it were read at the trial. See *id.* at 67. As a result of the trial, Ellis refused to publish his work in England. See *id.*

101. Hall's attempt to wrap the novel in respectability by including a laudatory *Commentary* by Ellis was of questionable value given the legal difficulties encountered by Ellis' own book on the subject. See *id.* Nonetheless, Ellis' following *Commentary* appeared in the early editions of *The Well*.

I [have] read *The Well of Loneliness* with great interest because—apart from its fine qualities as a novel by a writer of accomplished art—it possesses a notable psychological and sociological significance. So far as I know, it is the first English novel which presents, in a completely faithful and uncompromising form, one particular aspect of sexual life as it exists among us to-day. The relation of certain people—who, while different from their fellow human beings, are sometimes of the highest character and the finest aptitudes—to the often hostile society in which they move, presents difficult and still unsolved problems. The poignant situations which thus arise are here set forth so vividly, and yet with such complete absence of offence, that we must place Radclyffe Hall's book on a high level of distinction.

Havelock Ellis, *Commentary* to HALL, *supra* note 7, at 6 (emphasis omitted).

against strong moral and legal resistance.

B. The Well of Loneliness

As explained above, Hall's first goal was to popularize the work of the sexologists, principally the theories of Krafft-Ebing and Ellis regarding congenital inversion.¹⁰² However, she was not content simply to restate the current theories regarding causation or the efficacy of therapeutic intervention. Writing out of a sense of duty to the maligned minority whom she referred to as "my people,"¹⁰³ Hall wanted to illustrate Ellis' observation that "[t]he invert is not only the victim of his own abnormal obsession; he is the victim of social hostility."¹⁰⁴ Her long-term goal was to effect social change and increase the toleration for, and understanding of, inversion.¹⁰⁵ To this end, Hall created a protagonist who was morally above reproach and established that she was, through no fault of her own, a congenital invert.¹⁰⁶ She also detailed many of the indignities that inverts suffer at the hands of society, ranging from the conspiracy of silence regarding their orientation to the legal disabilities imposed on their relationships.¹⁰⁷ Finally, Hall added to the medico-scientific model an element of group identity, duty, and responsibility.¹⁰⁸ In this way, Hall advanced an identity model of homosexuality.

Hall's instrumental use of the novel to effect social, if not legal, change was not lost on *The Well's* detractors who denounced the book as

102. Before writing *The Well*, Hall and her partner, Troubridge, read aloud from Ellis' *Studies in the Psychology of Sex* and Krafft-Ebing's *Psychopathia Sexualis*. See SOUHAMI, *supra* note 25, at xix.

103. BAKER, *supra* note 24, at 226. Apparently, Hall had wanted for some time to write a book on sexual inversion out of a sense of duty to other inverts, but waited "until her name was made" to insure both a publisher and an audience for her work. See TROUBRIDGE, *supra* note 25, at 81; see also CLINE, *supra* note 25, at 2 (noting that Hall had won two prestigious literary prizes for her prior book—a distinction she shared only with E. M. Forester who had earned the honor for *A Passage to India*). Hall had actually touched on the topic of inversion in an earlier novel, *The Unlit Lamp*, and some of her early verse was homo-erotic. See RADCLYFFE HALL, *THE UNLIT LAMP* 63-64 (Jonathan Cape & Harrison Smith, Inc. 1929) (1924) (detailing a young woman's implicitly sexual desires and anxieties about one of her friends). However, writing *The Well* was a very different sort of undertaking.

104. ELLIS & SYMONDS, *supra* note 61, at 104.

105. See BAKER, *supra* note 24, at 217, 219-20.

106. See *id.* at 217, 219.

107. See CLINE, *supra* note 25, at 263-64 (extensively quoting a letter from Hall detailing her reasons for writing *The Well*).

108. See DICKSON, *supra* note 25, at 125-26 (discussing Hall's goal of helping her "fellow-sufferers" of inversion).

propaganda and “special pleading.”¹⁰⁹ Not only did Hall’s characters speak of their loves without shame, but the book itself was designed to proclaim the rights of inverts. In the words of one of *The Well’s* prosecutors, the novel was “a plea not only for the toleration but for the recognition of sexual perversion amongst women.”¹¹⁰

1. Constructing the Life of an Invert¹¹¹

The Well’s protagonist, Stephen Gordon, is a congenital invert with a highly developed sense of honor, who, despite money and privilege, must shoulder societal disapproval and romantic disappointments, but does so with a noble sense of abnegation.¹¹² On Krafft-Ebing’s scale, Stephen would likely rate at least a three, whereas on Kinsey’s scale, her sole attraction to women would earn her a perfect six.¹¹³

Born into the landed gentry, Stephen is raised with all the advantages that would be extended to a boy because her parents were disappointed that she was not a son.¹¹⁴ Krafft-Ebing was adamant that environmental factors alone cannot cause inversion, therefore the attitudes of Stephen’s parents cannot be blamed for her condition.¹¹⁵ As a child, Stephen pretends to be Lord Horatio Nelson and loves to ride,

109. BRITAIN, *supra* note 25, at 56 (quoting newspaper editor James Douglas of the *Sunday Express*). In his criticism of *The Well* and Hall’s belief that inversion is an inborn trait, Douglas also stated: “If Christianity does not destroy this doctrine, then this doctrine will destroy it, together with the civilization which it has built on the ruins of paganism.” *Id.* at 56 (quoting Douglas’ article).

110. SOUHAMI, *supra* note 25, at 195 (quoting a letter from Sir George discussing whether *The Well’s* publisher would be convicted of obscene libel).

111. Commentators often point to the plot of *The Well* to show the clear influence of Krafft-Ebing and Ellis, even suggesting that Hall based her protagonist on one of Krafft-Ebing’s case studies. *See, e.g.,* O’ROURKE, *supra* note 14, at 3 (explaining that “[i]t is likely that [Krafft-Ebing’s] Case 31 served as a model for Stephen Gordon”). Although there are certain similarities, Hall had always claimed that she had authority to write *The Well* because, as a congenital invert, she could write from personal and shared experiences. *See* Letter from Radclyffe Hall to Gorham Munson (June 2, 1934), at <http://www.datalounge.net/network/pages/lha/pblct/intrhall.htm> (last visited Jan. 24, 2001). Accordingly, to credit the sexologists as the source of Hall’s characters privileges them over Hall’s own experiences. The fact that the characters reflect the case studies could just indicate that the observations of Krafft-Ebing and Ellis did have some general applicability.

112. Ellis vouched for Stephen’s character in his *Commentary* when he stated that inverts “while different from their fellow human beings, are sometimes of the highest character and the finest aptitudes.” Havelock Ellis, *Commentary* to HALL, *supra* note 7, at 6 (emphasis omitted).

113. For a comparison of Krafft-Ebing’s scale with that of Kinsey’s, see *supra* note 69. Stephen’s exclusive same-sex attraction scores a six on Kinsey’s scale, and makes her at least a two on Krafft-Ebing’s. *See id.* However, Stephen does exhibit some cross-gender performance that would advance her along the Krafft-Ebing scale to at least a three. *See id.*

114. *See* HALL, *supra* note 7, at 12-13.

115. *See supra* note 63.

but she cannot knit to save her life.¹¹⁶ In the sexologists' literature, these traits signaled that a congenital predisposition was at work.¹¹⁷ In fact, Ellis specifically noted that female inverts sometimes display a "dislike and . . . incapacity for needlework and other domestic occupations, while there is often some capacity for athletics."¹¹⁸

Stephen develops a passionate, but chaste, childhood crush on a servant which later leads to an ambiguous love affair with a married woman.¹¹⁹ Along the way, Stephen feels revulsion at the sexual advances made by a cherished male friend;¹²⁰ this clarifies that she is a congenital invert because her primary attraction has always been directed towards the same sex.¹²¹

After Stephen has a fight with her mother over her attraction for the married woman, Stephen learns the true nature of her desire by reading a book by Krafft-Ebing and leaves her ancestral home to make her way in the world as a writer.¹²² During a patriotic stint as an ambulance driver on the western front in World War I, she meets Mary, a "normal girl" who, after pursuing Stephen for thirty-five pages, finally gets Stephen to respond to her advances "and that night they were not divided."¹²³ Following the logic of the sexologists, Mary seems to present a classic case of acquired homosexuality fostered by the single-sexed environment of the Women's Ambulance Corps.¹²⁴

Stephen and Mary settle in Paris and fall into the lesbian subculture where they encounter assorted lost souls.¹²⁵ Eventually, certain that Mary is not strong enough for life as an invert, Stephen concocts a scheme to drive Mary into the arms of Stephen's former male suitor, Martin.¹²⁶ The reader is ultimately left to assume that Mary transitions to a normal life with Martin without the necessity of hypnosis or any other therapeutic intervention. Obviously, Mary's stage of acquired

116. See HALL, *supra* note 7, at 20, 40, 47.

117. For example, Krafft-Ebing's case study 132 is a female invert who rides and engages in other male pursuits during childhood. See KRAFFT-EBING, *supra* note 40, at 227.

118. ELLIS & SYMONDS, *supra* note 61, at 98.

119. See HALL, *supra* note 7, at 129-50.

120. See *id.* at 101.

121. The revulsion that Stephen feels as a result of Martin's sexual advances secures her a position as a two on Krafft-Ebing's scale of congenital inversion. Her inversion must be congenital and not acquired because Stephen never was attracted to men. See *supra* note 69.

122. See HALL, *supra* note 7, at 202, 205.

123. *Id.* at 313.

124. See *supra* text accompanying notes 61-63 (describing acquired inversion).

125. Hall refers to these lost souls as the "miserable army." HALL, *supra* note 7, at 378.

126. See *id.* at 408-12. As explained below, however, Stephen's concern is not that her love would despoil Mary, but rather that an invert—no matter how wealthy and honorable—cannot offer a "normal girl" protection. See *infra* note 151.

homosexuality was treatable.¹²⁷

2. The Argument on Behalf of Inverts

As illustrated by the character of Stephen, Hall believed that inverts were born, not made. They are also transhistorical—existing in every age.¹²⁸ Hall announced to the reader that inverts can be found in every large city.¹²⁹ They often are very noble and honorable people, but many inverts have terrible “nerves,” largely due to the disabilities and silences forced on them by society.¹³⁰ Inverts should never marry,¹³¹ nor should they be cured.¹³² Hall was adamant in her belief that greater recognition was coming because “inverts were being born in increasing numbers.”¹³³

127. However, Ellis might have warned against encouraging Mary to marry in case there is a congenital component to acquired homosexuality, in which event marriage only defers the problem to future generations. See *supra* notes 74-75 and accompanying text (describing Ellis' views on encouraging those with acquired inversion to marry).

128. In *The Well*, Stephen's gay male friend, Brockett, uses a trip to Versailles as a coming-out occasion when he tells Stephen of the relationship between Marie Antoinette and Madame de Lamballe. See HALL, *supra* note 7, at 239. Putting it in contemporary terms, Brockett said “[t]hey must . . . have felt pretty miserable, poor souls; sick to death of the subterfuge and pretences.” *Id.*

129. *The Well* gave hope to many a lesbian reader when it explained that lesbians were relatively easy to find because “[t]here was many another exactly like [Stephen] . . . in every city.” *Id.* at 299. It was “in all the great cities of the world” that one could find the lesbian bars and “the garish and tragic night life . . . that lies open to such people as Stephen Gordon.” *Id.* at 378, 406. Like generations of lesbians since, Stephen and Mary ruefully asked “where was there to go except the bars?” *Id.* at 397.

130. The “nerves of an invert” figure prominently in *The Well* and in Hall's post-trial commentary. See, e.g., *id.* at 155 (illustrating the concerns of Stephen's governess reflecting on “the terrible nerves of the invert”).

131. Hall wrote: “[I]nverts should never be encouraged to marry.” SOUHAMI, *supra* note 25, at 216 (quoting Hall). Hall reinforces this belief in *The Well* with the insistence of Stephen's father stating, “Stephen won't marry—I don't want her to marry; it would only mean disaster.” HALL, *supra* note 7, at 110 (quoting Stephen's father).

132. Handwritten notes for a lecture Hall gave in 1929 said this in dramatic terms:

You can kill all the inverts but while they live you cannot make them other than inverted. They are and will always remain as God made them, and their sexual attractions will be therefore inverted as they were in the girl of whom I wrote—the unfortunate girl Stephen Gordon.

SOUHAMI, *supra* note 25, at 168 (quoting Hall's notes). In *The Well*, Stephen meets Blanc who “had spent his days going from doctor to doctor . . . not a few had unctuously set out to cure him. Cure him, good God! There was no cure for Blanc, he was, of all men, the most normal abnormal.” HALL, *supra* note 7, at 351.

133. HALL, *supra* note 7, at 406. A character in *The Well*, Valérie Seymour, explains that the increase in inverts was “[n]ature . . . trying to do her bit.” *Id.* Although *The Well* does not provide any estimates as to the incidence of congenital inversion in the general population, during the trials, Hall cited Magnus Hirschfeld's estimate that “fifteen persons in every thousand are inverted.” SOUHAMI, *supra* note 25, at 216 (quoting Hirschfeld and using that number to assert that “the question [was] of great social importance”). Krafft-Ebing considered “untrustworthy” Ulrichs' estimate that “there is one person affected with contrary sexual instinct to every two hundred mature men, or to every eight hundred of the population.” KRAFFT-EBING, *supra* note 40, at 230. Instead,

Although Krafft-Ebing suggested that inverts should not be held criminally responsible for something that was not their fault, Hall was not concerned merely with the absence of blame. Clearly, inverts should not be stigmatized, but Hall asserted that they also have an affirmative right to be free of these indignities because they are creatures of God.¹³⁴ In making this assertion, Hall modified the sexologists' arguments with an appeal to the divine that ultimately displaces the God of Reason with God the Creator.¹³⁵ Her argument is simple, yet radical: If inversion is a fact of nature, then inverts are creatures of God, and, as such, they are entitled to their passions.¹³⁶ Inverts will be able to enjoy their rights when they finally break the conspiracy of silence and declare themselves. Hope lies with the youth and triumph over ignorance.¹³⁷

Hall's neat biological argument is complicated by the fact that not all of the women in *The Well* who love other women are congenital inverts.¹³⁸ Unlike the sexologists, Hall does not adopt the distinction between congenital or acquired inversion—one is either an invert or normal.¹³⁹ Throughout the novel, Stephen seems doomed to be attracted to "normal" women. For these "normal" women who love inverts, appeals to nature and nature's God are inadequate because they would not seem to have been "born that way."¹⁴⁰ Stephen's partner, Mary, and

Krafft-Ebing relied on an estimate by the subject of one of his case studies who reported that he knew of fourteen "urnings" in a town of 13,000 and eighty in a town of 60,000—illustrating that it is indeed true that all homosexuals know each other. *See id.*

134. *See infra* note 135 and accompanying text.

135. Hall believed very strongly that a book such as *The Well* could only be written by an invert and that "no-one was better qualified to write the subject in fiction than an experienced novelist like [herself] who was actually one of the people about whom she was writing and was thus in a position to understand their spiritual, mental and physical reactions." Letter from Radclyffe Hall, author of *The Well of Loneliness*, to Gorham Munson, literary scholar (June 2, 1934), at <http://www.datalounge.net/network/pages/lha/pblct/intrhall.htm> (last visited Jan. 24, 2001).

136. The last scene in *The Well* is a direct appeal to God on behalf of inverts and their "right to [their] existence." HALL, *supra* note 7, at 437.

137. Throughout *The Well*, Stephen is ill-at-ease with her people, but the younger generation of inverts seem to have escaped some of her isolating pain, and they strike a note of optimism. *See id.* at 381 (noting that they are "more reckless, more aggressive and self-assured"). Convinced that "recognition was coming," *The Well's* prescription for inverts is to "cultivate more pride" and come out, come out, come out. *See id.* at 406.

138. Stephen, just like Hall and her partner, Troubridge, was a congenital invert because she never experienced sexual feelings towards men. *See* YOUR JOHN: THE LOVE LETTERS OF RADCLYFFE HALL 10-11 (Joanne Glasgow ed., 1997) (noting that Hall and Troubridge considered themselves congenital inverts).

139. The reader does not have enough information to determine whether Mary is a congenital invert or whether her inversion is acquired because the reader does not have access to her sexual history, just Hall's assertion that Mary is normal. *See* HALL, *supra* note 7, at 346.

140. However, one argument would be that an invert should be entitled to her passions even when they are directed towards normal women.

many of their acquaintances in the lesbian subculture are “normal” women. Apparently, it is not unusual for a “dignified and . . . very great lady” to abandon her husband and children for the love of an invert, thereby “facing scandal, opprobrium, persecution.”¹⁴¹ For these women, the object of their desire is not preordained at birth. Their desire is much more fluid, individual, and subject to change more than once over the course of their lives. Mary’s example proves that it is not strictly a one-way street into inversion. Normal women also leave their female lovers to marry and have children.¹⁴² When Hall wrote about the concern for “the lot of a girl who, herself being normal, gave her love to an invert” and explained that inverts do not always “attract their own kind, very often they attracted quite ordinary people,”¹⁴³ she confirmed the most salient feature of the contagion model: Homosexuals prey on innocent victims.

According to Hall, the problem with inversion is not the invert—it is society.¹⁴⁴ Hall identifies societal silence as the primary enemy of the invert.¹⁴⁵ Societal silence surrounding inversion separates the invert not only from others but also from her true nature.¹⁴⁶ It conspires against Stephen to keep her from herself, her people, and her history. The self-imposed silence of the inverted also alienates inverts from normal people and makes the life of an invert an “[i]ntolerable quagmire of lies and deceit.”¹⁴⁷ If Stephen or other inverts were to speak the truth and “declare themselves,” they risk that even their closest friends “would turn aside.”¹⁴⁸ Despite this risk, Hall nonetheless believed that inverts

141. HALL, *supra* note 7, at 351.

142. *See id.* at 353 (noting that sometimes one “suddenly marrie[s] . . . [and becomes thrilled] at the prospect of shortly becoming a mother”).

143. *Id.* at 353, 406.

144. *See id.* at 243.

145. *See id.*

146. Today, silence would be analyzed in terms of the “costs of the closet” or the “costs of concealment.” *See, e.g.,* Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992) (focusing on the importance of storytelling in describing and countering three important aspects of non-gay pre-understanding about gay people: the sex-as-lifestyle assumption, the idea that gay issues are inappropriate for public discussion, and the cross-gender assumption); ESKRIDGE, *supra* note 29, at 306-07 (discussing the “dilemma of the closet” and stating that “[a]mong the worst costs of the sexual closet is the self-recognition of lying about something important”).

147. HALL, *supra* note 7, at 334. When Stephen contemplates taking Mary home with her when she visits her mother, Stephen decides against it on the basis that she refuses to engage in the “despicable subterfuges” that would be necessary to conceal their relationship from Stephen’s mother. *See id.*

148. *Id.* at 243, 406.

had a duty to declare themselves and not perpetrate “lies of omission.”¹⁴⁹ Indeed, one of the characters in *The Well* goes as far as to declare closeted inverts as “traitors.”¹⁵⁰ In other words, Hall believed that inverts had a duty to conduct themselves without shame.

The failure of society to recognize inverts renders their unions very fragile and ultimately insecure. Conscious of the lack of legal standing afforded same-sex relationships, Hall constantly underscored the fact that Stephen could not “protect” her partner.¹⁵¹ Stephen ultimately drives Mary away so Mary could have “children, a home that the world would . . . hold sacred, the blessed security and the peace of being released from the world’s persecution”¹⁵²—things that even a rich and privileged invert could not offer.

Finally, in a scene reminiscent of the early years of the Human Immunodeficiency Virus (“HIV”)/Acquired Immune Deficiency Syndrome (“AIDS”) epidemic, Hall illustrates how quickly a same-sex partner is rendered invisible. When Stephen’s friend Barbara becomes ill, Barbara’s partner, Jaime, is without any power to “decide things.”¹⁵³

149. *Id.* at 243.

150. *Id.* at 406. The character Valérie Seymour’s conviction that inverts of means must declare themselves, foreshadowed the belief on the part of the contemporary gay and lesbian movement that homophobia would wither and die if everyone would just come out. When Valérie says, “As for those who were ashamed to declare themselves, lying low for the sake of a peaceful existence . . . they were traitors to themselves and their fellows,” she seems just a short step away from advocating “outing.” *Id.*

151. Hall’s recognition of the lack of legal standing afforded same-sex couples is clearly most profound when she discusses marriage. In both of Stephen’s relationships, there is a reoccurring question as to whether Stephen can “protect” her partner. Her wealth and social standing are irrelevant. When discussing the lot of a normal girl who gives her love to an invert, Hall writes: “Their lovers were helpless, for what could they do? Empty-handed they were, having nothing to offer.” *Id.* at 406. For example, in response to Angela’s rhetorical question of whether Stephen could marry her, Stephen realizes: “Protection—she could never offer protection to the creature she loved . . . [s]he could neither protect nor defend nor honour by loving; her hands were completely empty.” *Id.* at 153. To Stephen this means marriage and marriage only. Hall stated in an interview with the *New York Telegram Magazine* in 1928, “In the heart of every woman is the desire for protection. In the heart of every man is the desire to give protection to the woman he loves. The invert knows she will never enjoy this and because of her affliction will face social ostracism.” NICKY HALLETT, *LESBIAN LIVES: IDENTITY AND AUTO/BIOGRAPHY IN THE TWENTIETH CENTURY* 47 (1999) (quoting Hall).

152. HALL, *supra* note 7, at 430. Hall was an advocate of legal unions for inverts. See Letter from Radclyffe Hall, author of *The Well of Loneliness*, to Gorham Munson, literary scholar (June 2, 1934), at <http://www.datalounge.net/network/pages/lha/pblct/intrhall.htm> (last visited Jan. 24, 2001). Accordingly, it seems clear that this issue of lack of security was remediable by law, and was not an inherent flaw of inverted unions.

153. See HALL, *supra* note 7, at 400. This is a scene that the Human Immunodeficiency Virus (“HIV”)/Acquired Immune Deficiency Syndrome (“AIDS”) epidemic embedded in the consciousness of the lesbian and gay movement of the 1980s—giving rise to an increased awareness regarding the importance of durable powers of attorney and other health care planning measures.

The nurse turned to Stephen; "Is she a relation?"
Stephen hesitated, then she shook her head.
"That's a pity, in a serious case like this I'd like to be in touch with some relation, some one who has a right to decide things. You know what I mean—it's double pneumonia."
Stephen said dully: "No—she's not a relation."
"Just a friend?" the nurse queried.
"Just a friend," muttered Stephen.¹⁵⁴

After Barbara dies, Jaime tells Stephen that she cannot return to her hometown because she "'can't mourn [Barbara] without bringing shame on her name.'"¹⁵⁵ Silence follows this pair to the grave.

III. THE COUNTER-NARRATIVE OF HOMOSEXUALITY AS CONTAGION

By 1928, when *The Well* was published, there was a growing social awareness of same-sex desire between women. Although the work of the sexologists remained relatively inaccessible, it was possible to point to an increasingly diverse and growing body of literature, plays, and music that dealt with female inversion or lesbianism.¹⁵⁶ For example, in 1927, *The Captive*, a play depicting the irresistible allure of same-sex desire, caused a sensation on Broadway and throughout Europe, culminating in the enactment by the State of New York of legislation banning any dramatic production that showed perversion.¹⁵⁷ Legally, sexual acts between women had never been criminalized in England, although there had been a well-publicized effort in Parliament in 1920 and 1921 to

154. *Id.*

155. *Id.* at 401 (quoting Jamie).

156. In his editorial, James Douglas called *The Well* "'an intolerable outrage—the first outrage of the kind in the annals of English fiction.'" BRITAIN, *supra* note 25, at 53 (quoting Douglas). *The Well* was by no means the first novel written in English that touched on the theme of lesbianism. In 1928, at least three other books dealing with lesbianism were published and were left untouched by the authorities: *Orlando* by Virginia Woolf; *Extraordinary Women* by Compton Mackenzie; and *Ladies Almanack* by Djuna Barnes. See CLINE, *supra* note 25, at 232 (noting that "four[] lesbian narrative[s]" were published in 1928). It was not *The Well's* topic, but its overtly sympathetic approach to the topic which made it an "outrage." In Hall's letter to her publisher submitting her manuscript, she mentioned two earlier novels, Clemence Dane's 1917 novel, *A Regiment of Women*, and Rosamond Lehmann's 1927 novel, *Dusty Answer*, both of which dealt with female inversion. See BAKER, *supra* note 24, at 202.

157. For a discussion of the scandal that *The Captive* ignited in New York City in 1927, see KAIER CURTIN, "WE CAN ALWAYS CALL THEM BULGARIANS": THE EMERGENCE OF LESBIANS AND GAY MEN ON THE AMERICAN STAGE 43-104 (1987). See also *Liveright v. Waldorf Theaters, Corp.*, 221 N.Y.S. 194, 195, 196 (App. Div. 1927) (refusing to grant the owner of *The Captive* an injunction requiring the theater to allow the production to continue after the police raided the play and arrested the cast and producers on charges of obscenity).

extend the criminal sanction for “gross indecency” to acts between women.¹⁵⁸ In the United States, the sodomy laws were a confusing patchwork of crimes against nature laws, some of which were held to apply to women, some of which were not, and many of which were never tested.¹⁵⁹

In the political arena, the rights discourse adopted by Hall had been employed by the German homosexual emancipation movement beginning in the 1870s. The movement, however, had not successfully migrated to either the United States or Great Britain, where the emancipation of homosexuals was advanced by only a handful of radical and independent thinkers.¹⁶⁰ Despite the absence of any organized political movement, there was, as described in *The Well*, a vital lesbian social scene existing in most major cities.¹⁶¹ To the detractors of *The Well*, this growing visibility was positive proof that society needed to stand up against these shameless homosexuals.

When it was published in England on July 27, 1928, *The Well* was met with generally positive reviews.¹⁶² Many reviewers praised the courage and restraint with which Hall handled the material.¹⁶³ *The Times*

158. For a discussion of the unsuccessful attempt to amend the Labouchère Amendment to include acts between women, see Laura Doan, ‘Acts of Female Indecency’: *Sexology’s Intervention in Legislating Lesbianism*, in *SEXOLOGY IN CULTURE*, *supra* note 71, at 199. Thirty-five years earlier the Labouchère Amendment had criminalized acts of gross indecency between men. *See id.* at 200. It was the statute used to prosecute Oscar Wilde. *See* Martin Bowley, *An Overdue Reform*, *NEW LAW*, Jan. 29, 1999, at 141.

159. *See* ESKRIDGE, *supra* note 29, at 157-64 (discussing the evolution of sodomy laws in the United States). In 1939, the Georgia Supreme Court held that Georgia’s sodomy statute did not apply to acts between women. *See* *Thompson v. Aldredge*, 200 S.E. 799, 800 (Ga. 1939); *see also* ESKRIDGE, *supra* note 29, at 161 (discussing the evolution of the Georgia law).

160. In 1924, Henry Gerber started the Chicago Society for Human Rights that he modeled after his experience in Germany, but it only lasted one year before it disbanded under pressure from the Chicago police. *See* JONATHAN NED KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 385-93 (rev. ed. 1992). The British Society for the Study of Sex Psychology published pamphlets concerning homosexuality, but had a much larger charge than simply inversion. *See supra* note 80. In the political arena, anarchists and socialists were among the few thinkers willing to take up the cause of homosexual emancipation. Emma Goldman lectured in the United States about tolerance for homosexuals and wrote an article for a publication of the Scientific-Humanitarian Committee. *See* KATZ, *supra*, at 377. In England, Edward Carpenter spoke publicly about homosexuality, as did Ellis’ wife. *See generally* ROWBOTHAM & WEEKS, *supra* note 99 (discussing the life and work of both Carpenter and Ellis, and the socialist movement in an attempt to uncover the historical understanding of sexual relations to fully understand socialism as a “new way of life”). For a reprint of two of Edith Ellis’ lectures on homosexuality, see ELLIS & SYMONDS, *supra* note 61, at 113-15. Also in England, journals such as *The Freewoman*, *Time and Tide*, and *Urania* carried articles concerning desire between women. *See* HALLETT, *supra* note 151, at 27.

161. *See supra* note 129 (describing the urban lesbian subculture).

162. *See* BAKER, *supra* note 24, at 221 (characterizing the reviews as “mixed”).

163. For example, in her 1928 review, Vera Brittain described *The Well* as “‘a plea, passionate,

Literary Supplement referred to it as “sincere, courageous, high-minded and often beautifully expressed.”¹⁶⁴ Some reviewers adopted the pragmatic stance of Vera Brittain’s review entitled *Facing Facts* and argued that homosexuality was a fact of life and as such was “better frankly stated than concealed.”¹⁶⁵ The feminist press, however, was disappointed by Hall’s reliance on biology and the Bloomsbury writers considered the novel unremarkable and dull.¹⁶⁶ For example, Virginia Woolf, referring to *The Well*, wrote: “The dulness [sic] of the book is such that any indecency may lurk there—one simply can’t keep one’s eyes on the page.”¹⁶⁷ Nevertheless, Hall started to receive letters of thanks from grateful inverts.¹⁶⁸

The book was selling briskly on August 19, 1928 when James Douglas, the editor of London’s *Sunday Express*, called for the government to ban the book in an editorial entitled *A Book that Must Be Suppressed*.¹⁶⁹ He would later be echoed in the United States by John

yet admirably restrained and never offensive, for the extension of social toleration, compassion and recognition.” BRITAIN, *supra* note 25, at 48 (quoting Brittain’s review of *The Well*).

164. GEOFFREY ROBERTSON, *OBSCENITY: AN ACCOUNT OF CENSORSHIP LAWS AND THEIR ENFORCEMENT IN ENGLAND AND WALES* 35 (1979) (quoting the *Times Literary Supplement*).

165. BRITAIN, *supra* note 25, at 47, 49 (quoting one of *The Well*’s reviews).

166. The reviewer in *Urania* was quite blunt: “We venture the hope that Radclyffe Hall will give us another book in which no imitation men need figure.” HALLETT, *supra* note 151, at 93 (quoting the reviewer). Vera Brittain’s review in *Time and Tide* argued that Stephen’s childhood was consistent with the “usual preferences of any vigorous young female” and took Hall to task for not resolving “how far the characteristics of Stephen Gordon are physiological and how far they are psychological.” BRITAIN, *supra* note 25, at 50-51 (quoting from Brittain’s review of *The Well*).

167. CLINE, *supra* note 25, at 251 (quoting Virginia Woolf’s letter to Lady Ottoline Morrell). For a discussion of Hall’s uneasy relationship with the Bloomsbury group, see *id.* at 250.

168. Baker reported that by January 1929, Hall had received 5000 letters, only five of which were negative. See BAKER, *supra* note 24, at 250. Biographers and historians often point to the disparaging comments of the Bloomsbury writers and women in the Paris artistic lesbian community and conclude that inverts did not like or approve of the book. See, e.g., FADERMAN, *supra* note 52, at 322 (quoting Romaine Brooks and Violet Trefusis). In *Boots of Leather, Slippers of Gold*, an oral history study of the Buffalo lesbian communities, the authors concluded that the upper-class, artistic lesbian community that has so captured the imagination of feminist historians “had negligible impact on succeeding generations of middle—and working—class lesbians who read Radclyffe Hall’s *The Well* but little else.” See ELIZABETH LAPOVSKY KENNEDY & MADELINE D. DAVIS, *BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY* 34 (1993). In addition, an oft-cited 1934 review of *The Well* in which Henry Gerber denounced the novel as “ideal anti-homosexual propaganda” is of questionable value because, based on his review, it is not clear that Gerber actually read *The Well*. See KATZ, *supra* note 160, at 405 (reprinting Gerber’s review of *The Well*). Gerber criticized Hall for ascribing to a theory of “acquired homosexuality” that stressed environmental factors and called this theory, which, of course, Hall never espoused, “extremely silly.” *Id.* (reprinting Gerber’s review). Seemingly in agreement with Hall, Gerber stated authoritatively that individuals who become homosexual must have some predisposition “probably endocrinally.” *Id.*

169. SOUHAMI, *supra* note 25, at 191 (capitalization omitted). Douglas set the title of his

Sumner of the *Society for the Suppression of Vice*.¹⁷⁰ In case there was any doubt about what a lesbian looked like, the *Sunday Express* also printed a photograph of Hall to accompany the editorial. It showed Hall with “one hand . . . languidly holding a cigarette at waist height—and wearing a gentleman’s silk smoking jacket, a high collar and black bow tie.”¹⁷¹

Douglas’ editorial provided a strong counter-narrative to Hall’s identity model of homosexuality and articulated the essential features of the contagion model of homosexuality which persist to this day. Whereas Hall asserted that inverts were “born that way,” Douglas rejected the medico-scientific explanation and described homosexuality as a vice, an act freely chosen.¹⁷² Rather than seeing inverts as the victims of societal silence, he saw them as predatory creatures bent on despoiling England’s youth.¹⁷³ In response to Hall’s prescription that inverts should declare themselves, Douglas countered that inverts had no shame.¹⁷⁴ Both believed that they had God on their side,¹⁷⁵ and that they were the true voice of toleration.¹⁷⁶ When compared side by side, their competing characterizations of homosexuality and their prescription for change provide a stark contrast.

DOUGLAS	HALL
1. Homosexuality is a vice.	1. Homosexuality is a congenital trait.
2. Homosexuals prey on innocent victims.	2. Homosexuals are victims of society.
3. Homosexuals have no shame.	3. Homosexuals should declare themselves.
4. Homosexuals demand recognition, not mere toleration.	4. Homosexuals demand recognition, not mere toleration.
5. It is a battle between good and evil (God is on our side).	5. It is a battle between good and ignorance (God is on our side).

editorial in inch-high print. *See id.*

170. For a discussion of Sumner’s objection to *The Well*, see *infra* text accompanying notes 225-28.

171. BAKER, *supra* note 24, at 223 (noting that “[t]he picture was cut off at the knee, thereby eliminating the stockinged ankles and low heeled shoes which would have softened the severe image”). Hall wrote as an acknowledged congenital invert and identified herself as a member of the minority about whom she wrote, from the point of her initial contact with publishers, and throughout the trials and her post-trial commentary. *See supra* note 135. Hall was convinced that a book like *The Well* could only be written by a congenital invert. *See id.*

172. *See infra* Part III.A.1.

173. *See infra* Part III.A.2.

174. *See infra* Part III.A.3.

175. *See infra* Part III.A.5.

176. *See infra* Part III.A.4.

6. Society must silence homosexuality.	6. Society must break the silence over homosexuality and allow homosexuals to speak for themselves.
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It was Douglas' understanding of homosexuality that was eventually adopted by the prosecutors and the courts. As explained in Part IV of this Article, the judicial decisions declaring *The Well* obscene clearly follow the contagion model of homosexuality articulated by Douglas' editorial. The six maxims of homosexuality that Douglas delineated continue to this day, despite more than seventy intervening years of gay and lesbian visibility and activism, to inform and animate legal decisions and public policy-making regarding homosexuality.

A. *The Six Enduring Maxims of the Contagion Model of Homosexuality*

Douglas declared *The Well* to be “an intolerable outrage—the first outrage of the kind in the annals of English fiction.”¹⁷⁷ Words such as plague, pestilence, putrefaction, and leprosy helped to drive home his major theme that homosexuality is a contagion that must be contained.¹⁷⁸ Commentators sometimes dismiss Douglas as a crank, noting his bellicose prose, specifically his stated preference that “I would rather give a healthy boy or a healthy girl a phial of prussic acid than this novel. Poison kills the body, but moral poison kills the soul.”¹⁷⁹ However, Douglas' admonition is no more dire than statements made today by the FRC or even some members of Congress.¹⁸⁰ Although the editorial's language may be somewhat dated, its rhetorical appeal is not.

177. BRITAIN, *supra* note 25, at 53 (quoting from and reprinting Douglas' article in its entirety).

178. *See id.* at 53-55. Interestingly, Douglas does not use the word homosexuality in his editorial. He only uses the term sexual inversion once, but that may be because he was trying to rhyme something with “perversion.” *See id.* at 54. In case anyone could miss exactly which vice he was denouncing, Douglas mentions the Oscar Wilde trials in the last paragraph of the editorial when he delivers his warning to the “men of letters” to clean their own house. *See id.* at 57-58. If the “men of letters” did not rise to the occasion, Douglas warned that *The Well* would bring about the “contamination and corruption of English fiction” and would pollute bookstores and libraries. *Id.* at 53 (quoting Douglas' article).

179. BRITAIN, *supra* note 25, at 57 (quoting Douglas' article). *See also* BAKER, *supra* note 24, at 223 (describing Douglas as “descending from the Biblical metaphor of Pharaoh's Egypt to the more prosaic horrors of modern chemistry, the final *coup de grâce*”). Years later, Lord Birkett, the London defense counsel, remarked that finally “[t]he phials of prussic acid can be taken freely without apparent injury to the citizen or the State.” BRITAIN, *supra* note 25, at 154 (quoting Lord Birkett).

180. *See infra* text accompanying notes 342-47 (discussing the congressional debate over DOMA).

Douglas' editorial ensured that *The Well* was on its way to being declared “a most dangerous and corrupting book,”¹⁸¹ and that the six fundamental maxims of homosexuality were on their way to being ensconced in our cultural imagination as well as our jurisprudence.

1. Homosexuality Is a Vice

Douglas rejected the medico-scientific model of homosexuality completely. After quoting Ellis' *Commentary* to *The Well*, Douglas concluded that Ellis' “defence [sic] is wholly unconvincing.”¹⁸² For Douglas, homosexuality was a “loathsome vice[]”—a weakness of will—and not the result of endocrine imbalances.¹⁸³ He further claimed that the medico-scientific model was a clever attempt to excuse homosexuals for their excesses: “It even suggests that their self-made debasement is unavoidable, because they cannot save themselves.”¹⁸⁴ Invoking the notion of free-will, Douglas answered Hall's claim of congenital predisposition directly when he stated: “These moral derelicts are not cursed from their birth. Their downfall is caused by their own act and their own will. They are damned because they choose to be damned, not because they are doomed from the beginning.”¹⁸⁵ As explained in Part V of this Article, the ex-gay movement uses the argument of free will to show that anyone can come out of homosexuality.¹⁸⁶

2. Homosexuals Prey on Innocent Victims

This is the point that gives homosexuality its contagious nature and is the heart of the contagion model. Douglas believed that homosexuals recruit innocent victims, especially children, to practice their vice. Although we might “pity them . . . we must also pity their victims.”¹⁸⁷ The children are particularly at risk and “[w]e must protect [them] against the[] specious fallacies and sophistries” contained in homosexual “propaganda.”¹⁸⁸ Seduced by homosexuality, young men

181. BRITAIN, *supra* note 25, at 126 (quoting Sir Robert Wallace announcing the dismissal of the appeal).

182. *Id.* at 53 (quoting Douglas' article). Although Douglas argued that the question should be settled by appeal to Christian values, he adopted a contagion model that seems based at least in part on medical, as opposed to religious, constructs. *See id.* at 56. However, vice also has a contagious quality in the form of temptation.

183. *See id.* at 54.

184. *Id.* at 56 (quoting Douglas' article).

185. *Id.* (quoting Douglas' article).

186. *See infra* text accompanying notes 325-47.

187. BRITAIN, *supra* note 25, at 56 (quoting Douglas' article).

188. *Id.* (quoting Douglas' article).

and women will “whisper[]” about it even though they “cannot grasp its unutterable putrefaction.”¹⁸⁹ Referring to homosexuality as “this pestilence,” Douglas explained that it “is devastating the younger generation[,] . . . wrecking young lives[, and] . . . defiling young souls.”¹⁹⁰ Hall’s own description of the normal girl who gives her love to an invert seems to admit that homosexuals do not always stick to their own kind.

3. Homosexuals Have No Shame

Douglas’ editorial is one of the earliest configurations of the “flaunting” argument, namely that homosexuals perhaps would be tolerable if they just did not insist on flaunting their lifestyles. Of course, what constitutes “flaunting” is in the eye of the beholder and, when that beholder looks through the lens of heteronormativity, “flaunting” can encompass acts that would be unremarkable if performed by a heterosexual. What homosexuals need, the argument goes, is a good dose of shame—then they would not “flaunt themselves in public places with increasing effrontery and more insolently provocative bravado.”¹⁹¹ Douglas believed that these public homosexuals were everywhere: “The contagion cannot be escaped. It pervades our social life.”¹⁹² Calling these open homosexuals the “plague,” Douglas states that he has seen them “stalking shamelessly through great social assemblies.”¹⁹³ According to Douglas, homosexuals are confrontational by nature, and they “appear to revel in their defiance of public opinion.”¹⁹⁴ Instead of experiencing the appropriate sense of shame, Douglas concluded that homosexuals “take a delight in their flamboyant notoriety.”¹⁹⁵

4. Homosexuals Demand Recognition, Not Mere Toleration

On this point, both Douglas and Hall agreed—homosexuals are not asking for pity or mere toleration; they demand recognition, respect, and dignity. Presaging the contemporary argument against “special rights,” Douglas explained that although the English people are a patient and tolerant people, “slow to rise in their wrath,” this is just too much.¹⁹⁶ Homosexuals, Douglas charged, have “exploit[ed] their tolerance and

189. *Id.* at 55 (quoting Douglas’ article).

190. *Id.* at 54 (quoting Douglas’ article).

191. *Id.* (quoting Douglas’ article).

192. *Id.* at 55 (quoting Douglas’ article).

193. *Id.* at 54 (quoting Douglas’ article).

194. *Id.* (quoting Douglas’ article).

195. *Id.* (quoting Douglas’ article).

196. *Id.* at 55 (quoting Douglas’ article).

their indulgence”¹⁹⁷ and ““imagine that there is no limit to the patience of the English people.”¹⁹⁸ He was confident that the English people would ultimately succeed and ““show no mercy.”¹⁹⁹ They were left with no choice when ““[t]he decadent apostles of the most hideous and most loathsome vices no longer conceal their degeneracy and their degradation.”²⁰⁰

5. It Is a Battle Between Good and Evil

Both Hall and Douglas believed that they were engaged in a battle and claimed to have God on their side, but there was one important difference. Whereas Hall wanted to defeat ignorance, Douglas believed that he was fighting against evil, plain and simple. Douglas clearly foreshadowed today’s “culture war” when he proclaimed that society was engaged in a “battle”²⁰¹ that ““must be fought to the bitter end by the Christian Churches”” against the self-declared ““armies of evil.”²⁰² According to Douglas, it was a winner-take-all situation and ““the fight must be fought to the finish.”²⁰³ Douglas warned that ““[i]f Christianity does not destroy this doctrine, then this doctrine will destroy it, together with the civilisation [sic] which it has built on the ruins of paganism.”²⁰⁴ Other countries, such as France and Germany, had already succumbed to this plague, which is why the English people had to now stop it in its tracks.²⁰⁵

6. Society Must Silence Homosexuality

Douglas’ remedy was simple: Anything that portrays homosexuality in a positive light must be suppressed and this includes Hall’s attempt to get society to talk about homosexuality. To Douglas,

197. *Id.* (quoting Douglas’ article).

198. *Id.* at 54 (quoting Douglas’ article).

199. *Id.* at 55 (quoting Douglas’ article).

200. *Id.* at 54 (quoting Douglas’ article).

201. *Id.* at 55 (quoting Douglas’ article).

202. *Id.* at 55-56 (quoting Douglas’ article).

203. *Id.* at 55 (quoting Douglas’ article).

204. *Id.* at 56 (quoting Douglas’ article). Douglas considered the medical model of homosexuality, which he termed “pseudo-scientific thought,” to be the equivalent of paganism. *See id.* Therefore, the ultimate fight was between Christianity and paganism. *See id.*

205. *See id.* at 55. When Douglas declared that “the battle has been lost in France and Germany,” he was probably referring to Germany’s homosexual emancipation movement. *Id.* (quoting Douglas’ article). France had a reputation for being more permissive in matters of sexuality, as it did not criminalize sodomy. *See* H. MONTGOMERY HYDE, *THE LOVE THAT DARED NOT SPEAK ITS NAME: A CANDID HISTORY OF HOMOSEXUALITY IN BRITAIN* 135, 151 (1970). Finally, it was to France that Oscar Wilde retreated when he was released from Reading Gaol after serving his sentence for acts of gross indecency. *See id.* at 151.

The Well was a particularly dangerous piece of propaganda because “[i]t is a seductive and insidious piece of special pleading designed to display perverted decadence as a martyrdom inflicted upon these outcasts by a cruel society.”²⁰⁶ By suppressing the book, society would be “cleaning itself from the leprosy of these lepers, and making the air clean and wholesome once more.”²⁰⁷ He dismissed the fact that the book had received good reviews because literary merit was no defense. If anything, Douglas reasoned, it made the book more dangerous because “the adroitness and cleverness of the book intensifies its moral danger.”²⁰⁸ What might be “discussed in scientific text-books cannot decently be discussed in a work of fiction offered to the general reader.”²⁰⁹

B. *The Decision to Prosecute*

The ensuing moral panic and official suppression prompted by Douglas’ incendiary editorial follows what is by now a familiar pattern. A community leader expresses outrage over some expression of same-sex desire. This sparks a moral panic that ultimately results in some form of official action designed to suppress the expression. Today, this official action takes many forms, ranging from school officials removing students from the classroom of an openly gay teacher²¹⁰ to Congress enacting DOMA.²¹¹ In 1928, however, the standard for obscenity, as enunciated in the *Hicklin* rule, seemed tailor-made to suppress non-normative sexualities. The dispositive question was whether *The Well* had a tendency “to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”²¹² Under a contagion model of homosexuality, where same-sex desire is imbued with a universally powerful and seductive appeal, that question can only be answered in the affirmative.

The editorial accomplished its stated goal of prompting some form of action regarding the suppression of *The Well*.²¹³ After an insincere

206. BRITTAIN, *supra* note 25, at 56 (quoting Douglas’ article).

207. *Id.* at 55 (quoting Douglas’ article).

208. *Id.* at 56 (quoting Douglas’ article).

209. *Id.* at 54 (quoting Douglas’ article).

210. See *infra* Part V.C.3.c. William Randolph Hearst provided another example of the ability an editor who, through editorials, whipped up popular support for criminal charges to be pursued against “evil” plays like *The Captive*. See CURTIN, *supra* note 157, at 60-61 (contending that Hearst used the censorship law issue to “embarrass the liberal governor”).

211. See *infra* text accompanying notes 342-47.

212. *Regina v. Hicklin*, L.R. 3 Q.B. 360, 369 (1868).

213. Douglas’ other goal was to set up a censorship board. In his editorial, he specifically

offer by the publisher to remove the book and considerable maneuvering on the part of the government, Sir George Stephenson, the Deputy Director, agreed with Douglas that *The Well* was “in effect a plea not only for the toleration but for the recognition of sexual perversion amongst women”²¹⁴ and that it would “tend to corrupt the minds of young persons if it fell into their hands.”²¹⁵ Sir George also thought that it was relevant to note that “it would appear to be clear that the authoress is herself what is known as a homo-sexualist, or as she prefers to describe it an ‘invert.’”²¹⁶ Once the book was charged as “obscene libel,” the Metropolitan Police seized 247 copies of *The Well* and the burden then shifted to the publisher and the bookseller to “show cause why the books should not be destroyed.”²¹⁷ Two months elapsed between the appearance of Douglas’ editorial and the seizure.²¹⁸

Meanwhile, *The Well* was having a difficult time finding a publisher in the United States because of its controversial theme. This proved even more difficult as the U. S. newspapers started devoting considerable coverage to *The Well*’s legal difficulties in London.²¹⁹ The potential threat of obscenity charges were sufficient to scare off several

referred to the Censorship of Publications Bill that had been enacted in Ireland and that established a censorship board. See BRITAIN, *supra* note 25, at 57. Nothing like that existed in England with respect to literature. In England, the Lord Chamberlain’s Office acted as the direct censor of all plays that were publicly produced from the reign of Henry VII (1485-1509) until 1968. See JOHN JOHNSTON, *THE LORD CHAMBERLAIN’S BLUE PENCIL* 23-30 (1990). *The Captive* was not produced in England because it was rejected by the Lord Chamberlain. See CURTIN, *supra* note 157, at 50 (referring to *The Captive* by its French name, *La Prisonnière*).

214. SOUHAMI, *supra* note 25, at 195 (quoting Sir George). For a discussion of the publisher’s insincere offer to withdraw the novel, see *infra* note 218.

215. SOUHAMI, *supra* note 25, at 196 (quoting Sir George).

216. *Id.* (quoting Sir George).

217. BAKER, *supra* note 24, at 233.

218. See *id.* at 222-23, 233. The editorial worried Hall’s publisher, Jonathan Cape, who sent a copy of the book to the Home Secretary asking for what was in effect an advisory opinion. See *id.* at 226. If the book were to be considered obscene, the publisher promised that he would withdraw the book. See *id.* at 227. Cape also wrote a letter to Douglas to this effect with the intent that it be printed. See *id.* at 226. The Home Secretary at the time, Sir William Joynson-Hicks, was infamous for his opposition to revisions made to the Book of Common Prayer, and he had built his career on his uncompromising defense of public morals and hatred of communists. See *id.* at 227. Not surprisingly, the Home Secretary notified Jonathan Cape, the publisher, two days later that indeed the book would be considered obscene under the prevailing *Hicklin* standard. See *id.* True to his word, the publisher removed the book, but not before sending the printing moulds to Paris where the book was reissued in September. See *id.* at 227-28. Later, at the obscenity trials, the evidence of the publisher’s double dealing would be introduced to strengthen the case for the Crown. See BRITAIN, *supra* note 25, at 99-100 (quoting the Magistrate). It was copies of the Paris edition that were seized by the Metropolitan Police on October 19 after the Customs Board declined to take any action. See BAKER, *supra* note 24, at 233.

219. See KATZ, *supra* note 160, at 398 (reprinting two articles from the *New York Times* discussing the events in London).

publishers, including Alfred Knopf, who had originally agreed to publish the book but withdrew his offer after the book was declared obscene by the lower court in London.²²⁰ As a result, the publication of *The Well* in the United States was delayed, and, by the time the book appeared in December 1928, the appeals court in London had already upheld *The Well's* conviction as "obscene libel."²²¹

The small publishing firm of Covici-Friede, which also published another great obscene novel, *An American Tragedy*, agreed to publish *The Well* and immediately hired Morris Ernst, the anti-censorship attorney, to represent the firm.²²² Ernst urged the publisher to contact the *Society for the Suppression of Vice*, headed by John Sumner, and invite the Society to express its disapproval of the book.²²³ A similar appeal to the *Watch and Ward Society* in Boston was unsuccessful.²²⁴

Sumner obliged, denouncing the book as "vicious" and "literary refuse."²²⁵ Following Douglas, he too saw the book's special pleading as its most dangerous feature, noting that *The Well* argued that homosexuals should be "accepted on the same plane as persons normally constituted."²²⁶ Several weeks after Sumner purchased a copy of the book directly from the publisher, Manhattan police seized over 800 copies of the book on February 21, 1929.²²⁷ By the time of the seizure in the United States, *The Well* was in its sixth printing.²²⁸

220. See PAUL S. BOYER, PURITY IN PRINT: THE VICE-SOCIETY MOVEMENT AND BOOK CENSORSHIP IN AMERICA 131 (1968) (noting that Knopf had already set the type for the printing). The *New York Times* reported on August 30, 1928 that Knopf had acquired the United States' rights to *The Well*. See KATZ, *supra* note 160, at 398 (reprinting the article).

221. See BOYER, *supra* note 220, at 131, 133.

222. See *id.* at 132-33.

223. See *id.*

224. See *id.* at 133 (quoting Friede that the *Watch and Ward Society* responded that "they saw nothing wrong with the book"). Friede was not so successful with *An American Tragedy*. A court in Boston declared it obscene the day before the verdict on appeal in *The Well* case. See *Commonwealth v. Friede*, 171 N.E. 472, 472-73 (Mass. 1930) (reviewing on appeal the lower court's decision finding *An American Tragedy* obscene); see also 'Well of Loneliness' Cleared in Court Here: Friede, Publisher, Convicted in Boston Day Before Over Dreiser Book, Is Released, N.Y. TIMES, Apr. 20, 1929, at 20 [hereinafter *Well of Loneliness Cleared*] (mentioning the Boston case).

225. BOYER, *supra* note 220, at 133 (quoting Sumner).

226. *Id.* (quoting Sumner).

227. See *id.*

228. See SOUHAMI, *supra* note 25, at 239. Boyer provides a description of the advertising tactics of Covici-Friede and explains how the press coverage made the book a "runaway best-seller." BOYER, *supra* note 220, at 133. Over 100,000 copies of *The Well* were sold in the United States in the first year of its printing. See *id.* at 134.

IV. THE OBSCENITY CHARGES

It is a common mischaracterization of the obscenity trials to say that the legal proceedings against *The Well* were an attempt to suppress an entire theme, namely female homosexuality.²²⁹ This is not the case. At least three other novels were published in 1928, all of which dealt with female inversion.²³⁰ The legal proceedings against *The Well* were designed to suppress a particular treatment of that controversial theme. It was Hall's sympathetic portrayal of the theme and her appeal for recognition that gave *The Well* its power to corrupt the young and weak-minded. The prosecutors argued that it was precisely *The Well's* high moral tone, combined with its uncontested literary quality, which made *The Well* such an exceedingly dangerous book.²³¹

Throughout the proceedings, from the initial decision to prosecute to the appellate level (at least in the English case), there was no question that the prosecutors and judges were working from the contagion model of homosexuality. Hall's attempt to insulate her book from obscenity charges with the objectivity of the new science failed miserably as the medico-scientific model proved unpersuasive. If the authorities truly understood homosexuality as a contemptible vice practiced by shameless predators, then the logical decision was to try to suppress *The Well*. In the course of attempting to suppress Hall's expression of a positive lesbian identity, the official pronouncements made along the way expounded a strong countervision of homosexuality that continues to inform judicial and policy decision-making.

It is arguable that the official pronouncements also worked against the government's goal by further publicizing the concept of homosexuality, because the act of censorship requires discussion about the very topic sought to be silenced.²³² In the case of *The Well*, the trials

229. For example, Ernst consistently characterized the proceedings against *The Well* as an attempt to ban an entire "theme." See MORRIS L. ERNST & ALAN U. SCHWARTZ, *CENSORSHIP: THE SEARCH FOR THE OBSCENE* 73 (1964). Ernst and Schwartz's chapter *On Banning a Theme* deals with the United States trials of *The Well*. See *id.* at 71. They conclude that "[t]he great significance of *The Well of Loneliness* case is that since the book was allowed open circulation no theme, as a theme, has been banned by our courts." *Id.* at 79. In an earlier book on censorship, Ernst used the same general characterization. See MORRIS L. ERNST & ALEXANDER LINDEY, *THE CENSOR MARCHES ON: RECENT MILESTONES IN THE ADMINISTRATION OF THE OBSCENITY LAW IN THE UNITED STATES* 7 (1940) (calling the case an attempt "to inject a new principle into the obscenity law" and suppress a book because of its "theme").

230. See CLINE, *supra* note 25, at 232.

231. The distinguishing feature of Hall's work, as explained in the decision of the New York Magistrate, was that "[t]he unnatural and depraved relationships portrayed are sought to be idealized and extolled." *People v. Friede*, 233 N.Y.S. 565, 567 (Magis. Ct. 1929).

232. See *infra* Part IV.E.

certainly publicized both the book and the topic to a wider audience, but, more importantly, they also sent a very clear proscriptive message to authors, publishers, and inverters: Not all speech about a prohibited topic is equal.

A. *The Hicklin Rule*

At the time of the trials, the courts in the United States had widely adopted the *Hicklin* rule as the standard for obscenity, meaning that *The Well* was judged under the same standard in both New York and London, with only slight differences in the procedures.²³³ In the end, *The Well* was acquitted of obscenity charges in New York on appeal,²³⁴ but continued to have run-ins with the United States Customs Office.²³⁵ In England, the Customs Office had refused to take any action, but *The Well* was declared obscene libel by two criminal courts and remained banned until 1949.²³⁶

In both the United States and Great Britain, *The Well* was charged

233. New York courts had adopted the *Hicklin* rule in *People v. Muller*, 96 N.Y. 408, 411 (1884). It remained a widely accepted, although not exclusive, standard for obscenity in the United States until the latter half of the twentieth century. See EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS* 12 (1992) (noting that American courts followed the *Hicklin* rule “well into the twentieth century”).

In 1896, the United States Supreme Court adopted the *Hicklin* rule as the standard for the obscenity provision of the United States postal laws. See *Swearingen v. United States*, 161 U.S. 446, 451 (1896). For a discussion of early United States postal restrictions and the obscenity standard, see DE GRAZIA, *supra* note 233, at 4-5. Not until 1933 did any federal judge deviate from the rule that defined obscenity by reference to the most impressionable readers who might stumble across the publication when publishers challenged the United States Custom’s seizure of *Ulysses*. See *United States v. One Book Called “Ulysses,”* 5 F. Supp. 182 (S.D.N.Y. 1933). For a discussion of the seizure and the legal challenge, see DE GRAZIA, *supra* note 233, at 29-34. In *One Book Called “Ulysses,”* the judge modified the rule to state that material was obscene if it “[t]end[ed] to stir the sex impulses or to lead to sexually impure and lustful thoughts.” *One Book Called “Ulysses,”* 5 F. Supp. at 184. This marked the beginning of a series of modifications and reworking of the federal obscenity standard that would become of increasing importance as the Supreme Court recognized the First Amendment protection of literature and other forms of artistic expression.

234. See *infra* Part IV.D.

235. For a list of the Treasury Decisions dealing with *The Well* and other books charged as obscene, see JAMES C.N. PAUL & MURRAY L. SCHWARTZ, *FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL* 263 (Greenwood Press, Inc., 1977) (1961).

236. The different outcome under the same standard is paradoxical given that sex between women had never been criminalized in Great Britain, whereas the United States had sodomy laws in effect in every state. See *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986) (stating that sodomy was illegal in all fifty states until 1961). This paradox is all the more striking given that New York had just enacted legislation that banned dramatic productions which depicted perversity, including female homosexuality, in response to *The Captive* scandal of 1927. See *People v. Friede*, 233 N.Y.S. 565, 566-67 (Magis. Ct. 1929); see also *supra* note 156 and accompanying text (discussing *The Captive* and the enactment of the New York legislation).

with the criminal offense of obscenity.²³⁷ Under English law, the charge was actually that of “obscene libel,” a common law misdemeanor,²³⁸ because the English obscenity standards were derived from the laws governing libel.²³⁹ In New York, the crime of obscenity was codified in Section 1141 of the Penal Law.²⁴⁰ It provided: “‘A person who sells . . . or has in his possession with intent to sell, . . . any obscene, lewd, lascivious, filthy, indecent or disgusting book, . . . is guilty of a misdemeanor.’”²⁴¹ What was or was not obscene was determined by the standard articulated in 1868 by Lord Cockburn in *Hicklin v. Regina*²⁴² and widely known as the *Hicklin* rule.²⁴³ It declared as obscene any publication with a tendency “to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication

237. See BOYER, *supra* note 220, at 131, 133 (discussing how *The Well* was found legally obscene in both England and the United States). The question of whether a publication was obscene was significant in a variety of instances. See DE GRAZIA, *supra* note 233, at 17 (explaining how James Joyce could not find a man in England or the United States to publish *Ulysses*). First, there was the criminal charge of obscenity that would result in a case against the publisher and bookseller, and if found, result in the destruction of the publication. See *id.* at 9 (stating that Anderson and Heap were arrested and charged with publishing obscenity for printing and distributing the July/August 120 edition of *The Little Review* which contained an episode from *Ulysses*). Second, custom officials in both the United States and Great Britain were empowered to seize “obscene” materials at their respective borders. See NORMAN ST. JOHN-STEVAS, OBSCENITY AND THE LAW 132-33, 160 (1956). In addition, the United States had the notorious Comstock laws, which were designed to stop the flow of obscene materials in the United States mails. See DE GRAZIA, *supra* note 233, at 4. In England the authorities could close a bookstore or other establishment for the sale of “obscene” materials. See, e.g., ELLIS & SYMONDS, *supra* note 61, at 66-67.

238. When *The Well* was charged with obscene libel in 1928, it was possible to say that the standards regarding obscenity “had stood virtually unchanged for 200 years.” Richard Du Cann, *in* BRITAIN, *supra* note 25, app. at 159. This stands in sharp contrast to the rapid evolution of obscenity standards throughout the second half of the twentieth century. See DE GRAZIA, *supra* note 233, at 12. The common law misdemeanor of obscene libel was not codified until the Obscene Publications Act of 1959. See Du Cann, *supra*, app. at 167.

The Well was prosecuted under Lord Campbell’s Act of 1857, which streamlined the process by which a publication could be found obscene by eliminating the need for a formal indictment and a jury trial where the publications were seized. See Du Cann, *supra* note 238, app. at 161-62.

239. Obscene libel was a particular form of libel dating from 1727 when the court rejected the requirement that the writing complained of actually libel an identifiable individual or organization and allowed an indictment to stand on the common law crime of obscene libel for the publication of a pornographic pamphlet. See *id.* at 160-61. At that point, the court adopted the standard that would be the predecessor to the *Hicklin* rule, defining “obscene libel” as an act “‘tending to corrupt the morals of the King’s subjects.’” *Id.* at 159 (quoting the common law courts). For a general explanation of the evolution of obscenity standards in Great Britain and a discussion of the case against *The Well*, see ROBERTSON, *supra* note 164, at 15-44. See also ST. JOHN-STEVAS, *supra* note 237, at 66-124 (discussing generally the origins of obscenity laws and *The Well*).

240. See *Friede*, 233 N.Y.S. at 566.

241. *Id.* (quoting section 1141 of New York’s Penal Law).

242. L.R. 3 Q.B. 359 (1868).

243. See *id.* at 369.

of this sort may fall.”²⁴⁴

At the time of the trials, neither United States nor English courts would allow expert testimony as to whether or not the publication in question was obscene because that was the ultimate question of law to be decided by the judge.²⁴⁵ In addition, literary merit was not a defense.²⁴⁶ To the contrary, the law agreed with Douglas, who had observed that the quality of Hall’s prose only “‘intensifies its moral danger.’”²⁴⁷ Therefore, the fact that a book had literary merit could actually make it more likely to be found obscene because “[f]requently these attractive literary qualities are the very vehicles by which the destination of illegality is reached.”²⁴⁸

Although both trials were sensational and received considerable press coverage, the London trials had the added drama of a courtroom packed with eminent authors, educators, publishers, and scientists ready to take the stand and testify on behalf of *The Well*.²⁴⁹ In London, the witnesses were disallowed when counsel for the defense called his first witness and asked the witness if he considered *The Well* to be obscene.²⁵⁰ Ernst, as counsel for defense in New York, submitted, as part of the brief on appeal, the testimonials of esteemed writers such as Sherwood Anderson, John Dos Passos, Theodore Dreiser, and Ernest Hemingway, as well as a “‘Protest’” signed by seventy-four “‘men of letters, educators, publishers, artists and publicists.’”²⁵¹ Very few of the assembled luminaries were actually willing to speak out on behalf of homosexuality or even Hall’s artistic achievements—they were more

244. *Id.*

245. See *Friede*, 233 N.Y.S. at 569 (noting that “it has been held that the opinions of experts are inadmissible”).

246. See *id.* In Great Britain, literary merit or “public good” became an affirmative defense under the Obscene Publications Act of 1959. See also Du Cann, *supra* note 238, app. at 170.

247. BRITAIN, *supra* note 25, at 56 (quoting Douglas’ article).

248. *Friede*, 233 N.Y.S. at 569 (quoting *People v. Seltzer*, 203 N.Y.S. 809 (Sup. Ct. 1924)).

249. See BRITAIN, *supra* note 25, at 90 (noting that the assembled group included inter alia, E.M. Forster, V. Sackville-West, and Leonard and Virginia Woolf).

The London trials came first and were more glamorous, and as such, the New York proceedings are often handled as an afterthought—they lacked a certain degree of spectacle without the artistic luminaries and the author in court, and they were ultimately successful. The lower court case in New York produced a published opinion, whereas the London proceedings were not in courts of record, thus making it necessary to piece together the courts’ rationale for their decisions based on press accounts. See *infra* Parts IV.B-C. Britain’s book reprints many original newspaper accounts of the trials, as well as letters to the editor and literary reviews. See generally BRITAIN, *supra* note 25, at 87-93. Otherwise, Britain is neither a reliable source for biographical information on Hall nor does she accurately relate the plot of *The Well*.

250. See ST. JOHN-STEVAS, *supra* note 237, at 101-02 (reprinting the exchange between Norman Birkett and the Magistrate).

251. DE GRAZIA, *supra* note 23, at 201 (quoting the brief).

interested in testifying against censorship.²⁵²

B. *The London Trials*

The medico-scientific model was not embraced by the courts. As portrayed by the prosecutors and accepted by the courts, *The Well* involved a description of a particular type of vice—not of a particular type of person. For example, when the Magistrate, Sir Chartres Biron, disallowed the expert testimony, he framed the question quite clearly: “[D]oes this book as a whole defend unnatural practices between women?”²⁵³ No matter how loathsome these practices might be from a moral standpoint, they were not illegal. Still, the Magistrate understood them as obscene. He continued: “These unnatural offences between women which are the subject of this book involve acts which between men would be a criminal offence, and involve acts of the most horrible, unnatural and disgusting obscenity.”²⁵⁴ The fact that these acts were obscene were beyond dispute, but the question remained whether Hall was actually defending them. The Magistrate found that she was, and ordered the book to be destroyed as obscene libel.²⁵⁵

On appeal, the Attorney General, after characterizing *The Well* as “propaganda for the practice which has long been known as Lesbianism,” made a clear distinction between the “passive persons who indulge in it, who are the victims of others” and “the active persons who practice this vice.”²⁵⁶ With regard to the “victims,” the Attorney General noted that the “well-known vice” of lesbianism was “destructive of [their] moral and physical fibre.”²⁵⁷ The court agreed and held that *The Well* was “a most dangerous and corrupting book . . . of which the general tendency would be to corrupt the minds of the general body of those who may read it.”²⁵⁸

A consistent theme throughout these proceedings was that there was no shame expressed in *The Well*. On appeal, the court noted that the book “condones” sexual acts between women “and suggests that those guilty of them should not receive the consequences they deserve to

252. See BAKER, *supra* note 24, at 228-30 (describing Hall’s disappointment that the English writers who organized to protest on behalf of *The Well* refused to offer any opinion regarding *The Well*’s literary “merits” or “decency”).

253. SOUHAMI, *supra* note 25, at 221 (quoting Sir Chartres Biron).

254. *Id.* (quoting Biron).

255. See BRITAIN, *supra* note 25, at 98-101.

256. SOUHAMI, *supra* note 25, at 235 (quoting the then-Attorney General, Sir Thomas Inskip).

257. *Id.* (quoting Inskip).

258. BRITAIN, *supra* note 25, at 126 (quoting the Chairman of the Court).

suffer.”²⁵⁹ Presumably, the “consequences” are the societal stigma and ostracism that Hall made a case against in her book. The distinction is that Hall described homosexuals as the victims of an ignorant society, whereas the contagion model sees homosexuals as predators who stalk innocent victims.

The following passage from the Magistrate’s opinion is related to the argument that *The Well* had no sense of shame. It observed that *The Well* had the dual audacity to first fix no blame on homosexuals and then to suggest that these unnatural practices actually could be good for their practitioners.

There is not a single word from beginning to end of this book which suggests that anyone with these horrible tendencies is in the least blameworthy or that they should in any way resist them. The characters in this book who indulge in these horrible vices are presented to us as attractive people and put forward for our admiration; and those who object to these vices are sneered at in the book as prejudiced, foolish and cruel.

Not merely that, but there is a much more serious matter, the actual physical acts of these women indulging in unnatural vices are described in the most alluring terms; their result is described as giving these women extraordinary rest, contentment and pleasure; and not merely that, but it is actually put forward that it improves their mental balance and capacity.²⁶⁰

As the appeals court said: “Put in a word, the view of the Court is that this is a disgusting book, when properly read.”²⁶¹

C. *The New York Trials*

Magistrate Bushnell, the City Magistrate hearing the case, included a detailed summary of the plot line of *The Well* in his opinion.²⁶² He seemed particularly interested in Stephen’s knack for attracting “normally sexed” women who, at least in the case of Mary, become her victim. The Magistrate wrote:

The book here involved is a novel dealing with the childhood and early

259. *Id.* (quoting the Chairman of the Court).

260. SOUHAMI, *supra* note 25, at 228 (quoting Biron). Krafft-Ebing made a very similar assertion regarding the beneficial effects of allowing inverts to express their passions. *See supra* note 79.

261. BRITAIN, *supra* note 25, at 126 (quoting the Chairman of the Court).

262. *See* SOUHAMI, *supra* note 25, at 228 (quoting the opinion). It might be worthwhile to compare this characterization of the plot with the one provided earlier in this Article. *See supra* text accompanying notes 114-27.

womanhood of a female invert. In broad outline the story shows how these unnatural tendencies manifested themselves from early childhood; the queer attraction of the child to the maid in the household, her affairs with one Angela Crossby, a normally sexed, but unhappily married, woman, causing further dissension between the latter and her husband, her jealousy of another man who later debauched this married woman, and her despair, in being supplanted by him in Angela's affections, are vividly portrayed. The book culminates with an extended elaboration upon her intimate relations with a normal young girl, who becomes a helpless subject of her perverted influence and passion, and pictures the struggle for this girl's affections between this invert and a man from whose normal advances she herself had previously recoiled, because of her own perverted nature. Her sex experiences are set forth in some detail and also her visits to various resorts frequented by male and female inverts.²⁶³

Hall's expanded universe of inverts and the women who love them confirms the second maxim that inversion is contagious and that inverts prey on "normal" people. To the Magistrate, Hall's admission that "not always [do inverts] attract their own kind, very often they attracted quite ordinary people"²⁶⁴ must have sounded very ominous indeed.

The opinion that followed was very similar to the pronouncements made by Sir Chartres and the appeals panel in London. It is particularly notable because of the repeated emphasis on Stephen's entanglement with "normally sexed" women and the lack of shame. In most other respects, it accepts and reinscribes the six maxims of the contagion model of homosexuality.

1. Homosexuality Is a Vice

The New York court, without any discussion or elaboration, accepted that homosexuality was a vicious vice.²⁶⁵ The opinion does not try either to engage or dispute the medico-scientific model, but refers to "lustful and lecherous practices."²⁶⁶ It takes *The Well* to task because "it does not argue for repression or moderation of insidious impulses."²⁶⁷ (Arguably, one could call for repression or moderation even if the impulses were inborn.) The opinion suggests that some people may be

263. *People v. Friede*, 233 N.Y.S. 565, 566-67 (Magis. Ct. 1929).

264. HALL, *supra* note 7, at 353.

265. *See Friede*, 233 N.Y.S. at 567 (referring to "perverted ideas and unnatural vices").

266. *Id.* at 568. The closest the opinion comes to engaging the question of the medical cause of homosexuality is when the opinion cites Havelock Ellis for support that normal people need to be protected from the invert. *See id.* The court quotes Ellis: "'We are bound to protect the helpless members of society against the invert.'" *Id.* (quoting Ellis).

267. *Id.* at 567.

more susceptible to homosexual advances than others, but it is unclear whether this is due to a congenital predisposition or other factors, such as weak will or a generally depraved constitution.²⁶⁸ Whatever the precipitating cause, the opinion is clear that such impulses should be resisted.

2. Homosexuals Prey on Innocent Victims, and It Is Not Just the Children

The most remarkable feature of the opinion is its strong conviction that homosexuality has a wide universal appeal such that even “those of mature age and of high intellectual development and professional attainment” can fall under its spell.²⁶⁹ The defense brief had taken issue with the fact that the *Hicklin* rule used as a reference point the “dullest-witted and most fallible members” of the community.²⁷⁰ The court responded that it is not just the weak-willed who can succumb to the seductive charms of a homosexual. Quite the contrary, “those who are subject to perverted influences, and in whom that abnormality may be called into activity, and who might be aroused to lustful and lecherous practices” might include very upstanding accomplished citizens.²⁷¹ Thus, homosexuals do not just prey on children—everyone is at risk.

Because homosexuals are by nature predators, *The Well* “can have no moral value, since it seeks to justify the right of a pervert to prey upon normal members of a community, and to uphold such relationship [sic] as noble and lofty.”²⁷² In particular, the court objected to the “extended elaboration upon [Stephen’s] intimate relations with a normal young girl, who becomes a helpless subject of her perverted influence and passion.”²⁷³

3. *The Well* Extols Homosexuality

According to the Magistrate, *The Well* suffered from a conspicuous absence of shame.²⁷⁴ Hall certainly would have agreed with this, given that her goal was to portray virtuous inverts who suffer at the hands of society simply because of their God-given natures. However, the court was working on the belief that homosexuality was a loathsome vice. Any

268. *See id.* at 568.

269. *Id.* The court thus distinguished such types from “the young and immature, the moron, the mentally weak, or the intellectually impoverished.” *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 567.

273. *Id.* at 566-67.

274. *See* BRITAIN, *supra* note 25, at 100.

attempt on the part of Hall to depict honorable inverts or admirable relationships, was easily characterized as an attempt to “idealize[] and extol[]” what the court considered “unnatural and depraved relationships.”²⁷⁵ Emphasizing the boldness with which Hall carried out her special pleading, the court noted with great displeasure that Stephen announced to her mother ““there’s no shame in me.””²⁷⁶

4. *The Well* Demands More than Mere Toleration

When the court condemned *The Well* because it did “not argue for repression or moderation of insidious impulses,”²⁷⁷ there was the implication that perhaps *The Well* could have some redemptive value if it had chastened readers against expressing their same-sex desire. But, that was not Hall’s object. *The Well* argued not only for an invert’s “right of existence,” but also for an invert’s right to love and to express her desire.²⁷⁸ Reflecting back on his defense of *The Well*, Morris Ernst wrote in 1964: “We assume that the good judge might have concluded that the book was legal if Radclyffe Hall, the author, had had the characters apologetic for what they did to life and what life did to them.”²⁷⁹

5. It Is a Battle

The court asserted that it was charged with the duty to “protect the helpless members of society against the invert,”²⁸⁰ but did not engage in the battle imagery employed by Douglas. Instead, the court focused on its institutional role to implement existing public policy which the court declared was especially “hostile to the presentation and circulation of matter treating . . . sexual depravity.”²⁸¹ In obscenity cases, it was the court’s “duty” to protect “the weaker members of society from corrupt, depraving, and lecherous influences, although exerted through the guise and medium of literature, drama, or art.”²⁸²

6. *The Well* Is Obscene

Given the court’s characterization of homosexuality as a contagious vice, its decision that *The Well* violated the *Hicklin* rule was not

275. *Friede*, 233 N.Y.S. at 567.

276. *Id.* (quoting *The Well*).

277. *Id.*

278. *See id.*

279. ERNST & SCHWARTZ, *supra* note 229, at 73.

280. *Friede*, 233 N.Y.S. at 568 (quoting Havelock Ellis).

281. *Id.* at 569.

282. *Id.* at 568-69.

surprising. The court concluded that *The Well* was “a book exalting sex perversion.”²⁸³ The characters were “described in attractive terms.”²⁸⁴ The relationships were depicted as “noble and lofty.”²⁸⁵ Moreover, “the method” by which the theme was developed made *The Well* “strongly calculated to corrupt and debase”²⁸⁶ because “[f]requently these attractive literary qualities are the very vehicles by which the destination of illegality is reached.”²⁸⁷ What is more surprising is that the appeals court acquitted *The Well*.

D. *The New York Appeal and Epilogue*

From a procedural standpoint, the Magistrate’s opinion denied the publisher’s motion to dismiss the complaint against *The Well* and the defendants were then held for the Court of Special Sessions where the case was heard by a three-judge panel. In a two-to-one decision, the court concluded that the book was “not in violation of the law.”²⁸⁸ The three paragraph unpublished decision was quoted the next day in the *New York Times*.²⁸⁹ The terse opinion noted that inversion was a “delicate social problem,” but stated that this fact was not sufficient to make a book objectionable.²⁹⁰ With the favorable decision, the publisher stepped up its publicity machine and issued an autographed “Victory Edition” of *The Well* complete with a summary of the court proceedings.²⁹¹

E. *A Final Note About the Necessarily Partial Nature of Censorship*

Throughout the proceedings on both sides of the Atlantic, the supporters of Hall could be more accurately described as foes of state censorship.²⁹² Some, misunderstanding the legal standard for obscenity, argued quite literally that *The Well* was not really obscene because it had no unclean words and the topic was handled with considerable

283. *Id.* at 569.

284. *Id.* at 567.

285. *Id.*

286. *Id.*

287. *Id.* at 569.

288. ‘Well of Loneliness’ Cleared, *supra* note 224 (quoting the court).

289. *See id.* The article noted that Friede had been found guilty the day before by a court in Boston for his distribution of Theodore Dreiser’s *An American Tragedy*. *See id.*

290. *See id.*

291. *See* BOYER, *supra* note 220, at 134.

292. *See* BAKER, *supra* note 24, at 228-30.

restraint.²⁹³ Others took a more resigned stance, affirming that inversion was a real social problem that should be dealt with by open debate.²⁹⁴ A pronounced subset, however, adopted a wholly cynical view of state attempts at censorship and asserted that the act of censorship was itself self-defeating because it only served to further publicize *The Well*.²⁹⁵ While claiming to despise the vice in question, these thinkers argued that it was preferable to allow *The Well* to circulate unmolested than to educate the entire country as to the existence of lesbianism (remember, the very idea of it can be contagious).²⁹⁶

At first glance, the success of *The Well* seems to bear out this theory. There is no doubt that Douglas' editorial sold a considerable number of newspapers and increased public awareness of, and demand for, *The Well*.²⁹⁷ By the time Hall died in 1943, *The Well*, although still banned in England as obscene libel, was selling 100,000 copies in the United States each year and had been translated into eleven languages.²⁹⁸ The personal accounts of innumerable women attest to the fact that *The Well* gave them a sense of identity, of belonging, and, above all, the knowledge that they were not alone.²⁹⁹ Is it really the case that the cause of the lesbianism was better off thanks to the machinations of the Anglo-American legal systems and the extensive press coverage of the obscenity trials? Did lesbianism actually win a round when *The Well* went up the King's chimney? Is any act of censorship itself unstable and contradictory because it necessarily publicizes the very idea or theme it seeks to suppress?³⁰⁰

True, the trials and the media frenzy can be credited with increasing

293. See, e.g., BRITAIN, *supra* note 25, at 110-11 (reprinting a letter to the editor of *Time and Tide* asserting that *The Well* was not obscene because it would not "make people think ignobly of the fact of sex"). The decision in *People v. Friede* was quite clear that the lack of "unclean words" was not dispositive. See *People v. Friede*, 233 N.Y.S. 565, 567 (Magis. Ct. 1929).

294. This was the approach taken by Britain in her own review of *The Well*. See BRITAIN, *supra* note 25, at 47.

295. This brand of criticism was especially prevalent in England where it was leveled against the unpopular Home Secretary. For example, the preface of *The Sink of Solitude*, a work satirizing the Home Secretary, stated "[t]hanks to [the] crusade [of Douglas and the Home Secretary], millions of shop, office, and mill girls have been led to ask the furtive question: What is Lesbianism?" BRITAIN, *supra* note 25, at 97 (quoting P.B. Stephenson).

296. See *id.* at 98.

297. See *id.* at 58 (describing Douglas' article as a "newspaper 'stunt'").

298. See TROUBRIDGE, *supra* note 25, at 94.

299. See *supra* note 14.

300. On this point, Judith Butler explains: "Never fully separable from that which it seeks to censor, censorship is implicated in its own repudiated material . . . partly because the text in question takes on new life as part of the very discourse produced by the mechanism of censorship." JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 130 (1997) (discussing the "Don't Ask, Don't Tell Policy").

the popular knowledge of lesbianism, but they also helped to solidify the popular understanding of homosexuality as contagion. Accordingly, it is not possible to divorce knowledge of lesbianism from the very strong proscriptive message contained within the contagion model. If a woman reading *The Well* recognized herself in Stephen, her sense of recognition and belonging was augmented by her understanding that she belonged to a despised group who preyed on children and other innocents. The view that the obscenity trials and the extensive media coverage actually helped to promote homosexuality seriously misapprehends the proscriptive force of the contagion model, or what would now be called homophobia. Rather than inadvertently promoting homosexuality by simply speaking its name, the courts and the media were actively creating a negative model of same-sex desire, thereby reinforcing and making explicit the norm of exclusive opposite-sex attraction.³⁰¹

The trials sent a clear and strong proscriptive message to authors and publishers regarding the treatment of same-sex desire between women and set off what has been referred to as a “lesbian panic.”³⁰² Outside of publishing, lesbian panic on account of the trials was experienced by lesbian communities, friendship groups, and individual

301. Butler notes that “censorship seeks to produce subjects according to explicit and implicit norms, and that the production of the subject has everything to do with the regulation of speech.” *Id.* at 133. This observation recognizes the “productive” power of censorship. *See id.* at 132 (explaining that censorship is “formative of subjects and the legitimate boundaries of speech”).

302. *See generally* JEANNETTE H. FOSTER, SEX VARIANT WOMEN IN LITERATURE: A HISTORICAL AND QUANTITATIVE SURVEY 11 (1958) (“[T]rac[ing] historically the quantity and temper of imaginative writing on [lesbianism] from earliest times to the present day.”); PATRICIA JULIANA SMITH, LESBIAN PANIC: HOMOEROTICISM IN MODERN BRITISH WOMEN’S FICTION xii (1997) (examining the “socially and culturally ingrained *fear* of lesbianism and the stigma pertaining thereunto”). The trial sent a very clear message to publishers and authors regarding the treatment of same-sex desire between women and “surely circumscribed the manner in which lesbians and lesbianism could be represented and narrated—and published.” SMITH, *supra*, at 80. Smith makes the point about lesbian panic with regard to the United Kingdom, but Foster found it to be equally true of the United States. *See id.* Smith notes:

While it would be an oversimplification to claim that lesbian themes in female-authored fiction simply disappeared or were only rendered in a highly surreptitious manner over the two decades following the suppression of Hall’s novel and its 1949 reissue, the trial’s verdict “restrain[ing] British publishers . . . from issuing lesbian propaganda” surely circumscribed the manner in which lesbians and lesbianism could be represented and narrated—and published—in the United Kingdom.

Id. (quoting Foster) (alterations in original) (citation omitted). With regard to *The Well*, Foster reflects, “[j]ust how specifically the skirmish of censorship and its attendant publicity affected subsequent work is difficult to say.” FOSTER, *supra*, at 288. Foster goes on to note that the years immediately following *The Well* were rather tame in comparison to 1928. *See id.* With the exception of a few sensational copycat books, the biggest reaction to *The Well* was a surge of negative titles designed to function as a rebuttal to *The Well*. Foster notes, for example, “[t]hat antagonistic voices, first largely women’s and then men’s, swelled into a full chorus by 1933, might similarly seem a protracted echo of official disapproval.” *Id.*

women who became more convinced than ever that they should not draw attention to themselves.³⁰³ The result was a “hasty distancing that took place by women in the wake of . . . the 1928 trial of *The Well of Loneliness*.”³⁰⁴

Hall’s partner, Lady Troubridge, had encouraged Hall to write *The Well* saying that she was “sick to death of ambiguities.”³⁰⁵ Baker reported that some of Hall’s and Troubridge’s close friends actually did not know the nature of their relationship.³⁰⁶ Baker credits *The Well* with dispelling “the innocence of the times.”³⁰⁷ Baker wrote: “*The Well* changed all that, bringing female homosexuality into the forefront of public consciousness—and reinforcing an image of the lesbian, as a masculine woman, which would prove remarkably durable.”³⁰⁸ However, candor regarding one’s lesbianism was then, and continues to be, a double-edged sword. No matter how disempowering some women might have found their ambiguous romantic friendships, this ambiguity also provided a measure of safety.³⁰⁹ For some, the prospect of trading ambiguity for a new degree of candor may not have seemed like a very good deal, given that the cost of the candor was increased vulnerability and social stigma. By the time that the trials were over, Hall and Troubridge would never again have to worry about ambiguities clouding the true nature of their relationship.

303. For example, a group of lesbians living in Salt Lake City in the 1920s and 1930s reacted to the trials by “liv[ing] as conventionally as possible.” LEILA J. RUPP, *A DESIRED PAST: A SHORT HISTORY OF SAME-SEX LOVE IN AMERICA* 124 (1999) (noting that “[w]hen Radclyffe Hall’s famous lesbian novel *The Well of Loneliness* appeared in 1928, to great controversy, they shunned the very idea of publicity. Fearing exposure, they lived as conventionally as possible”). This tendency of lesbians to “self-police” even affected Toupie Lowther, a particularly masculine friend of Hall’s and Troubridge’s on whom Hall had modeled the portions of *The Well* involving World War I. Apparently after the publication of *The Well*, Toupie turned in her man-tailored attire for silk and chiffon. See HALLETT, *supra* note 151, at 55. Even many members of the Bloomsbury group were uneasy with the fact that homosexuality was being spoken about so openly. See CLINE, *supra* note 25, at 250 (noting that “Hall’s openness rattled both [E.M.] Forster and [Virginia] Woolf”).

304. HALLETT, *supra* note 151, at 178.

305. TROUBRIDGE, *supra* note 25, at 82. Troubridge explained that Hall “came to [her] one day with unusual gravity and asked for [her] decision in a serious matter.” *Id.* at 81. At the time, Hall was a best-selling author and she and Troubridge were a well-known pair who frequented plays and other social events. Cf. BAKER, *supra* note 24, at 248. The mere fact that there were any lingering ambiguities about the nature of their relationship proves just how unfamiliar the public was with this new species—the female invert.

306. See BAKER, *supra* note 24, at 248.

307. *Id.*

308. *Id.*

309. See FADERMAN, *supra* note 14, at 57 (stating that “[t]hose ‘explanations’ eventually blew the cover of women whose sexual relationships with other women may have been hidden under the guise of romantic friendship”) (emphasis added).

V. THE CONTAGION MODEL OF HOMOSEXUALITY IN CONTEMPORARY SOCIETY

Almost seventy-five years after Douglas published his broadside against *The Well* in particular, and homosexuality in general, the six maxims of the contagion model of homosexuality continue to frame the views of not just anti-gay activists, but also those of lawmakers, prosecutors, and judges. The core understanding of homosexuality expressed in the maxims supplies the “fear of contagion” that animates many anti-gay initiatives and many attempts to silence expressions of same-sex desire. Today, the legal doctrines enlisted to silence homosexuality are much more varied and, at times, more indirect, than the *Hicklin* rule. While sodomy laws continue to taint expressions of same-sex desire, and even bare statements of identity, with criminality,³¹⁰ and obscenity laws may foreclose certain expressions because they reflectively incorporate a lower bar for same-sex desire,³¹¹ direct state censorship under threat of criminal sanction is now the exception.

In lieu of direct censorship, the state necessarily participates in the suppression of expressions of same-sex desire whenever it advances, adopts, or condones the contagion model of homosexuality.³¹² This occurs when the state favors or privileges the contagion model of homosexuality over any other view in areas such as school curricula or public funding for the arts. By deciding what is and is not taught in the classroom or what is or is not funded with public monies, the state can effectively silence any model of homosexuality except the contagion model or, out of an abundance of caution, it can forbid the discussion or portrayal of homosexuality entirely.³¹³

The core recommendation, or perhaps the core imperative, of the contagion model is that positive articulations of homosexuality must be silenced. This can be accomplished by enlisting the help of the state, or through societal pressures or, more likely, by a combination of the two. As seen from the discussion of the attack and prosecution of *The Well* in Parts III and IV above, a positive articulation of same-sex desire is

310. For a discussion of the existing sodomy laws, see *infra* text accompanying notes 348-53.

311. For a discussion of obscenity laws and same-sex desire, see *infra* note 331.

312. See Robert C. Post, *Censorship and Silencing*, in CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION 1, 6 (Robert C. Post ed., 1998). Post notes that “state power . . . maintain[s] and privilege[s] particular discursive practices” whenever it “educates a student, or establishes acquisition criteria for a public library, or chooses to subsidize one form of speech rather than another.” *Id.*

313. For a discussion of the various ways in which states regulate the discussion of homosexuality through curriculum choice, see *infra* Part V.C.3.a.

simply one that is offered without shame. The contemporary contagion model, however, has a very expansive definition of what constitutes a positive articulation of same-sex desire. The concern is no longer primarily the artistic or literary depiction of the idea of homosexuality; it is the homosexual herself. In this way, the “avowed homosexual” has become the contested text.³¹⁴ The openly gay individual by her very being expresses a very dangerous idea, namely that homosexuality can exist without shame.

With regard to these dangerous individuals, sometimes the goal is to suppress their coming out speech. The “Don’t Ask, Don’t Tell” policy will remove a service member who utters the words “I’m gay,” and effectively silences such utterances under threat of discharge.³¹⁵ In jurisdictions without anti-discrimination protections, a state employer can fire an employee for the same statement because those words, paradoxically, are not of sufficient “public concern” to warrant First Amendment protection.³¹⁶ Other times, it is simply the existence of the avowed homosexual on the job or in the association that must be remedied because otherwise the employer or association will be forced to “promote” homosexuality.³¹⁷ Under the reasoning of the contagion model, there is no neutral ground—tolerating an openly gay employee or openly gay member is tantamount to championing homosexuality.

It would be profitable to examine in detail the variety of means by which the state continues to participate in the silencing of same-sex desire and their relationship to direct censorship. While much of the “new scholarship” on censorship is dedicated to exactly that task, this Part analyzes these attempts to silence expressions of same-sex desire in light of the six maxims of the contagion model.³¹⁸ The object is to illustrate the intellectual resilience of a particular understanding of the

314. For a discussion of the development of the expressive homosexual and the legal response thereto, see *infra* notes 449-465. See also Knauer, *supra* note 23.

315. A member of the armed forces can be separated from service if the member: i) engages or attempts to engage in homosexual acts; ii) declares that he is homosexual; or iii) attempts to marry someone of the same biological sex. See 10 U.S.C. § 654(b) (1994). For a discussion of the military rules and regulations governing homosexual acts, see *infra* text accompanying notes 357-61.

316. For a discussion of public employment cases, see *infra* text accompanying notes 461-65. Unlike under the military rules, the law obviously does not require that the employee who says “I’m gay” must lose her job. However, if a public employer fires an employee for saying “I’m gay,” the law will support, or at least respect that employer’s decision. See *infra* note 462 and accompanying text. Thus, the law makes the firing not only just possible, but final. The new scholarship would ask whether there is a meaningful difference between this sort of silencing and direct state intervention.

317. For a discussion of the reasoning that individuals who tolerate homosexuals are championing gay rights, see *infra* text accompanying notes 466-70.

318. See generally CENSORSHIP AND SILENCING, *supra* note 312, at 152 (discussing the psychological and conceptual dimensions of silencing).

nature of homosexuality and its socio-legal consequences.

The many contemporary reiterations of the contagion model make it more difficult to produce a definitive text, such as Douglas' editorial. Instead of relying solely on one text, this Part distills the current account of the contagion model from the writings of the FRC, a pro-family organization with a long history of anti-gay activism.³¹⁹ It then shows how the contagion model continues to form the basis of a variety of policy, legislative, and judicial decisions.

A. Pro-Family Organizations

Allowing for some "modernization of justification,"³²⁰ Douglas' views on homosexuality would fit in easily at any strategy meeting of

319. This Article bases its conclusions on the policies of the Family Research Council ("FRC") because the FRC is relatively mild in its approach to homosexuality and the FRC has considerable political influence. Anti-gay advocacy is one of the FRC's major activities. See HERMAN, *supra* note 6, at 67. With an eye to the larger societal audience, it eschews brimstone and instead recommends that its activists "articulate [their] position with clarity and compassion." Peter LaBarbera, *How to Protect Your Children from Pro-Homosexuality Propaganda in Schools*, Family Research Council: In Focus, available at <http://www.frc.org/papers/infocus/index.cfm?get=IF99J1&arc=yes> (last visited Jan. 31, 2001) (explaining that an activist parent should never "allow anyone to 'speak for [their] side' who does not address this issue with a Christlike attitude of love for sinners"). Originally an offshoot of Reverend Dobson's ministry, *Focus On the Family*, the FRC has emerged as one of the most influential pro-family organizations. See Don Lattin, *Gov. Bush Gets Warning: No More Double-Talk' on Abortion; Religious Right Still Alive, Says Ministry Leader*, S.F. CHRON., Mar. 13, 1999, at A10. Its former President, Gary Bauer, served as a domestic policy adviser under President Reagan. See JOHN GALLAGHER & CHRIS BULL, *PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990S*, at 21 (1996). He later ran an unsuccessful campaign for the Republican nomination for President in 1999. See Patti Waldmeir, *Michigan Likely to Offer McCain False Hope: Presidential Race George W. Bush Is Firmly in Pole Position in First Large State to Hold a Primary*, FIN. TIMES (London), Feb. 4, 2000, at 4. For a discussion of the FRC's lobbying efforts on behalf of DOMA and pro-family tax reform, see Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 186 n.277 (1998).

This Article does not use the statements of more extreme organizations, such as the Westboro Baptist Church headed by the Reverend Fred Phelps. With a catchy web address of "www.godhatesfags.com," the views of the Westboro Baptist Church are considerably more incendiary. For example, its Web page has a "Perpetual Gospel Memorial to Matthew Shepard," which shows an animated picture of Shepard's head surrounded by hell-fire. See Westboro Baptist Church, *Perpetual Gospel Memorial to Matthew Shepard*, at <http://www.godhatesfags.com/memorial.html> (last visited Feb. 7, 2001). The Memorial also counts down the number of days that "Shepard has been in hell." *Id.* Although this imagery might be closer to Douglas' prussiac acid language, the Westboro Baptist Church does not exert influence over policy formation. The concern of this Article is to isolate the articulated views regarding homosexuality that continue to influence the formation of the law, and not simply to catalogue anti-gay rhetoric. The latter would require a much longer article.

320. See Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178 (1996) (discussing the use of modernized rhetoric to justify core objections to minority rights).

the FRC, Concerned Women for America, Focus on the Family, or any other national organization dedicated to anti-gay activism.³²¹ Many of these organizations are informed by conservative Christian thought and are often identified as part of the Christian Right or the Religious Right, which became a political force in the 1980s after the Moral Majority entered electoral politics.³²² It is wrong to dismiss them as a fringe component on the diverse political stage. Their views, particularly those of the FRC, had a direct impact on congressional debate regarding gays in the military and DOMA, just as Douglas' editorial had a direct impact on the Home Office's decision to prosecute *The Well*.³²³

A side-by-side comparison of the contagion model of homosexuality espoused by Douglas and that advanced by the FRC shows a remarkable similarity in the structure and main points of the argument. Today, the contagion model still starts from the premise that homosexuality is an immoral, unhealthy, and freely chosen activity. In direct response to the identity model of homosexuality advanced by many mainstream pro-gay organizations (really just an updated variation of the medico-scientific model advocated by Hall), the contemporary contagion model specifically denies that homosexuals are "born that way," whereas Douglas and *The Well* trials barely engaged the medico-scientific model. In addition, a new form of rights rhetoric focuses on the rights of those opposed to the homosexual lifestyle, such that the flaunting argument is really about the infringement of the rights of others and the homosexual demand for recognition becomes a demand

321. For an excellent overview of the evolution of the anti-gay policies of conservative Christian organizations in the United States, see generally HERMAN, *supra* note 6. In addition to the general policies, she describes the various organizations and individuals who are prominent in anti-gay advocacy. *See id.* at 66-69 (outlining the various national organizations).

322. Herman defines the "Christian Right" as "a broad coalition of profamily organizations and individuals who have come together to struggle for a conservative Christian vision in the political realm." *Id.* at 9. She considers it "a paradigmatic movement for social change." *Id.* at 195. Since their inception, political organizations of the Christian Right have maintained a well-defined and articulated anti-gay policy. *See id.* at 60 (noting that "the fight against gay rights is among [the Christian Right's] foremost political priorities"). For a discussion of the forming of the Moral Majority and its impact on Ronald Reagan's election in 1980, see GALLAGHER & BULL, *supra* note 319, at 20-22.

323. Their understanding of homosexuality continues to inform judicial decision-making and has rejuvenated the citizen initiative as a viable political tool. For resources concerning anti-gay citizen initiatives, see the Web site of the Lambda Legal Defense and Education Fund, at <http://www.lambdalegal.org/> (last visited Jan. 24, 2001). It was conservative pro-family organizations that orchestrated the successful Amendment 2 in Colorado, as well as the numerous other state-wide anti-gay ballot initiatives that have taken place since 1992. *See* Jeffery A. Roberts & Virginia Culver, *Religious Right Sets Sights on State Politics*, DENV. POST, Jan. 15, 1996, at A01; George de Lama, *Colorado Springs Showdown: Gays Facing Fundamentalists*, CHI. TRIB., Apr. 27, 1993, at 1.

for “special rights” for perverts. Overall, the ante has been upped. The current fight with the forces of homosexuality is not merely a battle, but a full-blown “culture war”—public relations dictates that homosexuality must be silenced with compassion and not brimstone. Aside from these modernizations, the major concern remains that of the children.³²⁴

The following table is a side-by-side comparison of the two variations of the contagion model.

DOUGLAS	FRC
1. Homosexuality is a vice.	1. Homosexuality is an immoral, unhealthy, freely chosen activity, not a congenital trait.
2. Homosexuals prey on innocent victims.	2. Homosexuals prey on innocent victims.
3. Homosexuals have no shame.	3. Homosexuals flaunt their lifestyle, infringing on the rights of others.
4. Homosexuals demand recognition, not mere toleration.	4. Homosexuals demand “special rights,” not mere toleration.
5. It is a battle between good and evil (God is on our side).	5. It is a war between good and evil (God is on our side).
6. Society must silence homosexuality.	6. Society must silence homosexuality with compassion.

B. Homosexuality Is an Immoral, Unhealthy, and Freely Chosen Activity

The FRC’s Web page entitled *Homosexual Culture* is unequivocal about the organization’s stand on the nature of homosexuality. The first sentence reads: “FRC believes that homosexuality is unhealthy, immoral

324. One of the first forays of the Christian Right into politics involved the repeal of a gay rights ordinance in Dade County, Florida in 1977. Led by former Miss America and orange juice spokeswoman, Anita Bryant, the “Save Our Children” campaign orchestrated the successful repeal of the Dade County ordinance, as well as similar ordinances in St. Paul, Minnesota; Wichita, Kansas; and Eugene, Oregon. See GALLAGHER & BULL, *supra* note 319, at 16-17; Keith B. Richburg, *4th Gay Pride Day Attracts 5,000 to Huge Block Party*, WASH. POST, June 12, 1978, at C1. For a description of Miss Bryant’s anti-gay activities within the larger context of the Christian Right, see GALLAGHER & BULL, *supra* note 319, at 16-17. As suggested by the name of Bryant’s organization, identifying homosexuals with children and the attendant fears of molestation and/or recruiting has become a staple of the anti-gay plank of the Christian Right. As Miss Bryant stated in a 1977 fund-raising letter, “I don’t hate the homosexuals! But as a mother, I must protect my children from their evil influence.” *Id.* at 16 (quoting Anita Bryant).

and destructive to individual, families and societies.”³²⁵ The linchpin of the anti-gay argument is that homosexuality is chosen behavior.³²⁶ It is not in any way inborn, innate, or immutable.³²⁷ The pro-family organizations devote considerable space to in-depth discussions of the unhealthy sexual practices of (male) homosexuals and portray same-sex relationships as “fleeting.”³²⁸ Their characterization of homosexuality reverses the moral blamelessness of the “born that way” argument, counters any attempt to craft a suspect category based on sexual orientation, and militates strongly against recognizing same-sex relationships or otherwise viewing homosexuality as a valid alternative lifestyle.³²⁹ To the contrary, if homosexuals really can change their sexual orientation, then should not society offer them hope and not simply leave them “mired in an unhealthy, unnatural behavior[?]”³³⁰

1. We Know You Can Change

To prove that homosexuality is freely chosen, the pro-family groups respond to the various scientific studies suggesting that sexual orientation might be hard-wired with their own “independent” research,³³¹ but they lately have devoted an increasing amount of

325. Family Research Council, *Homosexual Culture*, Family Research Council: Issues In Depth, available at <http://www.frc.org/issues/homosexualmain.html> (last visited July 9, 2000).

326. Herman identifies “two key themes” in the characterization of homosexuality by the Religious Right: “homosexual practice is an incontrovertible sin” and “homosexuality is a chosen behavior.” HERMAN, *supra* note 6, at 69.

327. Herman notes that this conviction has both theological and practical roots. *See id.* at 71. On a theological level, it is not possible that God “made” anyone gay because, to the contrary, God made Adam and Eve. *See id.* The choice of behavior, albeit sinful, is also consistent with the notion of “human agency.” *Id.* at 71. From a practical and political standpoint, it is necessary to argue against immutability in order to avoid categorization as a suspect classification, thereby triggering higher constitutional scrutiny. *See id.* at 72.

328. *See* Robert H. Knight, *Answers to Questions About the Defense of Marriage*, Family Research Council: Insight, available at <http://www.frc.org/insight/is96c2hs.html> (last visited July 9, 2000) (stating that “[m]ost homosexual relationships are fleeting”).

329. The third sentence on the FRC Web page, entitled *Homosexual Culture*, makes this quite clear. It reads: “FRC opposes any attempts to equate homosexuality with civil rights or to compare it to benign characteristics such as skin color or place of origin.” Family Research Council, *Homosexual Culture*, *supra* note 325, available at <http://www.frc.org/issues/homosexualmain.html> (last visited July 9, 2000).

330. Knight, *supra* note 328, available at <http://www.frc.org/insight/is96c2hs.html> (last visited July 9, 2000) (stating that “[t]he more that homosexuality is encouraged, the more damage will be wreaked among individuals, families and society”).

331. Pro-family groups dedicate considerable resources to debunking the growing public acceptance of the belief that sexual orientation is hard-wired. They produce elaborate position papers that question the science, methodology, and motivation of the researchers. *See, e.g.*, Trudy Chun, *Born or Bred?: The Debate over the Cause of Homosexuality*, CWA Library, at http://www.cwfa.org/library/family/2000-06_pp_hs-cause.shtml (last visited Jan. 25, 2001); Yvette C. Schneider, *The Gay Gene: Going, Going . . . Gone*, Family Research Council: Insight, available

resources to the notion that individuals can successfully “come out” of homosexuality, thereby making self-professed “ex-gays” the poster children of the movement. In 1998, a consortium of pro-family organizations orchestrated a massive print and television advertising campaign to publicize the “ex-gay movement.” Full page ads in *The New York Times* and other papers across the country proclaimed that homosexuality was a sin and offered “hope and healing” for homosexuals.³³² One advertisement featured Anne Paulk, described as

at <http://www.frc.org/papers/insight/index.cfm?get=IS00D2&arc=yes> (last visited Jan. 24, 2001). Pro-family groups prefer psychological theories of causation. See HERMAN, *supra* note 6, at 71. For example, a FRC publication, entitled *Answers to Questions About the Defense of Marriage*, provides the following question and answer sequence:

Q: But studies show that homosexuals are born that way. How then can you blame them for their condition?

A: Nobody is “blaming” anyone for having homosexual desires. The “genetic” studies that have been publicized have been conducted by self-styled homosexual activists or have been misrepresented in the media . . . [T]he origins of the homosexual impulse [is] an uncompleted gender identity seeking after its own sex to replace what was not fully developed.

Robert H. Knight, *Answers to Questions About the Defense of Marriage*, Family Research Council: Insight, at <http://www.frc.org/insight/is96c2hs.html> (last visited July 9, 2000).

Herman notes that in addition to refuting the biological cause of homosexuality, developmental theories “provide further ammunition in the fight against single parenthood and inappropriate gender modeling.” HERMAN, *supra* note 6, at 71. See, e.g., Family Research Council, *Flawed Science Nurtures Genetic Origin for Homosexuality*, Family Research Council: In Focus, available at <http://www.frc.org/infocus/if94k7hs.html> (last visited Aug. 26, 2000); Robert H. Knight, *Uses of Kinsey’s Flawed Research*, Family Research Council: In Focus, available at <http://www.frc.org/infocus/if95d1hs.html> (last visited Aug. 26, 2000). Pro-family organizations also take issue with psychiatric work that they believe has helped to “normalize” homosexuality, such as the work of Dr. Evelyn Hooker. See Thomas Landess, *The Evelyn Hooker Study and the Normalization of Homosexuality*, Family Research Council: In Focus, available at <http://www.frc.org/insight/is95e1hs.html> (last visited Aug. 26, 2000). FRC takes particular issue with the 1973 decision of the APA to remove homosexuality from its diagnostic manual. See TERRY, *supra* note 40, at 381. It reports heavily on various lobbying attempts to have the APA reconsider its ruling, as well as its condemnation of reparative therapy to change sexual orientation. See Jan LaRue, *Statement Regarding the American Psychiatric Association’s Condemnation of Reparative Therapy for Homosexuals*, available at <http://www.frc.org/misc/lh99elhs.html> (last visited Aug. 27, 2000).

332. All four of the advertisements are available on CitizenLink, a Web site of Focus on the Family, at <http://www.family.org>. One advertisement was a testimonial of a former lesbian. See CitizenLink, *I’m Living Proof that Truth Can Set You Free*, at <http://www.family.org/cforum/research/papers/a0002798.html> (last modified Sept. 15, 1998) (advertisement). Another advertisement showed a picture of “[a] recent gathering of Exodus, a nationwide ex-gay ministry [that] drew more than 850 former homosexuals to Seattle to proclaim that hope for change is possible for those still struggling with homosexuality.” CitizenLink, *We’re Standing for the Truth that Homosexuals Can Change*, at <http://www.family.org/cforum/research/papers/a0002799.html> (last modified Sept. 15, 1998) (advertisement). A third advertisement was addressed to the parents of homosexuals and made an explicit link between homosexuality and unhealthy sexual practices. See CitizenLink, *From Innocence to AIDS. One Mother’s Plea to the Parents of Homosexuals*, at

“wife, mother, former lesbian,” and who, along with her ex-gay husband, later appeared on the front page of *Newsweek*.³³³ Another advertisement showed a picture of a young boy blowing out the candles on his birthday cake.³³⁴ Entitled *From Innocence to AIDS. One Mother's Plea to the Parents of Homosexuals*, it told parents to never accept a child's homosexuality because “[t]he life you save may be your child's.”³³⁵

Mainstream pro-gay organizations that advocate an identity model of homosexuality frequently take issue with the legitimacy of the ex-gays' message.³³⁶ Unfortunately, the debate often devolves to whether reparative therapy really can change an individual's true sexual orientation, characterizing sexual orientation as immutable and as impossible to change as the proverbial spots on the leopard. Working from a framework of immutability, the response to ex-gays is that they really are still gay, despite what they might say, or they really never were gay in the first place, despite what they might say. Neither side allows for the fluidity of object choice independent of identity that was present in Hall's explanation of the normal girl who gives her love to an invert and in the writings of the early sexologists.

The pro-family organizations make no attempt to silence the homosexual narratives of ex-gays because the contagion model demands, not only the suppression of positive articulations of homosexuality, but also requires the articulation of a counter vision. And, who better to tell the story than someone who has actually been

<http://www.family.org/cforum/research/papers/a0002802.html> (last modified Sept. 15, 1988) (advertisement). Finally, one advertisement entitled *In Defense of Free Speech* featured former Green Bay Packer Reggie White who had been criticized in the media for his statement describing homosexuality as a “sin.” See CitizenLink, *In Defense of Free Speech*, at <http://www.family.org/cforum/research/papers/a0002800.html> (last modified Sept. 15, 1998) (advertisement). The advertisement declared “[j]ust because we disagree doesn't make us homophobic.” *Id.*

333. See John Leland & Mark Miller, *Can Gays 'Convert'? A Controversial Series of Ads Claims that Homosexuals Aren't Born that Way, and Can Change. A Look Inside the 'Ex-Gay' Movement, and the Elusive Science of Sexual Orientation*, NEWSWEEK, Aug. 17, 1998, at 46; CitizenLink, *I'm Living Proof that Truth Can Set You Free*, at <http://www.family.org/cforum/research/papers/a0002798.html> (last modified Sept. 15, 1998) (advertisement).

334. See CitizenLink, *From Innocence to AIDS. One Mother's Plea to the Parents of Homosexuals*, at <http://www.family.org/cforum/research/papers/a0002802.html> (last modified Sept. 15, 1988) (advertisement).

335. *Id.*

336. For example, a publication of the National Gay and Lesbian Task Force states: “Ex-gay movement leaders claim that homosexuals can convert to heterosexuality, but . . . the treatment goal is to teach gay men and lesbians to repress their homosexual identity.” CHALLENGING THE EX-GAY MOVEMENT: AN INFORMATION PACKET 4 (1998).

there and done that. In this way, the testimony of “ex-gays” offers a first hand indictment of the immoral and unhealthy gay lifestyle.³³⁷ In the FRC position paper, *How Domestic Partnerships and “Gay Marriage” Threaten the Family*, the section entitled *The Myth of Homosexual Monogamy*³³⁸ concludes with a statement by a former homosexual that “[i]n the gay life, fidelity is almost impossible.”³³⁹ The emphasis on promiscuity highlights that in the wake of the HIV/AIDS epidemic, gay (male) sex is an unhealthy, as well as immoral, practice.³⁴⁰ The *Mother’s Plea* advertisement, described above, explains to the uninitiated that “[h]omosexuality is often a fast life of anonymous sex, drugs, alcohol, physical exhaustion in pursuit of pleasure, and even physical violence.”³⁴¹

The impact of the understanding of homosexuality as immoral and unhealthy was clearly evident in the 1996 congressional debate over

337. Herman notes that “discussions of homosexual behavior are replete with images of disease-ridden gay men.” HERMAN, *supra* note 6, at 76. In addition to the testimony of ex-gays, pro-family organizations often cull their information regarding same-sex desire and sexuality from gay and lesbian writings. *See id.* at 78.

338. Promiscuity has become an increasingly prominent topic in the wake of the same-sex marriage debate. *See* Robert H. Knight, *How Domestic Partnerships and “Gay Marriage” Threaten the Family*, Family Research Council: Insight, available at <http://www.frc.org/insight/is94f5hs.html> (last visited Jan. 31, 2001).

339. *Id.* (quoting former homosexual William Aaron).

340. *See id.* HIV/AIDS figures prominently in anti-gay rhetoric, and pro-family organizations often cite epidemiological statistics from the Centers for Disease Control (“CDC”) and the journal entitled *AIDS*. *See id.* (citing a study published in the journal *AIDS*). *See also* CitizenLink, *We’re Standing for the Truth that Homosexuals Can Change*, at <http://www.family.org/cforum/research/papers/a0002799.html> (last modified Sept. 15, 1998) (citing CDC statistics). Pro-family publications also describe gay male sexual practices in lurid detail. Herman notes that “[g]ay men are accused of playing with urine and excrement, of having a hugely disproportionate incidence of sexually transmitted diseases, and of being generally ravaged, physically and spiritually.” HERMAN, *supra* note 6, at 76. The dissemination of the misinformation regarding gay male sexuality reached its apex in the struggle over Amendment 2 in Colorado. The organization Colorado for Family Values distributed materials with detailed statistics regarding what (male) homosexuals supposedly did in bed. *See* GALLAGHER & BULL, *supra* note 340, at 115. The 1992 video, *The Gay Agenda*, also featured statistics on sexual practices. *See* HERMAN, *supra* note 6, at 80. The statistics cited in the video by Dr. Monteith were based on a widely disputed study conducted by the Family Research Institute led by Dr. Paul Cameron. David Colker, *Statistics in ‘Gay Agenda’ Questioned; Videotape: Critics Say Figures on Sex Practices Cited by Doctor Are Not Reliable*, L.A. TIMES, Feb. 22, 1993, at A16. Doubtless, many lesbians were surprised to learn that “100% of all homosexuals engage in fellatio.” Videotape: *The Gay Agenda* (Springs of Life Ministries 1992) (on file with the author). The video was sent to members of Congress and widely distributed within the Pentagon during the “Gays in Military” debate. *See* Carleton R. Bryant, *Pro-Ban Forces Circulate Graphic Video on Gays*, WASH. TIMES, Jan. 26, 1993, at A10. It was also screened by the Joint Chiefs of Staff. HERMAN, *supra* note 6, at 80.

341. CitizenLink, *From Innocence to AIDS. One Mother’s Plea to the Parents of Homosexuals*, at <http://www.family.org/cforum/research/papers/a0002802.html> (last modified Sept. 15, 1988).

DOMA.³⁴² Given that gay life is so pleasure driven, many argued, it was a mockery of the sanctity of the marriage of one man to one woman to even consider giving same-sex relationships legal recognition. Not only did the FRC and other pro-family organizations testify before Congress, but many of their statistics and accounts of the homosexual lifestyle were later repeated by members of Congress and entered into the record as fact.³⁴³ For example, Representative Coburn reported authoritatively that “over 43 percent of all people who profess homosexuality have greater than 500 partners,”³⁴⁴ while Representative Barr observed that “[t]he flames of hedonism . . . are licking at the very foundations of our society: the family unit.”³⁴⁵ Despite the fact that there was no realistic chance that a wave of same-sex marriage laws (or judicial decisions) was going to sweep the nation in 1996, it was important for Congress to proscribe same-sex marriage and, in so doing, bolster the counter vision of homosexuality as contagion.³⁴⁶ The concern was that if Congress failed to act, it would have sent a terrible message to children and directly challenged the prerogative of parents to control the moral training of their children.³⁴⁷

342. DOMA defines “marriage” and “spouse” for all purposes of federal law. It added the following amendment to the United States Code:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (Supp. IV 1999). DOMA also purports to grant states the power to refuse to recognize same-sex marriages from sister states. *See id.* Commentators have pointed out that this last provision may not be consistent with the Full Faith and Credit Clause of the United States Constitution. *See generally* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1976-80 (1997).

343. *See, e.g.*, Knauer, *supra* note 319, at 195 n.330 (noting that Representative Delay cited the FRC as a source for historical data).

344. 142 CONG. REC. H7441-44 (daily ed. July 11, 1996) (statement of Rep. Coburn) (substantiating his later claim that homosexuality is a “perversion” and “immoral”).

345. 142 CONG. REC. H7480-82 (daily ed. July 12, 1996) (statement of Rep. Barr).

346. States began to enact legislation that defined marriage as the union of one man and one woman after the 1993 Hawaiian Supreme Court decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). For a discussion of the increased legislative activity in the 1996 presidential campaign year, see Knauer, *supra* note 319, at 185-89.

347. *See* Knauer, *supra* note 319, at 194-95 (discussing both the concern over children and undermining parental teachings).

2. The Status/Acts Divide, Sodomy Laws, and Suspect Classification

In addition to providing rhetorical force for policy and legislative decisions, such as DOMA, the insistence that homosexuality is an immoral act that is freely chosen provides a counter point to a litigation strategy adopted by some pro-gay activists. Since *Bowers v. Hardwick*,³⁴⁸ pro-gay activists have attempted to create and litigate around a distinction between a homosexual act and the status of being homosexual, arguing that even if the law can criminalize an act, an individual should not suffer any adverse consequences simply because of her status as a homosexual.³⁴⁹ The more pro-gay organizations stress status, the more pro-family organizations stress that acts are the defining feature of the homosexual. There is no lifestyle or identity, simply immorality. Homosexuality is no more a lifestyle, deserving of legal protection, than is sado-masochism or adultery.³⁵⁰ Even if sexual orientation were considered a valid lifestyle, the fact that individuals can come out of homosexuality defeats any attempt to categorize sexual orientation as an immutable characteristic and attain suspect classification.³⁵¹ Obviously, homosexuals are trying to get “special

348. 478 U.S. 186 (1986). *Bowers v. Hardwick* affirmed the ability of states to criminalize homosexual behavior, finding no protection for homosexual sodomy in the constitutional right of privacy based on an interpretation of our nation's history and tradition. *See id.* at 190, 192-94, 196.

349. For a discussion of the split between acts and identity, see Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993).

350. For example, a FRC position paper asks whether schools should include “an all day workshop on prostitution? Or an in-school seminar on adultery?” Peter LaBarbera, *Top 10 Strategies Used by Homosexual Activists in Schools*, Family Research Council: Insight, available at <http://www.frc.org/papers/insight/index.cfm?get=IS99F4&arc=yes> (last visited Jan. 19, 2000).

351. There is only one federal appellate court decision holding that homosexuals constitute a suspect class under existing equal protection jurisprudence. *See Watkins v. United States Army*, 847 F.2d 1329, 1345, 1349 (1988), *different result reached on reh'g*, 875 F.2d 699, 711 (9th Cir. 1989) (finding that homosexuals have suffered a history of purposeful and invidious discrimination).

The Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. State and federal laws or policies that extend benefits, protections, or burdens based on certain classifications or categories of individuals are always subject to the mandate of the Equal Protection Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (holding that the Due Process Clause of the Fifth Amendment extends equal protection safeguards to federal laws and policies). Most classifications or categories need only bear a rational basis to a legitimate state interest. However, certain types of classifications require a higher degree of justification. The so-called “suspect classification” based on race is subject to a higher level of judicial scrutiny that requires the state to show that the classification is narrowly drawn to further a compelling state interest. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967). The designation of suspect classification is designed to combat “prejudice against discrete and insular minorities” and is derived from the famous footnote four in the *Carolene Products* case. *See United States v. Carolene Prods., Co.*, 304 U.S. 144, 152 n.4 (1938). A form of heightened or intermediate scrutiny is often applied to classifications based on gender, in which case the classification must serve an important, rather than a compelling, state interest. *See United States*

rights” based on their sexual tastes, something that society would not ever consider extending to any other group with deviant inclinations.

As noted above, the status-versus-acts divide is necessitated by the existence of sodomy laws that continue to criminalize private consensual noncommercial sex between consenting adults—laws that pro-family organizations wholeheartedly support.³⁵² The continued constitutionality of criminal sodomy statutes sends a powerful message regarding the value of same-sex sexuality and intimacy. Even if they are rarely enforced, sodomy statutes can be used to validate, excuse, or even compel differential treatment in the areas of employment, housing, and child custody because every declared homosexual is a presumptive sodomite.³⁵³

Perhaps the best known, and most litigated, example of this is the case of Robin Shahar, whose job offer for a position as a lawyer with the Georgia State Attorney General’s Office, then headed by Michael Bowers, was rescinded after she announced to several of her colleagues

v. Virginia, 518 U.S. 515, 523-24 (1996). The *Watkins* case provides a very detailed application of the constitutional requirements for suspect classification status to sexual orientation. See *Watkins* 847 F.2d at 1345-49, *different result reached on reh’g*, 875 F.2d at 711.

352. Currently, there are sixteen states which criminalize sodomy. See Lambda Legal Defense and Education Fund, *State-by-State Sodomy Law Update*, Lambda Legal Defense Fund: Resources, at <http://www.lambdalegal.org/cgi-bin/pages/documets/record?record=275> (last modified June 14, 2000). In recent years, a number of states’ sodomy laws have been either repealed or overturned by judicial decisions. Although the trend seems to be toward the abolishment of sodomy statutes, the Supreme Court of Louisiana recently upheld that state’s sodomy law. See *State v. Smith*, 99-0606 (La. 2000), 766 So. 2d 501, 511-12. In addition, four states have sodomy laws that only apply to same-sex sodomy. These states are Arkansas, Kansas, Oklahoma, and Texas. See ARK. CODE ANN. § 5-14-122 (Michie 1997) (criminalizing acts with “a person of the same sex or an animal”); KAN. STAT. ANN. § 21-3505 (1995) (criminalizing acts between “members of the same sex or between a person and an animal”); OKLA. STAT. ANN. tit. 21, § 886 (West Supp. 2001) (interpreting “crimes against nature” to apply to same-sex acts); TEX. PENAL CODE ANN. § 21.06 (Vernon 1994) (criminalizing “sexual intercourse with another individual of the same sex”). The Arkansas and Texas statutes are currently subject to court challenges. See Lambda Legal Defense and Education Fund, *State-by-State Sodomy Law Update*, Lambda Legal Defense and Education Fund: Resources, at <http://www.lambdalegal.org/cgi-bin/pages/documets/record?record=275> (last modified June 14, 2000). According to the FRC, the consequences of legalizing sodomy are far-reaching:

[It] would normalize [homosexuality] and encourage it. It would endanger not only the physical health but also the moral health of our nation. It would erode the legal basis to withhold full marital status to homosexual couples, to prevent harmful sex practices being taught in schools, and to give homosexuals the “right” to raise children.

Steven A. Schwalm, *Sodomy Laws Set Needed Standards*, FRC/Family Research Council Articles, available at <http://frc.org/articles/ar9815hs.html> (last visited Aug. 27, 2000).

353. For example, in the much publicized custody fight between Sharon Bottoms and her mother for the custody of Sharon Bottoms’ son, the Virginia Supreme Court noted that although “a lesbian mother is not *per se* an unfit parent” the “[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth; thus, that conduct is another important consideration in determining custody.” *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995).

that she and her partner were planning a religious commitment ceremony.³⁵⁴ Even though Shahar did not invite any of her colleagues to join her on her honeymoon, her status as a presumptive sodomite and a proponent of same-sex marriage was sufficient to justify Bower's recession of the offer because the continued employment of Shahar would undermine public confidence in the commitment of the Attorney General's Office to enforce the laws of the State of Georgia.³⁵⁵ The court agreed with the Attorney General that the presence of an openly gay employee "can undo an office."³⁵⁶

The United States military's "Don't Ask, Don't Tell" policy purports to accept the distinction drawn by pro-gay organizations between acts and status, but where it draws the line to separate acts from status has been a continued source of comment and criticism.³⁵⁷ The Department of Defense regulations interpreting the policy provide that "[s]exual orientation is considered a personal and private matter, and is not a bar to continued service under [the regulations] unless manifested by homosexual conduct."³⁵⁸ Thus, under the existing policy, the statement that "I'm gay" is sufficient to warrant separation from the service because it constitutes a prohibited act of homosexuality.³⁵⁹ The quiet, closeted, gay service member is not under threat of separation from the service provided he does not engage in any prohibited physical contact and that he is able to disprove his sexual orientation in case he is

354. See *Shahar v. Bowers*, 114 F.3d 1097, 1106, 1110 (11th Cir. 1997) (issuing a holding based on the *Pickering* balancing test that, even if Shahar's case implicated the right to intimate association or the right to expressive association, the employer's interest "in promoting the efficiency of the Law Department's important public service does outweigh Shahar's personal associational interests").

355. The court was referring to *Bowers v. Hardwick* when it wrote that the Law Department "had already engaged in and won a recent battle about homosexual sodomy—highly visible litigation in which its lawyers worked to uphold the lawful prohibition of homosexual sodomy." *Id.* at 1108. The court accepted the Attorney General's claim that, in light of that recent litigation, the presence of Shahar in the office could result in "loss of morale, loss of cohesiveness and so forth." *Id.*

356. *Id.* Specifically, the court found that the Attorney General was not unreasonable in his assertion that permitting an openly gay lawyer to serve in the Law Department could lead to confusion and undermine office cohesion because "[d]oubt and uncertainty of purpose can undo an office." *Id.* This statement is very close to the 1950 pronouncement that "[o]ne homosexual can pollute an entire office" from the Senate Investigating Committee's report on *Employment of Homosexuals and Other Sex Perverts in Government*. See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 174 (1997) (quoting the report).

357. See generally JANET E. HALLEY, *DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY* (1999) (discussing in depth the military's policy on homosexuals).

358. Department of Defense Directive, 1333.14, at E3.A.1.8.1.1 (1993).

359. See 10 U.S.C. § 654(b)(2) (1994).

investigated.³⁶⁰ However, the statement “I’m gay” carries with it such expressive power that it is not simply a passive statement of status. It is homosexuality.³⁶¹

At the time of the “Gays in the Military” debate, attempts to compare President Clinton’s proposal to lift the ban on gays to the end of racial desegregation of the armed services were roundly rejected by many concerned commentators, including then-Chairman of the Joint Chiefs of Staff, Colin Powell.³⁶² Since then, Powell’s testimony that sexual orientation was not analogous to race has been frequently cited in pro-family publications.³⁶³ Pro-family organizations consider the ability to distinguish homosexuals from other real and deserving minorities as necessary to deflect the potentially sympathetic pro-gay appeals for civil rights.³⁶⁴ Moreover, asserting that, contrary to race, sexual orientation is “changeable behavior widely regarded as immoral while [race] is an immutable, inborn, and innocuous trait”³⁶⁵ undermines attempts to construct sexual orientation as a recognized suspect classification for purposes of constitutional jurisprudence.³⁶⁶ Once it is established that homosexuality is not the same as race, the stage is set for the “special

360. See generally Defense Directive 1332.14, at E3.A1.1.8.1.2, E3 A1.1.8.4.5 (explaining the burdens of proof applicable to such a proceeding). On the other hand, the service member who does engage in homosexual physical contact may be permitted to stay in the service if, inter alia, the contact is a “departure from the member’s usual and customary behavior” and “the member does not have a propensity or intent to engage in homosexual acts.” Defense Directive 1332.14, at E3.A1.1.8.1.2.

361. During the House and Senate hearings concerning gays in the military, General Norman Schwarzkopf endorsed the view that a statement of homosexual status equaled homosexual conduct. See ESKRIDGE & HUNTER, *supra* note 356, at 395-96 (citing *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Committee on Armed Services* (May 11, 1993)). More specifically, General Schwarzkopf agreed with Senator Levin’s following characterization of his testimony: “‘You said that the statement I am a homosexual, that is conduct in your book.’” *Id.* at 395 (excerpting the hearings).

362. See GALLAGHER & BULL, *supra* note 319, at 134-38. President Truman issued Executive Order 9981 on July 26, 1948 mandating equal opportunity “for all persons in the armed services without regard to race, color, religion or national origin.” Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948). Truman’s Executive Order was cited as precedent for Clinton’s proposal to lift the ban on gays serving openly in the military by Executive Order. See Ann Scales, *President Takes Stand on Gay Rights: In Speech, Promotes Equality as Part of ‘One America’ Push*, BOSTON GLOBE, Nov. 9, 1997, at A1.

363. For a discussion of Powell’s high profile statements during the debate, see GALLAGHER & BULL, *supra* note 319, at 134-38 (stating that Powell’s opposition to lifting the ban on gays in the military “would help inoculate the pro-ban forces from charges of prejudice”).

364. Herman spends a chapter outlining the development of this strategy. See HERMAN, *supra* note 6, at 111-36.

365. LaBarbera, *supra* note 350, available at <http://www.frc.org/papers/insight/index.cfm?get=IS99F4&arc=yes> (last visited Jan. 19, 2000).

366. For a discussion of *Watkins v. United States Army*, 847 F.2d 1329 (1988), see *supra* note 351.

rights” campaign under which gays are constructed as a particularly powerful minority seeking special rights for their immoral lifestyle.³⁶⁷

C. *Homosexuals Prey on Innocent Victims*

If homosexuality were simply a “loathsome vice,” there might not be that much cause for alarm. The real problem, according to pro-family organizations, is that homosexuals actively recruit others to practice their immoral and unhealthy habits. One of the most salient features of the contagion model is that everyone in society is potentially at risk because homosexuality is very seductive and, apparently, has universal appeal.³⁶⁸ According to pro-family literature, the present-day homosexual predator/recruiter has three faces: (1) the older lesbian;³⁶⁹ (2) the gay activist;³⁷⁰ and (3) the male pedophile.³⁷¹

Notwithstanding the general threat to society, pro-family organizations typically emphasize the need to protect children because they can most easily be led astray.³⁷² Building on the construction of same-sex sexuality as unhealthy, pro-family organizations contend that society has not only a moral, but also a public health interest in preventing homosexuals from preying on innocent victims. A FRC position paper warns: “From every medical and health aspect . . . including the probability of becoming infected with AIDS—it is tragic, even criminal to lead a child into homosexuality because he or she showed some degree of sexual confusion in adolescence.”³⁷³

For pro-family organizations, Anita Bryant’s original rallying call—“Save Our Children”—has taken on a renewed urgency. Homosexuals are having their own children in what has been called a

367. The construction of gays as a very small and disproportionately wealthy and powerful interest group has parallels with the anti-Semitic image of Jews. See HERMAN, *supra* note 6, at 125-28. To illustrate that gays are a very tiny minority, pro-family groups devote considerable resources to establishing that the incidence of homosexuality is much lower than gay activists have led Americans to believe. See *id.* at 74 (noting that this also shows that gay activists are “duplicit[ous]”).

368. This is consistent with the views of Magistrate Bushnell who explained that everyone is at risk and susceptible to bad influences, not simply the weak-willed and the young. See *supra* Part IV.C.2.

369. See *infra* Part V.C.1.

370. See *infra* Part V.C.2.

371. See *infra* Part V.C.3.

372. This assumes that children, in particular, possess “a malleable sexuality, vulnerable to persuasion.” HERMAN, *supra* note 6, at 79 (discussing the construction of children in the pro-family “discourse of seduction”).

373. LaBarbera, *supra* note 350, available at <http://www.frc.org/papers/insight/index.cfm?get=IS99F4&arc=yes> (last visited Jan. 19, 2000).

“gayby boom.”³⁷⁴ Homosexual activists are litigating a number of different school issues, including access for gay-straight student clubs and anti-gay harassment.³⁷⁵ And, finally, homosexuals have even led an assault on the Boy Scouts.³⁷⁶ The traditional stereotype of the male homosexual as pedophile³⁷⁷ informs much of this concern, although the pedophile is subsumed within the image of the gay activist who actively recruits young people as part of a larger political program. The FRC cautions parents that “[g]rooming young students for ‘coming out’ as homosexuals, bisexuals and ‘transgenders’ is a central plank of the homosexual education movement.”³⁷⁸

1. The Adult Victim

An interesting corollary to the children-as-victim is the growing tendency of some pro-gay groups to characterize a woman in a lesbian relationship as a victim of an often-abusive female partner.³⁷⁹ Contradicting generally accepted estimates that the incidence of domestic violence does not vary between same-sex and opposite-sex couples,³⁸⁰ The FRC reports that the incidence of domestic violence is 47.5% in lesbian relationships and only 0.22% in heterosexual

374. Barbara Kantrowitz, *Gay Families Come Out: Same-Sex Parents Are Trying to Move Out of the Shadows and into the Mainstream. Will They—And Their Kids—Be Accepted?*, NEWSWEEK, Nov. 4, 1996, at 50, 52 (referring to the recent increase in gay families with children as a “gayby boom”).

375. Advocacy organizations such as the Lambda Legal and Education Fund have successfully asserted the rights of students who are perceived as gay to be free of harassment and violence while at school. See *Nabozny v. Podlesny*, 92 F.3d 446, 449, 458 (7th Cir. 1996) (finding that the school district violated a student’s equal protection rights when it failed to respond to complaints of continued harassment due to the student’s sexual orientation).

376. For a discussion of *Dale v. Boy Scouts of America*, 734 A.2d 1196 (N.J. 1999), see *infra* Part V.C.4.

377. For a discussion of the long-standing stereotype of the male homosexual as a pedophile, see HERMAN, *supra* note 6, at 78-80. The assertions of the pro-family groups often are fueled by the activities of the North American Man-Boy Love Association (“NAMBLA”), an organization that promotes intergenerational sex. See *id.* at 79.

378. LaBarbera, *supra* note 350, available at <http://www.frc.org/papers/insight/index.cfm?get=IS99F4&arc=yes> (last visited Jan. 19, 2000). The testimony of former lesbian Anne Paulk reinforces the fear that students will be influenced by gay role models in the schools when she explains: “My sexual attraction to women blossomed in college, and after a gay counselor affirmed my feelings I joined the campus gay/lesbian group.” CitizenLink, *I’m Living Proof that Truth Can Set You Free*, at <http://www.family.org/cforum/research/papers/a0002798.html> (last modified Sept. 15, 1998). For a discussion of the dangers of gay school counselors, see *infra* text accompanying notes 462-64 (discussing *Rowland v. Mad River Local School District*, 730 F.2d 444 (6th Cir. 1984)).

379. See Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 331-33 (1999).

380. See *id.* at 329 n.16.

relationships.³⁸¹ The introduction of an abusive female partner adds the element of danger and destructiveness that had been missing in the pro-family characterizations of lesbians, but that was so easily provided by HIV/AIDS in the context of relationships between men.³⁸² A FRC press release by a “former lesbian,” makes this connection explicit: “I saw fifteen of my friends die of AIDS, and I, along with many of my former lesbian friends, was a victim of domestic violence.”³⁸³

2. The “Trophy Children”

Lawmakers debating DOMA worried that recognition of same-sex relationships would send a bad signal to the children. An even larger concern of pro-family organizations, however, is reserved for the children being raised by same-sex couples or gay or lesbian parents. The concern is twofold. First, pro-family organizations assert that same-sex couples will “exploit [their children] in order to make some political point.”³⁸⁴ The second concern is that being raised by parents in a same-sex relationship poses a “clear danger . . . to children’s development of healthy sexual identities.”³⁸⁵ The message is clear: Gay parents will produce gay children.³⁸⁶

381. See Family Research Council, *Culture Facts October 21, 1998*, available at <http://www.frc.org/culture/cu98j3.html> (last visited July 9, 2000) (reporting an increase in same-sex domestic violence).

382. See Knauer, *supra* note 379, at 332 (noting that “[s]ame-sex domestic violence provides an opportunity to craft an independent image of lesbian relationships as violent and dangerous”). Pro-family groups are generally at a loss for a consistent way to characterize lesbians, sometimes adding them in with gay men almost as an afterthought and more often associating them more closely with feminism. Herman contends that the prevailing characterization of lesbians is as radical feminists and that the image of the highly sexualized predators is secondary. See HERMAN, *supra* note 6, at 103. For a general discussion of the difficulty in conceptualizing the lesbian, see generally *id.* at 92-110.

383. Family Research Council, *Homosexuals Can Change, But Should Not Be Forced*, FRC Says, available at <http://www.frc.org/press/121598.html> (last visited July 9, 2000) (quoting Yvette Cantu, FRC Policy Analyst).

The “woman-as-victim” scenario preserves the distinction between the true invert/homosexual and the “normally sexed” woman that so troubled Magistrate Bushnell. See text accompanying *supra* note 265.

384. Katherine Q. Seelye, *House Approves Measure Barring Gay Adoptions in Washington*, N.Y. TIMES, Aug. 8, 1998, at A12 (quoting Rep. Steve Largent).

385. Knight, *supra* note 338, available at <http://www.frc.org/insight/is94f5hs.html> (last visited Jan. 31, 2001).

386. Gallagher and Bull explain that pro-family groups believe that “gay parenting is itself a form of recruitment.” GALLAGHER & BULL, *supra* note 319, at 222. Since homosexuality is considered a psychological response to compensate for a developmental stunted gender identity, a child with same-sex parents (or a non-heterosexual parent) will likely turn to homosexuality because he or she will never be able to “understand true femininity or true masculinity.” *Id.* at 223 (quoting a pro-family publication).

The fears over gay and lesbian parenting are expressed in judicial decisions denying custody or visitation rights based on a parent's sexual orientation,³⁸⁷ the refusal of courts and legislatures to allow second parent adoptions,³⁸⁸ and the reluctance of courts to recognize parenting rights of non-biological co-parents.³⁸⁹ It also was used repeatedly in connection with DOMA debate on both the federal and the state levels: If same-sex couples are able to marry or form legally recognizable domestic partnerships, what will stop them from adopting children?³⁹⁰ Very often, it is the law that prevents them, such as when Representative Steve Largent voted to ban adoptions by same-sex couples in the District of Columbia because he did not think that same-sex couples should be able to use children as ““trophies from the culture war.””³⁹¹

3. But, It Is Not Just Their Own Kids

Homosexuals are not content to recruit simply their own children. All of the nation's schoolchildren are at risk because homosexual activists have infiltrated the schools, first under the guise of sex education training and now in the form of diversity or multicultural training because “[d]iversity’ is a vogue concept that is being used to advance the homosexual agenda.”³⁹² A FRC position paper urges parents

387. See *supra* note 355.

388. See ESKRIDGE & HUNTER, *supra* note 356, at 832-33 (providing an overview of custody and sexual orientation).

389. See generally William B. Rubenstein, *Divided We Propagate: An Introduction to Protecting Families: Standards for Child Custody in Same-Sex Relationships*, 10 UCLA WOMEN'S L.J. 143, 145 (1999); Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child*, 66 TENN. L. REV. 1019, 1019 (1999).

390. At a FRC-sponsored Capitol Hill briefing, the speaker, who assumed that adoption by homosexuals was not “in the best interest” of children, concluded that “[k]ids do not care about being politically correct. They just want a mommy and a daddy.” Mary Beth Style, *Defense of Marriage Act: How Adoption Policy is Affected*, Family Research Council: At the Podium, available at <http://www.frc.org/podium/pd96g8hs.html> (last visited Aug. 26, 2000). According to pro-family organizations, same-sex couples not only pose a danger to their children's healthy sexual identities, but by definition, they are not even a family. See Knauer, *supra* note 319, at 191 (discussing Rep. Largent's objection to motherless and fatherless families).

391. Seelye, *supra* note 384 (quoting Rep. Largent).

392. Robert L. Maginnis, *Federal Government Promotes Homosexuality Using “Diversity” Cover*, Family Research Council: Insight, at <http://www.frc.org/insight/is94l2hs.html> (last visited Aug. 26, 2000). The fight over diversity training in the curriculum received national attention in 1990 when New York City attempted to adopt a multicultural curriculum, *Children of the Rainbow*, that included several references to same-sex relationships. See GALLAGHER & BULL, *supra* note 319, at 219-20 (describing the joint efforts of the Archdiocese of New York and the Christian Coalition). The most shocking element of the curriculum was that its bibliography contained three children's books dealing with children being raised by gay or lesbian parents, including the incendiary *Heather Has Two Mommies*. See *id.*

to take this threat seriously: “Of all the advances of the homosexual agenda, perhaps none is more disturbing than the penetration of the nation’s schools with messages and programs designed to teach homosexuality as normative.”³⁹³ In its step-by-step guide entitled *How to Protect Your Children From Pro-Homosexuality Propaganda in Schools*,³⁹⁴ The FRC instructs concerned parents not to wait until their school actually implements such curricular changes.³⁹⁵ The key is to be pro-active: “Before the school year even begins, write a letter to your principal asking him if he or any other school administrator, or any teacher, has attended ‘diversity’ or ‘tolerance’ seminars dealing with ‘sexual orientation.’”³⁹⁶ In particular, parents are encouraged to ask if the school has even sent its teachers to seminars sponsored by Parents, Friends, and Families of Lesbians and Gays (“PFLAG”) or the Gay, Lesbian and Straight Education Network (“GLSEN”).³⁹⁷ Parental (or state) control over the educational experience is of paramount importance because:

Children are the prize to the winners of the second great civil war. Those who control what young people are taught and what they experience—what they see, hear, think, and believe—will determine the future course of the nation. Given that influence, the predominant

393. LaBarbera, *supra* note 350, *available at* <http://www.frc.org/papers/insight/index.cfm?get=IS99F4&arc=yes> (last visited Jan. 19, 2000).

394. LaBarbera, *supra* note 319, *available at* <http://www.frc.org/papers/infocus/index.cfm?get=IF99J1&arc=yes> (last visited Jan. 31, 2001).

395. *See id.*

396. *Id.*

397. *See id.* The FRC very closely monitors the activities of the Gay Lesbian and Straight Education Network (“GLSEN”). Its weekly newsletter on “homosexual culture,” called *Culture Facts*, reported in great detail the result of an undercover investigation of a GLSEN workshop for youth at its annual conference. *See* Family Research Council, *GLSEN Workshop Guides Underage Youth in ‘Gay’ Sex Technique*, Family Research Council: Culture Facts, *available at* <http://www.frc.org/papers/culturefacts/index.cfm?get=CU00E1&arc=yes> (last modified May 3, 2000). The GLSEN workshop was entitled *What They Didn’t Tell You About Queer Sex & Sexuality in Health Class*. *See id.* The FRC described the workshop as “‘how-to’ lessons in homosexual acts such as lesbian sex and ‘fisting.’” *Id.* A pro-family activist attended the workshop and recorded the proceedings “to prove to skeptical outsiders that GLSEN promotes a ‘radical sexual agenda.’” *Id.*

Pro-family organizations stress that diversity training—i.e., pro-homosexual propaganda—starts as young as kindergarten. In the *Top Ten Strategies Used by Homosexual Activists in Schools*, strategy number two is “[s]tart with [v]ery [y]oung [c]hildren.” LaBarbera, *supra* note 350, *available at* <http://www.frc.org/papers/insight/index.cfm?get=IS99F4&arc=yes> (last visited Jan. 19, 2000). Indeed, the Web site of GLSEN includes training materials that are labeled “age appropriate” for kindergarten and elementary school, such as *Advice to Teachers: Tinky Winky in the Classroom*. *See* GLSEN, *Advice to Teachers: Tinky Winky in the Classroom*, Resources: Curricula, *at* <http://www.glsen.org/templates/resources/record.html?section=16&record=36> (Jan. 1, 1999).

value system of an entire culture can be overhauled in one generation, or certainly in two, by those with unlimited access to children.³⁹⁸

a. Curriculum Issues

Some of the most sustained fights over curriculum content have been in the area of sex education, specifically HIV/AIDS prevention, where pro-family groups in favor of abstinence-based programs have clashed with advocates of safer sex instruction.³⁹⁹ To pro-family organizations, homosexual acts are synonymous with disease and death.⁴⁰⁰ Any discussion of safer gay sex is anathema. Under the contagion model of homosexuality, a condom demonstration in a high school health class can easily be read as providing children with a “how to” primer in vice, or worse, “condemning [them] to death by AIDS.”⁴⁰¹

Parental objections to curricular components dealing with homosexuality, whether it be safer sex instruction or diversity training, have led several jurisdictions to legislate the content of their curriculum to insure that homosexuality is not portrayed in a favorable light.⁴⁰²

398. HERMAN, *supra* note 6, at 85 (quoting a publication authored by James Dodson, founder of Focus on the Family, and Gary Bauer, former president of the FRC) (internal quotation marks omitted).

399. Herman notes that pro-family groups believed that “HIV/AIDS education in particular was used by the gay movement as a cover for homosexual designs on youth.” HERMAN, *supra* note 6, at 83. For a description of the abstinence-based sex education materials, see People for the American Way, *Teaching Fear: The Religious Right’s Campaign Against Sexuality Education*, at <http://www.pfaw.org/issues/right/teachingfear96.shtml> (last visited Jan. 30, 2001); see also NARAL: Productive Freedom & Choice, *The Need for Comprehensive Sexuality Education*, NARAL Resources, at <http://www.naral.org/mediareources/fact/sexed.html> (last visited Jan. 30, 2001).

400. See People for the American Way, *Teaching Fear: The Religious Right’s Campaign Against Sexuality Education*, at <http://www.pfaw.org/issues/right/teachingfear96.shtml> (last visited Jan. 30, 2001) (quoting Dr. Robert L. Simonds of the pro-family organization Citizens for Excellence).

401. *Id.* (quoting Simonds).

402. There is considerable activity designed to implement abstinence-based programs that, to quote the federal legislation funding such programs, “teaches that a mutually faithful monogamous relationship in [the] context of marriage is the expected standard of human sexual activity.” 42 U.S.C. § 710(b)(2)(D) (Supp. IV 1999). Even if these programs do not teach anything expressly negative about homosexuality, it is clear that a same-sex relationship, absent equal marriage rights, could never satisfy “the expected standard of human sexual activity.” *Id.* Not only do such relationships necessarily fall short, but according to the abstinence-based programs, will “likely . . . have harmful psychological and physical effects,” as will all “sexual activity outside of the context of marriage.” *Id.* § 710(b)(2)(E). The welfare reform legislation of 1996 included matching federal money for state grants to programs with solely abstinence-based instruction. See 42 U.S.C. § 703(a) (1994).

Some jurisdictions mandate that sex education classes teach that homosexuality is illegal and immoral.⁴⁰³ Others jurisdictions simply forbid any curricular reference to homosexuality, even outside the context of discussion on sexuality⁴⁰⁴ or restrict any discussion of homosexuality to “the context of instruction concerning sexually transmitted diseases.”⁴⁰⁵

In virtually identical language, Alabama and Texas require that their sex education programs include an “emphasis” presented “in a factual manner and from a public health perspective” that “homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense.”⁴⁰⁶ Mississippi and North Carolina simply require that their health education programs must include the legal status of homosexual conduct.⁴⁰⁷ Arizona adopts a slightly different approach in that it does not require the teaching of negative “facts” about homosexuality, but instead forbids local school districts from teaching anything that: “[p]romotes a homosexual life-style [sic] [, p]ortrays homosexuality as a positive alternative life-style

403. See *infra* text accompanying notes 406-07.

404. This was the compromise struck by the New York City School Board to resolve the controversy over the *Children of the Rainbow*. See Nancy Tenney, Note, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 BROOK. L. REV. 1599, 1603 n.16 (1995) (quoting a letter from the superintendent announcing board policy). The complete silencing of homosexuality reinforces heteronormativity, but does not participate directly in the maintenance of a counter vision of homosexuality as contagion.

405. S.C. CODE ANN. § 59-32-30(A)(5) (Law Co-op. 1990). The South Carolina Comprehensive Health Education Program provides that the mandatory health education programs to be implemented by local school boards “may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases.” *Id.*

406. ALA. CODE § 16-40A-2(c)(8) (1995); TEX. HEALTH & SAFETY CODE ANN. § 163.002(8) (Vernon 1992). Texas has an additional statutory requirement that applies specifically to HIV/AIDS instruction. See *id.* § 85.007(b)(2) (Vernon Supp. 2001). It requires that the materials in all HIV/AIDS education programs for minors must “state that homosexual conduct is not an acceptable lifestyle and is a criminal offense.” *Id.* Given the recent challenges to the Texas sodomy statute, it will be interesting to see if this language evolves to stress immorality rather than illegality. See Eric Berger & Kathryn A. Wolfe, *Danburg Again Files Bill Seeking Sodomy Law’s Removal*, HOUSTON CHRON., Jan. 20, 2001, at A31 (noting that the 2-1 decision of a three-judge panel of the 14th Court of Appeals that the Texas sodomy violated the state’s constitution is being appealed).

407. See MISS. CODE ANN. § 37-13-171(1)(e) (Supp. 1999); N.C. GEN. STAT. § 115C-81(e1)(3) (1999). In the same section, students in Mississippi also are required to be taught, as part of their abstinence education, “the current state law” related to “forcible rape,” “statutory rape,” “paternity establishment,” and “child support.” MISS CODE ANN. § 37-13-171(1)(e). The North Carolina statute refers to instances where “homosexual acts are a significant means of transmission.” N.C. GEN. STAT. § 115C-81(e1)(3).

[sic] [, or s]uggests that some methods of sex are safe methods of homosexual sex.”⁴⁰⁸

b. Gay Student Groups

On the college and university level, there is a long history of largely unsuccessful attempts by state institutions to deny gay student groups official recognition or access to campus facilities.⁴⁰⁹ The early cases date mostly from the initial post-Stonewall wave of activism when gay student organizations relied on First Amendment precedent established during the anti-war enthusiasm of the late 1960s and early 1970s.⁴¹⁰

408. ARIZ. REV. STAT. ANN. § 15-716(c)(1-3) (West 2000). Louisiana also adopts a negative approach when it forbids any “sex education course offered in the public schools” from using “any sexually explicit material depicting male or female homosexual activity.” LA. REV. STAT. ANN. § 17:281A(3) (West 1999).

409. See, e.g., *Gay Student Servs. v. Tex. A & M Univ.*, 737 F.2d 1317, 1334 (5th Cir. 1984); *Gay Lib v. Univ. of Mo.*, 558 F.2d 848, 857 (8th Cir. 1977); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167 (4th Cir. 1976); *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 663 (1st Cir. 1974); *Student Coalition for Gay Rights v. Austin Peay State Univ.*, 477 F. Supp. 1267, 1273 (M.D. Tenn. 1979); *Wood v. Davison*, 351 F. Supp. 543, 549 (N.D. Ga. 1972).

Private colleges or universities in jurisdictions with anti-discrimination laws covering sexual orientation have also been required to recognize student groups, subject to exemptions for religiously affiliated institutions. See *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 39 (D.C. 1987). For example, in *Gay Rights Coalition of Georgetown University Law Center*, the District of Columbia Court of Appeals, sitting en banc, held that the District of Columbia’s Human Rights Act (the “Act”) could not require the University to “endorse” the student organization because it would impermissibly burden the University’s exercise of religion, but the Act could require the University to distribute “tangible benefits” to the student group given the District’s “compelling interest in eradicating sexual orientation discrimination.” *Id.* Congress amended the Act in 1989 to include an exemption for religiously affiliated institutions. See *Nation’s Capital Religious Liberty and Academic Freedom Act*, Pub. L. No. 101-168, 103 Stat. 1284 (1989) (codified as amended at D.C. CODE ANN. § 1-2520(3) (1999)). The exemption is broader than the holding in the *Georgetown* case and allows religiously affiliated organizations to withhold both benefits and endorsements. See D.C. CODE ANN. § 1-2520(3) (1999). The amendment provides that religiously affiliated institutions may “deny, restrict, abridge, or condition . . . (A) the use of any fund, service, facility, or benefit; or (B) the granting of any endorsement, approval, or recognition, to any person or persons that are organized for, or engaged in, promoting, encouraging, or condoning any homosexual act, lifestyle, orientation, or belief.” *Id.*; see also William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2431-28 (1997) (discussing different approaches to recognizing the equality and liberty interests of gay and religious groups).

410. See *Healy v. James*, 408 U.S. 169, 194 (1972); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

The more recent litigation regarding student activity fees has not been solely targeted at gay student groups, but instead takes aim at a potentially wide range of student organizations, including groups supporting “gay rights, women’s rights, the environment and other causes.” Linda Greenhouse, *No Student Veto for Campus Fees: Justices Affirm College Control of Allocating Activity Funds*, N.Y. TIMES, Mar. 23, 2000, at A1. However, if successful, the litigation could have consequences for the funding of any controversial student group, whether conservative or

Applying a standard developed in connection with the Students for a Democratic Society (“SDS”), federal courts have consistently held that such restrictions imposed on student groups by a state school violated the students’ First Amendment rights of speech and association, absent a showing that the restrictions were necessary to stop “advocacy or conduct [that] is directed at producing or is likely to incite imminent lawless action.”⁴¹¹ Courts have rejected attempts to link gay student activities—even dances—with the imminent commission of sodomy.⁴¹² Notwithstanding the success of these challenges, they show how easily lesbians and gay men can elide with criminality when they organize and litigate in the shadow of sodomy laws.⁴¹³

progressive. Students at the University of Wisconsin challenged the University’s mandatory student activity fee on the grounds that it required them to subsidize student organizations whose speech they found “objectionable, even offensive.” *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 230 (2000). A unanimous Supreme Court held that the viewpoint neutrality with which the University distributed the funds was a sufficient safeguard to First Amendment interests of the objecting students. *See id.* at 229-30. A second student activity fee case against the University of Minnesota was recently dismissed by a Minnesota district court. *See Lambda Legal Defense and Education Fund, Curry v. Regents of University of Minnesota: Final Victory!*, Lambda Legal Defense and Education Fund: Cases, at <http://www.lambdalegal.org/cgi-bin/pages/cases/record?record=78> (last visited Feb. 20, 2001).

411. *Gay Students Org. of the Univ. of N.H.*, 509 F.2d at 662.

412. In *Gay Students Organization of the University of New Hampshire*, the First Circuit rejected the University’s argument that its prohibition on any social activities sponsored by the Gay Students Organization was necessary to prevent them from holding any social activities on campus property that would foster or facilitate illegal activity, such as “deviate sexual acts” and “lascivious carriage.” *See id.* at 662-63. The court accepted the finding of the District Court that “[t]here were no official complaints about the dance, and no evidence was adduced to show that improper or illegal activities had taken place.” *Id.* at 662 (quoting the lower court opinion).

413. Recently, the Alabama legislature attempted to underscore the nexus between gay student groups and sodomy and passed legislation providing that:

No public funds or public facilities [could] be used by any college or university to, directly or indirectly, sanction, recognize, or support the activities or existence of any organization or group that fosters or promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws [of the state of Alabama].

ALA. CODE § 16-1-28(a) (Supp. 1999). The Eleventh Circuit invalidated the provision as violative of the First Amendment. *See Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1545 (11th Cir. 1997). The element of contagion runs through many of these cases. In his dissent to the denial of certiorari in *University of Missouri v. Gay Lib*, referring to the students who were urging repeal of the sodomy law, Justice Rehnquist wrote:

[T]he question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles sufferers be quarantined.

Univ. of Mo. v. Gay Lib, 434 U.S. 1080, 1084 (1978) (Rehnquist, C.J., dissenting).

In the 1990s, the controversy regarding gay student groups moved to the high school level.⁴¹⁴ The proliferation of gay/straight alliances in high schools nationwide has provoked considerable controversy, as local school boards have tried unsuccessfully to deny them access to school facilities.⁴¹⁵ Under the Equal Access Act of 1984, a public secondary school which allows noncurriculum related student clubs becomes a “limited open forum” and cannot discriminate among groups on the basis of the content of their speech.⁴¹⁶ In 1996, the Salt Lake City Board of Education banned forty-six school clubs that were not directly related to curricular concerns, including the Young Republicans, in order to avoid being considered a “limited open forum” so it could bar the gay/straight alliance.⁴¹⁷ Although the option chosen by Salt Lake is

414. According to a lawyer with Lambda Legal Defense and Education Fund, one of the reasons for this shift in emphasis is that “[t]he average age at which students self-identify as lesbian and gay has dropped dramatically over the last 20 years.” Barbara Whitaker, *To Outlaw Gay Group, District May Ban Clubs: Teenagers’ Meeting Roil a Community*, N.Y. TIMES, Feb. 10, 2000, at A24 (quoting Jon W. Davidson). As a result, “[h]igh schools are having to deal with this issue whereas they didn’t in the past.” *Id.* (quoting Davidson).

415. The GLSEN estimates that there are more than 700 gay/straight alliances in middle schools and high schools across the country. See Andrea Billups, *Pro-Family Groups Press for ‘Truth’ About Gay Lifestyle*, WASH. TIMES, Apr. 28, 2000, at A3.

416. See 20 U.S.C. §§ 4071-4074 (1994). Applying to public secondary schools receiving federal funding, the Act provides that a school which “grants an offer[] to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time” creates a “limited open forum.” *Id.* § 4071(b). A school which qualifies as a “limited open forum” may not “deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.” *Id.* § 4071(a). Examples of “noncurriculum related student group[s]” include a chess club and a photography club. See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 254, 256 (1990) (alteration in original).

Interestingly, Congress enacted the Equal Access Act of 1984 after extensive lobbying by pro-family organizations to insure that religious student groups would have the opportunity to use school facilities for their activities, including prayer. See David Buckel, *Gay/Straight Student Alliances and Other Gay-Related Student Groups*, at <http://www.glsen.org/pages/sections/library/schooltools/021.article> (last visited July 16, 2000).

417. The long-standing dispute in Salt Lake City illustrates the lengths to which local school boards will go to deny gay/straight alliances access to the school’s public address system and the school’s bulletin boards. After all student clubs were banned in 1996, the students attempted to organize a second gay/straight alliance in 1999. See Press Release, *Gay/Straight Alliance’s Lawsuit to Proceed Against Salt Lake School Board: Utah Federal Judge Says Barring Student Group May Have Violated the First Amendment* (Oct. 8, 1989), at Lambda Legal Defense and Education Fund, <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=485> (last visited Jan. 22, 2001). The case was dismissed by a federal district court in November 1999 after the school board developed and adopted a policy that it would not censor pro-gay views. See Press Release, *Gay Positive Views Will Not Be Censored, Salt Lake School Officials Guarantee: Federal Judge Dismisses School Clubs Case After Students Get What They Wanted* (Dec. 2, 1999), at Lambda Legal Defense and Education Fund, <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=535> (last visited Jan. 19, 2001). Four months later, however, the same school board refused to permit a student organization, the East High PRISM Club, that

extreme, other school districts have also considered banning all noncurriculum related student clubs, rather than allowing a gay/straight alliance to use their schools' public address systems and bulletin boards.⁴¹⁸

c. The Gay Teacher

Currently, eleven states and the District of Columbia have legislation providing for non-discrimination in employment on the basis of sexual orientation, and numerous municipalities provide similar protection.⁴¹⁹ For the jurisdictions without such protections, the legal status of gay and lesbian teachers remains unclear.⁴²⁰ Under the *Pickering* balance test applied to the First Amendment rights of state employees, a statement of sexual orientation is not protected because it is not a matter of "public concern."⁴²¹ Accordingly, teachers must be openly gay at their own peril.

However, even in states with anti-discrimination protection, there appears to be a new trend of open hostility toward gay and lesbian

was designed to be "curriculum-related" and to address topics that would otherwise arise in classroom discussion from the perspective of lesbians and gay men. *See* Press Release, Salt Lake School District Official Sued for Nixing Yet Another Student Club: Despite In-Court Pledge Not to Suppress Gay-Positive Views, District Rejects Club's Application (Apr. 11, 2000), at Lambda Legal Defense and Education Fund, <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=621> (last visited Jan. 22, 2001). The federal District Court issued an injunction granting the student organization temporary access and the litigants from the gay/straight alliance case appealed the dismissal citing bad faith on the part of the school board. *See* Press Release, Judge Orders School to Make Room for Student Club with Gay Perspective: Students Win Injunction Against School Official Who Blocked Club's Application (Apr. 27, 2000), Lambda Legal Defense and Education Fund, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=630> (last visited July 16, 2000). In October 2000, the Salt Lake City School Board reversed its policy and decided to allow the clubs to meet, thereby prompting the students to drop their lawsuits. *See* Press Release, Students and Salt Lake City School Board End Feud Over Gay-Supportive Clubs: Students and School Board Settle Two Lawsuits and Appeals (Oct. 6, 2000), at Lambda Legal Defense and Education Fund, <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=721> (last visited Jan. 24, 2001).

418. A school board in Orange California recently considered the same option. *See* Whitaker, *supra* note 414, at A1. The Orange Unified School District considered banning "all 38 noncurricular clubs, including the Black Student Union and the Gentlemen's Club" in order to avoid recognizing the Gay-Straight Alliance. *Id.*; *see also* Press Release, Judge Rules El Modena High Gay-Straight Alliance Must Be Allowed to Meet (Feb. 4, 2000), Lambda Legal Defense and Education Fund, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=566> (last visited Jan. 22, 2001) (reporting that Judge David O. Carter issued a preliminary injunction blocking the Orange Unified School District's attempt to ban the Gay-Straight Alliance from meeting on campus).

419. *See supra* note 30.

420. *See* Mary L. Bonauto, *Overview of the Rights of Gay, Lesbian and Bisexual Teachers*, at <http://www.glsen.org/pages/sections/library/schooltools/015.article> (last visited July 16, 2000).

421. *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 449 (6th Cir. 1984).

teachers, as concerned parents demand that school officials transfer their children out of the classrooms of gay and lesbian teachers.⁴²² Three recent cases in California, a state which recognized protection of gay and lesbian employees even before sexual orientation was included in its statewide non-discrimination policy,⁴²³ have involved high school teachers asserting discrimination on account of sexual orientation.⁴²⁴ In two cases, school officials had acquiesced to parents' requests to have their children removed from the teachers' classrooms.⁴²⁵ The third case alleges harassment by school officials, colleagues, and others on account of sexual orientation.⁴²⁶

422. The Lambda Legal Defense and Education Fund first reported this growing trend in 1998. See Myron Dean Quon, *Teacher Harassment—The New Focus of the Radical Right?*, Lambda Legal Defense and Education Fund: News & Views (Oct. 1, 1998), at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=339> (last visited Jan. 25, 2001) (explaining the trend as a response to the success of safe schools litigation and the efforts on behalf of gay/straight alliances); see also Myron Dean Quon, *Teachers Under Fire: Educators Caught in the Cross-Hairs of the Radical Right*, Lambda Legal Defense and Education Fund: News & Views (Oct. 1, 2000), at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=713> (last visited Jan. 25, 2001).

423. See *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 610 (1979) (holding that "the struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity").

424. In *Merrick v. Rio Bravo-Greeley Union School District*, parents demanded that their children be removed from the classroom of Dr. Merrick, an award-winning science teacher, "because they thought he was gay." Myron Dean Quon, *School's in Session and Prejudice Gets an "F,"* Lambda Legal Defense and Education Fund: News & Views (June 30, 1999), at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=452> (last visited Jan. 24, 2001). Dr. Merrick filed a complaint with the appropriate state agency and eventually reached a settlement with the school district. See Lambda Legal Defense and Education Fund, *Merrick v. Rio Bravo-Greeley Union School District*, Lambda Legal Defense and Education Fund: Cases, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=105> (last visited Jan. 22, 2000) (announcing the settlement). In *Kavanaugh v. Hemet Unified School District*, the school district honored a parent's request to remove a tenth grade student from Kavanaugh's English class. See Press Release, California Department of Industrial Relations Vindicates Lesbian Teacher: School District Cannot Pull Students from Classroom Because Teacher Is a Lesbian (June 20, 2000), at Lambda Legal Defense and Education Fund, <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=647> (last visited Jan. 19, 2001). The California Department of Industrial Relations affirmed that the action constituted discrimination based on sexual orientation. See *id.* The parent claimed that Kavanaugh had created a "hostile learning environment" because she mentioned her same-sex partner. See *id.* In *Murray v. Oceanside Unified School District*, Dawn Murray, a high school biology teacher, alleged that she had been denied a promotion on account of her sexual orientation and was subjected to "name-calling, homophobic graffiti, and vicious sexual rumors spread by other teaching staff." Myron Dean Quon, *Teacher Harassment—The New Focus of the Radical Right?*, Lambda Legal Defense and Education Fund: News & Views (Oct. 1, 1998), at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=339> (last visited Jan. 25, 2001).

425. See *supra* note 424 (discussing the cases of *Merrick v. Rio Bravo-Greeley Union School District* and *Kavanaugh v. Hemet Unified School District*).

426. See *supra* note 424 (discussing the case of *Murray v. Oceanside Unified School District*).

4. The Pedophile and the Gay Scout Master

Lurking not far below the surface of all of these concerns about the influence of outside activists on student groups, the presence of openly gay teachers, and the inclusion of gay positive images in the curriculum, is the pedophile.⁴²⁷ Often the language employed by pro-family groups merely suggests pedophilia by placing adult (male) homosexuals within striking distance of young boys. When a FRC position paper reports that “homosexual youth organizations now cater to young teens, who mingle with older homosexuals,”⁴²⁸ the unstated danger should be clear to the reader.

Child sexual abuse was a powerful subtext of James Dale’s struggle to force the Boy Scouts to reinstate him as an assistant Scout Master. The New Jersey Supreme Court ruled that the Boy Scouts were a place of public accommodation and the failure of the Boy Scouts to allow Dale to serve as an assistant Scout Master violated the New Jersey public accommodation law barring discrimination based on sexual orientation.⁴²⁹ After Justice Handler of the New Jersey Supreme Court mentioned the fear of child sexual abuse in his concurring opinion, the gloves came off, and the pedophile, not fearful allusions or coded references, made an actual appearance.⁴³⁰ Explaining that the public accommodation law was designed to protect individuals from discrimination based on “archaic” and “stereotypical notions” about homosexuals,⁴³¹ Justice Handler noted that a “particularly pernicious stereotype about homosexuals is implicit in Boy Scouts’ arguments: ‘the sinister and unspoken fear that gay scout leaders will somehow cause physical or emotional injury to scouts.’”⁴³² Identifying the specter of the pedophile, Justice Handler then declared: “The myth that a homosexual male is more likely than a heterosexual male to molest children has been

427. The FRC continually tries to refute studies that show that gay men are no more likely than heterosexual men to sexually abuse children. *See, e.g.*, Brief of Amicus Curiae Family Research Council at 25, *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000) (No. 99-699) [hereinafter Brief of FRC] (asserting that homosexual pedophiles molest more children per capita than heterosexual pedophiles).

428. LaBarbera, *supra* note 350, *available at* <http://www.frc.org/papers/insight/index.cfm?get=IS99F4&arc=yes> (last visited Jan. 19, 2000).

429. *See Dale v. Boys Scouts of Am.*, 734 A.2d 1196, 1218 (N.J. 1999). For an in-depth discussion of the case, see Knauer, *supra* note 23.

430. *See id.* at 1242-43 (Handler, J., concurring).

431. *Id.* at 1242 (quoting the Appellate Division).

432. *Id.* at 1243 (quoting the Appellate Division). The New Jersey Appellate Division first raised the issue of this being an unfounded stereotype. *See Dale v. Boy Scouts of Am.*, 706 A.2d 270, 289 (N.J. Super. Ct. App. Div. 1998).

demolished.”⁴³³ To the extent the Boys Scouts’ claim was based on this fear “it must be rejected as an unfounded stereotype.”⁴³⁴

Numerous pro-family organizations filed amicus briefs in connection with the Boy Scouts’ appeal to the United States Supreme Court, voicing their concern about state law forcing the Boy Scouts to accept an “avowed homosexual” into its ranks.⁴³⁵ The brief filed by the FRC and the brief filed by a consortium of pro-family groups, including Concerned Women for America, both contain express references to (male) homosexuals as pedophiles.⁴³⁶ The term pedophile or some derivation thereof appears thirty-one times in the thirty-page brief filed by FRC.⁴³⁷ These amici make it quite clear that “[f]orcing the Boy Scouts to accept avowed homosexuals as adult leaders would increase the risk of sexual molestation of young boys.”⁴³⁸ Some of the more lurid prose have an inappropriately seductive ring: “[T]he Boy Scout setting appears to be an ideal place for certain pedophiles, especially male homosexual pedophiles, to pursue potential boy victims, with overnight camp-outs in secluded locations providing ample time and opportunity for intimate contact.”⁴³⁹ Of course, not only do these boys risk abuse if a homosexual is present, but they risk becoming a homosexual themselves

433. *Dale*, 734 A.2d at 1243. Justice Handler then cites numerous studies and publications that stand for the proposition that homosexuals are no more likely to sexually abuse children than heterosexuals. *See id.* For a discussion of the social science data amassed by pro-family organizations and their research arms, see HERMAN, *supra* note 6, at 70.

434. *Dale*, 734 A.2d. at 1243.

435. The term avowed homosexual is pejorative. The Boy Scouts consistently referred to Dale in their court filings as an “avowed homosexual.” *See, e.g., Dale*, 734 A.2d at 1205; *Dale*, 706 A.2d at 275. In *Boy Scouts of America v. Dale*, the majority used the term “avowed homosexual.” *See* 120 S. Ct. 2446, 2455 (2000). The dissent referred to Dale as “gay” or “openly gay.” *See id.* at 2477 (2000).

436. *See* Brief of FRC, *supra* note 427, at 29; Brief of Amicus Curiae Public Advocate of the United States et al. at 5, *Boy Scouts of Am. v. Dale*, 120 S.Ct. 2446 (2000) (No. 99-699) [hereinafter Public Advocate Brief].

437. *See generally* Brief of FRC, *supra* note 427. Both briefs take issue with the studies cited by Justice Handler and endeavor to prove that homosexuals are not only more likely to abuse children than heterosexuals, but that homosexuals abuse larger numbers of children than heterosexuals who abuse children. *See id.* at 25 (citing the “rates of molestation” to be an average of 150 boys per homosexual pedophile and twenty girls per heterosexual pedophile); *see also* Public Advocate Brief, *supra* note 436, at 24 (claiming that Justice Handler selectively chose social science research to support “the result he so desired to reach”).

Separate amicus briefs filed in support of Dale by the American Public Health Association and the APA both respond to the social science data cited by the pro-family organizations. *See* Brief of Amicus Curiae Am. Public Health Ass’n et al. at 15-21, *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000) (No. 99-699); Brief of Amicus Curiae Am. Psychological Ass’n at 4-24, *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000) (No. 99-699).

438. Brief of Public Advocate, *supra*, note 436, at 5.

439. *Id.*

because “[p]edophilia plays a key role in the development of future homosexuals.”⁴⁴⁰ It is unclear whether the primary concern is to stop child sexual abuse or to stop the creation of new homosexuals.

Indeed, since the FRC brief makes the Boy Scouts sound like such a hotbed of pedophilia, one wonders how any parent would ever let her child get involved with Scouting in the first place: ““on an average of more than once a week for the past two decades, a Cub Scout, Boy Scout or Explorer Scout of the Boy Scouts of America . . . has reported being sexually abused by an adult leader.””⁴⁴¹ Citing “[t]he hundreds of sexual abuse lawsuits brought by Scouts against Scout leaders,”⁴⁴² the FRC explains that the Boy Scouts must be ever vigilant to protect the boys and itself from liability and that even married Scout Masters should not be considered above suspicion because ““[p]edophiles sometimes marry for convenience or cover . . . and to gain access to children.””⁴⁴³ In an odd twist of logic, the brief then concludes “it is imperative that homosexuals are excluded from [Boy Scouts of America] membership in order to protect Scouts from potential abuse by homosexual pedophiles.”⁴⁴⁴ However, there does not seem to be any good way to tell who is and who is not a homosexual.

D. Homosexuals Flaunt Their Lifestyle, Infringing on the Rights of Others

If Douglas thought that inverts conducted themselves openly and without shame in 1928, he should see them now.⁴⁴⁵ According to a FRC article, “[b]y 1997 . . . homosexual activists had become perhaps the most powerful political and social force *per capita* in the United States.”⁴⁴⁶ In describing, the “meteoric success” of homosexuals, the article makes the case that homosexuals are, indeed, everywhere and that

440. *Id.* at 25. Apparently, a particularly compelling piece of evidence is that more than sixty percent of respondents stated that their first same-sex sexual partner was “someone older.” *See Id.* (citing Bell and Weinberg’s study of male homosexuality).

441. Brief of FRC, *supra* note 427, at 27 (quoting the dissenting opinion in a case in which the plaintiff sought damages from the Boy Scouts as a result of alleged molestation by a Scout leader).

442. *Id.* at 26.

443. *Id.* at 23 (alteration in original) (quoting a statement by the National Center for Missing and Exploited Children).

444. *Id.* at 29.

445. Douglas observed that inverts “flaunt themselves in public places with increasing effrontery and more insolently provocative bravado.” BRITAIN, *supra* note 25, at 54 (quoting Douglas’ article).

446. Robert H. Knight, *A Progress Report on Homosexual Activism*, Family Research Council: Articles, available at <http://www.frc.org/articles/ar97e4hs.html> (last visited Aug. 26, 2000).

they are in positions of power, particularly in the media.⁴⁴⁷ This flaunting of unabashed homosexuality infringes on those members of society who believe that homosexuality is an immoral and unhealthy lifestyle. Homosexuals are on television, and they are in the editorial rooms, the neighborhoods, and the schools. Large public displays, such as gay pride parades, are openly held in all major cities. Individuals who are opposed to homosexuality are bombarded with the gay agenda daily, but, more importantly, anti-discrimination laws might actually force them to compromise their strongly held moral (and religious) views and accept homosexuals into their workforce, their apartment buildings, and their associations.⁴⁴⁸

Although the spectacle of a large gay pride parade or march might get considerable coverage in the pro-family press, it is not these flaming examples of gay pride that most concern the pro-family organizations.⁴⁴⁹ Pro-family organizations seem most concerned about the growing number of avowed homosexuals who, they report, have infiltrated every aspect of social life. The most dangerous—i.e., effective—propaganda, as pro-gay organizations have always held, is the openly gay individual who chooses to live her life without the “lies” and “subterfuges” that so disturbed Hall.⁴⁵⁰

Interestingly, these individuals do not have to be, and often they are not, gay activists. Today, a homosexual who is not in the closet exists as a highly politicized subject, despite never having marched in a Gay Pride parade, joined the Human Rights Campaign, or otherwise engaged in

447. See *id.* (noting that every major television show has openly gay writers). As evidence of the pro-gay slant in the media, pro-family organizations point to the murder of thirteen-year-old Jesse Dirkhising by two men who tortured and sodomized Jesse before suffocating him. See Robert H. Knight, *A Tale of Two Killings: Was One of Them Underplayed?*, Family Research Council: Articles, available at <http://www.frc.org/articles/ar00a2hs.html> (last visited Aug. 27, 2000). The pro-family press contrasted the media coverage of the Dirkhising murder with that of Matthew Shepard, claiming that the media did not want to portray homosexuality in a negative light. See *id.* Knight charged the national media with ignoring the murder and its tie to “the increasing promotion of sadistic sex and pedophilia in mainstream homosexual publications, events and advertisements.” *Id.*

448. For a discussion of the Employment Non-Discrimination Act (“ENDA”), see Family Research Council, *ENDA: A Religious Liberties Threat*, Family Research Council: In Focus, available at <http://www.frc.org/papers/infocus/index.cfm?get=IF98E2&arc=yes> (last visited Jan. 24, 2001).

449. See Peter J. LaBarbera, *What You Didn't Hear About the 'Gay' March*, Family Research Council: Culture Facts (May 3, 2000), available at <http://www.frc.org/papers/culturefacts/index.cfm?get=CU00E1&arc=yes> (last visited Jan. 30, 2001) (describing a “‘Dungeon Dance’” held at a Washington, D.C. gay bar on the eve of the Millennium March).

450. See HALL, *supra* note 7, at 334.

any public, much less conventionally political activity.⁴⁵¹ In the midst of a “Culture War,” it is not possible for an openly gay person simply to be neutral, because the absence of condemnation signals approval and hence, promotion of homosexuality. The narratives of the ex-gays show that, in order to be acceptable, homosexuality must be coupled with shame.

Under this formula, an individual who does not express shame over her sexual orientation is thereby promoting homosexuality. In the words of Justice Stevens in his dissent in *Dale*, this reasoning means that “homosexuals are simply so different from the rest of society that their presence alone” constitutes a form of speech.⁴⁵²

[A]n openly gay male is irreversibly affixed with the label “homosexual.” That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority.⁴⁵³

The individual referred to by Justice Stevens as an “openly gay male,”⁴⁵⁴ was designated in the majority opinion as an “avowed homosexual,”⁴⁵⁵ suggesting that gays take some sort of public oath or pledge that then alters their lives forever.⁴⁵⁶

In the absence of a public oath or pledge, there remains the question of when exactly does an individual with same-sex object desire become an “avowed homosexual.” For Dale, it was when his picture was in a local newspaper with an identifying caption which labeled him as the co-president of the Rutgers University gay student group.⁴⁵⁷ According to counsel for the Boy Scouts at oral argument, Dale “put a banner around his neck when he . . . got himself into the newspaper. . . . He can’t take

451. Under the contagion model, the charge that a homosexual is not ashamed of her perversion does not necessarily mean she is making public expressions of pride. To the contrary, she is charged with flaunting her sexual orientation to the extent that she acknowledges that she is gay and does not also exhibit extreme remorse. One of the reasons that any expression of same-sex desire is considered flaunting is that heteronormativity ensures that the sexual orientation of heterosexuals remains unmarked. Thus, even a well-meaning individual who hears a friend or acquaintance talk about her partner might hear the word “partner” to be a little louder and a little more strident than it was meant to be.

452. *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2476 (2000) (Stevens, J., dissenting) (asking whether the mere presence of a homosexual warrants “special First Amendment treatment”).

453. *Id.* (Stevens, J., dissenting).

454. *Id.* (Stevens, J., dissenting).

455. *Id.* at 2455.

456. For a discussion of the pejorative nature of the term, see *supra* note 435.

457. See *Dale*, 120 S. Ct. at 2449.

that banner off. He put it on himself and, indeed, he has continued to put it on himself.”⁴⁵⁸ Working from the contagion model which only allows the discussion of homosexuality when coupled with shame, counsel for the Boys Scouts expressly recognized that Dale could correct his ways in the following exchange at oral argument:

QUESTION: [W]hat if someone is homosexual in the sense of having sexual orientation in that direction but does not engage in any homosexual conduct?

MR. DAVIDSON: [I]f that person also were to take the view that the reason they didn’t engage in that conduct [was because] it would be morally wrong . . . [and] that person would not be excluded.⁴⁵⁹

In other words, if Dale would just consider reparative therapy, all would be forgiven.⁴⁶⁰

Despite the fact that openly gay individuals exist as highly politicized subjects in the public employment setting, coming out speech is not protected speech under the First Amendment because it is not an issue of “public concern.”⁴⁶¹ The public employment cases are particularly interesting because they illustrate just what it takes to be considered too gay to handle. For some individuals, such as Joseph Acanfora, a high school science teacher in Maryland, it was joining a gay organization while in college.⁴⁶² John Singer, a clerk typist with the EEOC, was fired for “‘openly and publicly flaunting his homosexual

458. Transcript of Oral Argument, *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000) (No. 99-699), available at 2000 WL 489419, at *19 (April 16, 2000). The notion that Dale cannot take off the banner is probably a bit of an overstatement because under the contagion model an individual can take off that “banner” as soon as she expresses remorse and a commitment to change, as evidenced by the celebrated testimony of the ex-gays.

459. *Id.* at *6.

460. It might be that a completely quiet—i.e., hidden—homosexual would be acceptable, just like the quiet service member. However, because it takes so little under the contagion model to earn a charge of flaunting, the quiet homosexual would have to burrow very far back in the closet.

461. See *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 449 (6th Cir. 1984).

462. See *Acanfora v. Bd. of Educ. of Montgomery County*, 491 F.2d 498, 499-500 (4th Cir. 1974). Joseph Acanfora was transferred to a non-teaching position after school officials learned that he was gay. See *id.* at 500. In college, Acanfora had joined a gay student organization and his membership complicated his application for a teaching certificate. See *id.* The approval of his teaching certificate was announced at a press conference that came to the attention of school officials. See *id.* After his transfer, Acanfora appeared in press, radio, and television interviews discussing the general topic of homosexuality, sometimes appearing with his parents. See *id.* Applying the *Pickering* balancing test, the Fourth Circuit held that these appearances related to the topic of homosexuality generally and were protected by the First Amendment. See *id.* at 501. Unfortunately, Acanfora had omitted his membership in the gay student group on his employment application and the Fourth Circuit denied relief because he had “purposefully misled the school officials.” *Id.* at 504.

way of life.”⁴⁶³ For others, such as Marjorie Rowland, a guidance counselor in Ohio, it was simply telling a colleague or a student that she was bisexual.⁴⁶⁴ A more recent example is the *Shahar* case, which presents a very clear sense of what it means to live as an avowed homosexual and, therefore, to have the power to disrupt an entire office and shake public confidence:

Department employees, among many others, were invited to a “Jewish, lesbian-feminist, out-door wedding” which included exchanging wedding rings: the wearing of a wedding ring is an outward sign of having entered into marriage. Shahar listed her “marital status” on her employment application as “engaged” and indicated that her future spouse was a woman. She and her partner have both legally changed their family name to Shahar by filing a name change petition with the Fulton County Superior Court. They sought and received the married rate on their insurance. And, they, together, own the house in which they cohabit. *These things were not done secretly, but openly.*⁴⁶⁵

The fact that there is no neutral stand when it comes to homosexuality has consequences for not only the individual, but also for an employer or anyone else who grants the shameless homosexual a

463. *Singer v. United States Civil Serv. Comm’n*, 530 F.2d 247, 255 (9th Cir. 1976) (quoting the statements of the Civil Service Commission investigator), *vacated by* 429 U.S. 1034 (1977).

464. The court of appeals also took issue with the fact that Rowland disclosed the sexual orientation of two of the students at the school. *See Rowland*, 730 F.2d at 450. In addition to Rowland’s First Amendment claim, the court also denied her equal protection claim. *See id.* at 451. The court’s discussion of this claim is particularly relevant to the topic of flaunting because it shows how the force of heteronormativity can so easily affect reasoning. The court stated that it denied the equal protection claim because “the plaintiff sought to prevail . . . without any showing that heterosexual school employees in situations similar to hers have been, or would be, treated differently for making their personal sexual preferences the topic of comment and discussion in the high school community.” *Id.* at 451-52. First, it is worth noting that the news of Rowland’s sexual orientation spread like wild fire throughout the school, so it is not clear that Rowland ever intended to make her sexual orientation the topic of gossip. More importantly, there is the question of whether Rowland’s colleagues would have been fired for discussing their own “sexual preferences.” On one hand, there can be little doubt that Rowland’s colleagues would not be subject to disciplinary action if they mentioned their husband, fiancé, or even boyfriend. But perhaps that is not what the court was talking about. If the court was working from the contagion model, then it would view homosexuality as a collection of immoral and unhealthy acts that gay rights advocates are trying to pass off as a lifestyle. In this case, the question is whether Rowland’s colleagues would have been subject to disciplinary messages if they mentioned their interest in sado-masochism. For an interesting reading of the *Rowland* case, see Janet E. Halley, *The Construction of Homosexuality*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* 82, 84-86 (Michael Warner ed., 1993). For an interesting reading of *Acanfora* and *Rowland*, see SEDGWICK, *supra* note 19, at 69-71.

465. *Shahar v. Bowers*, 114 F.3d 1097, 1107 (11th Cir. 1997) (emphasis added).

platform.⁴⁶⁶ For example, when a school introduces the notion that homosexuality is not an immoral and unhealthy lifestyle, the FRC considers this to be a promotion of homosexuality.⁴⁶⁷ Likewise, an employer who does not discriminate on the basis of sexual orientation and hires an avowed homosexual is promoting homosexuality. FRC criticism is particularly harsh for employers who provide domestic partnership benefits or otherwise recognize their gay employees. These corporations “take advantage of homosexual affluence”⁴⁶⁸ and are “unremittingly hostile to traditional values.”⁴⁶⁹ The FRC regularly monitors corporate employee benefit policies and urges its members to patronize pro-family companies.⁴⁷⁰

It is one situation if an individual chooses to participate in the gay agenda, but it is quite another when the state forces an individual to aid and abet immoral lifestyles. Anti-discrimination laws that include sexual orientation threaten to force individuals to accept avowed homosexuals over their sincerely held moral and religious beliefs. Although anti-discrimination laws dealing with employment, housing, and public accommodation generally have broad exclusions for private organizations, particularly religious organizations, pro-family groups do

466. For example, openly gay Republican Congressman Jim Kolbe spoke at the 2000 GOP convention on the subject of globalization and did not mention his sexual orientation. Richard L. Berke, *For the Republican, a Night to Bolster Bush*, N.Y. TIMES, Aug. 2, 2001, at A1. Many pro-family forces, however, saw Kolbe’s appearance as an endorsement of the homosexual lifestyle by the Republican party. See *On Kolbe’s Speech*, Aug. 4, 2000, Family Research Council: Culture Facts, at <http://www.frc.org/papers/culturefacts/index> (last visited Dec. 19, 2000) (quoting a letter from “a former homosexual and Republican” denouncing Kolbe’s speech). During Kolbe’s speech, “12 members of the Texas delegation removed their straw cowboy hats, close their eyes and bowed their heads.” Alex Kuczynski & Matthew Purdy, *Outside the Hall, Fund-Raising and Unmuffled Yawns*, N.Y. TIMES, Aug. 2, at A15. See also, Knauer, *supra* note 23 (noting that “openly gay individuals send a gay-affirming message when they are silent or even when they are plainly talking about other things”).

467. See LaBarbera, *supra* note 319, available at <http://www.frc.org/papers/infocus/index.cfm?get=IF99J1&arc=yes> (last visited Jan. 31, 2001). LaBarbera explains, “[w]hen you take a behavior that has been considered immoral and unhealthy for centuries and start teaching children—even kindergartners—that it is morally acceptable and the basis for a healthy ‘identity,’ that is promotion!” *Id.*

468. Family Research Council, *Stewardship and Corporate Responsibility: Family Policies*, Family Research Council: Sexuality & Culture, available at <http://www.frc.org/iss/hsx/content.cfm?get=family> (last visited Feb. 7, 2001).

469. Family Research Council, *Stewardship and Corporate Responsibility*, Family Research Council: Sexuality & Culture, available at http://www.frc.org/iss/hsx/content.cfm?get=corp_response (last visited Jan. 25, 2001).

470. See Family Research Council, *Corporate Family Policies*, available at <http://www.frc.org/steward/family.html> (last visited Aug. 27, 2000) (noting that many corporations “take advantage of homosexual affluence” and “have abandoned the family as a social model in favor of homosexuality”). The extent of pro-gay corporate policies proves that “[t]he homosexual lobby is one of the most powerful forces affecting societal mores today.” *Id.*

not believe that these exclusions are sufficiently broad.⁴⁷¹ Instead, they emphasize the individual and the individual's right to practice his faith. For example, a FRC position paper states:

[The Employment Non-Discrimination Act ("ENDA")] trashes the traditional respect for and accommodation of religious faith and practice found in civil rights laws. It seeks to chill and suppress religious expressions and freedom of speech by using the law to transform or extinguish religious practices that are disfavored by the elite, such as the practice of declaring homosexuality a "sin."⁴⁷²

A major objection to DOMA (as well as to ENDA) was that it would force business owners to treat the same-sex partners of their employees like spouses and that this would necessarily force the business owners to compromise their religious beliefs.⁴⁷³ This emphasis on the individual who claims to be above the law has led to a variety of lawsuits where individuals either claim exemption from anti-discrimination laws or seek to have them overturned based on their individually held moral and religious beliefs. These include landlords who refuse to rent to unmarried couples in violation of local law and taxpayers who sue their municipalities to overturn their domestic partnership ordinances.⁴⁷⁴

471. For example, the very broad New Jersey law against discrimination, which includes sexual orientation as a protected category, provides an exception to the definition of "public accommodation" for "any institution, bona fide club, or place of accommodation, which is in its nature distinctly private" and "any educational facility operated or maintained by a bona fide religious or sectarian institution." N.J. STAT. ANN. § 10:5-5(l) (West 2000). Moreover, its fair housing provisions specifically empower certain religious organizations to make decisions regarding the sale, lease, or rental of property that are "calculated by such organization[s] to promote the religious principles for which [they are] established or maintained." *Id.* § 10:5-5(n).

472. Family Research Council, *ENDA: A Religious Liberties Threat*, *supra* note 448, available at <http://www.frc.org/papers/infocus/index.cfm?get=IF98E2&arc=yes> (last visited Jan. 24, 2001).

473. See Knauer, *supra* note 319, at 193 n.322 (quoting the concern of Rep. Funderburk that his constituents were outraged "'that their tax money could be spent paying veteran's benefits or Social Security based on the recognition of same-sex marriages'"). This concern was first raised by Gary Bauer in his testimony before Congress when he stated that "'[b]usinessmen would be forced to subsidize homosexuality or face legal sanctions.'" *Id.* (quoting Gary Bauer) (alteration in original).

474. Pro-family organizations applaud landlords who "refuse to aid and abet what they consider sinful behavior." Knight, *supra* note 338, available at <http://www.frc.org/insight/is94f5hs.html> (last visited Jan. 31, 2001). Knight reports:

Lawsuits filed against landlords unwilling to rent to unmarried couples out of religious conviction are largely the work of the Lambda Legal Defense and Education Fund, the American Civil Liberties Union's homosexual legal project, and other homosexual activist organizations intent on using government power to force acceptance of their agenda.

Outside the realm of religion, there remains the constitutional argument that forcing an association to welcome an avowed homosexual into its ranks violates the association's freedom of speech rights (including the freedom of association). In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,⁴⁷⁵ the state trial court held that the Massachusetts public accommodation law required the Boston St. Patrick's Day Parade to include a contingent of openly gay marchers because the parade was found to come within the statute's definition of a public accommodation.⁴⁷⁶ However, the United States Supreme Court ruled that the application of the public accommodation law violated the parade sponsor's freedom of speech.⁴⁷⁷ The banners of the openly gay marchers would compel the parade to embrace speech with which it did not agree. As described above, the most recent public accommodation case involved the Boy Scouts and no communicative banners, just an avowed homosexual who wanted to continue to serve as a Scout Master. Given the expressive power of an avowed homosexual, it was not surprising that the Boy Scouts won the right to exclude avowed homosexuals because "[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a . . . message"⁴⁷⁸ and that message was at odds with the requirement that a Scout be "'straight'" and "'clean.'"⁴⁷⁹

E. Homosexuals Demand "Special Rights," Not Mere Toleration

According to pro-family organizations, not only do homosexuals infringe on the rights of others when they express their homosexuality, but the very rights that they are asserting are "special rights."⁴⁸⁰ As the first maxim of the contagion model proves, homosexuals are not a valid

Id. See also Heidi Eischen, *For Better or Worse: An Analysis of Recent Challenges to Domestic Partnership Benefits Legislation*, 31 U. TOL. L. REV. 527, 533-38 (2000) (describing the different approaches that taxpayers and other citizens have used to challenge domestic partnership laws).

475. 515 U.S. 557 (1995).

476. *See id.* at 561-62.

477. *See id.* at 573.

478. *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2455 (2000) (comparing the message sent by an avowed homosexual versus a heterosexual who was opposed to the ban on homosexuals).

479. *Id.* at 2452 (quoting Scout Law). The Boy Scouts were at a loss to show that the organization disapproved of homosexuality. The Boy Scouts based its claim that the presence of Dale was inconsistent with its message on the requirement that a Scout must be "morally straight" according to the Scout Oath and "clean" according to Scout Law. *See id.* For a discussion of the Scout's argument that its laws and policies were designed to be prescriptive and not proscriptive in nature, see Knauer, *supra* note 23.

480. *See* HERMAN, *supra* note 6, at 133-36 (discussing the evolution of the "special rights" strategy).

minority because homosexuality is not a benign characteristic like race, and it can be changed.⁴⁸¹ Pro-family organizations contend that homosexuals are not like any traditional minorities in the United States because they are an exceedingly powerful and wealthy group.⁴⁸² The rights that homosexuals demand come at the expense of others and at the expense of religious freedom and freedom of speech. Pro-family organizations stress that homosexuals are intolerant of anyone with whom they disagree, and they spew a brand of politically correct orthodoxy. A FRC position paper notes wistfully, “[i]t seems like only yesterday that homosexual activists wanted only ‘tolerance.’”⁴⁸³

Echoing Sir Chartres’ observation that *The Well* “‘sneered at’” individuals who “‘object[ed]’” to “‘th[is] vice[]’” as “‘prejudiced, foolish and cruel,’”⁴⁸⁴ the FRC warns its activists not to expect respect from the homosexuals who “‘equat[e] the sincerely held beliefs of their foes with ‘hate,’ ‘intolerance,’ ‘bigotry,’ and ‘prejudice.’”⁴⁸⁵ Somehow, when homosexuals are around, the caring and compassionate people end up looking intolerant. The FRC urges its activists to appear compassionate and non-judgmental and to stress that “[c]ompassion—not bigotry—impels us to support healing for homosexuals who want to change.”⁴⁸⁶

The “special rights” argument was used very effectively in the Amendment 2 citizens’ initiative in Colorado. Organized by the pro-family group Colorado for Family Values, the initiative sought, by amendment to the state constitution, to repeal local gay rights ordinances and prohibit the enactment of any future state or local gay civil rights laws.⁴⁸⁷ The campaign slogan of Colorado for Family Values was

481. For a discussion of remarks made by General Colin Powell in connection with the “Gays in the Military Debate,” see GALLAGHER & BULL, *supra* note 319, at 134-38.

482. See HERMAN, *supra* note 6, at 111-36 (discussing the notion of illegitimate minorities).

483. Knight, *supra* note 338, available at <http://www.frc.org/insight/is94f5hs.html> (last visited Jan. 31, 2001).

484. SOUHAMI, *supra* note 25, at 228 (quoting Biron).

485. LaBarbera, *supra* note 350, available at <http://www.frc.org/papers/insight/index.cfm?get=IS99F4&arc=yes> (last visited Jan. 19, 2000) (quoting the record of homosexual education activists).

486. Family Research Council, *Homosexual Culture*, *supra* note 325, available at <http://www.frc.org/issues/homosexualmain.html> (last visited July 9, 2000).

487. The text of Amendment 2 provided as follows:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota

“Equal Rights—Not Special Rights.”⁴⁸⁸ As a FRC position paper defending Amendment 2 explains:

Homosexuals have the same rights all citizens have. They have the same redress that all citizens have if they face discrimination. They want an extra level of preferential treatment that would allow them to cite their homosexuality anytime they do not get what they want—a job, a promotion, whatever. People who commit adultery do not have such a right. People who abuse drugs do not have such a right. In fact nobody else has the right to insist that their behavior is irrelevant to an employer.⁴⁸⁹

In addition to establishing that homosexuals were not a valid minority, Colorado for Family Values also characterized homosexuals as an undeserving minority by publicizing statistics that showed very high income levels for homosexuals and comparing these figures to “disadvantaged African-Americans.”⁴⁹⁰

When the voters of Colorado approved Amendment 2, it was up to the Supreme Court of Colorado and the United States Supreme Court to invalidate it on equal protection grounds.⁴⁹¹ The dissenting opinion authored by Justice Scalia accepted many of the pro-family characterizations of homosexuality, including that homosexuals have “disproportionate political power” and “high disposable income.”⁴⁹² The dissent declares that “the amendment prohibits *special treatment* of homosexuals, and nothing more.”⁴⁹³ It also voices the constant pro-family objection that homosexuals make pro-family activists out to be bigots. “This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this

preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Romer v. Evans, 517 U.S. 620, 624 (1996) (quoting COLO. CONST. art II, § 30(b)) (internal quotation marks omitted).

488. Robert F. Nagel, *Playing Defense*, 6 WM. & MARY BILL RTS. J. 167, 172 (1997).

489. Robert H. Knight, *The Impact of Romer v. Evans*, Family Research Council: Insight, available at <http://www.frc.org/insight/is96e2hs.html> (last visited Aug. 27, 2000).

490. See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW: 2000 SUPPLEMENT* 213 (2000).

491. See *Romer*, 517 U.S. at 635-36.

492. *Id.* at 645, 647 (Scalia, J., dissenting). A FRC position paper on the Supreme Court decision writes very favorably of Scalia’s dissenting opinion. See Knight, *supra* note 489, available at <http://www.frc.org/insight/is96e2hs.html> (last visited Aug. 27, 2000). In particular, it praises Justice Scalia for drawing a distinction between homosexuality and homosexuals or “those who engage in homosexual acts” and homosexuals because “[i]n singling out the behavioral characteristic in question, Scalia correctly reflected the Christian view of loving the sinner but hating the sin.” *Id.*

493. *Romer*, 517 U.S. at 638 (Scalia, J., dissenting).

institution are selected, pronouncing that ‘animosity’ toward homosexuality is, evil.”⁴⁹⁴

The claim that homosexuals threaten free speech has been used increasingly by pro-family organizations. It was showcased in one of the ex-gay advertisements featuring football player Reggie White, who was “branded” in the media after making anti-gay remarks.⁴⁹⁵ The pro-family organizations have packaged White as someone who is brave enough to speak out and risk being attacked for his views because “homosexual activists routinely use the tactics of threats, intimidation, blackmail and deception to strangle a free and open exchange on homosexual behavior.”⁴⁹⁶ Beyond simple social pressure, gay activists exert political and legal pressure to conform: “‘Gay rights’ laws are a massive club with which to beat everyone else into acceding to homosexuals’ increasingly strident demands for mandated acceptance.”⁴⁹⁷

The most extreme characterization of homosexual orthodoxy attempts to draw similarities between the tactics employed by homosexual activists and those used by the Nazi party or Communist revolutionaries.⁴⁹⁸ References to jack-booted thugs, Red Guards, and thought-police are not uncommon even in mainstream pro-family materials.⁴⁹⁹ To further the connection between Nazis and homosexuals, pro-family organizations allege that homosexuals played an integral role in the Third Reich.⁵⁰⁰ Recently, the FRC denounced the Holocaust

494. *Id.* at 636 (Scalia, J., dissenting) (citation omitted).

495. See CitizenLink, *In Defense of Free Speech*, at <http://www.family.org/cforum/research/papers/a0002800.html> (last modified Sept. 15, 1998) (advertisement) (featuring a picture of “minister and pro-football player Reggie White”).

496. *Id.* In a similar vein, a FRC position paper against hate crimes legislation reports that “[t]he soldiers of political correctness daily encroach on the fields of conscience, guilt-mongering people into submission, directing others not only to act and talk like them, but to think like them, as well.” Robert Regier, *Battle Heats Up for Control of Our Minds*, Family Research Council: Press Room, available at <http://www.frc.org/press/index/cfm?get=oped&id=AR99G3> (last visited Feb. 7, 2001) (discussing proposed national hate crimes legislation).

497. Knight, *supra* note 489, available at <http://www.frc.org/insight/is96e2hs.html> (last visited Aug. 27, 2000).

498. “The association of homosexuality with Nazism has been . . . deployed widely.” HERMAN, *supra* note 6, at 90.

499. See, e.g., Robert H. Knight, *John Rucker and the Thought Police*, Family Research Council: Sexuality & Culture, available at <http://www.frc.org/iss/hsx/retrieve.cfm?get=AR00E1> (last visited Jan. 25, 2001) (discussing “Red Guards” and “Re-education camps”).

500. For example, Pat Robertson of the Christian Coalition said the following on his television show, the *700 Club*: “When lawlessness is abroad in the land, the same thing will happen here that happened in Nazi Germany. Many of those people involved in Adolph Hitler were Satanists. Many of them were homosexuals. The two things seem to go together.” People for the American Way Foundation, *Anti-Gay Politics and the Religious Right: Gays as Enemies of Faith*, at <http://www.pfaw.org/issues/right/rtvw.antigay.shtml> (last visited Feb. 7, 2001) (quoting Pat Robertson).

Memorial Museum for “distorting the history of the Holocaust by ignoring the perpetrating role of Nazi Homosexuals.”⁵⁰¹ The identification of homosexuals with Nazis rounds out the picture and makes it very clear that, as discussed below, this is indeed a battle between good and evil.⁵⁰²

F. *It Is a Culture War*

Douglas might have characterized it as a battle, but seventy-plus years later, make no mistake. This is more than a battle, it is a war—a culture war.⁵⁰³ Pro-family organizations have used the term “culture war” as a “catch phrase” since 1992.⁵⁰⁴ It appeared in Supreme Court jurisprudence in 1996 when Justice Scalia used the German term “Kulturkampf” in his dissenting opinion in *Romer v. Evans*⁵⁰⁵—asserting that the majority had “mistaken a Kulturkampf for a fit of spite.”⁵⁰⁶

Building on the militancy of gay activists and their push for orthodoxy, described above, the FRC makes it clear that it is the

501. Nathaniel S. Lehrman, *Holocaust Museum Ignores Nazi Homosexuals*, Family Research Council: Culture Facts, available at <http://www.frc.org/papers/culturefacts/index.cfm?get=CU00E1&arc=yes> (last visited Jan. 24, 2001) (asserting that “the Museum [had] accepted the lie that the Nazis abhorred homosexuality”).

502. For a discussion of the “culture war” between the forces of good and evil, see *infra* Part V.F.

503. The battlefield terminology is even adopted by supposedly objective commentators. For example, Gallagher and Bull’s book on the clash between pro-family and pro-gay interests is entitled *Perfect Enemies*. See GALLAGHER & BULL, *supra* note 319. From the first sentences of the *Introduction*, the book is peppered with illusions to war:

There is a *great battle raging* in America today. The cause of the *hostility* is one the nation’s founders could never have imagined: gay rights. On one side of the *battlefield* are religious conservatives who believe they are *taking a last stand* against moral decline; on the other, gays and lesbians who believe that they are *fighting* for the basic civil liberties guaranteed by the Constitution. After years of *skirmishes*, two groups that had been largely unknown to the public and unnoticed by the press seem suddenly to be everywhere, *locked in combat*. That *combat* promises to be part of the political landscape for years to come.

Id. at xi (emphasis added) (capitalization omitted).

Despite the urge to dismiss the battle/war talk as hyperbole, it is likely that some of the “skirmishes” probably did feel life-threatening. See, e.g., *id.* at 49-51 (discussing the violence and death threats during the Oregon citizen’s initiative). When AIDS activists took to the street to challenge the pharmaceutical companies and the federal inaction, many were indeed “fighting for their lives.” Jason DeParle, *Rude, Rash, Effective, Act-Up Shifts AIDS Policy*, N.Y. TIMES, Jan. 3, 1990, at B1.

504. See HERMAN, *supra* note 6, at 55 (defining it as “‘struggles over ideas and values, rights and responsibilities’”).

505. 517 U.S. 620 (1996).

506. *Id.* at 636 (Scalia, J., dissenting). William Eskridge has questioned Justice Scalia’s usage of the term. See Eskridge, *supra* note 409, at 2413-14 (describing the origin of the term).

homosexuals who are on the offensive. "Ordinary people did not pick this fight. They are not the aggressors."⁵⁰⁷ To the contrary, pro-family organizations "are merely defending the basic morality that has sustained the culture for everyone against a radical attack."⁵⁰⁸

The reports of pro-family organizations regarding the imperiled future of civilization are supported by appeals to history.⁵⁰⁹ One FRC position paper states authoritatively: "virtually all political revolutions that brought about societal collapse were preceded by sexual revolutions in which marriage and family were no longer accorded premiere status."⁵¹⁰ Thus, in this war, the stakes are very high because it is ultimately the future of civilization that is on the line. In 1989, William Dannemeyer, at the time a member of the United States House of Representatives, wrote:

"How are we, as supporters of the Judeo-Christian ethic, supposed to respond to this well-planned and well-financed attack on our civilization? The question faces us wherever we turn, demanding an answer—not in ten years, not in two years, but this year, now! . . . We must either defeat militant homosexuality or it will defeat us."⁵¹¹

The "fall of civilization" rhetoric reached its height during the congressional debate on DOMA where members of Congress regaled the floor with dark images of the fall of Rome and even Nero at his fiddle.⁵¹² Numerous members of Congress took the opportunity to not just speak out against same-sex relationships, but to warn that the attempt to redefine marriage to include same-sex couples would foretell the end of civilization as we knew it because such a radical act of redefinition threatened the very foundation of society, "the moral fiber that keeps this Nation together."⁵¹³

507. Robert H. Knight, *Answers to Questions About the Defense of Marriage*, Family Research Insight, at <http://www.frc.org/insight/is96c2hs.html> (last visited July 9, 2000).

508. *Id.*

509. Herman notes that pro-family organizations use the descent of "Greco-Roman antiquity" into "debauchery" as their point of reference. See HERMAN, *supra* note 6, at 110.

510. Knight, *supra* note 338, available at <http://www.frc.org/insight/is94f5hs.html> (last visited Jan. 31, 2001).

511. HERMAN, *supra* note 6, at 63 (alteration in original) (quoting from former Rep. Dannemeyer's book *Shadows in the Land*).

512. See, e.g., Knauer, *supra* note 319, at 195-96.

513. 142 CONG. REC. H7480, H7488 (daily ed. July 12, 1996) (statement of Rep. Stearns). See also Robert H. Knight, *Answers to Questions About the Defense of Marriage*, Family Research Insight, at <http://www.frc.org/insight/is96c2hs.html>. (last visited July 9, 2000) (noting that "[m]arriage has been the foundation of civilization for thousands of years").

G. Society Must Silence Homosexuality

The contagion model of homosexuality provides a very strong justification for its ultimate policy recommendation—society must silence expressions of homosexuality, albeit with compassion and not brimstone. If homosexuality is a freely chosen vice that undermines the moral fabric of this country and poses a significant public health threat, then it must be contained and, if possible, eradicated. This containment policy is particularly difficult because homosexuality, although not a pathology, has the capacity to spread like a contagion. Everyone is potentially susceptible to its insidious charms. Exposure to the idea of homosexuality in the media or in the schools is one site of contagion, as are the messages of approval and promotion sent by pro-gay policies adopted by the government and corporations. The idea of homosexuality, however, is also expressed by the existence of avowed homosexuals in all walks of life whose expressive lifestyles and militant pride are designed to entice others into their lifestyle. If homosexuals cannot be eradicated through conversion or other means, the most important goal is to stop the stream of lies; to silence the positive image of homosexuality or at least curtail its reach.

As discussed above, this understanding of homosexuality continues to inform a variety of laws, public policy, and judicial decisions all of which further the goal of silencing positive articulations of same-sex desire. The means by which the state continues to silence the expression of same-sex desire have largely left the realm of the criminal and center instead on disabilities imposed on individuals, speech, or ideas.⁵¹⁴ For example, although obscenity standards have retreated significantly from Lord Cockburn's 1857 pronouncement of the *Hicklin* rule,⁵¹⁵ Congress

514. As discussed above, sodomy laws, although rarely enforced, continue to work to silence positive expressions of same-sex desire in a variety of indirect ways. Sodomy laws reinforce the distinction between status and acts, thereby separating homosexuals from their expressions of intimacy. They also offer justification for a wide variety of legal messages that view gay men and lesbians as presumptive sodomites. See *supra* text accompanying notes 350-58. They also had a chilling effect in 1928. After the Oscar Wilde trial and the apparent ease with which the prosecution could make its case, male homosexuals were reluctant to, in the words of Radclyffe Hall, "declare themselves." Letter from Radclyffe Hall to Gorham Munson (June 2, 1934), at <http://www.datalounge.net/network/pages/lha/pblct/intrhall.htm> (last visited Jan. 24, 2001). For example, E.M. Forester did not feel that he could publish his novel, entitled *Maurice*, during his lifetime for fear of either criminal charges or suppression of the book as obscene libel. See SOUHAMI, *supra* note 25, at 203.

515. Existing obscenity law reaches only "prurient" or "patently offensive" work which lacks "serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 26 (1973). There remain questions as to whether expressions of same-sex desire are subject to a lower bar even under present-day obscenity standards. The upheaval in the early 1990s over an exhibit of Robert

and executive agencies have imposed conditions on state-funded speech mandating that it cannot be offensive or outside the bounds of “general standards of decency.”⁵¹⁶ Often, the decision to include such a subjective standard was intentionally designed to disqualify expressions of same-sex desire.⁵¹⁷

Whenever a state chooses between the two most popular models of homosexuality—i.e., the contagion model and the identity model—it does not directly censor the opposing model, but it does provide the other with a state-sanctioned platform.⁵¹⁸ Unlike the questions of state-

Mapplethorpe’s homoerotic photographs at a Cincinnati museum is a case in point. *See Contemporary Arts Ctr. v. Ney*, 735 F. Supp. 743, 744-45 (S.D. Ohio 1990) (granting a preliminary injunction against removal of the photographs by the authorities). The museum was eventually acquitted on charges of obscenity. *See Isabel Wilkerson, Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. TIMES, Oct. 6, 1990, at A1. Presumably, the lower bar would be the natural result of the lower tolerance that exists in society at large with regard to expressions of same-sex desire—i.e., flaunting).

516. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 576 (1998) (quoting 20 U.S.C. § 954(d)(1) (1994)). In *Finley*, the statutory language in question was as follows: “[G]eneral standards of decency and respect for the diverse beliefs and values of the American public.” *Id.* (quoting 20 U.S.C. § 954(d)(1) (1994)). Karen Finley, and other artists who were denied funding, alleged that the statute violated free speech rights because it allowed viewpoint discrimination. *See id.* at 577, 579. The Court also denied plaintiffs claim, which had been upheld by the circuit court, that the statute violated due process rights because it was unconstitutionally vague. *See id.* at 579.

Another example of this involves grant proposal guidelines issued by the Center for Disease Control with regard to HIV/AIDS education. In *Gay Men’s Health Crises v. Sullivan*, 792 F. Supp. 278 (S.D.N.Y. 1992), the language in question was “offensive to a majority of the intended audience or to a majority of adults outside the intended audience.” *See id.* at 295 (quoting 55 Fed. Reg. 10,667, 10,668 (Mar. 22, 1990) and substituting the word “adults” for “persons” as used in the text of the regulation) (footnote omitted). The district court held that the language was unconstitutionally vague and that it was an invalid exercise of agency discretion because it went beyond the agency’s statutory authority to refuse to fund “obscene” material. *See id.* at 291.

517. Until very recently, the Internal Revenue Service required “homosexual toleration” organizations that applied for exemption from income tax under section 501(c)(3) of the Internal Revenue Code to state that they would not attempt to convince anyone to become a homosexual. *See Fred Stokeld, IRS Withdraws Controversial Letter to Gay Group*, TAX NOTES TODAY, July 16, 1997, at 136-3. In 1997, the Gay and Lesbian Adolescent Support System challenged this administrative practice when, in connection with its application for exemption, the IRS requested that the organization “describe in detail the procedures and safeguards in place to assure that counselors . . . do not encourage or facilitate homosexual practices or encourage the development of homosexual attitudes and propensities by minor individuals.” *Id.* (quoting the IRS request).

518. When the state adopts an official version of homosexuality, that version carries the imprimatur of official approval which in and of itself has communicative value. Legislators and policy makers readily admit and enlist the expressive power of the state. One of the main justifications for DOMA was that the failure to act would send a message to the children about the desirability of same-sex relationships. *See Knauer, supra* note 319, at 194. Members of Congress thought that this message would be so strong that it would override the children’s religious and parental moral teachings. *See id.* at 194-95. Thus, the congressional hearings and debates over DOMA presented an opportunity to reaffirm the centrality of the contagion model in American policy-making.

funded speech, this is not a case where the state subsidizes the speech of an individual or an organization. Instead, this is what occurs in connection with curricular reform where the state installs a particular model of homosexuality as the official version or account of same-sex desire.⁵¹⁹ Even in instances where the state ostensibly shies away from any mention of homosexuality, such as those sex education programs that stress abstinence, the state in effect champions heterosexuality.

Silence may often be exacted by the absence of protection for the politicized subject of the avowed homosexual. It may require an employee (or a tenant or a Scout Master) to choose between his job (or apartment or troop) and the closet. The failure to protect coming out speech and the expressive lifestyle of the avowed homosexual also sends a message. It shows that the state has remained firm against the onslaught of homosexual activists and has refused to grant “special rights” to sodomites. These special rights are not only unfair, but they directly infringe on the rights of other (more morally responsible) members of society.

Finally, the current rash of anti-gay legislation offers a much more direct and targeted approach to silencing the idea of same-sex desire, whether it be embodied in a person, a curriculum, or a marriage license.⁵²⁰ Until recently, a combination of sodomy laws, obscenity laws, diagnostic manuals, and social opprobrium was sufficient to curtail or foreclose expressions of homosexuality. Now, laws describe specifically what homosexuals (and only homosexuals) cannot do and where positive articulations of homosexuality (and only positive articulations) cannot be spoken. For example, vague “crimes against nature” statutes in some states have become proscriptions only against “homosexual sodomy.”⁵²¹ In addition, same-sex couples in many states are specifically prohibited from marrying or adopting children.⁵²² In some states, an individual who is a homosexual cannot adopt children or participate in foster care programs.⁵²³ Even if a same-sex couple were in a recognized union for state purposes, it would not be recognized for federal purposes. Under no circumstances can an openly gay individual serve in the United States military.⁵²⁴ And, in numerous states, the topic of homosexuality must be

519. For a discussion of curriculum reform, see *supra* Part V.C.3.a.

520. Eskridge reports that there is now more anti-gay legislation than ever before. See ESKRIDGE, *supra* note 29, at 205.

521. See *supra* note 352.

522. See *supra* notes 416-24 and accompanying text.

523. See ESKRIDGE & HUNTER, *supra* note 356, at 844-45 (discussing laws in Florida and New Hampshire).

524. See *supra* notes 359-63 and accompanying text (discussing the “Gays in the Military

presented in schools in a certain manner, if it is allowed to be presented at all.⁵²⁵

Anti-discrimination laws and favorable judicial decisions sometimes provide only limited and fleeting protections for individuals in same-sex relationships or those who identify themselves as gay or lesbian. Anti-gay citizen initiatives in Cincinnati and Maine have successfully overturned anti-discrimination protection approved by legislative bodies.⁵²⁶ And voters in Hawaii have, in effect, overturned a state supreme court decision recognizing the right of same-sex couples to marry.⁵²⁷

The legal disabilities described above not only silence speech, but also foreclose speech,⁵²⁸ as they send a strong proscriptive message about homosexuality and reinscribe the norm of universal heterosexuality in law and public policy. In so doing, they also facilitate a regime of societal regulation that stigmatizes and silences same-sex desire,⁵²⁹ and they insure the continued vitality of the understanding of homosexuality as contagion.

VI. CONCLUSION

The controversy over *The Well* illustrates that the contagion model of homosexuality has longstanding roots in Anglo-American jurisprudence, dating from at least 1928. Although it may be no surprise that same-sex desire historically has been subject to legal disabilities, the contagion model represented a distinct change in the understanding of

Debate”).

525. See *supra* notes 401-09 and accompanying text.

526. See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 300-01 (6th Cir. 1997) (upholding the constitutionality of the City Charter Amendment denying anti-discrimination protection to homosexuals); *Maine Voters Repeal Gay Rights Law*, N.Y. TIMES, Feb. 11, 1998, at A15 (describing how a “people’s veto” blocked a bill that would have added sexual orientation to classes protected under the state human rights act). For a description of the very contentious citizen initiatives in Oregon and Colorado, see GALLAGHER & BULL, *supra* note 319, at 47-62, 103-124.

527. See *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (unpublished table decision), No. 20371, 1999 Haw. LEXIS 391, at *6-7 (Haw. Dec. 9, 1999) (upholding the validity of the voter initiative); *Hawaii’s Ban on Gay Marriage*, N.Y. TIMES, Dec. 20, 1999, at A36.

528. See BUTLER, *supra* note 300, at 137-41 (describing the operation of “foreclosure”).

529. As seen in the case of Marjorie Rowland, the force of heteronormativity renders heterosexuality unremarkable, such that a wedding ring, pictures of the family on the desk in the office, or a comment about what one did with her spouse over the weekend is not perceived as flaunting a sexual orientation or making an issue out of one’s lifestyle. See *supra* note 467 and accompanying text. Individuals who are in same-sex relationships who engage in the exact same activities are “avowed homosexuals” who, like Dale, have wrapped themselves in a banner of activism. See *supra* notes 457-463 and accompanying text.

same-sex desire. Despite his disdain for the early sexologists, Douglas' broadside assumed the existence of a particular type of person who practiced certain depraved vices, who exhibited no shame in "social assemblies," and who demanded recognition.⁵³⁰ Writing in response to Hall's sympathetic use of a modified identity model to argue for toleration and recognition, Douglas' ire was targeted at the invert/homosexual and not the occasional sodomite.⁵³¹

The similarities between Douglas' counter-narrative of homosexuality as contagion and the contemporary views of the FRC are striking. The six essential maxims set forth by Douglas, with some minor modernizations, enjoy a wide circulation today. They are assiduously advanced by pro-family organizations, adopted by members of Congress, and enshrined in judicial opinions. In this way, the socio-legal response to *The Well*—i.e., the deployment of the contagion model—provides an important link in our understanding of the continued regulation of the expression of same-sex desire. It raises the question of why the contagion model has enjoyed such longevity and continued acceptance. Moreover, how has the contagion model of homosexuality managed to remain relatively stable in the face of decades of gay and lesbian visibility and activism?

Today, pro-gay and pro-family groups continue to spar over the true nature of homosexuality in the belief that if their side can define the nature of same-sex desire, they can control its legal and social status. This was also true of Douglas and Hall. Both advanced a particular view of homosexuality with the expectation that if his or her view was recognized by the court, certain results would necessarily follow. For Hall, it was important for the court to make a distinction between "perversion" and "inversion" and to recognize that although inversion might not be normal, it was natural.⁵³² Douglas and the prosecution only saw perversion, weak wills, and the possibility of contamination.⁵³³ One construction of homosexuality would exonerate the book, the other would consign it to the King's furnace as obscene libel.

In the contemporary debate, pro-family organizations devote considerable resources to debunking the claim of a biological or genetic cause of homosexuality through the ex-gay movement and sponsoring

530. See BRITAIN, *supra* note 25, at 54.

531. For a discussion of the distinction between an invert and a sodomite, see *supra* text accompanying notes 55-57.

532. For a discussion of Hall's argument based on nature, see *supra* text accompanying notes 134-36.

533. For a description of Douglas' view of *The Well*, see *supra* Part III.

independent research.⁵³⁴ As pro-gay organizations retreat more and more into the language of immutability, the questions become whether an individual can really change his sexual orientation and which side has better science. The position of the pro-gay organizations seems to misapprehend the contagion model which has at its core a belief in the immorality of same-sex sexuality and the essential charge that homosexuality must be contained. First, the conviction of pro-gay organizations that a biological pre-disposition toward same-sex desire would relieve homosexuality of its immorality is highly questionable, particularly given the emphasis pro-family groups place on free will. Second, this conviction also requires a biological explanation that would apply to every individual who experiences same-sex desire. If some individuals were capable of experiencing same-sex desire in the absence of a predisposition, then there would still be a need for containment because homosexuality would still be contagious.

This second point seems the most difficult to overcome. Even the most elaborate taxonomic explanations of the early sexologists ascribed a biological cause only to certain subsets of individuals who experienced same-sex desire.⁵³⁵ In *The Well*, Hall freely discussed the “normal” women who fall for inverts.⁵³⁶ As long as individuals continue to perceive that object choice is either independent from identity or subject to change over their lifespan, there will be ex-gays and “normal” women who from time to time may fall in love with inverts. Thus, if science cannot eliminate the risk of contagion, the only way to neutralize the possibility of contagion is to appeal directly to morality. Rather than asserting that same-sex desire must be moral because it is inborn, the debate must be centered on the morality of same-sex desire and not its etymology.

In the meantime, the contemporary regulation of same-sex desire, informed directly by the contagion model, continues. Although direct censorship is now the exception, the state continues to silence positive articulations of same-sex desire in a wide variety of contexts, including education, public employment, and government-funded programs.⁵³⁷ The

534. For a description of the efforts of pro-family organizations to discredit scientific work that suggests that homosexuality is in some way hard-wired, see *supra* note 331. For a discussion of the ex-gay movement, see *supra* text accompanying notes 333-39.

535. For a discussion of how object choice remained, in some cases, independent of identity, see *supra* text accompanying notes 55-57.

536. For a discussion of the place of “normal” women in Hall’s construction of the identity of an invert, see *supra* text accompanying notes 138-43.

537. For a discussion of the continuing spheres of silence in contemporary society, see *supra* Part V.G.

text of Hall's "most dangerous and corrupting book"⁵³⁸ has been replaced by the "avowed homosexual" and his expressive lifestyle.⁵³⁹ Courts are just as concerned today about the message sent by an openly gay assistant Scout Master as they were about the message sent by *The Well* in 1928.

538. BRITAIN, *supra* note 25, at 126.

539. For a discussion of the expressive lifestyle of an openly gay person, see *supra* text accompanying notes 492-512. See also Knauer, *supra* note 23.