

# “I Made Up My Mind to Get It”: The American Trial of *The Well of Loneliness*, New York City, 1928–1929

LESLIE A. TAYLOR

*University of Washington*

FROM DECEMBER 1928 TO APRIL 1929, New York City attorneys, courts, and the public pondered “sex matters,” “a delicate social problem,” and “one woman’s fight for social adjustment despite abnormality.”<sup>1</sup> When writers for the *New York Times* used these descriptions to convey the lesbian theme of Radclyffe Hall’s novel *The Well of Loneliness*, they were participating in a scandal in which normative values about “sexual explicitness” and the causes of sexual identity and gender were being contested. The scandal forced publishing houses, vice societies, attorneys, and the courts to articulate the manner in which a lesbian novel could—and could not—corrupt.

The debate surrounding *The Well of Loneliness* stands in stark contrast to the debate over lesbian representation in the play *The Captive*. During the furor over *The Captive* between 1926 and 1927, New York courts ruled that lesbian and deviant female heterosexual representation onstage was unacceptable. The New York legislature capitalized on judicial opinion and amended the obscenity statute to prohibit plays with “sex degeneracy” and “sex perversion.” Although the scandal over *The Captive* had quieted after April 1927, the publication of *The Well* in December 1928 reignited the debate over lesbian representation. The trial of *The Well* resulted in a verdict

I would like to thank Professors Linda Kerber, Lauren Rabinovitz, and Pat Cain of the University of Iowa for all their helpful comments and suggestions on earlier versions of this article. Thanks also to Maureen Howe and my colleagues in the American Studies Program for their patience, humor, and solidarity. I owe special thanks to Stephanie G. Begen, the granddaughter of Morris L. Ernst, for allowing me to quote from his papers.

<sup>1</sup>“To Print Banned Book Here,” *New York Times*, 30 August 1928; “Well of Loneliness’ Cleared in Court Here,” *New York Times*, 20 April 1929; and “Police Seize Novel by Radclyffe Hall,” *New York Times*, 12 January 1929.

*Journal of the History of Sexuality*, Vol. 10, No. 2, April 2001

© 2001 by the University of Texas Press, P.O. Box 7819, Austin, TX 78713-7819

different from the one handed down in the earlier case. The publishers of the novel, Covici-Friede, were charged with printing obscenity, but both the New York courts and the U.S. Customs Service held that *The Well of Loneliness*, a novel with a lesbian theme, was not obscene and could be printed and distributed.

In order to defend *The Well*, attorney Morris Ernst utilized a strategy in which he pitted two representations of “lesbians” and “lesbian desire” against each other. *The Well* could not be obscene, he reasoned, because *Mademoiselle de Maupin*, a “truly obscene” book that contained explicit lesbian sexuality, circulated without restriction or censure. Ernst argued further, and the judges affirmed, that *The Well* should be cleared of all charges because the text lacked sexual explicitness, not because lesbianism itself was not an obscene subject.

In 1928, at the age of forty-seven, Radclyffe Hall wrote *The Well of Loneliness* because she wanted to be the first person who would “smash the conspiracy of silence” about sexual inversion.<sup>2</sup> Hall was a product of the British upper class, a prize-winning author, and a self-identified “invert” who wore “mannish” clothes and liked to be called “John.”<sup>3</sup> Hall incorporated many of these characteristics into her protagonist Stephen Gordon. In the first of five long sections, Hall describes the idyllic life at Gordon’s ancestral home, Morton, which was inhabited by Sir Philip; his Irish wife, Anna; and their young daughter, Stephen. Stephen is described as a “narrow-hipped, wide shouldered little tadpole of a baby,” who is proficient at “masculine” endeavors such as riding horses astride, hunting, fencing, and analytical thinking.<sup>4</sup> While Stephen and her father have a close relationship, the relationship between mother and daughter is strained because Anna senses something odd about Stephen. Stephen’s oddness is made clear when she develops her first crush—and the object of her desire is the servant woman, Collins. In her late adolescence, Stephen develops an intense friendship with Martin Hallam, a young Canadian. Martin falls in love with her, but when he proposes marriage, Stephen’s revulsion at the prospect forces her to ask Sir Philip whether there is something “strange” about her. Sir Philip does not answer, but his private ruminations disclose to the reader that Stephen possesses an “abnormal”

<sup>2</sup>Hall to Gerard Manley Hopkins, 15 August 1928, in Michael Baker, *Our Three Selves: The Life of Radclyffe Hall* (London: Hamish Hamilton, 1985), 222.

<sup>3</sup>In addition to two volumes of poetry, Hall had published *The Unlit Lamp* (1924), which also had a lesbian theme but had escaped censure, and *Adam’s Breed* (1926), for which she won the Prix Femina and the James Tait Black Memorial Prize for best novel of the year. Quotation in Baker, 196–97; Baker’s book is generally regarded as the definitive Hall biography. See also the book by Hall’s partner, Lady Una Troubridge, *The Life and Death of Radclyffe Hall* (London: Hammond & Hammond, 1961).

<sup>4</sup>Radclyffe Hall, *The Well of Loneliness* (New York: Covici-Friede, 1928; reprint, New York: Avon, 1981), 13. All citations will be to the Avon edition.

condition, a condition that Sir Philip has discovered in sexology books. The first section ends with Sir Philip's death, before he reveals the secret.

The second section chronicles Stephen's full embrace of a "masculine" style of dress and her desire for women. She pursues a relationship with Angela Crosby, a married American woman and former actress. But Angela's interest in Stephen is not genuine: she is titillated by Stephen's attention, but she will not face society's disapproval. Angela eventually betrays Stephen to Anna. When a distraught Stephen is forced to face her mother and admit her deviance, Anna demands she leave Morton. Stephen spends her last night in her father's library where she discovers a book by Richard von Krafft-Ebing (probably *Psychopathia Sexualis*). When Stephen opens the book, she finds, "On its margins were notes in her father's small, scholarly hand and she saw that her own name appeared in those notes—"<sup>5</sup> Upon realizing she is an invert, she is both relieved and devastated: "[God] let us get flawed in the making."<sup>6</sup> With her governess, confidant, and fellow invert, Puddle, by her side, she leaves the ancestral home for London.

When section 3 opens, the reader learns that Stephen has become a writer and that her first book has been greeted with acclaim. An effete man and fellow writer, Jonathan Brockett, befriends her and begins to teach her about "their kind." At his suggestion, Stephen moves to Paris, buys a house on Rue St. Jacob, employs several servants, and immediately becomes part of the elite lesbian circle, headed by Valerie Seymour, a thinly disguised Natalie Barney.<sup>7</sup> When World War I breaks out, Stephen volunteers in the all-woman ambulance corps, which is filled with inverts like herself, who make good workers, the omniscient narrator notes, because "bombs do not trouble the nerves of the invert."<sup>8</sup>

Section 4 documents Stephen's growing friendship and love for Mary, a penniless young Welsh woman who is also a war volunteer. While Stephen feels a need to "protect" Mary, it is Mary who initiates the relationship. When the war ends, the two vacation on the Mediterranean where they consummate their relationship. In the last section, Mary and Stephen create a life together in Paris. Generally it is a happy one, but Mary becomes lonely when Stephen returns to her writing. Brockett, who has survived the war and also lives in Paris, advises Stephen that "normal" women like Mary need things like friends and amusements, and if Stephen were a man, Mary would have babies to care

<sup>5</sup>Hall, 204. The reason for Hall's decision to utilize the far less sympathetic formulations by Krafft-Ebing rather than those of Ellis is unclear. Both texts were published prior to World War I, the time in which Stephen is supposed to have found the text. Also, Hall showed her own positive appraisal of Ellis's work by including his preface.

<sup>6</sup>Hall, 204.

<sup>7</sup>For more on this wealthy expatriate lesbian and her salon at 20 Rue St. Jacob, see Shari Benstock, "Paris Lesbianism and the Politics of Reaction, 1900–1940," in *Hidden From History*, ed. Martin Duberman, Martha Vicinus, and George Chauncey, Jr. (New York: Meridian, 1989), 332–46.

<sup>8</sup>Hall, 271.

for. To ease Mary's loneliness, Stephen decides to integrate Mary and herself into the lesbian salons and the seamy bar scene, although she despises both. Despite Stephen's best attempts, proper Parisian society rejects the couple, and even her own biological family rejects Mary. Stephen despairs over what she is doing to Mary, although Mary never criticizes Stephen or their life. When Martin Hallam unexpectedly calls upon them and befriends Mary, Stephen decides to save Mary from the desperate life of the inverted. She creates an elaborate plan in which Stephen dupes Mary into believing that she and Valerie are having an affair. Mary, heartbroken, falls into the arms of Martin, who waits to take her into normal society. On the last page, a disconsolate Stephen cries out to God and society to accept "the invert."

Radclyffe Hall's *The Well of Loneliness* was published by Jonathan Cape in England in July 1928 to a mixture of acclaim and criticism. By September, the British Home Secretary unofficially declared *The Well* obscene. Rather than face a trial, Jonathan Cape, much to Hall's displeasure, voluntarily withdrew the book and ceased printing in Britain. Then Cape—with Hall's permission—subleased the rights to Pegasus Press, a Paris firm, and a new edition was printed in France. On October 4, customs authorities seized 250 copies of *The Well* at Dover, only to release them two weeks later. British officials had ordered the book's seizure and later its release as they sought the best legal grounds upon which to test the book's obscenity. On October 19, only one day after the books were released, police raided several bookstores and Cape's offices and charged Cape with violating the Obscene Publications Act of 1857. The Act defined a book as obscene if it "tended to corrupt those whose minds were 'open to immoral influence.'" Despite testimony from some of the most influential British writers, including Virginia Woolf, the British courts found Hall's book obscene in November 1928. The appellate court affirmed the lower court's decision in December: it took only ten minutes for the twelve judges to rule that *The Well* was "a disgusting book . . . prejudicial to the morals of the community." The ban lasted in England until 1948.<sup>9</sup>

<sup>9</sup>Baker, 223–45. Baker's text is regarded as the authoritative source on the British trial. Vera Brittain's *Radclyffe Hall: A Case of Obscenity?* (New York: A. S. Barnes, 1969) was the first book to analyze both the British and New York trials and to compile book reviews and court opinions. The American trial gets short shrift in most gay and lesbian literary criticism and historical narratives. One of the most widely read critical works, Rebecca O'Rourke's *Reflecting on the Well of Loneliness* (New York: Routledge, 1989), 93, provides an in-depth history of the British trial but obscures the American trial, and even erroneously lists Knopf as the original American publisher. The only critical article to discuss *both* trials in detail is Sonja Ruehl's "Inverts and Experts: Radclyffe Hall and the Lesbian Identity," in *Feminism, Culture and Politics*, ed. Rosalind Brunt and Caroline Rowan (London: Lawrence and Wishart, 1982), 28–30. For brief references to *The Well's* American trial, see Sherrie Inness, *The Lesbian Menace: Ideology, Identity and the Representation of Lesbian Life* (Amherst: University of Massachusetts Press, 1997), 14; George Chauncey, Jr., *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World 1890–1940* (New York: Basic Books, 1994), 324; Terry Castle, *The Apparitional Lesbian: Female Homosexuality and Modern Culture* (New York:

*Publishers' Weekly* and the *New York Times* covered the British trial and the novel's trudging path toward publication in the United States. The publicity around the British obscenity trial affected American perception of the book and influenced the type of publishing house that finally accepted the work. In America, Doubleday had published Hall's novel *Adam's Breed* but rejected *The Well*; Houghton Mifflin and Harper's also rejected it.<sup>10</sup> Meanwhile in London, Hall met Blanche Knopf of A. A. Knopf, who immediately insisted on reading the manuscript. Within just a few days, Mrs. Knopf agreed that A. A. Knopf would publish the book. During the summer of 1928, Alfred Knopf wrote Hall, "I have now finished [it] and feel very happy indeed that we are to publish it. It strikes me as a very fine book indeed and the first half of it is simply superb. I have very great hopes for its success and will assure you, in any case, of a very good looking volume."<sup>11</sup> While the Knopfs were willing to publish it, they were also following its problematic reception in Britain and envisioned a legal battle in the United States as well. During contract negotiations, Knopf demanded that Hall accept all legal responsibility should American authorities take action. Hall demanded that Knopf strike this proviso; the day before her deadline of June 22, they complied.<sup>12</sup> Knopf planned an October publication date, and Hall began sending them ideas and photographs for their publicity campaign.<sup>13</sup>

After *The Well* was removed from circulation in Britain, *Publishers' Weekly* included a statement from Hall herself defending her book. "I claim that

---

Columbia, 1993), 5; Esther Newton, "The Mythic Mannish Lesbian: Radclyffe Hall and the New Woman," in *Hidden from History* (New York: Meridian, 1989), 291; Catharine Stimpson, "Zero Degree Deviancy: The Lesbian Novel in English," *Critical Inquiry* 8: 367 (winter 1981); Bonnie Zimmerman, *The Safe Sea of Women: Lesbian Fiction 1969–1989* (Boston: Beacon Press, 1990), 7; Gillian Whitlock, "'Everything Is out of Place': Radclyffe Hall and the Lesbian Literary Tradition," *Feminist Studies* 13: 558–59 (fall 1987); and Leigh Gilmore, "Obscenity, Modernity, Identity: Legalizing *The Well of Loneliness* and *Nightwood*," *Journal of the History of Sexuality* 4: 603–24 (April 1994). The trial holds an important place in the history of obscenity law and the history of vice societies. See Paul Boyer, *Purity in Print: The Vice-Society Movement and Book Censorship in America* (New York: Charles Scribner's Sons, 1968), 130–35; Felice Flanery Lewis, *Literature, Obscenity, and the Law* (Carbondale: Southern Illinois University Press, 1976), 97–98, 108–11; Walter Kendrick, *The Secret Museum: Pornography in Modern Culture* (New York: Viking, 1987; reprint, Berkeley: University of California Press, 1996), 56, 180–81, 285; and Edward de Grazia, *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius* (New York: Random House, 1992), 165–208.

<sup>10</sup>Baker, 206.

<sup>11</sup>Alfred A. Knopf to Radclyffe Hall, 19 July 1928, in A. A. Knopf Collection, Harry Ransom Humanities Research Center (HRHRC), University of Texas, Austin.

<sup>12</sup>Baker, 207.

<sup>13</sup>Radclyffe Hall to Alfred A. Knopf, 8 July 1928 and 24 July 1928, in A. A. Knopf Collection, HRHRC.

far from encouraging depravity my book is calculated to encourage mutual understanding between normal persons and the inverted which can only be beneficial to both and to society at large.”<sup>14</sup> In the same article, *Publishers’ Weekly* also apprised the industry of Knopf’s continued commitment to the book: “According to [Knopf] the withdrawal of the book in England will not affect their publishing of the book as planned.”<sup>15</sup> On August 30, 1928, the *New York Times* announced that Knopf would print the “banned book here” despite the “newspaper controversy.”<sup>16</sup>

Although A. A. Knopf had originally contracted with Hall to publish the book, and despite their public commitment to it, the maelstrom in England changed their position. Fearing the costs of legal prosecution and that *The Well* would be viewed as pornography, Knopf broke their contract with Hall even before the official verdict in England was handed down in November.<sup>17</sup> Although Mrs. Knopf had supported the book, she had been in Europe when the British flurry began. Upon returning to America she found the situation “much more serious than I expected.” Threats to prosecute already loomed. “The book has had a lot of very unfortunate publicity in the American press and certain over-zealous reporters have already brought it to the attention of the public authorities,” she warned Hall. “Whether these authorities would commit themselves to an opinion in advance of publication I don’t know—They would be under no obligation to do so—but if approached would doubtless react as your Home Secretary did.”<sup>18</sup>

Not only was the situation serious legally, but distributors were nervous as well. Blanche wrote Knopf that “while orders are coming in for the book they are not coming in any great quantities from the better type of bookseller but rather from dealers who expect a sensational demand for the book from people who might expect something very salacious. I am convinced that handle the book as we might, we could never avoid selling it as a dirty book, which is the last thing you or any of us want to see happen in connection with it.”<sup>19</sup> Because the book had become “dirty,” and because there was no way to strip it clean of that imprimatur, Knopf suggested Hall “would be most wise to keep the book entirely out of the American market. No American publisher could now handle it except as pornography.”<sup>20</sup> As a token courtesy, she offered to turn the typeset book over to a new publisher for cost.<sup>21</sup>

<sup>14</sup>*Publishers’ Weekly*, 1 September 1928, 683.

<sup>15</sup>Ibid.

<sup>16</sup>*New York Times*, 30 August, 1928, 36.

<sup>17</sup>Blanche Knopf to Radclyffe Hall, 20 September 1928, in A. A. Knopf Collection, HRHRC.

<sup>18</sup>Ibid.

<sup>19</sup>Ibid.

<sup>20</sup>Ibid.

<sup>21</sup>Ibid.

*Publishers' Weekly* publicized Knopf's decision to break the contract with Hall. While the anonymous author did not explicitly chide Knopf, the tone conveyed disappointment and frustration: "The work was accepted after having been read by four readers, including two of the members of the firm, who all agreed that it was the work of a gifted writer who probably had before her a distinguished career, and, while it dealt with a very delicate subject and one that might be regarded by many as taboo, it did so without offense."<sup>22</sup>

By November 1928, four major U.S. publishing houses had refused to publish *The Well*. The publicity being generated around its publication and distribution virtually assured that only a house with little to lose and a relish for risk would approach it. The men who won the U.S. copyright for *The Well*, Pascal "Pat" Covici and Donald Friede, had set up their own publishing house only five months before in June 1928. To the venture, the partners contributed \$30,000 and their individual experiences at fighting censorship. Pat Covici was a forty-year-old Chicago bookseller who had previously published avant-garde books. In 1924, on the advice of his attorney Clarence Darrow, he had pled *nolo contendere* to a charge of violating the postal obscenity statute for publishing and distributing Wallace Smith's phallic illustrations in Ben Hecht's *Fantazius Mallare*. Covici regretted not fighting the charge, and his regret cemented his opposition to censorship.<sup>23</sup> After the incident, Covici moved to New York City.<sup>24</sup>

When Covici met his future business partner in January 1928, Donald Friede was a wealthy twenty-seven-year-old and a dropout of several Ivy League schools whose psychoanalyst had suggested that publishing might be a more suitable career. Friede had begun his career in Knopf's stockroom in 1924, transferred to their accounting office, and then tried (and failed) to sell advertising space in the *American Mercury*. When he moved to Boni & Liveright in 1925, "the most flamboyant publishing house of all time," Friede bought himself a vice presidency, a position from which he could make publishing decisions.<sup>25</sup>

<sup>22</sup>*Publishers' Weekly*, 10 November 1928, 1988. A. A. Knopf's decision to capitulate was not unprecedented. In two other incidents, he succumbed to pressure from the New York Society for the Suppression of Vice (NYSSV). In 1915, during his first year of publishing, Knopf withdrew and melted the plates of Stanislaw Przybicki's *Homo Sapiens*. Knopf, who explained his decision to the readers of *Publishers' Weekly*, rationalized that because the book had been "smirched," he would no longer print it. In 1924, Knopf withdrew Floyd Dell's *Janet March* when the NYSSV threatened to prosecute. For a discussion of these actions, see Boyer, *Purity in Print*, 36, 135; *Publishers' Weekly*, 22 January 1916, 280.

<sup>23</sup>See John Tebbel, *A History of Book Publishing in the United States: The Golden Age between Two Wars, 1920-40*, 4 vols. (New York: R. R. Bowker, 1978), 3:147.

<sup>24</sup>Boyer, 132.

<sup>25</sup>Donald C. Friede, *The Mechanical Angel: His Adventures and Enterprises in the Glittering 1920s* (New York: Alfred A. Knopf, 1948), 16-23; Tebbel, 3:141.

In April 1927, while still at Boni & Liveright, Friede volunteered to contest the power of Boston's Watch and Ward Society and sold a copy of Dreiser's *An American Tragedy* to a Boston police officer. The act was well planned: a photographer caught the event and Boston duly charged Friede with selling an obscene volume.<sup>26</sup> Despite the valiant efforts of attorney Arthur Garfield Hays, who had also argued *The Captive* case, to guarantee that not just parts but the entirety of the book would be admitted into evidence, Friede was found guilty.<sup>27</sup> Friede was in the process of appealing his obscenity conviction in Boston when he and Covici opened their publishing firm in New York City.

Covici-Friede's first book was a twenty-dollar set of François Villon's complete works in French and English. The book was chosen because they found it worthy and because it catered to the current craze for limited editions, a craze John Tebbel describes as "a reflection of the affluent twenties and the consequent craving for visible evidences of culture on the part of people who had either ignored it or could not afford it before."<sup>28</sup> In their first months, Covici-Friede also published Ben Hecht and Charles MacArthur's play *The Front Page*, and Richard Aldington's *Collected Poems*.<sup>29</sup>

Friede was aware that small editions of "polite erotica" priced between ten dollars and twenty-five dollars were especially popular during this era.<sup>30</sup> The popularity of "erotica" would influence Covici-Friede's decision to win the rights to *The Well of Loneliness*. They knew little about Radclyffe Hall or lesbianism until Friede overheard gossip during a party at Theodore Dreiser's home:

I came back . . . in a state of high excitement. From everything everybody there said about the book—it was by a woman named Radclyffe

<sup>26</sup>Boyer, photograph 24; Friede, 134–48. Boston's obscenity statute was one of the strictest in the nation; Chapter 272, section 28, in *General Laws of the Commonwealth*, vol. II (Boston: Wright & Potter, 1921): "Whoever imports, prints, publishes, sells or distributes a book, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or *manifestly tending* to corrupt morals of youth," could be found guilty of possession or sale of obscene literature (emphasis added). Even one "obscene" word could make a book obscene. In 1930, an anticensorship coalition successfully pressured the legislature to liberalize the statute. See Boyer, 190–206.

<sup>27</sup>Edward de Grazia, 137–38, suggests that the defense team, consisting of Friede, Theodore Dreiser, Horace Liveright, and Clarence Darrow, may have helped the jury reach a guilty verdict when the four attended an event in honor of Margaret Sanger near the end of the trial. Sanger presented herself with tape over her mouth because Boston authorities had told her she could not speak publicly—and the police attended the event ready to arrest her if she disobeyed. Dreiser and Darrow gave speeches in which they castigated Boston's obscenity statute and generally made fun of the city.

<sup>28</sup>Tebbel, 3:147.

<sup>29</sup>Tebbel, 3:147–48.

<sup>30</sup>Ibid.



Hall and dealt with the taboo subject of Lesbianism—it was a fine and sincere piece of writing, and besides it carried the endorsement of Havelock Ellis, which certainly precluded the possibility of its being merely another bit of pornography. I made up my mind to get it.<sup>31</sup>

There were obstacles, however. While he was consulting with a book buyer at Macy's, Friede learned that a major publishing house had promised Cape a \$7,500 advance for rights to *The Well*. More determined than ever, Friede finagled a \$10,000 loan from the conservative Fifth Avenue Bank.<sup>32</sup> With this advance plus the promise of a 15 percent straight royalty, Cape gave Covici-Friede the rights.<sup>33</sup> Friede recalled that he and Covici sensed the book would be a best-seller. They also realized they were going to need a lawyer, for they were sure to be charged with obscenity.<sup>34</sup>

As every publisher in the city knew, the New York Society for the Suppression of Vice (NYSSV), under the leadership of John Sumner, relentlessly patrolled the boundaries of “decent” and “indecent” literature. A lawyer-turned-stockbroker, Sumner had become secretary of the Vice Society upon Anthony Comstock's death in 1915. During World War I, the Vice Society, in league with other reformers, had staged several purity campaigns and helped remove “dirty” literature from circulation.<sup>35</sup> Following the war, the Vice Society's triumphs decreased with the general loosening of wartime strictures and an explosion of small publishing houses eager to challenge the older ones who had shied away from provocative themes and “explicit” language.<sup>36</sup> The struggles over clashing cultural values had resulted in two attempts to amend New York's obscenity statute.<sup>37</sup> Seemingly, the power of the censors was beginning to diminish.

Historian Paul Boyer concludes that the most important factor in establishing “procedural restraints on book prosecutions” was really the New York judiciary. A number of cases had established that a book must be judged in its entirety, that expert opinion was admissible, and that a book's impact must be measured on adults, not on the immature.<sup>38</sup> Boyer found

<sup>31</sup>Friede, 90.

<sup>32</sup>Ibid., 91.

<sup>33</sup>Friede did not know that Cape had sold them the American rights because he had been unable to set up his own U.S. publishing house in time; see Tebbel, 3:416.

<sup>34</sup>Friede, 91–92.

<sup>35</sup>Jay A. Gertzman, “John Saxton Sumner of the New York Society for the Suppression of Vice: A Chief Smut-Eradicator of the Interwar Period,” *Journal of American Culture* 17: 42 (summer 1994).

<sup>36</sup>Boyer, 128–29. Tebbel explores the exciting rise and fall of these houses in his chapter, “New Publishers of the Twenties,” 3:128–200.

<sup>37</sup>See Leslie Taylor, “Up and Down the Aisles of Lesbos: Indecency in the New York Theatre, 1926–27,” in “Veritable Hotbeds: Lesbian Scandals in the United States, 1926–1936” (Ph.D. diss., University of Iowa, 1998).

<sup>38</sup>Boyer, 124.

that by 1929 some “taboos” remained, including “explicit discussion of sexual perversion,” but he maintained that the Vice Society was in decline.<sup>39</sup> However, this conclusion must be rethought in light of the Vice Society’s campaign against lesbian materials. In concert with the district attorney and reform societies, Sumner lent his considerable support to the successful movement to close *The Captive*. Although Sumner and the coalition in which he was a part had been unable to limit literary publications between 1923 and 1925, they had in 1927 successfully amended the obscenity statute to prohibit “sex perversion” and “sex degeneracy” on the stage.<sup>40</sup> While the Vice Society may have been at its nadir in general, the organization had reached its apex in controlling lesbian representation.

When Covici and Friede turned to Morris Ernst for assistance in understanding these legal complexities, he had practiced law for thirteen years. Ernst was born in 1888 in Alabama to Jewish parents who had emigrated from Czechoslovakia. In 1890, he and his family moved to New York City. His father managed a store, and his mother attended and graduated from Hunter College, becoming part of the second generation of women pursuing a higher education. Ernst attended Horace Mann High School, graduated from Williams in 1909, and then worked as a shirt and furniture salesman during the day while he studied law at night. Admitted to the bar in 1913 after failing once, he started a practice with Messrs. Greenbaum and Woolf in 1915.<sup>41</sup> Ernst had not sought a career in anticensorship cases. Only in 1927, after he lost an obscenity case brought by U.S. Customs against John Hermann’s autoerotic novel *What Happens*, did he become interested in book censorship. After his loss, he and fellow attorney William Seagle studied the history and current practice of censorship in the United States and Europe. Their book, *To the Pure*, published by Viking in 1928, is an eclectic mix of rhetoric and law, but it also contains valuable information on trials in New York City and Boston, including a list of the books Boston banned in 1927.<sup>42</sup> When *To the Pure* was published, it received immediate critical praise. Boston authorities, on the other hand, responded by adding it to their ever-growing list of prohibited books.<sup>43</sup>

When Covici-Friede hired him in the fall of 1928, Ernst was in the process of defending Mary Ware Dennett against the charge of obscenity for mailing “The Sex Side of Life: An Explanation for Young People.”<sup>44</sup>

<sup>39</sup>Boyer, 130.

<sup>40</sup>Arthur Garfield Hays, *Let Freedom Ring* (New York: Horace Liveright, 1937), 237–75.

<sup>41</sup>“Morris Ernst, ‘Ulysses’ Case Lawyer Dies,” *New York Times*, 23 May 1976.

<sup>42</sup>Morris L. Ernst and William Seagle, *To the Pure . . . : A Study of Obscenity and the Censor* (New York: Viking Press, 1928).

<sup>43</sup>*Publishers’ Weekly*, 10 November 1928, 1983.

<sup>44</sup>Dennett was arrested for sending obscene material through the mail, a federal charge. She had mailed her pamphlet to a “Mrs. Miles” in Virginia, who was a “postal police agent” assigned to apprehend her. Dennett was indicted and convicted; her conviction

Defending autoerotic literature and sex-education materials prepared Ernst well to argue for the appropriateness of lesbianism in literature.<sup>45</sup> Ernst's successful defense of several controversial books brought him many more censorship cases and a leadership position in the ACLU by 1929. In 1933, he would successfully represent Random House before the Supreme Court in an effort to clear *Ulysses* of obscenity charges.<sup>46</sup>

Morris Ernst was driven by an unbridled disdain for the NYSSV, a hatred of censorship, an affinity for controversy, and a love of publicity.<sup>47</sup> When he met with Covici and Friede, he immediately urged Friede to notify Sumner of their intent to publish in order to create and publicize the test case and to preempt Sumner from once again suing some unsuspecting bookstore clerk instead of the publisher.<sup>48</sup> Sumner was eager to oblige. Even before publication of *The Well* in the United States, Sumner had written that it was "literary refuse" and especially "vicious" because the sympathetic treatment given to the characters implied they should be "accepted on the same plane as persons normally constituted."<sup>49</sup> Two weeks before publication, Sumner delivered a thinly veiled threat to Covici-Friede: "[W]e are writing with a view to suggesting [sic] a re-consideration of any intent to publish same here, particularly in view of the fact that the law in England and here and its interpretation is about the same."<sup>50</sup> Of course,

---

was eventually overturned in *U.S. v Dennett* (1936). Ernst remained her attorney throughout the process. See de Grazia, 323.

<sup>45</sup>Not all of Ernst's positions were so admirable: he was virulently anti-Communist and supported measures within the ACLU to restrict Communist political activity. See Samuel Walker, *In Defense of American Liberties* (New York: Oxford University Press, 1990), 231–32.

<sup>46</sup>Morris L. Ernst and Alan U. Schwartz, *Censorship: The Search for the Obscene* (New York: Macmillan, 1964), 80–107. The standard of obscenity articulated by Judge John M. Woolsey, that a text was obscene if it aroused lust in the "average person," constituted a major shift in the way obscenity was defined. See de Grazia, xi–xii. Woolsey tested the book's effect on himself and two of his friends in what Leigh Gilmore called "the erection test." The *Ulysses* decision was affirmed on appeal, but as de Grazia points out, trial and appellate courts in other federal districts were not bound to follow the Woolsey ruling (p. 30). In *Roth v U.S.* (354 US 476), the court defined an object as being obscene if it had the ability to arouse the average person's "prurient interest," a definition similar to Woolsey's ruling.

<sup>47</sup>In a 1964 interview, Ernst told Boyer that early in his career, "I realized the inadequacy of my part-time preparation. I started to make up for it by exhibitionism and have never recovered" (Boyer, 147).

<sup>48</sup>Boyer, 133. On the different strategies of suing bookstore clerks and publishers, see Ernst, *To the Pure*, 232–33.

<sup>49</sup>NY Vice Society Annual Report (1928) and New York Vice Society, Periodical Letter, 12 March 1929, cited in Boyer, 133.

<sup>50</sup>John Sumner to Covici-Friede, 1 December 1928, in File: *People v Covici-Friede*, Box 383, Morris Ernst Collection (hereinafter cited as MEC), HRHRC. I am especially grateful to Stephanie G. Begen, who administers the estate of Morris L. Ernst, for permission to cite the holdings of this collection.

Covici-Friede refused to “re-consider.” They brought out the book on December 15 and invited Sumner to purchase one of their first copies. He did, directly from Friede himself, for five dollars.<sup>51</sup> The trio then waited for Sumner’s next action.

Although Covici-Friede sensed *The Well’s* importance, they were unprepared for the volume of sales the book commanded. When Covici-Friede first took possession of the plates, they discovered Knopf had already printed a number of copies on very expensive paper. Covici-Friede repackaged the Knopf copies, added their own title page, and marketed it as a “prepublication edition” for the astronomical price of \$10. To their surprise, their edition sold out overnight. In 1928, the average price for a book was \$2.50, and even the regularly priced edition sold for \$5.00. The public bought twenty thousand copies of *The Well* within the first month and one hundred thousand copies within the year. Hall’s first royalty check was for \$64,000.<sup>52</sup> It was no understatement when Friede remarked, “Thanks to *The Well of Loneliness* we were off to a roaring start.”<sup>53</sup> While waiting for Sumner to bring formal charges, Covici and Friede moved their plates to New Jersey in order to continue publishing.<sup>54</sup> At the end of December, Covici-Friede completed their second, third, and fourth printings. These phenomenal figures resulted in part from the coverage of the British trial, Knopf’s public withdrawal, book reviews, and print ads. The huge buzz about the novel’s theme and its ban in England also incited sales.

As Ernst waited for the inevitable summons to arrive, he began to prepare for the trial.<sup>55</sup> First, he researched lesbianism. Ernst’s notes and memos suggest that he was able to learn a good deal about lesbianism and homosexuality through the New York Public Library’s collection. There he located Arthur Symond’s *Lesbia and Other Poems*; the *Lesbian Herald* published by the Students of Woman’s College in Frederick, Missouri; Mary Mill Patrick’s *Sappho and the Island of Lesbos*; Emily L. Shields’s *The Cults of Lesbos*; and Anomaly’s *The Invert and His Social Adjustment*.<sup>56</sup>

In addition to becoming knowledgeable about fiction and poetry, Ernst analyzed the work of the two sexologists whose writings Hall had utilized

<sup>51</sup>“Police Seize Novel by Radclyffe Hall,” *New York Times*, 12 January 1929; Boyer, 133.

<sup>52</sup>Friede, 94; Boyer, 134.

<sup>53</sup>Friede, 95.

<sup>54</sup>Friede, 94. Boyer, 133, states that they printed in Massachusetts and distributed from New Jersey. Neither state ever brought action against *The Well*.

<sup>55</sup>Because Ernst deposited all his preliminary briefs, correspondence, and research at the University of Texas’s Henry Ransom Humanities Research Center, it is possible to peer inside the creation of legal strategy and to discern the options available to him in 1928 and 1929 as he made choices about how to argue the case.

<sup>56</sup>“Books—New York Public Library,” in File: Miscellaneous Memoranda, Box 383, MEC.

in *The Well*. Ernst asked Friede to send him an English translation of Krafft-Ebing's *Psychopathia Sexualis* and started an intellectual quest that led him to become familiar with the most popular strands of thinking on the causes of sexual identity.<sup>57</sup> A German scientist, Krafft-Ebing was the pre-eminent sexologist in the last quarter of the nineteenth century, and his twelfth (and last) edition in 1902 contained a compendium of 238 case studies of sexual variation, including homosexuality, fetishism, sadism, and masochism.<sup>58</sup> Krafft-Ebing argued that homosexuality was sometimes congenital and sometimes acquired. He believed that masturbation was a major factor in acquired homosexuality.<sup>59</sup> Although Krafft-Ebing at the end of his career placed a greater emphasis on congenital causes of homosexuality, he always maintained that sexual inversion was degeneracy.<sup>60</sup>

Ernst also became familiar with Havelock Ellis's work "Sexual Inversion," first published in 1897.<sup>61</sup> Although Krafft-Ebing used the concept of sexual inversion in his work, Ellis provided a more thorough cross-cultural and historical analysis of sexual inversion in women. The concept of "sexual inversion" denoted those persons who believed their gender role was opposite to their biological sex. Inverted women exhibited "manish" or "masculine" characteristics, for example, a taste and toleration for cigars, a dislike and sometimes incapacity for needlework and other domestic occupations, and some capacity for athletics.<sup>62</sup> Ellis also found truly inverted women often had firm or firmer muscles than noninverted women, masculine larynxes, and deep voices.<sup>63</sup> Inverts also had a predilection for crimes of passion.<sup>64</sup> Ellis distinguished between sexual inversion (gender role) and homosexuality (sexual-object choice).<sup>65</sup> While he

<sup>57</sup>Morris Ernst to Donald Friede, n.d., in File: *AP v Herrick*, Box 383, MEC.

<sup>58</sup>Vern L. Bullough, *Science in the Bedroom: A History of Sex Research* (New York: Basic Books, 1994), 40–43.

<sup>59</sup>Paul Robinson, *The Modernization of Sex* (New York: Harper and Row, 1976), 5.

<sup>60</sup>Richard von Krafft-Ebing, *Psychopathia Sexualis*, trans. Franklin S. Klaf, 12th ed. (New York: Stein and Day, 1965), 264.

<sup>61</sup>Ellis's work on sexual inversion consists of several chapters: "Sexual Inversion in Men," "Sexual Inversion in Women," "The Nature of Sexual Inversion," and "The Theory of Sexual Inversion." Ellis enlarged and edited his views between 1897 and 1915. Although Ernst was ignorant of sexological literature published before *The Well*, in 1936 he wrote a forward to the Random House collection of Ellis's work to protest the continuing censorship of that work in England.

<sup>62</sup>Havelock Ellis, "Sexual Inversion in Women," in *Studies in the Psychology of Sex* (New York: Random House, 1936), 250.

<sup>63</sup>*Ibid.*, 255.

<sup>64</sup>*Ibid.*, 201–2.

<sup>65</sup>For an overview of sexological theories that adhered to or conflicted with Ellis's, see George Chauncey, Jr., "From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance," *Salmagundi* 58/59: 116, 119 (fall 1982/winter 1983).

found “a very pronounced tendency among sexually inverted women to adopt male attire when practicable,” he also found not all transvestites were sexual inverts.<sup>66</sup>

Most significant, Ellis argued that “inversion” was almost always congenital: he traced the heredity of inverted men and often found other relatives who exhibited inversion. Since Ellis argued that congenital inversion could not be altered or cured, censure and prohibition were improper and useless.<sup>67</sup> It is obvious why Radclyffe Hall became enamored of Ellis’s theories: he explained the causes of inversion, he did not vilify inverts nor argue for cures, and he explained Hall’s own desire to wear men’s clothes and define herself as “John.” Because she also proffered a congenital theory of sexual inversion, Hall was able to convince Havelock Ellis himself to write a preface to *The Well*.<sup>68</sup>

For every conclusion he offered, Ellis noted an exception. Inverts were often homosexual, but Ellis also found instances in which inverts were not. For example, he found examples of inverted women who were married to men or who were bisexual. He provided histories of “men-women” who defined themselves as “husbands” and had “wives,” relationships neither the persons themselves nor Ellis defined as “homosexual.”<sup>69</sup> Although Ellis firmly believed in congenital causes, he found situations in which women could acquire homosexuality: in the “hotbeds” of prisons and schools; in sex-segregated factories; or in living or working situations among prostitutes, nuns, actresses, or chorus girls.<sup>70</sup> He also located a discrete group of women who were not “inverted,” who were “womanly” and possessed good figures, and who were likely to reciprocate “homosexual” advances. Ellis suggested womanly women settled for inverted women because “average men” passed them by. At the same time he discovered that the same group “seem to possess a genuine, though not precisely sexual, preference for women over men.” “Womanly” women upset Ellis’s theories of “congenital” homosexuality, but he did not probe into their inclinations.

Although Ernst did not disclose which theory of inversion he subscribed to after reading these sexological works, he did compose a list of “famous homosexuals” akin to Ellis’s. Ernst’s list contained more men than women and included Catherine II of Russia, Queen Christina of Sweden, Queen

<sup>66</sup>Ellis, “Sexual Inversion in Women,” 245.

<sup>67</sup>Robinson, 5. Ellis only implicitly responded to Freudian theories of male homosexuality that were explained by the unsuccessful resolution of the Oedipus complex. Ellis believed that the scientific community largely agreed with congenital explanations.

<sup>68</sup>Some of the correspondence between Radclyffe Hall and Havelock Ellis regarding his preface and her reaction to the British scandal resides at the HRHRC: Radclyffe Hall to Havelock Ellis, 18 April 1928 and 23 August 1928.

<sup>69</sup>Ellis, 261.

<sup>70</sup>*Ibid.*, 209–21.

Anne of England, Madame Blavatsky, Rosa Bonheur, George Sand, and Madame de Staël.<sup>71</sup> He did not—or could not—note any American lesbians, and the list of notables was not included in his defense brief. Only when Ernst turned to social scientific journals did he discover any information about lesbianism in the United States. Using the articles Katharine Bement Davis published in *Mental Hygiene* and the *Journal of Social Hygiene* and would collect in her *Factors in the Sex Life of Twenty-two Hundred Women* (1929), Ernst discovered statistics about the prevalence of American lesbianism. On an undated page simply titled “Homosexuality,” Ernst noted the following statistics: 290 women out of 1,000, or 29 percent, were “partially homosexual”; 184 of 1,000 unmarried women and 163 of 1,000 married women “indulged in homosexual relation with physical expression.”<sup>72</sup> Ernst never used any of these statistics in his brief, nor did he ponder the cause of these behaviors. He certainly did not ask why “married” women engaged in “homosexual” relations, nor how that behavior confounded the theory that the relationship between a behavior and an identity was stable or accurate.

When he wrote his briefs, Ernst chose not to employ the identity “lesbian” or Ellis and Hall’s preferred term of “invert.” Instead, he actively discouraged the use of sexological language altogether. Although he never stated so definitively, Ernst was more inclined toward a Freudian theory of homosexuality, that is, a theory that homosexuality was caused by an unsuccessful resolution of various developmental crises. In one of his numerous outlines to himself in preparation for a conference with a Baltimore psychiatrist, he wrote, “Don’t use words like ‘Lesbian.’ This is a story of a woman not fully developed; thwarted in life.” He also stated, “If the word ‘homosexual’ is used, we should get a doctor in order to define it.” Ernst considered asking William Alanson White, the psychiatrist who had testified in the infamous Leopold and Loeb murder trial, to “define it,” but he did not.<sup>73</sup> He also wrote to Katharine Bement Davis about the possibility of testifying, but came to the conclusion not to use sexological experts at all.<sup>74</sup>

<sup>71</sup>“Memo,” n.d., in File: *AP v Herrick*, Box 383, MEC.

<sup>72</sup>“Homosexuality,” n.d., in File 4: Data, Box 383, MEC. Ernst noted that he found these statistics in Katharine Bement Davis, “A Study of the Sex Life of the Normal Married Woman,” *Journal of Social Hygiene* 9: 24–25 (January 1923); Davis, “A Study of Certain Auto-Erotic Practices, Part I,” *Mental Hygiene* 8: 723 (July 1924); and Davis, “A Study of Certain Auto-Erotic Practices, Part II,” *Mental Hygiene* 9: 58 (January 1925). There is a problem with Ernst’s assertion. Since none of these articles made use of the data on homosexuality and *Factors* was not published until 1929, it remains unclear from where Ernst derived the statistics. Davis herself may have provided the data via telephone or through correspondence. See my chapter “‘Its Frankness Quite Takes My Breath Away’: Katharine Bement Davis’s *Factors in the Sex Life of Twenty-two Hundred Women* (1929),” in Leslie Taylor, “Veritable Hotbeds.”

<sup>73</sup>“Facts in regard to conference with Dr. Wertham in Baltimore—January 17, 1929,” in File: *Well of Loneliness* Miscellaneous Outlines, Box 384, MEC.

<sup>74</sup>Morris Ernst to Katharine Bement Davis, 7 December 1928, in File: *AP v Herrick*, Box 383, MEC. I found no response in either Ernst’s or Davis’s papers to this request. At

From the amount of reading he had accomplished, Ernst probably realized firm definitions of “invert,” “lesbian,” “pervert,” “hermaphrodite,” “mannish woman,” or “lady lover” would result in a never-ending discussion in his brief and in court. Ernst instead relied on another set of signifiers for “lesbian,” “homosexual,” or “invert”; he employed the terms “not fully developed” or “thwarted in life” or “this problem.” Ernst had read Ellis’s work, and he seemed to agree with Ellis that “lesbianism” ought not to be censured or prohibited. However, Ernst could not see a way to defend lesbianism in a positive or celebratory fashion, and so he had to categorize Stephen Gordon as “thwarted” and “pitied.” Because sexology did not contain enabling language, Ernst relegated Ellis and others to his personal research outlines and decided to construct his case around literary works that contained lesbian sexuality that had been cleared of obscenity.

As Ernst prepared his briefs at the close of 1928, critics began receiving the Covici-Friede edition and began reviewing the book. The reviewers were unable to comment on American legal activity since their writing preceded or coincided with the onset of the New York complaint.<sup>75</sup> However, since the British trial and the appeal had just ended, these actions afforded reviewers the opportunity to analyze the British trial, hypothesize about the American response, and discuss the effects of censorship.

Many of the reviewers provided only brief critical appraisals of Hall’s writing and the strengths of *The Well* before turning to the larger cultural problems it provoked. Robert Morss Lovett commented in *The New Republic*, “Altogether ‘The Well of Loneliness’ is a novel of unusual power, distinction and charm, thoroughly English in quality except for the fact that its emotional energy is abnormal.”<sup>76</sup> The *Chicago Tribune*’s Fanny Butcher praised Hall’s writing, and the way she developed the relationship between Stephen and her horse (!). But overall she found Hall “allowed her eagerness to right a wrong to cloud her technical judgment.” Butcher honestly revealed the reasons she had chosen to review the book:

There are two reasons for the discussion of the book by American critics, its “news value” and its literary value. Its psychological or moral or ethical value or influence for either good or bad lie[s] entirely outside the field of the literary editor’s pen. The “news value” of the book is very quickly made obvious by the echoes of the European

---

the time Ernst wrote, Davis was getting ready to retire from her position as secretary of the Bureau of Social Hygiene.

<sup>75</sup>Although Cape’s edition had been out since August, American reviewers did not pay attention to the book until an American edition became available. According to *Book Review Digest*, only four American newspapers and magazines reviewed *The Well*: the *Chicago Daily Tribune*, *The Nation*, and *The New Republic*, and the *New York Herald Tribune*. The *New York Times* did not review it although they closely followed the British and New York City trials.

<sup>76</sup>Robert Morss Lovett, *The New Republic*, 2 January 1929, 195.



furor that it has caused. The fact that it has appeared in an American edition is news, and all of the news there is about the book.<sup>77</sup>

But the title of Fanny Butcher's review, "Radclyffe Hall Book Written in Fine English," with the subhead, "Banned in Britain, It's at Premium Here," contradicted her effort to cleanse the book of its tainted "news value." Furthermore, Butcher's review was placed alongside reviews of books by or about other iconoclastic women, including reviews of Margaret Sanger's *Motherhood in Bondage* and Rheta Childe Dorr's biography, *Susan B. Anthony*. This configuration suggests that birth control advocates, suffragists, and inverted women were all linked with *The Well's* "news." Even the generally neutral *Book Review Digest* editorialized about *The Well's* "news" and "literary" value:

This serious novel on a forbidden theme has received a notoriety out of proportion to the significance of the book, from the fact that it has been the subject of sensational discussion and withdrawn from publication in England. The theme of homosexuality, not uncommon in Continental fiction, has been ruled by an English magistrate as indecent for use in fiction.<sup>78</sup>

Reviewers often incorporated a sense of American superiority when they analyzed the British response. Butcher glibly asserted, "[I]t has been published in America quite openly and without the slightest subterfuge, the only deterrent to the buyer being the price of the book which is twice that of the usual novel."<sup>79</sup> Lovett pointed out, "The English-reading public accepts Gide and Proust with a certain complacent wonder—'How different from the home life of our own dear Queen,' etc."<sup>80</sup> He found that "Continental" or French literature was accepted until one of their own professed to the same deviance: "The English meet the challenge in characteristic fashion. They suppress the book, and thereby endorse its social significance."<sup>81</sup> But Lovett also believed that the citizens of New York City were similarly predisposed to censor material containing lesbian content: "In view of the prosecution of 'The Captive,' it may be doubted whether the novel will escape in this country."<sup>82</sup> An anonymous writer in

<sup>77</sup>Fanny Butcher, "Radclyffe Hall Book Written in Fine English," *Chicago Daily Tribune*, 29 December 1928. The book review page also contained a pattern for a "gayly" lined "green" taffeta dress. George Chauncey has convincingly argued that while "gay" was consistent with "fairy" stereotypes in the late 1920s, "gay" as a term began to "catch on" in the 1930s. See Chauncey, *Gay New York*, 14–21. Wearing green (especially on Thursdays) also signified "queerness." The inclusion of gay and green on this book review page suggests that deviant men were included with various iconoclastic women.

<sup>78</sup>1928 *Book Review Digest*, 342.

<sup>79</sup>*Chicago Daily Tribune*, 29 December 1928.

<sup>80</sup>Lovett, *The New Republic*, 2 January 1929.

<sup>81</sup>Ibid.

<sup>82</sup>Ibid.

*The Nation* concurred and presciently mapped out the events: “[T]he new law [prohibiting sex perversion onstage] was a move in a certain direction, and there is every likelihood that *The Well of Loneliness* will be made the occasion of an attempt to extend this specific prohibition to the novel.”<sup>83</sup>

Unlike Ernst, book reviewers incorporated sexological language when they reviewed the book, evidence of the popularization of Ellis’s and Krafft-Ebing’s theories by the late 1920s.<sup>84</sup> Lovett used “The Invert” as the title for his review, and Butcher stated, “The heroine of ‘The Well of Loneliness’ is congenitally an invert.” More than any other reviewer, Mary Ross used inversion theory as the basis of her review. In “The Terrible Birthright,” Ross defined “congenital invert” for her readers: “sexual instinct turned by inborn constitutional abnormality toward persons of the same sex.” She also elaborated on the complex arguments sexologists waged with each other about the difference between innate inversion and acquired homosexuality. Ross, however, explained that the definition of “inversion” was not equivalent to “homosexuality” and included “all kinds of sexual attraction between men and men or women and women, which may be the result of accidental conditions and not a sign of innate abnormality.”<sup>85</sup>

Although Ross believed that *The Well* failed as literature, she was more willing to align herself with Ellis’s endorsement of its social significance: “Certainly it is desirable that the world should learn to treat with tolerance and kindness sexual aberrations which ordinarily can be of no possible harm to it.”<sup>86</sup> The mystery of the invert needed the scientist’s dispassionate study, commonsense understanding, and frankness. Where Ross saw the issue as both scientific and social, Lovett concluded that *The Well* asked two different questions: one about art and one about morals. The homosexual theme, he believed, was a passing fad, like incest, neither of which posed real concern. The moral question was more interesting to consider: Lovett asked whether society had a right to protect itself against the invert through censorship and ostracism and he answered no. Lovett declared that *The Well* was really a “novel of purpose,” “a plea to society for the rights of the individual . . . a challenge which must be met because it is an appeal against the injustice and cruelty of society.” Stressing the “rights of the individual” is a particularly potent discourse, given the American respect for individualism.<sup>87</sup> Ernst, however, did not use it.

*The Well*’s reviewers understood that censorship bred publicity and that an attempt to repress actually produced knowledge. “An intellectual

<sup>83</sup>“The Well of Loneliness,” *The Nation*, 2 January 1929, 5.

<sup>84</sup>John D’Emilio and Estelle Freedman, *Intimate Matters: A History of Sexuality in America* (New York: Harper & Row, 1988), 224–26.

<sup>85</sup>Mary Ross, “The Terrible Birthright,” *New York Herald Tribune*, 16 December 1928.

<sup>86</sup>*Ibid.*

<sup>87</sup>Lovett, *The New Republic*, 2 January 1929. See Robert Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley: University of California Press, 1985) for a discussion of this “first language of individualism.”

quarantine, a moral *'cordon sanitaire'* is futile," Lovett concluded. "In every instance it defeats itself. The most certain and the most dangerous way to advertise any practice regarded as unsocial is organized interference."<sup>88</sup> Ross declared that the flurry of activity in England ought not be repeated here, "[C]ertainly suppression of the novel would give it an importance which it does not deserve and contribute to still further public misunderstanding."<sup>89</sup>

Like the reviewers, Ernst understood that attempts to censor produced publicity. As his clipping file began to grow with reviews and newspaper coverage, he mounted a publicity campaign and solicited information and testimonials from writers, physicians, and clergy. He also solicited opinions about lesbian literature and lesbianism from a broad spectrum of writers and professionals. Ernst kept thirty-five letters and telegrams he received in support of *The Well of Loneliness* in a file called "Testimonials."<sup>90</sup> If Ernst received threatening or unfavorable telegrams, he did not keep them. Many writers pledged support for the book itself and, implicitly, its lesbian theme. Susan Glaspell wrote: "Glad to join protest against censoring Well of Loneliness. Have read this serious interesting novel and action against it seems preposterous to me."<sup>91</sup> Edna St. Vincent Millay was even more vehement: "To censor *The Well of Loneliness* is nonsense. To censor any book sponsored by Mr. Havelock Ellis is an offensive impertinence."<sup>92</sup> Some testimonials condemned censorship yet avoided praise for the literary merits of *The Well*. Even the *Tribune's* Fanny Butcher herself eventually realized that *The Well* was more than just "news," and she shed her journalistic neutrality to lend her weight to the cause: "Censorship of good literary work pampers the prurient by suggesting books which by their very literary quality would escape such readers experience has proved that instead of removing it censorship has succeeded brilliantly in spreading what it considers contamination."<sup>93</sup> Robert Nathan wrote more pithily, "Consider Sumner's action against W of L ridiculous. Book is dull and honest and about as immoral as Pilgrims Progress."<sup>94</sup>

Ernst also attempted to create allies with literary associations. He solicited Carl Van Doren, editor in chief of the Literary Guild of America.

<sup>88</sup>The most obvious articulator of the "repressive hypothesis" is Michel Foucault, *The History of Sexuality: An Introduction*, trans. Robert Hurley, vol. 1 (New York: Random House, 1978), 10–12.

<sup>89</sup>Ross, "Terrible Birthright," 3.

<sup>90</sup>File: Testimonials, Box 383, MEC.

<sup>91</sup>Susan Glaspell to Morris Ernst, 19 January 1929, in File: Testimonials, Box 383, MEC.

<sup>92</sup>Edna St. Vincent Millay to Morris Ernst, 23 January 1929, in File: Testimonials, Box 383, MEC.

<sup>93</sup>Fanny Butcher to Morris Ernst, 15 January 1929, in File: Testimonials, Box 383, MEC.

<sup>94</sup>Robert Nathan to Morris Ernst, 17 January 1929, in File: Testimonials, Box 383, MEC.

Ernst suggested, “The Literary Guild could make a real contribution to the freedom of letters if it would see fit to place its stamp of approval on this book. It is my impression that advance in this country will only be made during the next decade by the acceptance of respectable groups of isolated works such as this.”<sup>95</sup> Van Doren declined. “I have read TWOL and I am sorry not to like it so well as you do. The theme is interesting because it is a novel, but I find the treatment sentimental to the point where it is almost maudlin. The copy which I am returning to you looks as if it had been slept with. Well, it has.”<sup>96</sup> Despite Van Doren’s lack of enthusiasm, Ernst would include his name in the brief.

The most obvious constituencies—publishing houses—would not march behind this particular anticensorship banner. Albert Boni, of the publishing house Boni & Boni, and formerly Friede’s boss and Horace Liveright’s business partner, solicited support from his publishing colleagues and failed. Ernst wrote to him the day before the magistrate’s hearing:

I am afraid that we had better not make any use of the publishers’ position in *The Well of Loneliness* case because of the absence of the several most prominent firms might act as a boomerang. Your kind efforts to get the publishers united in this cause of censorship and the difficulties apparent from our efforts, is a clear indication of at least one reason for Mr. Sumner’s success.<sup>97</sup>

Unfortunately, no list remains of those publishers willing to speak out, but it surely did not include the Knopfs or the other prestigious houses that had declined to publish Hall’s book. Ernst’s attempt to create alliances within the industry failed; he was able to succeed only with individuals who had little or no institutional allegiance or support. Boni’s and Ernst’s lack of success stemmed from Sumner’s potent threat to publishing houses and Sumner’s support from some magistrates and from the district attorney’s office.

While Ernst kept the publicity machine in operation in New York City, Donald Friede looked for opportunities both to contest the obscenity law and to publicize their book further.<sup>98</sup> He even went to Boston, where he had been convicted, and gave a copy of *The Well* to the Watch and Ward Society, the same group who contested *An American Tragedy*. Friede’s attempt to goad Boston into another fight stemmed partly from his worry

<sup>95</sup>Morris Ernst to Carl Van Doren, 30 November 1928, in File: *AP v Herrick*, Box 383, MEC.

<sup>96</sup>Carl Van Doren to Morris Ernst, 6 December 1928, in File: *AP v Herrick*, Box 383, MEC.

<sup>97</sup>Morris Ernst to Albert Boni, 4 February 1929, in File: *AP v Herrick*, Box 383, MEC.

<sup>98</sup>Friede, 94. Friede admitted he was surprised when *The Well* continued to sell even after it was cleared.

the book would cease to sell well if it was shorn of controversy. Ironically, the Society told Friede they found nothing wrong with the book. "This was very definitely not what I wanted to hear," he related, "but I had to be satisfied with it."<sup>99</sup>

Although Boston was not eager for a trial, New York was. On Friday, January 11, 1929, exactly one month after Friede sold him a copy of *The Well*, Sumner returned with a summons from Chief Magistrate William McAdoo. Friede was ordered to appear in court for the violation of Article 106, Section 1141 of the penal code: "A person who sells . . . or has in his possession with intent to sell . . . any obscene, lewd, lascivious, filthy, indecent or disgusting book."<sup>100</sup> Several detectives accompanied Sumner to Covici-Friede's offices and seized 865 copies of *The Well of Loneliness*.<sup>101</sup> The *New York Times* duly reported the seizure and reminded the public that the sale of twenty thousand books placed *The Well* near the top of the best-seller list.<sup>102</sup> Some of New York's other newspapers were willing to criticize, rather than merely report, the raid. The *Telegraph* found "the mental abnormality of the Sumners whose joy is in sniffing obscenity which does not exist outside their own minds" worse than the "social problem of physical sex abnormality."<sup>103</sup> When they heard about the raid, the *Daily News* posed the question, "But who is John S. Sumner that he can do these things? Why is he?"<sup>104</sup> Sumner and the Society exercised authority under Section 1147 of the New York Criminal Code:

Any agent of the New York Society for the Suppression of Vice, upon being designated thereto by the sheriff of any county, may within such county make arrests and bring before any court or magistrate thereof having jurisdiction, offenders found violating the provisions of any law for the suppression of the trade in and circulation of obscene literature and illustrations, advertisements and articles of indecent and immoral use, as it is or may be forbidden by the laws of this state, or of the United States.

<sup>99</sup>Ibid.

<sup>100</sup>James C. Cahill, comp. and ed., *Cahill's Consolidated Laws of New York*, 1928 Supplement (Chicago: Callaghan, 1928), 694.

<sup>101</sup>"Police Seize Novel by Radclyffe Hall," *New York Times*, 12 January 1929; Tebbel, 3:149.

<sup>102</sup>*New York Times*, 12 January 1929. There are no records pertaining to Friede's prosecution, including briefs, in the District Attorney's Record of Cases at the Municipal Archives, City of New York. According to archivist Kenneth Cobb, the district attorney's office kept records only of cases that came before the Court of General Sessions. Friede was tried before the Court of Special Sessions.

<sup>103</sup>"Obscene Censors," *New York Telegraph*, 14 January 1929; DA Scrapbook, vol. 334, n.p., Municipal Archives, City of New York.

<sup>104</sup>"John S. Sumner: Who, What, Why—I," *Daily News*, 23 January 1929; DA Scrapbook, vol. 334, n.p.

Like his predecessor, Anthony Comstock, Sumner was a deputy with authority to investigate obscenity violations. Despite the statute, the newspaper editors could not fathom the reason for Sumner's many actions and believed he and the Vice Society were mostly ineffective: "Sumner does not obtain many convictions under this law. He does succeed in smothering many a book until it is forgotten."<sup>105</sup> The public questioning of Sumner and the Vice Society hinted that the legislative battles and the book raids had besmirched the Vice Society's reputation and that their actions would no longer be accepted without reservation.

Ernst and Friede seized the opening the newspapers offered and went on the offensive. They included a "Publisher's Statement" in editions of *The Well* printed after December. In the statement they placed at the end of the book, Covici and Friede, with Ernst's assistance, denounced the British trial and the upcoming New York prosecution and affirmed their great pride in publishing so distinguished a book.<sup>106</sup> The statement served several purposes: it informed the reader about the book's legal history on two continents and incited the reader's sympathy. The statement may also have fueled sales and interest in the trial's outcome. The allure of possessing a book that might at any moment be ripped from the shelves is a great enticement for sales and gossip.

Donald Friede was arraigned in the court of magistrate Hymen Bushel in the seventh district on January 22, 1929.<sup>107</sup> District Attorney Joab Banton, who prosecuted this case himself, called only one witness—John Sumner—and he testified that he had indeed bought the book from Friede. Ernst offered letters and telegrams protesting Sumner's action and supporting *The Well*, but these were not taken into evidence. Magistrate Bushel adjourned the hearing until February 5 so that he could examine the book.<sup>108</sup> He later deferred the hearing until February 19.<sup>109</sup> Just two days before the hearing was to occur, Ernst and Sumner debated the topic of "censorship" at a luncheon of the New York Chapter of the League for Industrial Democracy at the Town Hall.<sup>110</sup> Ernst demanded that the legislature investigate NYSSV's activities, and he personally castigated Sumner for "sniping" and for attacking the "impecunious." Sumner, in reply, noted

<sup>105</sup>"John S. Sumner: Who, What, Why—II," *Daily News*, 24 January 1929. DA Scrapbook, vol. 334, n.p.

<sup>106</sup>Publisher's Statement, 22 December 1928, in File: Miscellaneous Memoranda, Box 383, MEC. The statement in Ernst's files shows that he marked up at least one draft of the document. The New York Public Library has several editions of *The Well* from 1928–29, including the one containing the "Publisher's Statement."

<sup>107</sup>Ernst did not take or keep notes on the arraignment. Newspapers are the only source on the arraignment itself.

<sup>108</sup>"Publisher Is Arraigned," *New York Times*, 23 January 1929.

<sup>109</sup>"Defers Hearing on Books," *New York Times*, 6 February 1929.

<sup>110</sup>"Ernst and Sumner Debate Censorship," *New York Times*, 17 February 1929.

the “large organizations” against whom he had brought action. In their coverage, the *Times* made no mention of the impending Hall case. The reporter did note that Assistant District Attorney James Wallace and Arthur Garfield Hays were in attendance although they were not identified as having been the principal sparring partners in *The Captive* trial.

To prove that *The Well* was not obscene, Ernst argued that the book could not corrupt. In 1928, the test of obscenity in New York and the United States was derived from the British case *Regina v Hicklin* (1868), which held that works were to be found obscene if “the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences and might come in contact with it.”<sup>111</sup> Ernst had several options to support his contention that *The Well* was not obscene. He could urge tolerance for a minority group, argue for the right of individual expression, or perhaps most daring, could cite books with similar representations and argue that representation of lesbian desire was acceptable. Instead of using the precedents established by the obscenity trial *Halsey v New York* (1922), he chose to erase the sexual explicitness in *The Well*.<sup>112</sup>

The *Halsey* case dealt with Theophile Gautier’s *Mademoiselle de Maupin*. Ernst used the case repeatedly in *To the Pure* to illustrate the changing definition of obscenity. He discovered that *Mademoiselle de Maupin* was the only book to contain “explicit” lesbian descriptions that the courts had cleared of obscenity. Ernst found that the Appeals Court had evaluated Gautier’s book on five points: the reputation of the author, critical opinion, the importance of judging not selected passages but the entire book, the high level of language vs. that “of the street,” and the effect of its translation from the French.<sup>113</sup> *Halsey* also established the precedent that “classics” were not to be judged by standards applicable to “ordinary” works.<sup>114</sup>

Gautier’s *Mademoiselle de Maupin* appeared in an English-language edition in New York City around 1910 without a publisher’s imprint, seventy-five years after its first publication in Paris in 1835.<sup>115</sup> The novel is the complicated story of three lovers told through several narrative voices in a series of letters. The first half of the book describes Chevalier d’Albert’s

<sup>111</sup>*Hicklin* remained the test for obscenity in the United States until the 1933 *Ulysses* case; see de Grazia, xi, and Kendrick, 120–23.

<sup>112</sup>*Halsey v New York Society for the Suppression of Vice*, 234 NY 1, 136 NE 219 (1922). Briefs, trial transcripts, and motions are in a file of the same title at Old Files, Municipal Archives, City of New York.

<sup>113</sup>Ernst and Schwartz, 57.

<sup>114</sup>Morris Ernst and Alexander Lindey, *The Censor Marches On: Recent Milestones in the Administration of the Obscenity Law in the United States* (New York: De Capo Press, 1971), 4.

<sup>115</sup>Lewis, *Literature, Obscenity, and the Law*, 41.

search for the perfect woman. His search completed, he turns to a passionate extramarital heterosexual relationship with Rosette. In the second half of the novel, a “lesbian” theme develops. Madelaine de Maupin, disguised as “Theodore,” befriends d’Albert and Rosette. The reader, via her letters, learns “she” has donned masculine attire to learn about the world of men in order to find one man she can love. As the novel continues, Rosette falls in love with “Theodore” as does d’Albert, who briefly anguishes over this homosexual love before convincing himself that “Theodore” really must be a woman. Desiring sexual experiences, she/he becomes “Madelaine” and consummates “her” attraction with d’Albert, but for one evening only. The story does not end here, for “Madelaine,” now initiated, consummates her/his passion for Rosette, but we are never to know which of the personas she/he affects.<sup>116</sup> Her/his musings about being a “third” type of person represent the most compelling part of the novel.

In November 1917, Raymond Halsey, a bookstore clerk and Columbia graduate, sold a copy of *Mademoiselle de Maupin* to John Sumner. Sumner targeted Gautier’s novel because he felt it was an affront during a time of war.<sup>117</sup> His purchase precipitated a trial against Halsey for the sale of obscene literature. At the trial, Halsey was acquitted in the Court of Special Sessions of the charge of selling an obscene volume, but Halsey did not let the case end there. He sued Sumner and the Vice Society for false arrest and malicious prosecution and won \$2,500 in monetary damages from a jury. The Appellate Division affirmed the judgment. The Vice Society appealed and the case went to New York State’s highest tribunal, the Court of Appeals, which affirmed the decision five to two.<sup>118</sup> Judge Andrews found for Halsey using “the whole book concept,” a criterion that Felice Flanery Lewis has concluded led to the protection of “classic” literature from obscenity convictions.<sup>119</sup> But the court also reproached the Vice Society for its methods and declared that Mr. Sumner “had not acted as a reasonable and cautious man would act,” a criticism Ernst gleefully noted in his preliminary outlines.<sup>120</sup> Ernst chose *Mademoiselle de Maupin* because of its explicit lesbianism and because it represented a particularly painful defeat for the NYSSV. It was in fact their *only* loss during the World War I era and the first time they had been sued successfully.

In Ernst’s view, *Mademoiselle de Maupin* was the perfect companion text for Radclyffe Hall’s *The Well of Loneliness* and her protagonist Stephen Gordon. Both novels contained sexual activity between women, both novels placed significant weight on dress and gender, and both novels pondered

<sup>116</sup>Theodore Gautier, *Mademoiselle de Maupin*, trans. Joanna Richardson (New York: Penguin, 1981.)

<sup>117</sup>Boyer, *Purity in Print*, 61.

<sup>118</sup>*Halsey v New York Society for the Suppression of Vice*, 234 NY 1, 136 NE 219 (1922).

<sup>119</sup>Lewis, 41.

<sup>120</sup>Memo, n.d., in File: Well of Loneliness—Miscellaneous Outlines, 14, Box 383, MEC.



the place of the “third sex” and the “invert” in society. Ernst briefly utilized and dispensed with *Madelaine: The Autobiography of a Prostitute*. In 1920, the New York courts had declared this book not obscene because it contained no “word pictures” that tended to excite lustful or lecherous desire.<sup>121</sup> Ernst found their verdict shocking because prostitution was a criminal act. Ernst rejected the comparison of the semiautobiographical tale of an aristocratic British white lesbian with the autobiography of a white working-class prostitute because it was both too contrary and not contrary enough. The social status of the protagonists in these two novels was different, whereas the characters in Gautier’s novel were more like those in Hall’s book in terms of social class. In order to argue for a comparison between Stephen and the prostitute Madelaine, Ernst would have to differentiate and create a hierarchy between two very different kinds of deviants—a lesbian and a prostitute. This was dangerous territory. Ernst would have to delve into criminal sexual activities and argue for lesbianism on the grounds that it was not criminal, unlike prostitution.<sup>122</sup> Furthermore, Ernst was probably aware from reading Ellis that prostitutes were often also lesbians. This was far shakier ground than arguing for the legitimacy of the lesbian theme in literature.

Gautier’s *Mademoiselle de Maupin* offered Ernst a position from which he could make more legitimate claims. Ernst could argue for both Hall’s and Gautier’s prize-winning reputations; literary critics considered Gautier one of the “greats” although the publication of *Mademoiselle de Maupin* cost his admission to the Academie Française. Ernst had seventy-four published authors willing to support *The Well*, and he could refer to the critics cited by the court itself in the *Halsey* case. He also wanted to present the book as a whole and discuss the book’s “high” language, two points that the court used to clear *Mademoiselle de Maupin*. Most obviously, he could link *The Well* with *Mademoiselle de Maupin* because the court had found “explicit” lesbianism not to be obscene.

Ernst compared the two books so that the magistrate could view the good qualities they shared and distinguish the worthy qualities that *The Well* alone possessed. Ernst maintained that *The Well* was a superior book because it protested against misunderstanding and intolerance; *Mademoiselle de*

<sup>121</sup> *People v Brainard*, 192 App Div 817, 183 NYS. 452 (1924).

<sup>122</sup> Ruthann Robson, *Lesbian (Out)Law: Survival under the Rule of Law* (Ithaca, NY: Firebrand Books, 1992), 47–59. Robson has found almost no cases in the early twentieth century where women were prosecuted for “sodomy” or “unnatural acts.” The definition of “sodomy” or “unnatural acts” can vary from state to state and can include any nonprocreative acts with opposite or same-sex partners. In New York City, George Chauncey discovered there was a dramatic increase in the enforcement of the sodomy statute during the 1890s and thereafter by the Society for the Prevention of Cruelty to Children. In the cases Chauncey discovered, “sodomy” in New York City was interpreted solely as anal penetration or oral/genital contact between men; see Chauncey, *Gay New York*, 140–41.

*Maupin*, however, protested against only prudery and moral bigotry. *Mademoiselle* had vulgar and indecent paragraphs, where *The Well* was entirely free from salacious or objectionable allusions. *Mademoiselle* had a “light bantering, pagan and frivolous tone,” whereas *The Well* had seriousness, dignity, and restraint. Furthermore, the version used in the 1922 case had illustrations and “vivid word-portrayals.” On the other hand, *The Well* was “safe” because it had “no illustrations, no lengthy and detailed descriptions; no sensuous word-pictures.”<sup>123</sup>

When he completed his brief, Ernst argued for *The Well* on six points: (1) it did not fit the definition of obscenity because it had social value and significance; (2) other books with similar themes or explicitness were cleared; (3) the terms of its publication and sale refuted obscenity; (4) obscenity was a “living standard” and books must be judged by mores of the day; (5) where suppression had occurred, there were no like elements involved in this case; and (6) in order to judge the book, it must be read as a whole.<sup>124</sup>

Ernst categorically denied that *The Well* possessed the ability to corrupt. He found that it had “not one dirty word, not a single indecent scene, not a single suggestive episode. On the contrary, it is written with extraordinary restraint and delicacy. To put it in another way, if Stephen were a man and not a woman, the book would be merely a rather over-sentimental bit of Victorian romanticism.”<sup>125</sup> Ernst’s summary of *The Well of Loneliness* emphasized its lack of indecency:

The book is a well-written novel of considerable social significance, high moral fervor and seriousness of purpose. The central character, whose life history is traced from early childhood, is an Englishwoman of the upper class, intelligent, sensitive, idealistic. The outstanding feature of her life is that, in spite of her earnest desire to fit harmoniously into the general scheme of her family and her social environment, she is thwarted in the development of her emotional life. . . . In short, her life is one of poignant tragedy. It moves the reader to sincere compassion. It pleads for a tolerance based on a profounder understanding of human nature, human shortcomings and human sufferings.<sup>126</sup>

Since Ernst’s brief focused on the central question “Will the law condemn a book otherwise unobjectionable because of its theme?” he chose the most “salacious” and “lewd” lesbian “word-pictures” from *Mademoiselle de Maupin* and the least from *The Well of Loneliness*. Ernst packed his forty-two-page brief with five pages from *Mademoiselle de Maupin*. Although

<sup>123</sup>Defense Brief for the Magistrate’s Court, City of New York, Seventh District—Borough of Manhattan: *People of the State of New York v Donald Friede and Covici-Friede, Inc.*, 18, in Box 383, MEC. Unfortunately, the *People’s* briefs are not included among Ernst’s papers.

<sup>124</sup>Defense Brief, 3.

<sup>125</sup>Defense Brief, 9.

<sup>126</sup>*Ibid.*, 2.

Ernst clearly knew the book, he chose only those selections occurring in the last quarter of the book. Reading his selections, one would never know that the book reveled in the details of an “explicit” heterosexual relationship for two hundred pages. In his exegesis of *Mademoiselle de Maupin*, Ernst included the first kiss between Theodore/Madelaide and Rosette:

I felt her half-naked and rebellious bosom bounding against my breast, and her twined fingers twitching in my hair. A shiver ran through my whole body, and my heart beat violently. Rosette did not release my mouth; her lips enveloped mine, her teeth struck against my teeth, our breaths were mingled. I drew back for an instant, and turned my head aside two or three times to avoid this kiss; but a restless attraction made me again advance, and I returned it with nearly as much ardor as she had given it.<sup>127</sup>

In this passage, references to “bosoms” and bodily “shivers” render this incident “explicit.” More specifically, a kiss between two “women” becomes “explicit” sexuality, whereas a kiss between a woman and a man would be classified as “normal.” “Explicit” became code for “deviant” sexuality.

Twenty-three pages later in the brief, far away from Gautier’s “explicit” paragraphs, Ernst devoted only two pages to the specific content of *The Well*. Instead of exact quotations, he provided brief summaries of fourteen of the eighty-two pages John Sumner found “objectionable.” None of the pages Ernst summarized contained evidence of *The Well*’s “explicit” sexuality. Of course, had he located “explicit” acts, he would have jeopardized his strategy. However, to disallow explicit desire could have profoundly limiting implications for future texts with lesbian representation. For example, Ernst cited one passage describing Stephen and Angela’s relationship. “Stephen conceives a fondness for Angela Crossby, and she becomes solicitous about her personal appearance.”<sup>128</sup> What, he pointedly asked the magistrate, is there offensive about this? He did not quote *The Well* itself: “Then Stephen took Angela into her arms, and she kissed her full on the lips, as a lover.”<sup>129</sup>

Ernst offered few summaries of Stephen and Mary’s relationship, and the passages he provided were sanitized of lesbian desire. “During the war, Stephen enlists in a motor ambulance unit of British women-drivers. She meets Mary. Mary, being of the fragile and dependent type, admires Stephen’s strength and determination, and has become attached to her. The war ends, and Mary pleads that she be permitted to stay near Stephen.”<sup>130</sup> He did not include any citations that could be interpreted as “explicit,” such

<sup>127</sup>Ibid., 14.

<sup>128</sup>Ibid., 40.

<sup>129</sup>Hall, 146.

<sup>130</sup>Defense Brief, 42.

as the famous line, “and that night they were not divided”;<sup>131</sup> or, “[Stephen] would wake in the mornings to find Mary beside her, and all through the day she would keep beside Mary, and at night they would lie in each other’s arms.”<sup>132</sup> Ernst did not provide any examples of Mary’s desire: “Mary sat down in an arm-chair and watched [Stephen], noticing the strong, thin line of her thighs; noticing too the curve of her breasts—slight and compact, of a certain beauty.”<sup>133</sup>

Ernst offered an interpretation of *The Well* that did not permit a real comparison with *Mademoiselle de Maupin*. His reading disallowed lesbianism to be articulated as anything more than an emotional and pitiful involvement. When Hall’s British attorney employed a similar strategy, Hall had become furious.<sup>134</sup> *The Well* was her attempt to discuss inversion as a condition while testifying to its emotional and bodily pleasures.<sup>135</sup> Although Ernst possessed all the British trial materials, there is no evidence he and Hall ever corresponded about strategy,<sup>136</sup> nor was he under any obligation to do so since he represented Friede. Ernst’s decision to evacuate lesbian desire to win the case was tactically sound but philosophically at odds with the author’s intent.

Although Ernst chose not to locate explicit lesbian desire in *The Well of Loneliness*, that does not mean that it was invisible for readers—or judges—in 1928 and 1929. The scandal swirling around *The Well* suggests that, in fact, lesbian desire had become too visible. Ernst’s refusal to see or embrace explicitness rather is about “the frame of reference of visibility, of *what can be seen*.”<sup>137</sup> The decisions Ernst made to defend *The Well* illustrate that “visibility” is historically situated. His decision testifies to his ability as a lawyer to find ground on which he can win. However, the spectrum of choices he possessed also showed the limits the law imposed.

Ernst could not see or welcome sexual explicitness, and he could not untangle sex, gender, and sexuality, but neither could the rest of the

<sup>131</sup>Hall, 313.

<sup>132</sup>Ibid., 325.

<sup>133</sup>Ibid., 321.

<sup>134</sup>Baker, 252–3.

<sup>135</sup>A demand that lesbianism be recognized as carnal, physical, and explicit runs through much of the work in lesbian literary criticism. See Catharine Stimpson, “Zero Degree Deviancy,” 364. In *The Apparitional Lesbian*, Terry Castle has illustrated the ways lesbians and lesbianism have been “ghosted” and rendered asexual.

<sup>136</sup>Hall did telegraph Friede to thank him for soliciting the support of American writers. Friede visited Hall and Troubridge in Paris in early March long after Ernst had plotted their strategy. Friede reassured Hall and Troubridge that he and Covici would fight the obscenity charges to the end; see Baker, 253.

<sup>137</sup>Teresa de Lauretis, “Sexual Indifference and Lesbian Representation,” *Theater Journal* 40: 171 (fall 1988). George Chauncey has also rejected a flat definition of “invisibility” and demands we ask “invisible to whom?” In exploring the “myth of invisibility,” he explains, “Even those parts of the gay world that were invisible to the dominant society were visible to gay men themselves”; see Chauncey, *Gay New York*, 4.

culture. Ernst did not question the link he made between transvestism and lesbianism. For Ernst, Madelaine's (as Ernst always called the character) transvestism becomes synonymous with lesbianism, and Madelaine and Stephen become synonyms for each other. Ernst chose to include only those passages where Madelaine/Theodore in "her" masculine disguise finds that she/he attracts women and is attracted to them. He never discloses that she might be bisexual or heterosexual or that d'Albert, the male protagonist, might also possess a slippery identity. By emphasizing "Madelaine's" mannishness, Ernst confirmed—and publicized—Ellis's insight about distinctly American perceptions of "inversion." It made for a more sound legal case to make "Madelaine" more like Stephen because it confirmed circulating theories of sexual inversion that supported the idea of the lesbian as mannish.

While Ernst used Ellis to support his argument, Ellis himself wrote that the link between transvestism and inversion was in large part culturally specific to the United States: "transvestitism or cross-dressing in the [United] States seems to be in a large proportion associated with homosexuality."<sup>138</sup> In contrast, transvestism in Germany, France, and England did not necessarily involve inversion. Certainly, transvestism was a "very pronounced tendency" in sexually inverted women, but Ellis explained that mannish clothes were not worn to make an impression on other women but because "the wearer feels more at home in them." That sense of being "at home," that there was a link between a sense of self and clothes, was one Hall and *The Well* demonstrated. Hall's vision of inversion played into a particular view becoming prominent in the United States.<sup>139</sup>

Ellis maintained that a "distinct masculinity" informed female inversion and created the "mannish lesbian." While he wrote at length about mannishness, Ellis wrote more tersely about "womanly women" like Mary or Angela except to note that they were "not usually attractive to the average man, though to this rule there are many exceptions. Their faces may be plain or ill-made, but not seldom they possess good figures." As a result, the "womanly women"—Mary, Angela, Rosette, and Hall's own partner, Una Troubridge—all were left outside the argument; their identities were left inchoate and unrecognized.<sup>140</sup>

<sup>138</sup>Ellis, 244–45.

<sup>139</sup>For more on this topic, see Inness's chapter, "Who's Afraid of Stephen Gordon?: The Lesbian in the United States Popular Imagination of the 1920s," in *The Lesbian Menace*. While I concur with Inness's premise that the image of the mannish lesbian, with congenital inversion as its cause, was being popularized at this time, this idea alone cannot account for the interest in *The Well*. Inness ignores the contribution that the trial made to the novel's popularity and cannot explain, for example, the massive and sudden sale of twenty thousand copies.

Instead of teasing out the differences among all these types of “women,” Ernst created a simple parallel among characters who he decided were “lesbians.” The actual relationship was much more complicated. Madelaine/Theodore’s sense of “herself” as a “third” sex was in stark contrast to Stephen’s identity as a congenital invert.<sup>141</sup> For example, Ernst cited the following passage from *Mademoiselle de Maupin* but did not explore its tantalizing assumptions: “I belong to a third distinct sex, which as yet has no name: higher or lower, more defective or superior; I have the body and soul of a woman, the mind and power of a man, and I have too much or too little of both to be able to pair with either.”<sup>142</sup> Madelaine/Theodore’s sexual-object choices varied as “their” clothes and gender altered in a playful and fascinating paradigm that allowed the same relationship to be defined simultaneously as both lesbian and heterosexual. In *The Well*, Stephen gloried in her men’s clothes, the smart jackets, her collars and ties, and cropped hair, but her sexual-object choices were for women only. Despite Stephen’s repeated references to her “manhood,” there is never any indication that other people view the character of Stephen as a “real” man. The townspeople saw Stephen only as odd.

Ernst’s contribution to *The Well*’s legal strategy was to argue that *The Well* was less “explicit” than *Mademoiselle de Maupin*, and to illuminate theories of gender and sexuality currently circulating. He also sought to disprove the charge that *The Well* could corrupt. Ernst analyzed Covici-Friede’s marketing and distribution practices in order to argue that the novel was not obscene. For example, *The Well*’s high price of five dollars kept it out of the hands of those who had only pennies to spend on pornographic postcards.<sup>143</sup> As a result, *The Well* was confined to the middle and upper classes, or to those who utilized the public libraries. Ernst also noted that *The Well* was distributed through legitimate outlets. Nearly every bookstore in New York City carried it, and carried it openly. Ernst pointed out that in Boston, “the scene of so many book massacres,” *The Well* was being sold openly and without any pending prosecution. Surely, he implied, the City of New York, which had prided itself on its openness, would not take the challenge and become stricter than Boston. Ernst also

<sup>140</sup>There is a growing volume of literature on the “womanly women,” who in the forties would be called “fems” or “femmes.” See Madeline Davis and Elizabeth Kennedy, *Boots of Leather, Slippers of Gold: The History of a Lesbian Community* (New York, Routledge, 1993). There is also a developing body of work that discusses the silence surrounding the experience of “femme” lesbians. See Joan Nestle, ed., *The Persistent Desire: A Femme-Butch Reader* (Boston: Alyson Press, 1992); and Leslie Feinberg, *Stone Butch Blues* (Ithaca, NY: Firebrand Press, 1993).

<sup>141</sup>Marjorie Garber, *Vested Interests: Cross Dressing and Cultural Anxiety* (New York: Routledge, 1992), 11.

<sup>142</sup>Defense Brief, 16.

<sup>143</sup>Defense Brief, 22.

contrasted *The Well*, a book, to postcards and motion pictures, which could be absorbed more quickly. Because *The Well* was not sold in dives or sold in secret like “real” pornography, Ernst argued that the court could not find the book obscene.<sup>144</sup> Since *The Well* was “a lengthy, closely printed book, without illustrations, [it] is entitled to different consideration and greater latitude, because the morally weak and susceptible whom society seeks to protect would be little likely to possess the patience, the intelligence and perseverance to wade through it.”<sup>145</sup>

Ernst’s other contribution was to push the limits of what could be used as evidence. He took no chance that the American magistrate would refuse “expert opinion,” as did his British counterpart. He placed excerpts from testimonials and book reviews from American and British papers into the brief itself, including those from the *New York Herald Tribune*, *The New Republic*, and *The Nation*. He listed seventy-four of “the most eminent men [and women] of letters, critics, artists, and publicists in the United States, praising the book and protesting against its proposed suppression.”<sup>146</sup> In addition to the testimonials cited above, he included those of Ellen Glasgow, Fannie Hurst, Ernest Hemingway, Theodore Dreiser, Upton Sinclair, Sherwood Anderson, F. Scott Fitzgerald, and Floyd Dell.

Throughout the brief, Ernst attempted to challenge the test for obscenity. He also demanded that this particular book, and *all* books charged with obscenity, be read in their entirety and not be judged on isolated passages. Of course, Ernst used isolated passages from *Mademoiselle de Maupin* to prove explicitness, a point that may have undone his logic. He explained, however, that although he used passages from *The Well*, he used them in a different way:

We have reviewed the foregoing passages merely to demonstrate the utter absurdity of an attempt to discover impropriety therein. Even though one [may] have the benefit of Mr. Sumner’s pointing finger, one searches in vain. But in fairness and justice, no books should be read for obscenity with a summary of warning passages beside the reader. When one looks deliberately for obscenity, one can find it in the noblest book in the world.<sup>147</sup>

To prove his point, he noted that abolition materials had once been “obscene,” but that perspective had changed. He was also able to cite the changes in women’s fashion and the “frankness” in young adults’ sexual education. Ernst reminded the court that “any high school girl in the city may go to a book store or a circulating library,” and then he listed for the

<sup>144</sup>Ibid., 23.

<sup>145</sup>Ibid., 19–20.

<sup>146</sup>Ibid., 30.

<sup>147</sup>Ibid., 42.

magistrate several fictional works and the major sexological writers. Ernst declared that if any of these scientific books were condemned, it would “prevent the proper enlightenment of the public on an important social problem.”<sup>148</sup> Ernst’s plea for “enlightenment” is notable because he had maintained that Stephen and Mary led “thwarted,” “underdeveloped,” or “pitiable” lives, a discourse within which “lesbians” have very little room to maneuver. Although Ernst could have created an argument that enlightenment would lead to tolerance for a minority group and for a more just society, he did not.

When Friede and Ernst appeared for trial on February 19, 1929, Covici-Friede had completed their seventh printing of *The Well of Loneliness*.<sup>149</sup> Despite Ernst’s creative arguments about *The Well’s* lack of explicit sexuality and his plea to consider all the merits of the book, magistrate Hyman Bushel ordered the complaint. However, under New York’s Inferior Criminal Courts Act, Bushel, as a magistrate, was *not* a trier of fact. He could make no judgment about whether *The Well* was obscene. His judicial powers allowed him to determine only whether there was probable cause that the book violated the statute. The most he could do was to remand the case to the Court of Special Sessions, the three-person tribunal that had exclusive jurisdiction to hear and determine all charges of misdemeanors, except libel, committed within the city of New York.<sup>150</sup>

On February 21, 1929, in a scathing opinion, Bushel made it clear he believed the book would be found obscene under the statute. “I am convinced that *The Well of Loneliness* tends to debauch public morals,” Bushel fumed. “[I]ts subject-matter is offensive to public decency, and . . . is calculated to deprave and corrupt minds open to its immoral influences . . . who might come in contact with it.” He found the novel’s appeal for tolerance to be most unacceptable:

The characters in the book who indulge in these vices are described in attractive terms, and it is maintained throughout that they be accepted on the same plane as persons normally constituted, and that their perverse and inverted love is as worthy as the affection between normal beings, and should be considered just as sacred by society.<sup>151</sup>

Bushel refused to consider the book’s literary value or any of the favorable critical opinions Ernst had carefully amassed, nor did he refer to Ernst’s

<sup>148</sup>Ibid., 36.

<sup>149</sup>By October 1932, Covici-Friede had reprinted *The Well* sixteen times, although the absolute number of books printed in each run is unknown. This information is taken from the flyleaf of one of the many Covici-Friede editions.

<sup>150</sup>*Inferior Criminal Courts Act of the City of New York, 1910. Thompson’s Laws of New York*, Pt. II (Brooklyn, NY: Edward Thompson, 1939); Lloyd I. Paperno and Arthur Goldstein, *Criminal Procedure in New York* (New York: Acme, 1960), 169–74.

<sup>151</sup>*People v Friede*, 133 Misc 611, 233 NYS 565 (1929).



argument concerning *Mademoiselle de Maupin* or the precedents *Halsey* had established. He argued that it was his duty as magistrate to protect the weak from corruption, and he widened the definition of “the weak” to include “the mature, those of high intellectual development and professional attainment.”<sup>152</sup> Broadening the terms excluded the very persons Ernst believed the book was suited for—adults. Bushel went further and cited the legislative changes resulting from *The Captive* scandal and succeeded in pulling *The Captive* scandal forward into *The Well* case. He argued that the legislature’s amendment to the obscenity statute prohibiting sex perversion onstage proved that social mores were united against lesbian representation onstage and should be extended to lesbian representation in print.

Bushel refused to dismiss the complaint, and the case was held for the action of the Court of Special Sessions. Friede was arrested but promptly freed on \$500 bail.<sup>153</sup> The *New York Times*, and all historians who have followed the *Times*, erroneously reported that the book was ruled obscene. It was not. Ernst described the opinion as a “trimming,” but he explained to Hall’s attorney that it was only an “indictment.” Ernst remained confident that the higher courts would clear the book.<sup>154</sup> Ernst filed essentially the same brief with even more testimonials from scientists, Protestant clergymen, and a rabbi. He also refuted Bushel’s claim that *The Captive* decision affected the case.<sup>155</sup> Because *The Captive* was a play, he argued, it fell under Penal Law 1140-a, “Immoral shows and exhibitions,” not Penal Law 1141, “Obscene prints and articles.” Of course, both parts fell under Article 106, “Indecency.” It was a fine legal strategy, and Ernst ably refuted Bushel’s logic that the section on drama should have an impact on literature. At the same time, differentiating plays from books did not allow Ernst to argue for lesbian representation as a suitable theme in any genre.

The Court of Special Sessions convened two months later on April 19 to give its decision. Friede hurried back from Boston where his obscenity conviction for selling *An American Tragedy* had been upheld.<sup>156</sup> The ruling shocked both him and Ernst, and they appeared at the Court of Special Sessions with great apprehension. However, in three short paragraphs, the court cleared *The Well* of all charges of obscenity. The court was not one of record, but the *New York Times* carried the opinion. That the *Times* carried the opinion testified again to the book’s import and the way that issues of lesbian representation intrigued the newspaper’s readers. In a clear victory for Ernst, the court agreed that the theme itself was not

<sup>152</sup>Ibid.

<sup>153</sup>“Novel ‘Loneliness’ Is Ruled Obscene,” *New York Times*, 22 February 1929; “Bushel on Censorship,” *Publishers’ Weekly*, 2 March 1929, 962–63.

<sup>154</sup>Morris Ernst to H. F. Rubenstein, 21 February 1929, in File: *AP v Herrick*, Box 383, MEC.

<sup>155</sup>*Liveright v Waldorf Theaters*, 221 NYS 194 (1927). Cited in Defense Brief, 3.

<sup>156</sup>*Commonwealth v Friede*, 271 Mass. 318 (1930).

grounds for the charge of obscenity. "The book in question deals with a delicate social problem, which, in itself, cannot be said to be in violation of the law unless it is written in such a manner as to make it obscene . . . and tends to deprave and corrupt minds open to immoral influence."<sup>157</sup> They were unwilling to define what manner of writing could corrupt. They refused to hold on the issue of explicitness in *Mademoiselle de Maupin*, declined to consider the issue of literary merit, and did not elaborate upon their narrow definition of obscenity:

This is a criminal prosecution, and, as judges of the facts and the law, we are not called upon, nor is it within our province to recommend or advise against the reading of any book, nor is it within our province to pass an opinion as to the merits or demerits thereof, but only as to whether same is in violation of the law. After a careful reading of the entire book, we concluded that the book in question is not in violation of the law.<sup>158</sup>

Ernst and Friede were ecstatic about the verdict. They took out a full-page ad in the *New York Times Book Review* on May 5 touting American liberalism: "The Most Controversial Book of the Century—Suppressed in England and Vindicated by an American Court."<sup>159</sup> Covici-Friede also produced a "Victory Edition" and advertised it in *Publishers' Weekly*. For twenty-five dollars, readers could purchase a special two-volume edition printed on handmade paper with Ernst's summary of the trial, the Court of Special Session's opinion, Hall's autograph, and her own preface.<sup>160</sup> The profits from *The Well* helped keep Covici-Friede in business for nine more years.<sup>161</sup>

With their vindication in the Court of Special Sessions, Ernst and Covici-Friede were able to clear the way for a broader circulation of *The Well*. In

<sup>157</sup>"Well of Loneliness' Cleared in Court Here," *New York Times*, 20 April 1929.

<sup>158</sup>*Ibid.*

<sup>159</sup>*New York Times Book Review*, 5 May 1929, 17. There was also a full-page ad for *Sex and Civilization* with even larger type on page 19, emphasizing Havelock Ellis's introduction.

<sup>160</sup>*Publishers' Weekly*, 27 April 1929, 1990. This ad was placed on the first page of that week's issue, usually a very expensive placement. Only 201 copies of the "Victory Edition" were offered for sale, numbered 24 to 225. Number 46 resides in the library at the Kinsey Institute for Research in Sex, Gender and Reproduction, Bloomington, Indiana. Ernst's remarks were, as usual, dramatic and humorous.

<sup>161</sup>According to Tebbel, 3:149–50, Covici-Friede was forced to close in 1938. The firm had lasted only ten years. Like other small publishing houses in the 1920s, the book-buying patterns upon which their house relied had been altered by the stock market crash. Covici-Friede had published at least one more controversial book, Theodore H. van de Velde's *Ideal Marriage*, an "explicit" marriage manual. They had \$200,000 invested in limited editions and as much in advances and were on the cusp of publishing what would have been their most successful book when their printer refused to float their debt any longer. Instead, Viking was the publisher of John Steinbeck's *The Grapes of Wrath*. Covici also went to Viking where he continued his editorial relationship with Steinbeck. Friede went to Hollywood where he briefly directed the story department for Myron Selznick. He later became an

order to test the issue of importing *The Well* and affirm Covici-Friede's American copyright, a secretary at Covici-Friede requested the Pegasus Press edition of *The Well* from France.<sup>162</sup> Although the lower Customs Court declared the book obscene in May, the higher court reversed the decision in July 1929.<sup>163</sup> The opinion allowed versions of *The Well* to circulate and further legitimized lesbianism as a subject suitable for print. Furthermore, the victory in New York City almost certainly convinced the New Orleans District Attorney not to bring charges against booksellers in that city.<sup>164</sup> In a flurry of correspondence beginning April 30 (the day after the Court of Special Session's opinion) through June 24, 1929, Isaac Heller apprised Ernst of the situation and enlisted his advice should the district attorney charge the booksellers Heller represented.

Without the decisions of the New York state courts and U.S. Customs, it is quite possible that lesbian literature would have had limited circulation in the United States. Instead, because of its scandalous obscenity trial, *The Well* became the first "lesbian" novel in English precisely because it carried "the legal mark of that pronouncement."<sup>165</sup> As a result, *The Well of Loneliness* became "the one novel that every literate lesbian in the four decades between 1928 and the 1960s would certainly have read."<sup>166</sup> If not for the decision of the Court of Special Sessions, *The Well* would not have been sold openly in bookstores or circulated through libraries. If not for the successful resolution of *The Well* scandal, New York publishers might not

---

editor at Doubleday. Readers have continued to buy *The Well* to the present day. For an analysis of *The Well*'s publishing history and the way in which it was packaged since the 1960s, see Michèle Aina Barale, "Below the Belt: (Un)Covering *The Well of Loneliness*" in *Inside/Out: Lesbian Theories, Gay Theories*, ed. Diana Fuss (New York: Routledge, 1991), 235–57.

<sup>162</sup>Morris Ernst to G. D. Eaton, Customs Bureau, 10 December 1928, in File: *AP v Herrick*, Box 383; [Name undecipherable], Assistant Collector, U.S. Customs Service, Treasury Department to Morris Ernst, 13 December 1928, in File: *AP v Herrick*, Box 383, MEC.

<sup>163</sup>"Customs Seeks to Bar 'Well of Loneliness,'" *New York Times*, 16 May 1929; "'Well of Loneliness' Held Not Offensive," *New York Times*, 27 July 1929; "'The Well of Loneliness' Has Been Pronounced Respectable by the United States Customs Court," *Publishers' Weekly*, 10 August 1929, 542.

<sup>164</sup>Isaac Heller to Morris Ernst, 30 April 1929, 13 May 1929, 6 June 1929, and 24 June 1929; Morris Ernst to Isaac Heller, 30 April 1929, and letter, n.d., in File: *AP v Herrick*, Box 383, MEC.

<sup>165</sup>Gilmore, "Obscenity, Modernity, Identity," 614.

<sup>166</sup>Lillian Faderman and Ann Williams, "Radclyffe Hall and the Lesbian Image," *Conditions* 1 (April 1977): 32. Several other books with lesbian themes were also published in Great Britain in 1928, but none faced censorship: Virginia Woolf's *Orlando*, Djuna Barnes's *Ladies' Almanack*, and Compton MacKenzie's *Extraordinary Women*. Gillian Whitlock has suggested that Woolf's book "mystified" everyone except those "in the know"; Barnes's book was privately printed and thus enjoyed none of the publicity a large publishing house could manufacture; and MacKenzie's satire of a lesbian colony on the island of Capri generated no adverse reaction. Gillian Whitlock, "Everything Is out of Place," 555.

have produced scores of lesbian novels during the 1930s.<sup>167</sup> Lillian Faderman, who has labeled the 1930s a period of “Wastelands and Oases,” has concluded that these novels represented more “wasteland” than “oasis” because they were morose and incorporated a pathology model. Some scholars have argued that the pathology in *The Well* did not allow room for a “positive” identity; that the pathology theories Hall promulgated had a deleterious effect on individuals.<sup>168</sup> But others have argued that even poorly written or offensive novels could spawn new imaginative directions. Literary critic Sonja Ruehl has suggested, and a number of other scholars have concurred, that Hall’s novel and her use of the category “invert” constituted a “reverse discourse.”<sup>169</sup> That is, when persons created under the category speak, they transform the category. It should be obvious that Hall’s novel could have provoked none of this debate about its effect if the New York courts had found the book obscene.

Had *The Well* been declared obscene, it is difficult to imagine that even obscure novels would have been allowed to circulate. Certainly the book would have survived in some capacity—even if one copy was smuggled in from Paris, passed around, and cheaply reproduced in a small journal, similar to the techniques Margaret Anderson and Jane Heap of *The Little Review* used to circulate *Ulysses*.<sup>170</sup> But a different verdict would have encouraged the New York Society for the Suppression of Vice to press its advantage. With the NYSSV’s triumphant victory in the theater and in the state legislature, it is not difficult to imagine John Sumner bringing book after book to the attention of Assistant District Attorney Wallace. Instead, the publicity around both the British and the New York trials ensured *The Well* a prominent place in the public imagination.

Although the Court of Special Sessions cleared *The Well of Loneliness*, the judges did not ponder in writing the social merit of lesbian representation, even the “inexplicit” kind. Instead, only Bushel’s scathing denunciation of inverts remains in the legal record. His opinion wound its way into the historical record without the counterbalance from the Court of Special Sessions. While *People v Friede* was a victory, it was a limited one. Ernst’s strategy—as creative as it was—still contained dangerous implications for lesbian representation. The American trial of *The Well* did force

<sup>167</sup>Lillian Faderman, *Odd Girls and Twilight Lovers* (New York: Columbia, 1993), 101. Some of the novels published include *Hellcat* (1934), *Love like a Shadow* (1935), *Queer Patterns* (1935), and *Pity for Women* (1937).

<sup>168</sup>Faderman, 101–3. For more on this debate, see Newton, “The Mythic Mannish Lesbian,” 281–93, and Carroll Smith-Rosenberg, “Discourses of Sexuality and Subjectivity: The New Woman, 1870–1936,” in *Hidden from History*, 264–80.

<sup>169</sup>Ruehl, 21; Gilmore, 612–14; Jonathan Dollimore, *Sexual Dissidence: Augustine to Wilde, Freud to Foucault* (New York: Oxford University Press, 1991), 51.

<sup>170</sup>Anderson and Heap were eventually arrested, charged, and found guilty of selling obscenity, and Sumner instigated these charges as well. See de Grazia, 8–9.

the question of whether lesbians and lesbianism could be represented and, if so, how and to whom that information could be conveyed. The conclusion in 1929 was that only those lesbian novels without explicit lesbian sexuality, that relied on a biological theory of inversion, and that were directed to consumers with money and the capacity for high language could circulate safely.