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The Crucible, Harvard's Secret Court, and Homophobic Witch Hunts

Amy D. Ronner[†]

INTRODUCTION

In Arthur Miller's *The Crucible*, Danforth, chief jurist in the Salem witch trials, admonishes:

But you must understand, sir, that a person is either with this court or he must be counted against it, there be no road between. This is a sharp time, now, a precise time—we live no longer in the dusky afternoon when evil mixed itself with good and befuddled the world. Now, by God's grace, the shining sun is up, and them that fear not light will surely praise it. I hope you will be one of those.¹

Judge Danforth fanatically heeds a view of the world as tidily partitioned into deific benevolence and diabolical evil. At the end of the play, triumphant Danforth, in the name of absolute morality, executes John Proctor, Rebecca Nurse, and other innocent people.

Although Miller's tragedy occurs in seventeenth-century Salem, it is also intended to be a critique of the atrocities committed by Miller's contemporaries. In the 1950s, when the

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¹ Arthur Miller, *The Crucible*, reprinted in THE CRUCIBLE: TEXT AND CRITICISM 94 (Gerald Weales ed., Penguin Books 1996) (1953) [hereinafter Miller, *The Crucible*; subsequent citations to this collection (hereinafter WEALES ANTHOLOGY) refer to the pagination therein].

play was written, McCarthyism gripped America in a brutal crusade to purge it of suspected Communists.² In the throes of such hysteria, our government hunted down innocent people, branded them disloyal, and denounced them. The targets, after losing their friends and jobs, became social outcasts. During that era, thousands of people were fired from positions in federal, state, and local government as well as from private employment.³ Many others were prosecuted under the Smith

² See generally Joseph R. McCarthy, *Communists in the State Department*, 96 CONG. REC. 15, 4159-62 (1950), reprinted in WEALES ANTHOLOGY, *supra* note 1, at 406, 408 (speaking of “those who are a threat to this Nation,” and stating “[i]t is an example of the extent to which men honored with high positions will go to conceal communism, men whose shadows hover like vultures over the corpse of China and whose actions rip at the backbone of freedom in America”) (from a speech originally given May 25, 1950, at the Catholic Press Association convention); Henry Steele Commager, *Who Is Loyal to America*, HARPER’S, Sept. 1947, at 193-99, reprinted in WEALES ANTHOLOGY, *supra* note 1, at 395, (“[I]ncreasingly Congress is concerned with the eradication of disloyalty and the defense of Americanism, and scarcely a day passes that some Congressman does not treat us to exhortations and admonitions, impassioned appeals and eloquent declamations.”); Irving Louis Horowitz, *Culture, Politics and McCarthyism: A Retrospective from the Trenches*, 22 WM. MITCHELL L. REV. 357, 365 (1996) (“McCarthyism is another word for intolerance backed by power.”); Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CAL. L. REV. 1387, 1403 (2005) (During the age of McCarthyism, “tens of thousands of innocent individuals had their reputations, their careers, and their personal lives destroyed [and] most civil libertarians, most lawyers, most public officials, most intellectuals, and most others who should have known better, including the justices of the Supreme Court, dithered over what to do.”).

Several of Miller’s contemporaries and other critics have noted the parallel between *The Crucible* and McCarthyism. See Brooks Atkinson, *At the Theatre*, N.Y. TIMES, Jan. 23, 1953, at 15, reprinted in WEALES ANTHOLOGY, *supra* note 1, at 192, 192 (alluding to *The Crucible*’s “current implications.”); Lee Baxandall, *Arthur Miller: Still the Innocent*, ENCORE, XI, May-June 1964, at 16-19, reprinted in WEALES ANTHOLOGY, *supra* note 1, at 352, 357 (“Miller behaved at the height of the McCarthy period with greater courage than did many of his companions in peril; and his play *The Crucible* was, all things considered, an admirable counterstroke.”); Eric Bentley, *The Innocence of Arthur Miller*, in WHAT IS THEATRE? INCORPORATING “THE DRAMATIC EVENT” AND OTHER REVIEWS 1944-1967, at 62-65 (1968), reprinted in WEALES ANTHOLOGY, *supra* note 1, at 204, 205 (discussing the “debate as to whether this story of seventeenth-century Salem ‘really’ refers to our current ‘witch hunt.’”); Harold Hobson, *Fair Play*, THE SUNDAY TIMES (London), Nov. 14, 1954, at 11, reprinted in WEALES ANTHOLOGY, *supra* note 1, at 227, 227 (“Arthur Miller keeps one eye steadily fixed on the present anti-communist investigations in the United States.”); Robert Warshaw, *The Liberal Conscience in The Crucible*, in THE IMMEDIATE EXPERIENCE 189-03 (1962), reprinted in WEALES ANTHOLOGY, *supra* note 1, at 210, 221 (Arthur Miller “has set forth brilliantly and courageously what has been weighing on all our minds; at last someone has had the courage to answer Senator McCarthy.”).

³ See Stone, *supra* note 2, at 1400 (“More than 11,000 people were fired from federal, state, local or private employment for alleged disloyalty. More than a hundred were prosecuted under the Smith Act because of their involvement in the Communist Party. One hundred thirty-five were prosecuted for contempt of Congress Fear of ideological condemnation swept the nation.”); see also Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 20 (1991) (“The McCarthy apparatus did not touch everyone, but for those who ran afoul of it the impact was brutal. Even citizens

Act because of alleged Communist involvement, and still others were held in contempt of Congress when they refused to cooperate with the House Un-American Activities Committee.⁴

As this reign of terror burgeoned, the country's intellectuals, scholars, teachers, and artists also became prey.⁵ Arthur Miller was one of the writers blacklisted, and, as Professor Geoffrey R. Stone explains, "[l]ike the Puritans in the Salem witch trials, [the red hunters] demanded public denunciation, purgation, humiliation, and betrayal."⁶ Although McCarthy's dark epoch technically spanned five years, the devastation would last for more than a decade.⁷

Today's legal scholars have revived the study of McCarthyism, which, as Professor Seth F. Kreimer explains, "has become a term of opprobrium, of classic political impropriety,"⁸ and they raise the specter of one "repugnant" man "stir[ing] up fear, confusion, and suspicion, then us[ing] it as a license to trash basic civil liberties."⁹ Such commentators, like Miller himself, are cognizant of the fact that it "help[s] to know our past if we are to cope well with our present" and that history is innately redundant.¹⁰

who were not called before loyalty boards or investigating committees felt what would later be called a 'chilling effect.'").

⁴ Stone, *supra* note 2, at 1400; *see also* Kreimer, *supra* note 3, at 20 ("In 1954, as Senator McCarthy's power began to wane, a national opinion survey found that 41% of a national sample felt that 'some [or all] people do not feel as free to say what they think as they used to,' although only 13% said they personally were chilled.") (citing SAMUEL A. STOUFFER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES: A CROSS SECTION OF THE NATION SPEAKS ITS MIND 78-80 (1955)).

⁵ *See* Stone, *supra* note 2, at 1400 ("Red-hunters demanded, and got, the blacklisting of such writers as Dorothy Parker, Dalton Trumbo, James Thurber, and Arthur Miller."); Gerald Weales, *Arthur Miller: Man and His Image*, in AMERICAN DRAMA SINCE WORLD WAR II 3-17 (1962), reprinted in WEALES ANTHOLOGY, *supra* note 1, at 343, 343 ("When [Miller] appeared before the House Committee on Un-American Activities . . . there was a dignity in his refusal to give names, in his willingness to describe his past without apologizing for it . . .").

⁶ Stone, *supra* note 2, at 1400.

⁷ *Id.* at 1403; *see also* Kreimer, *supra* note 3, at 21 ("[T]he striking thing about the enterprise which Senator McCarthy embodied was that it achieved, strictly through the use of information, a substantial impact on citizens' lives, the discourse of the republic, and the exercise of the First Amendment rights of speech, belief, and association.").

⁸ Kreimer, *supra* note 3, at 14.

⁹ Ally Hack, *Forfeiting Liberty: A Collective Sense of Vulnerability and the Need for Proactive Protection After 9/11*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 469, 487 n.85 (2004) (quoting A. LIMAN, *LAWYER: A LIFE OF COUNSEL AND CONTROVERSY* 8-9 (1998)).

¹⁰ Stone, *supra* note 2, at 1387 ("[T]he Age of McCarthy bears some relation to the present.").

At present, most scholars revisiting the red hunters, who spawned government-sponsored terrorism, tie it to our post-September 11 climate, in which the Bush administration has shackled civil liberties with new restrictions and birthed the mutant USA Patriot Act, the centerpiece of antiterrorism strategy.¹¹ Miller likely would not quarrel with the notion that the post-9/11 paranoia, along with the Executive's passion for debilitating our Constitution and augmenting state power to investigate, detain, and interrogate, mirrors the Salem hysteria and McCarthy's pogrom. But Miller would poignantly suggest that *The Crucible* is most of all a work of art with a universality that transcends time and place.¹² According to Miller, we, as a species, inevitably engage in witch hunts that bring us pain, death, and destruction.¹³

This Article is not just about Salem or McCarthyism, and it is surely not about our contemporary disgrace, the post-9/11 undermining of our civil liberties. Although all such subjects are intertwined and of paramount importance, this Article, obedient to what is Miller's veritable thesis, explores the ubiquitous nature of witch hunts generally and suggests that they can erupt at any time and in any place.

This Article is divided into three parts. Part I contains an analysis of *The Crucible* and Miller's portrayal of that irreconcilable tension between the individual and an oppressive

¹¹ See Hack, *supra* note 9, at 486-93, 487 n.85 (quoting A. LIMAN, LAWYER: A LIFE OF COUNSEL AND CONTROVERSY 8-9 (1998)); see also *id.* at 514 ("Too often we seek to avoid the difficult trade-offs by striking an illegitimate balance, sacrificing the Right to Expression in order to further the population's security. But such illegitimate trade-offs lead to insecurity, as witnessed . . . during the 1950s with McCarthyism, where innocent people, citizens as well as non-citizens, shouldered the burden of America's insecurity."); Stone, *supra* note 2, at 1407 (comparing McCarthyism to the present and how "[i]n the wake of September 11, Americans were more than willing to accept significant encroachments on their freedoms in order to forestall further attacks").

¹² See Arthur Miller, *Brewed in the Crucible*, N.Y. TIMES, Mar. 9, 1958, at 3, reprinted in WEALES ANTHOLOGY, *supra* note 1, at 169, 170-71 (explaining that he was "drawn to write *The Crucible* not merely as a response to McCarthyism," but as a way to explore "the questions [he] was absorbed with before"); Arthur Miller, *Introduction to COLLECTED PLAYS 39-45 (1957)*, reprinted in WEALES ANTHOLOGY, *supra* note 1, at 161, 163 [hereinafter Miller, *Introduction*] ("I wished for a way to write a play that would be sharp, that would lift out of the morass of subjectivism the squirming, single, defined process which would show that the sin of public terror is that it divests man of conscience, of himself."); see also Gerald Weales, *Introduction to WEALES ANTHOLOGY*, *supra* note 1, at iii, xv ("The chief reason why Miller did not go for a one-to-one analogy between the Salem trials and the loyalty hearings of the 1950s is that beyond whatever immediate point he wanted to make as a political man he hoped, as an artist, to create a play that might outlast the moment."); see also *infra* notes 17, 34-38 and accompanying text.

¹³ See *infra* notes 34-38.

social context. After summarizing the play itself, this part dissects Miller's objectives: his attempt to expose the forces that underlie all witch hunts, to identify the kinds of accusers and judges that indulge in such irrational persecutions, and to describe the destructive aftermath of such brutal purges. Specifically, the Salem witch hunt, depicted in *The Crucible*, kills innocent people, ravages a community, makes a mockery of the judicial system, and defies lies.

Part II, shifting from 1692 Salem to another witch hunt in 1920 at Harvard University, focuses on William Wright's recent masterpiece, *Harvard's Secret Court*¹⁴ and its theme, the pulverization of individuals by institutional tyranny. After investigative research, digestion of Harvard records, and review of materials unearthed by reporters for *The Harvard Crimson*, Wright learned that Harvard convened a Secret Court, spearheaded by President Lowell, and maliciously hunted down young men it believed either were homosexuals or had merely befriended homosexuals. Essentially, Harvard, like the Salem witch court, punished the accused and ruined most of their lives.

This part of the Article, which fleshes out the similarities between *The Crucible* and *Harvard's Secret Court*, explores Wright's laudatory goals: his efforts to delineate the motives behind the witch hunt, to reveal the irrational fears and warped mindset of the perpetrators, and to divulge the tragic results of such a purge. In *The Crucible*, the hysteria brought death and destruction, but Harvard's crusade went further than that. That is, Harvard, not satisfied with a penalty in the form of expulsion, actually stalked its victims for most of their lives, obstructing their efforts to complete their educations elsewhere and blocking their hopes of simply eking out a living. As in *The Crucible*, the Harvard witch hunt spread to a community, derogated the school's judicial system, and paid homage to lies.

Part III travels from 1920 to the present in an effort to bolster the message in Miller's *The Crucible* and in Wright's *Harvard's Secret Court*—namely, that the malevolent forces that propel witch hunts are omnipresent and can spring into action at any time. As it would be impossible to address all of today's "secret courts," particularly in contemporary America

¹⁴ WILLIAM WRIGHT, *HARVARD'S SECRET COURT: THE SAVAGE 1920 PURGE OF CAMPUS HOMOSEXUALS* (St. Martins, 2005).

with its post-9/11 agenda, this Article will focus on just one cruel present-day witch hunt. That is, despite some progress, the United States conducts a homophobic campaign, as did 1920s Harvard, that debilitates minorities in multiple facets of their lives.¹⁵

This Part hones in on discrimination in the context of family law, which is an especially toxic arena for gays, lesbians, and other sexual minorities. After summarizing the obstacles that homosexuals face when they seek to adopt children or even obtain custody or visitation rights with respect to their own children, the Article scrutinizes the flawed reasoning in a recent high profile case, *Lofton v. Kearney*, in which a federal appellate court upheld the constitutionality of a statute barring homosexual adoption.¹⁶ It is here that the Article brings together seventeenth-century Salem, 1920s Harvard, and 2007 America by exposing the common denominators of all such witch hunts.

In concluding, this Article returns to Salem and the Secret Court, and links them to judicial decisions, like that in *Lofton*, which effectively expel certain individuals from the constitutional kingdom of basic rights and entitlements. Such witch hunts bring about death, destroy livelihoods, blight communities, illegitimate judicial systems, and pay homage to lies. There is, however, an even more insidious wound that such witch hunters inflict—namely, allowing absolute morality to trespass on the most sacrosanct private sphere.

I. THE WITCH HUNT IN *THE CRUCIBLE*

The Crucible, the third of Arthur Miller's major plays, appeared in 1953 in the wake of *All My Sons* and *Death of a Salesman*. These, along with a later work, *A View from the Bridge*, explore the irreconcilable tension between the individual and an oppressive social context.¹⁷

¹⁵ See generally AMY D. RONNER, HOMOPHOBIA AND THE LAW 3 (American Psychological Association 2005) (exploring how "homophobic attitudes still pervade both legislative and judicial decisions, denying rights on the basis of sexual orientation and gender identity" and how "[s]uch beliefs are rooted in and perpetuate cruel stereotypes, which surface in all facets of the law").

¹⁶ 157 F. Supp. 2d 1372, 1384 (S.D. Fla. 2001), *aff'd*, 358 F.3d 804, 827 (11th Cir. 2004) (upholding FLA. STAT. ANN. § 63.042(3) (West 2006)) ("No person eligible to adopt under this statute may adopt if that person is a homosexual.").

¹⁷ See Miller, *Introduction*, *supra* note 12, at 171 (explaining that Miller "was absorbed with . . . the conflict between a man's raw deeds and his conception of himself; the question of whether conscience is in fact an organic part of the human being, and

The Crucible, however, is preeminent not only because it transcends time and place, but also because it integrates multiple themes. Of course, on a literal level, it portrays Salem, Massachusetts at the time of the 1692 witch hunt. Conterminously, it analogizes the witch trials to the communist hunt that transpired in the McCarthy era of the 1950s.¹⁸ The play's real genius, however, is that it, like the timeless mythical Janus, looks backward and forward at once.

A. *The Witch Hunt*

The actual plot of *The Crucible* is not all that complicated, but concededly it works better on stage than it does in summary.¹⁹ It is 1692 and a gaggle of young girls, including Minister Parris's own daughter, has apparently been trying to conjure spirits in the forest, and two are left in a hypnotic trance. When the girls begin naming those that have cavorted with the devil, the whole thing gets blown out of proportion and a court is convened to redress the diabolic epidemic.

While numerous characters get entangled in the events, the Proctors and Abigail Williams are central. One of the witch court's targets is Elizabeth Proctor, a chilly Puritan woman, who has become the mortal enemy of a seventeen-year-old, Abigail Williams, "an orphan, with an endless capacity for

what happens when it is handed over not merely to the state or the mores of the time but to one's friend or wife."); Stephen Fender, *Precision and Pseudo Precision in The Crucible*, reprinted in WEALES ANTHOLOGY, *supra* note 1, at 272, 273 ("[T]he play [tells] the story of John Proctor at odds with a monolithic society."); see also David Levin, *The Crucible in Retrospect: Essays on the Play*, 28 NEW ENG. Q. 537-42 (1955), reprinted in WEALES ANTHOLOGY, *supra* note 1, at 248, 251 ("In the twentieth century as well as the seventeenth, Mr. Miller insists in his preface, [absolute morality,] this construction of human pride makes devils of the opponents of orthodoxy and destroys individual freedom."); Warshow, *supra* note 2, at 223 ("[T]he men and women hanged in Salem were not upholding witchcraft against the true church; they were upholding their own personal integrity against an insanely mistaken community."); Gerald Weales, *Arthur Miller: Man and His Image*, in WEALES ANTHOLOGY, *supra* note 1, at 333, 350 ("The theme that recurs in all his plays [is] the relationship between a man's identity and the image that society demands of him.").

¹⁸ See *supra* notes 2-10 and accompanying text.

¹⁹ See Albert Hunt, *Realism and Intelligence: Some Notes on Arthur Miller*, ENCORE, May-June 1960, at 12-17, 41, reprinted in WEALES ANTHOLOGY, *supra* note 1, at 324, 329 ("A summary can do no justice to the richness and complexity of the play."). There are, however, some excellent summaries of *The Crucible*. See, e.g., David R. Samuelson, *Hart, Devlin, and Arthur Miller on the Legal Enforcement of Morality*, 76 DENV. U. L. REV. 189, 213-15 (1998-1999); David R. Samuelson, "I Quit this Court.' Is Justice Denied in Arthur Miller's *The Crucible*?", 2 U. CHI. L. SCH. ROUNDTABLE 619, 621-29 (1995).

dissembling.”²⁰ While employed in Elizabeth’s home, Abigail had an affair with the husband, John Proctor. Elizabeth discovered the adultery and fired the servant. Abigail becomes obsessed with retaliation and connives to become the new Mrs. Proctor. As part of her scheme, Abigail accuses Elizabeth of witchcraft.

John Proctor, eager to gain his wife’s forgiveness, reinstate her trust, and save her life, opposes the machinations of the witch court. He, along with an old individualist, Giles Corey, unite to combat lies and vindicate the forces of truth. Initially, John Proctor is able to conscript one of the girls, Mary Warren, into admitting that there was never any witchery and that it was all a mere pretense.²¹ But ultimately, Mary, buckling under pressure from the court and the other girls, revives her trumped-up charges.²²

Another fiasco occurs: in a proceeding out of earshot of his wife, John confesses to his adulterous gaffe with Abigail, his wife’s accuser, in an effort to impeach her as a witness.²³ Lamentably, this strategy backfires as well when the court summons Mrs. Proctor to corroborate her husband’s testimony. Elizabeth lies for the very first time in her life, thus unwittingly aiding the court in nullifying her husband’s defense.²⁴ After this, the court indicts John Proctor himself.

The play climaxes with John’s dilemma and struggle of conscience. To save his own life, Proctor must lie by stating that he has been in league with the devil. In this, he momentarily falters by embracing the chance to live, but later recants, refusing to put a false confession in writing and implicate others in some sham indictment. John Proctor, rather than “lie and sign [him]self to lies,” surrenders to the gallows.²⁵

The many critics and scholars who have analyzed *The Crucible* have essentially aligned themselves with one of two bickering camps. One such approach is simply to accept the play as a historical rendition of the witchcraft trials in Salem.²⁶

²⁰ Miller, *The Crucible*, *supra* note 1, at 8-9.

²¹ *Id.* at 80-81 (Proctor forces Mary Warren to help), 89 (Mary confesses, “It were pretense, sir.”).

²² *Id.* at 115-20.

²³ *Id.* at 110-12.

²⁴ *Id.* at 113.

²⁵ *Id.* at 143.

²⁶ Miller himself stated that he “had known of the Salem witch hunt for many years before ‘McCarthyism’ had arrived, and it had always remained an inexplicable darkness to me.” Miller, *Introduction*, *supra* note 12, at 164; *see also* Atkinson, *supra*

Miller had drama critics, like Henry Hewes, who most appreciate the play as a study of the “remorseless, unbending ideology of the Puritans” who at least “had constructive uses in settling this country.”²⁷

Another school of thought relegates *The Crucible* to an allegorical censure of the American political upheaval of the early 1950s.²⁸ For example, renowned 1950s essayist Robert Warshow, exclaiming “at last someone has had the courage to answer Senator McCarthy,”²⁹ basically foists the Salem debacle into the periphery:

Mr. Miller has nothing to say about the Salem trials and makes only the flimsiest pretense that he has. *The Crucible* was written to say something about Alger Hiss and Owen Lattimore, Julius and Ethel Rosenberg, Senator McCarthy, the actors who have lost their jobs on radio and television, in short the whole complex that is spoken of, with a certain lowering of the voice, as the “present atmosphere.”³⁰

But even Warshow, who believes the play is really about the “present atmosphere,” says that there is more to *The Crucible*, that “the men and women hanged in Salem . . . were upholding their own personal integrity against an insanely mistaken community” and requests that we never forget that “‘witch trials’ are always with us.”³¹ As he suggests, it is the universality of Miller’s play that matters most.

Miller himself acknowledges the link between his play and the political climate of his own time. Miller had personally endured what he denominated “the knuckleheadedness of McCarthyism” when he was called before the House Committee on Un-American Activities.³² In a stance reminiscent of *The*

note 2, at 192 (“*The Crucible* . . . is a self-contained play about a terrible period in American history” when “silly accusations of witchcraft by some mischievous girls in Puritan dress gradually take possession of Salem.”); Henry Hewes, *Arthur Miller and How He Went to the Devil*, SATURDAY REV., Jan. 31, 1953, at 24-26, reprinted in WEALES ANTHOLOGY, *supra* note 1, at 182, 182-83 (“Miller has chosen to turn away from the modern arena, where he is demonstrably at home, to try his hand at writing a historical play that involves some fairly remote events that happened during the Salem witchcraft trials of 1692.”).

²⁷ Hewes, *supra* note 26, at 183.

²⁸ See *supra* note 2 and accompanying text.

²⁹ Warshow, *supra* note 2, at 221.

³⁰ *Id.* at 217.

³¹ *Id.* at 217, 223, 210.

³² Arthur Miller, *Many Writers: Few Plays*, N.Y. TIMES, Aug. 10, 1952, at II.1, reprinted in WEALES ANTHOLOGY, *supra* note 1, at 157, 160; see also *supra* notes 2, 6 and accompanying text.

Crucible's protagonist, John Proctor, Miller refused to name communists.³³

Miller has told us, however, that "McCarthyism may have been the historical occasion of the play, [but is] not its theme."³⁴ He admonishes us not to become too wedded to 1950s politics or just to historical Salem, but to imbibe what is the play's more comprehensive message about witch hunts of all eras so that we learn to recognize their toxic attributes. He explains:

It was not only the rise of "McCarthyism" that moved me, but something which seemed more weird and mysterious. It was the fact that a political, objective, knowledgeable campaign from the far Right was capable of creating not only a terror, but a new subjective reality, a veritable mystique which was gradually assuming even a holy resonance. The wonder of it all struck me that so practical and picayune a cause, carried forward by such manifestly ridiculous men, should be capable of paralyzing thought itself, and worse, causing to billow up such persuasive clouds of "mysterious" feelings within people.³⁵

Miller essentially has three objectives: first, he wants to take us beyond Salem and McCarthy's inquisition to introduce us to the "weird and mysterious" forces common to all irrational persecutions.³⁶ Second, he seeks to identify the kinds of accusers and judges adept at not only conjuring up such "terror" or "new subjective reality," but also shellacking it with "holy resonance."³⁷ Third, through *The Crucible*, Miller tries to expose the results of such witch hunts, the "paralyzing" devastation that destroys lives and apotheosizes lies.³⁸

B. *The Forces Behind the Witch Hunt*

In *The Crucible*, multiple "weird and mysterious" forces activate the mass hysteria.³⁹ Salem citizens, fusing faith with government, adhere to a belief in the existence of an air-tight order for all things and fear anything that might conceivably

³³ Richard H. Rovere, *Arthur Miller's Conscience*, NEW REPUBLIC, June 17, 1957, at 13-15, reprinted in WEALES ANTHOLOGY, *supra* note 1, at 315, 315; see also *supra* notes 2, 6.

³⁴ Weales, *supra* note 12, at xvi (discussing Arthur Miller's interview in *Theatre World* in 1965).

³⁵ Miller, *Introduction*, *supra* note 12, at 161-62.

³⁶ *Id.* at 161.

³⁷ *Id.* at 162.

³⁸ *Id.*

³⁹ *Id.* at 161.

fray such trusty fabric. Miller tells us that this Zeitgeist is what makes Salem susceptible to the upheaval:

The Salem tragedy . . . developed from a paradox. It is a paradox in whose grip we still live, and there is no prospect yet that we will discover its resolution. Simply, it was this: for good purposes, even high purposes, the people of Salem developed a theocracy, a combine of state and religious power whose function was to keep the community together, and to prevent any kind of disunity that might open it to destruction by material or ideological enemies.⁴⁰

Miller adds, however, that in theocratic 1692, there was an incipient championing of “greater individual freedom,” which fertilized the ground for a “perverse manifestation of the panic.”⁴¹

We are introduced to the atmosphere in Act One when we meet the Reverend Parris, Salem’s minister, kneeling beside the bed of his “inert” ten-year old daughter, Betty.⁴² Betty and another catatonic teenager have incited rumors of demonic possession. The other girl is Ruth Putnam, the only child of Thomas Putnam, a wealthy landholder and one of the play’s villains.⁴³ Although Parris, aware that the girls had been dancing in the woods, initially resists the idea of witchcraft, he nevertheless summons an expert, Reverend John Hale, from a nearby town.⁴⁴

Miller tells us that “there is very little good to be said for [Parris],” and implies that his flaws mirror those of his community.⁴⁵ Parris, who “believe[s] he [is] being persecuted wherever he [goes],” is paranoid, tending to inflate every gesture into a personal affront.⁴⁶ In fact, “[i]n meetings, he fe[els] insulted if someone r[ises] to shut the door without first asking his permission.”⁴⁷ He, as a widower with no “interest in” or “talent with” children, has few personal bonds and shares that societal “predilection for minding other people’s business [which] was time-honored among the people of Salem, and . . . undoubtedly created many of the suspicions which were to feed

⁴⁰ Miller, *The Crucible*, *supra* note 1, at 6-7.

⁴¹ *Id.* at 7.

⁴² *Id.* at 3.

⁴³ *Id.* at 15-16.

⁴⁴ *Id.* at 14.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

the coming madness.”⁴⁸ Parris personifies that phobia about a world bristling with enemies, where there is no private sphere, and where it is everyone’s business to ensure that everyone knows their rightful place.

In the world of *The Crucible*, one place that is never right is the forest. In Act One, Miller describes “[t]he edge of the wilderness” as being close by and that the “Salem folk believed that the virgin forest was the Devil’s last preserve, his home base and the citadel of his final stand.”⁴⁹ For Parris’ parishioners, “the American forest was the last place on earth that was not paying homage to God.”⁵⁰ Because they in essence mistrusted their own circumference, a “space so antagonistic to man,” the *Crucible* populous adopted what Miller describes as a cult of “self-denial” along with “their purposefulness, their suspicion of all vain pursuits, [and] their hard-handed justice.”⁵¹

What launches the play is that damned forest, or rather Parris’s suspicion that his daughter and her friends have penetrated the forbidden situs and have danced naked in the moonlight in the throes of a seance. For Parris and his community, such rituals titillate them with their worst fears: the heathen forest, dark night, the moon, young girls, nakedness, dancing, and spirits. Such ingredients, of course, amount to the total usurpation of accepted order and the fracturing of the one rightful structure.

Professor Penelope Pether, who accurately detects in *The Crucible* a tension between female and male, explains that Miller’s women are “marginal[] to their society’s benefits and [in] opposition to its laws.” When they “seek to ‘sport,’ to achieve a measure of autonomy, and are in a measure successful, the law goes mad, because law as it is constituted in Miller’s Salem accords no place to women except those of child,

⁴⁸ Miller, *The Crucible*, *supra* note 1, at 3, 5.

⁴⁹ *Id.* at 5. Miller also tells us that “[t]he parochial snobbery of these people was partly responsible for their failure to convert the Indians” and that “[p]robably they also preferred to take land from heathens rather than from fellow Christians.” *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 6; see also Penelope Curtis, *The Crucible*, *THE CRITICAL REV.*, 1965, at 45-58, reprinted in *WEALES ANTHOLOGY*, *supra* note 1, at 255, 258 (“As Miller points out, the two crucial factors in [the Salemites’] lives were the land and their religion. . . . Their speech has the saltiness, the physicality of a life lived close to the soil and the waste.”).

wife, slave, servant or whore.”⁵² Miller’s Salem, however, is not purely misogynistic or even paradigmatic of a sexist “American community [that] cannot give women a voice . . . without everything going mad.”⁵³ Rather, *The Crucible* is Miller’s psychological portrait of a colony skittish about the potential disruption of traditional concepts of male and female and spooked by anything that can be remotely conceived of as a threat to patriarchal power. In *The Crucible*, the dancing naked coven is antipodal to that safe haven, the place where girls belong: that is, girls ought to be properly attired, confined to town, church, or the meeting house, and must not stray far from the “small-windowed, dark houses snuggling against the raw Massachusetts winter,” those boxes of Puritanical morality.⁵⁴ For Salem, the proper formula is a married man plus woman plus one or more obedient offspring.

The female witchery derides that sanctified status quo and imposes a threat to the traditional family. It is the deranged Abigail Williams, the progenitor of the Salem madness, who fleshes out the theme when she schemes to dismantle the Proctor family. That is, Abigail, who “drank a charm to kill John Proctor’s wife,” hurls her own grenade of falsehood into the Proctor hearth and home by manipulating the judges, inflaming their suspicions, and directing wrath at Proctor’s wife in an effort to secure her eradication.⁵⁵ She personifies what Salem so fears—an assault on the sacrosanct domestic reality.⁵⁶

While Abigail unleashes irrational fear, she also opens Pandora’s box to related “weird and mysterious” forces that catalyze the witch hunt—lust and rage.⁵⁷ After Abigail and John Proctor have sex, she persuades herself that she has found love, but Miller tells us it is all about fiery lust. Abigail woos John with pyric passion, “I have a sense for heat, John, and yours has drawn me to my window, and I have seen you

⁵² Penelope Pether, *Jangling the Keys to the Kingdom: Some Reflections on The Crucible, on an American Constitutional Paradox, and on Australian Judicial Review*, 8 CARDOZO STUD. L. & LITERATURE 317, 328 (1996).

⁵³ *Id.*

⁵⁴ Miller, *The Crucible*, *supra* note 1, at 4.

⁵⁵ *Id.* at 19.

⁵⁶ See Hobson, *supra* note 2, at 228 (explaining that they are not “merely the foolish activities of unbalanced girls; they are the setting for an attack upon the state, the state of matrimony and domestic happiness. One of the witches, Abigail Williams, is genuinely plotting to overthrow that particular part of the American way of life which is represented by [the Proctor family].”).

⁵⁷ Miller, *Introduction*, *supra* note 12, at 161.

looking up, burning in your loneliness."⁵⁸ Although John concedes that he "may have looked up" at her window, he, knowing that he has erred, renounces the heat.⁵⁹

Abigail, in contrast to Proctor, has irrevocably lost control, and it is her imbalance that christens the slaughter.⁶⁰ It is she who acts out her most libidinous impulses, so much so that she symbolizes what Freud has denominated the id, which the superego aspires to keep in check.⁶¹ What ails Abigail is lust, jealousy, and hatred, along with an obsessive resolve to do whatever it takes to secure the already-married man that has come to scorn her. As such, Abigail resembles what we have come to call a "stalker," one who vows to hound the object of her desire to the very peril of anyone that gets in the way.

Through Abigail we learn that other forces at work in *The Crucible* include repression and negation. For Freud, "the essence of repression lies simply in the function of rejecting and keeping something out of consciousness,"⁶² and it coincides with "negation," a phenomenon that Freud described as a "way of taking account of what is repressed."⁶³ According to Freud, negation is a process through which the "subject-matter of a repressed image of thought can make its way into

⁵⁸ Miller, *The Crucible*, *supra* note 1, at 23.

⁵⁹ *Id.*

⁶⁰ Miller, *Introduction*, *supra* note 12, at 164 ("It was that Abigail Williams, the prime mover of the Salem hysteria, so far as the hysterical children were concerned . . .").

⁶¹ See generally SIGMUND FREUD, *The Origin and Development of Psychoanalysis* (1909), reprinted in A GENERAL SELECTION FROM THE WORKS OF SIGMUND FREUD 3, 12 (John Rickman ed. 1957) (1937) [hereinafter GENERAL SELECTION]. Freud has described how "people fall ill of a neurosis." SIGMUND FREUD, *Some Character-Types Met with in Psychoanalytic Work* (1915), reprinted in GENERAL SELECTION, at 98, 100-01. He explained:

[F]or a neurosis to break out there must be a conflict between the libidinal desires of a person and that part of his being which we call his ego, the expression of his instinct of self-preservation, which also contains his ideals of his own character. A pathogenic conflict of this kind takes place only when the libido is desirous of pursuing paths and aims which the ego has long overcome and despised, and has therefore henceforth proscribed: and this the libido never does until it is deprived of the possibility of an ideal satisfaction consistent with the ego.

Id. at 100-01; see also Sigmund Freud, *The Ego and the Id* (1923), reprinted in GENERAL SELECTION, *supra*, at 210.

⁶² SIGMUND FREUD, *Repression* (1915), in GENERAL SELECTION, *supra* note 61, at 87, 89.

⁶³ SIGMUND FREUD, *Negation* (1925), in GENERAL SELECTION, *supra* note 61, at 54, 55.

consciousness on condition that it is denied.”⁶⁴ Freud likens this to taking in food and then spitting it out:

Expressed in the language of the oldest, that is, of the oral, instinctual impulses, the alternative runs thus: “I should like to eat that, or I should like to spit it out”; or carried, a stage further: “I should like to take this into me and keep that out of me.” That is to say: it is to be either *inside me* or *outside me*. . . . [T]he original pleasure-ego tries to introject into itself everything that is good and to reject from itself everything that is bad. From its point of view what is bad, what is alien to the other ego, and what is external are, to begin with, identical.⁶⁵

The image of young girls frolicking in the buff in the illicit forest and at least an unconscious sense that post-adolescent Abigail is panting in heat awaken Salem’s libidinous impulses and sexuality, appetites which usually are repressively denied and tucked tight into that proverbial Puritan corset.⁶⁶ For the participants, the witch hunt becomes a way to vent all of that. Essentially, the judges, accusers, and some victims can allow forbidden images and desires into their consciousness on the condition that they are then banished. They can thus ingest a panoply of taboos, lusts, jealousies, and hatreds, and then expel them in the form of the death penalty. In truth, the Salem court mutates into a coven that exorcizes its own unconscious witchery. The merger of religion with government, the panic directed at anything that conceivably might threaten the tidy order of men and women acquiescing to their assigned roles, and the repression of libidinous impulses activate the cast of Salem accusers and judges.

C. *The Witch Hunters*

In *The Crucible*, Miller also alerts us to the kind of accusers and judges who propagate terror and destroy innocent lives, characters including Abigail, Reverend Parris, Thomas Putnam, Reverend Hale, Judge Hathorne, and Deputy Governor Danforth. Although Abigail, addicted to her own lustful pursuit of John Proctor, is a point of origin, the witch hunt effortlessly spreads to recruit fanatics. What is unsettling (and for some the very thing that makes them balk at the play)

⁶⁴ *Id.*

⁶⁵ *Id.* at 55-56.

⁶⁶ See Fender, *supra* note 17, at 284-85 (“[O]thers see evidence of witchcraft in the illness of a hysterical girl, and the witch hunt will express their repressed envy, libido and land lust.”).

is that there is nothing particularly peculiar about the perpetrators; the horror is that they are ordinary, albeit fallible, beings who are caught up in a rather prosaic pursuit of their own self-interests.⁶⁷

Abigail, with her monomaniacal drive to steal another woman's husband, can easily twist the other girls because they have their own compatible agenda: they want to finesse witchcraft charges to cover up their own miscreant dalliance in the forbidden woods.

For Reverend Parris, the campaign provides him with a fortuitous means to solidify his insecure position in a parish that does not particularly like him or appreciate his leadership style.

Another zealot is Thomas Putnam, who considers himself "the intellectual superior" to everyone.⁶⁸ Miller explains that it "is not surprising to find that so many accusations against people are in the handwriting of Thomas Putnam, or that his name is so often found as a witness corroborating the supernatural testimony, or that his daughter led the crying-out at the most opportune junctures of the trials."⁶⁹ Putnam is "a deeply embittered man" with "many grievances" and a "vindictive nature [that] was demonstrated long before the witchcraft began."⁷⁰ He naturally finds the hunt to his liking. He, believing that his family honor has been sullied, exploits this chapter in Salem history to restore himself to the lofty position to which he believes he is entitled. Putnam is also engaged in a land dispute with Francis and Rebecca Nurse, and pursues his squabble with neighbor Giles Corey over some pasture.⁷¹ Thus, as Corey tells the court, the desire to wipe out enemies and confiscate land are the things that drive Putnam.⁷²

Reverend John Hale, central to the play, is somewhat enigmatic due to the fact that he, like Proctor, evolves.⁷³ At the

⁶⁷ See Walter F. Kerr, *The Crucible*, N.Y. HERALD TRIBUNE, Jan. 23, 1953, at 12, reprinted in WEALES ANTHOLOGY, *supra* note 1, at 189, 190 ("[T]he folk who do the final damage are not the lunatic fringe but the gullible pillars of society" and "even the upright man is eventually tormented into going along with the mob to secure his own way of life, his own family.").

⁶⁸ Miller, *The Crucible*, *supra* note 1, at 14.

⁶⁹ *Id.* at 15.

⁷⁰ *Id.* at 14-15.

⁷¹ *Id.* at 26, 96.

⁷² *Id.* at 96.

⁷³ See Warshow, *supra* note 2, at 213-14 (describing Hale as "a kind of idiotic 'liberal' scoutmaster, at first cheerfully confident of his ability to cope with the Devil's

start, Reverend John Hale boasts that he can distinguish between diabolism and mere sin.⁷⁴ But this man, who once preached that “[w]e cannot look to superstition in this” and that “[t]he Devil is precise; the marks of his presence are definite as stone,” becomes less self-assured and more remorseful.⁷⁵ In the end, Hale is left enfeebled, essentially begging the innocent to save themselves with false confessions.⁷⁶

Through Hale, Miller suggests that witch hunts debilitate not just their actual victims but also the very institutions that perpetuate them. But there is more to Hale’s transformation than even that. In the beginning, Hale seems to embody the very ideology that disposes Salem to the “weird and mysterious” forces that provoke acts of savagery.⁷⁷ That is, Hale initially subscribes to the communal picture with its tidy partitions of black and white:

Like Reverend Hale and the others on this stage, we conceive the Devil as a necessary part of a respectable view of cosmology. Ours is a divided empire in which certain ideas and emotions and actions are of God, and their opposites are of Lucifer. It is as impossible for most men to conceive of a morality without sin as of an earth without “sky.” Since 1692 a great but superficial change has wiped out God’s beard and the Devil’s horns, but the world is still gripped between two diametrically opposed absolutes.⁷⁸

Hale, like the others, clings to the unyielding conviction that the cosmos is bifurcated into distinct turfs of good and evil, God and Satan, and that all things lock precisely into such a Manichaean configuration. He, and other congregants are drawn to missions of absolute morality that tout good and wage war on abstract evil.

Hale starts with the “goal [of] light, goodness and its preservation” and anticipates “what may be a bloody fight with the Fiend himself,”⁷⁹ but as the drama unfolds his intellect betrays his fanaticism: Hale begins to suspect that the world is not all that cut and dry and begins to see that that putative court of light, god and goodness is swirling with dark, devilish,

wiles and in the last act babbling hysterically in an almost comic contrast to the assured dignity of the main characters”).

⁷⁴ Miller, *The Crucible*, *supra* note 1, at 38-39.

⁷⁵ *Id.* at 38.

⁷⁶ *Id.* at 132-45.

⁷⁷ See *supra* notes 35-36 and accompanying text.

⁷⁸ Miller, *The Crucible*, *supra* note 1, at 33.

⁷⁹ *Id.* at 36.

bane.⁸⁰ Hale's philosophical rift with the collective truth hobbles him and allies him with some of the Salem martyrs.⁸¹ Hale estranges himself from Judge Hathorne, "a bitter, remorseless Salem judge," and from the more deadly Deputy Governor Danforth, the chief jurist, who cannot be distracted from his "exact loyalty to his position and his cause."⁸²

Unlike most of the other characters in the play, Hathorne and Danforth never seem to be real people. But in defense of the playwright, such lack of character development is both intentional and artistically effective. Hathorne and Danforth are purposely dehumanized, degenerating into mere cranks and shafts in one droning confession-execution apparatus. They exist to show us the kind of flintheartedness spawned by the "weird and mysterious" forces that consume Salem.⁸³ They are, as Professor Penelope Curtis has put it, "Evil with a capital 'E' [that] comes into power only when the community gives it institutional status."⁸⁴ Danforth and Hathorne molt into *the* institution: they constitute the court, the society, the absolute morality, and the ersatz gods.

Miller is quite conscious of what he has accomplished with his judges. While Miller describes Danforth's "evil [as] more than personal, . . . [as] nearly mythical," he rebukes himself for not making this deputy governor "evil enough."⁸⁵ Miller explains, "I did not clearly demarcate the point at which [Danforth] knows what he has done, and profoundly accepts it as a good thing. This alone is evil."⁸⁶ Miller states that in the wake of the actual Salem debacle, once the madness subsided, one of the judges drank himself to death while the others "insisted they had done well."⁸⁷ Such insistence of having "done well" is the very abyss of evil into which Miller's Danforth does not visibly descend. As such, Miller is cognizant of the fact that as bad as Danforth is, there is still something worse, something that is not merely the *doing* of evil, but actually equals evil itself. Miller suggests, at least on an implicit level, that the real

⁸⁰ See Miller, *The Crucible*, *supra* note 1, at 128-45.

⁸¹ See *id.*

⁸² *Id.* at 85.

⁸³ Miller, *Introduction*, *supra* note 12, at 161.

⁸⁴ Curtis, *supra* note 51, at 263.

⁸⁵ SHEILA HUFTTEL, *excerpt from ARTHUR MILLER: THE BURNING GLASS* 146-47 (1965), *reprinted in* WEALES ANTHOLOGY [entitled *More on Danforth*], *supra* note 1, at 173, 173 (citing a statement by Miller sent to Huftel).

⁸⁶ *Id.*

⁸⁷ *Id.* at 174.

abomination are witch hunters who so relish their office, who do meticulous follow-up, and who relentlessly proceed even after the dirty deeds are done. They are, as discussed below, more like witch hunters in *Harvard's Secret Court*.⁸⁸ And while such accusers and witch hunters, like Abigail, Reverend Parris, Thomas Putnam, Reverend John Hale, Judge Hathorne, and Deputy Governor Danforth, are vile unto themselves, the damage they cause is cataclysmic.

D. *The Damage*

The witch hunt not only results in the death of many innocent people, but also blights the community, derogates the judicial process, and trumps truth with lies. In the last acts of *The Crucible*, there are lots of graves and destruction. Hale, who has “signed seventy-two death warrants,” balks at taking more lives “without there be a proof so immaculate no slightest qualm of conscience may doubt it.”⁸⁹ Hale’s doubt contrasts with Danforth’s hubristic certitude. When Hale requests pardons or postponements, Danforth just slaps him down:

Them that will not confess will hang. Twelve are already executed; the names of these seven are given out, and the village expects to see them die this morning. Postponement now speaks a floundering on my part; reprieve or pardon must cast doubt upon the guilt of them that died till now. While I speak God’s law, I will not crack its voice with whimpering. If retaliation is your fear, know this—I should hang ten thousand that dared to rise against the law, and an ocean of salt tears could not melt the resolution of the statutes.⁹⁰

Danforth, claiming to be the patriarch, God, and law, creates proceedings in his own likeness: they must thus be swift, efficient and merciless, but have a facade of fairness and consistency.

The witch hunt, however, does not just bludgeon individuals, but spreads to the vicinity, leaving it with “orphans wandering from house to house; abandoned cattle bellow[ing] on the highroads, [and] the stink of rotting crops hang[ing] everywhere.”⁹¹ And time does not readily heal such wounds: “Certain farms which had belonged to the victims

⁸⁸ See *infra* Part II.D (discussing how Harvard pursued its victims even after they were expelled and tried to block their efforts to continue their education and self-actualize).

⁸⁹ Miller, *The Crucible*, *supra* note 1, at 99.

⁹⁰ *Id.* at 129.

⁹¹ *Id.* at 130.

were left to ruin, and for more than a century no one would buy them or live on them.”⁹²

Beyond the death of innocent people, like Salem’s pious Rebecca Nurse, and the waste that persists long after “the fever died,” there are other, more subtle, but equally grievous injuries.⁹³ *The Crucible* witch hunt effectively extirpates the fundament of American justice and substitutes a malignancy that purports to function without legal representation. Specifically, the Salem court is empowered to decide life or death and yet, none of its victims have lawyers defending them. It is here that one motif in Miller’s play coincides with seminal United States Supreme Court decisions confirming the importance of counsel in our justice system.

The Salem witch trials, of course, pre-date by almost two and a half centuries *Powell v. Alabama*,⁹⁴ the landmark case in which the United States Supreme Court gave our Sixth Amendment right to counsel the dignity and some of the stature it enjoys today.⁹⁵ The nineteenth-century playwright of *The Crucible*, however, was likely aware of *Powell* or at least understood that constitutional safeguards neither preside over witch hunts nor over “Congressional investigations of political unorthodoxy.”⁹⁶

In fact, Miller’s witch court essentially simulates the lawless and lawyerless trial court in *Powell*, a capital case that began when nine uneducated black youths, collectively named the “Scottsboro Boys,” were picked up for raping two white women on a train.⁹⁷ These boys, strangers in the community,

⁹² Miller, *The Crucible*, *supra* note 1, at 146.

⁹³ *Id.*

⁹⁴ 287 U.S. 45, 53 (1932).

⁹⁵ See U.S. CONST. amend. VI; WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 8-9 (1955) (discussing the early rejection of the right to counsel for felons); FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT* 9-10 (1951) (analyzing why the denial of counsel to felons was accepted in early England); Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433, 438-41 (1993) (discussing early law with respect to right to counsel); The Honorable Juan Ramirez, Jr. and Amy D. Ronner, *Voiceless Billy Budd: Melville’s Tribute to the Sixth Amendment*, 41 CAL. W. L. REV. 103, 111-21 (2004) (discussing the history of the Sixth Amendment and its relationship to therapeutic jurisprudence); James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Messiah Doctrine*, 22 U.C. DAVIS L. REV. 1, 10 (1988) (explaining why “[t]he right to counsel does not have the illustrious Anglo-American heritage one might expect”).

⁹⁶ Miller, *supra* note 32, at 160.

⁹⁷ See CLARENCE NORRIS & SYBIL D. WASHINGTON, *THE LAST OF THE SCOTTSBORO BOYS* 20 (1979).

were efficiently tried, convicted and sentenced to death. Although they technically had representation, the lawyers had been appointed only on the morning of trial.

The Supreme Court, overturning their convictions, found that the tardy appointments were constitutionally infirm, depriving the defendants of legal advice “during perhaps the most critical period of the proceedings against [them] . . . from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important.”⁹⁸ In *Powell*, Justice Sutherland explained that the failure to afford the Scottsboro Boys a “fair opportunity to secure counsel of [their] own choice” violated due process.⁹⁹ The Court, focusing on capital cases, said that the appointment of counsel was a “logical corollary”¹⁰⁰ of the defendant’s right to a fair hearing and stressed that even an “intelligent and educated” layperson would need “the guiding hand of counsel at every step.”¹⁰¹

The *Powell* decision was a landmark and when Miller was writing *The Crucible*, it had already infiltrated our legal system and the pores of American culture.¹⁰² In the play, when John Proctor, fumbling with his papers, apologizes for not

⁹⁸ *Powell*, 287 U.S. at 57.

⁹⁹ *Id.* at 53.

¹⁰⁰ *Id.* at 72.

¹⁰¹ *Id.* at 69. There is also reason to believe that the Scottsboro Boys, like the targets of the Salem witch hunt, were innocent. See generally Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 676 n.20 (1992) (pointing out that there were “reasons to believe that the defendants [in *Powell*] were innocent and . . . that the crime had not occurred at all”).

¹⁰² In *Johnson v. Zerbst*, 304 U.S. 458 (1937), decided five years after *Powell*, the Court held that the Sixth Amendment mandated that federal courts provide indigent defendants with appointed counsel in all serious criminal cases. Justice Black called the right to counsel “one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty,” and said that the Sixth Amendment is “a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’” *Id.* at 462. The *Johnson* Court, relying on *Powell*, felt that the Sixth Amendment recognized “the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal.” *Id.* at 463. At the time Miller was writing *The Crucible*, *Gideon v. Wainwright*, 372 U.S. 335 (1962), had not been decided, and *Betts v. Brady*, 316 U.S. 455 (1942), the case that *Gideon* overruled, was the law. Despite *Powell* and *Johnson*, the Court in *Betts* refused to apply the Sixth Amendment right to counsel to the states via the Fourteenth Amendment’s Due Process Clause. *Powell*, 287 U.S. at 461-62. As such, the *Betts* majority concluded that due process did not necessarily require the appointment of counsel in all felony cases, but only when specific circumstances demonstrated that the absence of counsel would result in a fundamentally unfair trial. *Id.* at 473; see also Ramirez & Ronner, *supra* note 95, at 111-16 (analyzing the path from *Powell* to *Gideon*).

being a lawyer, and Danforth responds, “[t]he pure at heart need no lawyers. Proceed as you will,”¹⁰³ Miller reminds us of the reprehensibility: a tribunal that, without the “guiding hand”¹⁰⁴ of lawyers, can deliver death blows.

Miller’s message also harmonizes with a core tenet of therapeutic jurisprudence, a relatively new field of legal study that already has had a significant impact on the courts and our laws.¹⁰⁵ The basic premise of therapeutic jurisprudence is that the law “function[s] as kind of therapist or therapeutic agent” and that “legal procedures . . . constitute social forces that, whether intended or not, often produce therapeutic or anti-therapeutic consequences.”¹⁰⁶ What therapeutic jurisprudence endorses is simply the creation of legal procedures that have a therapeutic impact on the participants and our culture at large.

Various therapeutic jurisprudence scholars have pointed out that when individuals participate in a legal process what influences them the most is not the result, but their own assessment of the fairness of the process itself.¹⁰⁷ For example,

¹⁰³ Miller, *The Crucible*, *supra* note 1, at 93; *see also id.* at 95 (Hathorne asks suspiciously “What lawyer drew this . . . ?” and Corey replies, “You know I never a hired a lawyer in my life.”).

¹⁰⁴ *Powell*, 287 U.S. at 69.

¹⁰⁵ *See generally* DAVID B. WEXLER & BRUCE WINICK, *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (1996) (collecting contributions on therapeutic jurisprudence from academics and professionals from different legal areas); DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991) (essays applying therapeutic jurisprudence to problems in mental health law); BRUCE J. WINICK, *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW* (1997) (essays explaining how therapeutic jurisprudence can help us understand and restructure mental health law); COURT REV. 1-68, Spring 2000 (special issue on therapeutic jurisprudence, collecting articles on how therapeutic jurisprudence can affect courts and judicial decisions); Symposium, *Therapeutic Jurisprudence in Clinical Legal Education and Legal Skills Training*, 17 ST. THOMAS L. REV. 403 (2005) (special issue devoted to the role of therapeutic jurisprudence in clinical legal education); Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999) (applying therapeutic jurisprudence to criminal justice); Ramirez & Ronner, *supra* note 95 (applying therapeutic jurisprudence to the Sixth Amendment); Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant’s Voice: The Antitherapeutic per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499 (2000) (applying therapeutic jurisprudence to appellate practice); Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89 (2002) (applying therapeutic jurisprudence to juvenile justice).

¹⁰⁶ Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POLY & L. 184, 185 (1997).

¹⁰⁷ *See* E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 61-92 (1988); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 83-84, 94-95 (1975); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 5-6 (2004) [hereinafter TYLER, *OBEY THE LAW*]; E. Allen Lind et al.,

Tom Tyler, a social psychologist and proponent of procedural justice, has explained:

Studies suggest that if the socializing influence of experience is the issue of concern (i.e., the impact of participating in a judicial hearing on a person's respect for the law and legal authorities), then the primary influence is the person's evaluation of the fairness of the judicial procedure itself, not their evaluations of the outcome. Such respect is important because it has been found to influence everyday behavior toward the law. When people believe that legal authorities are less legitimate, they are less likely to be law-abiding citizens in their everyday lives.¹⁰⁸

Professor Keri Gould, who has addressed similar issues when individuals are charged with crime, has concluded that those who "experienced a legal procedure that they judged to be unfair . . . had less respect for the law and legal authorities and are less likely to accept judicial decisions."¹⁰⁹ Essentially, such feelings can denigrate an individual and cause what psychologists have labeled "learned helplessness," which breeds apathy and makes people simply give up.¹¹⁰ Moreover, an anti-therapeutic process can also harm society, making it lose faith in our laws and justice system.¹¹¹

When, however, individuals believe that the legal system has treated them fairly, with respect and dignity, there is instead a therapeutic effect.¹¹² Specifically, the participants

Voice Control and Procedural Justice: Instrumental and Non-Instrumental Concerns in Fairness Judgments, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990). For application of such principles in civil commitment hearings, see Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 433-35 (1992) [hereinafter Tyler, *Psychological Consequences*]; Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 46-47 (1999) (discussing the role of counsel in civil commitment hearings).

¹⁰⁸ Tyler, *Psychological Consequences*, *supra* note 107, at 437 (footnotes omitted); see also Amy D. Ronner, *Punishment Meted Out for Acquittals: An Antitherapeutic Jurisprudence Atrocity*, 41 ARIZ. L. REV. 459, 472-77 (1999) (discussing how unfair procedures spawn disrespect for the law, disregard for human life, rage, and helplessness).

¹⁰⁹ Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835, 865 (1993); see also Ronner, *supra* note 108.

¹¹⁰ MARTIN E. P. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT AND DEATH* xvii (1992) (discussing learned helplessness). In his study, Seligman, a psychologist, defines the causes of learned helplessness: "First an environment in which some important outcome is beyond control; second, the response of giving up; and third, the accompanying cognition: the expectation that no voluntary action can control the outcome." *Id.*; see also Ronner, *supra* note 108, at 472-77 (discussing how punishments for acquittals can engender learned helplessness).

¹¹¹ See Ronner, *supra* note 108, at 481.

¹¹² See TYLER, *OBEY THE LAW*, *supra* note 107, at 71-74.

in the process do not just experience greater satisfaction, but tend to be more inclined to accept responsibility for their own conduct and take measures to reform. A therapeutic process is simply one that gives the litigant or an accused a sense of “voice,” which is a chance to tell his or her story to a decision-maker.¹¹³ Along with voice is “validation” or the belief that the adjudicator has really heard and taken seriously the participant’s position.¹¹⁴ With voice and validation, litigants tend to find the results of a proceeding less coercive and feel as if they voluntarily played a role in the judicial outcome.¹¹⁵ As such, the participants, the observers, and the culture itself tend to be more at peace with the result—even one with which they do not necessarily agree.¹¹⁶

One thing that therapeutic jurisprudence scholars stress is that attorneys are key, even more so in criminal proceedings. It is the attorney who can help individuals articulate their position and tell their stories. It is the attorney who can help effectuate individual participatory interests and thus, yield a process with voice and validation.¹¹⁷ It is the attorney who can make the proceedings seem less coercive and increase the likelihood that the results will be experienced as fair.

¹¹³ Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. U. L. REV. 1145, 1158 (1997) (explaining the importance of “voice” and “validation” in mental health law); see also Ronner, *supra* note 105, at 93-96 (discussing “the three ‘Vs’: voice, validation, and voluntary participation” in the context of juvenile justice); Ronner & Winick, *supra* note 105, at 501-03 (discussing the importance of voice and validation in appellate proceedings).

¹¹⁴ See Winick *supra* note 113, at 1158; Ronner, *supra* note 105, at 93-96; Ronner & Winick, *supra* note 105, at 501-03.

¹¹⁵ See Winick *supra* note 113, at 1158 (discussing voluntary participation as being key to a therapeutic procedure).

¹¹⁶ *Id.* (discussing the importance of the perceived fairness of proceedings in therapeutic jurisprudence). The MacArthur Research Network on Mental Health and the Law has examined patient perceptions of coercion and has found that even in situations that are inherently coercive—like civil commitment—individuals feel more validated when they perceive the authorities as benevolent and when they have voice and participation. See Winick, *supra* note 107, at 47-50; see also Nancy S. Bennett et al. *Inclusion, Motivation and Good Faith: The Morality of Coercion in Mental Hospital Admission*, 11 BEHAV. SCI. & L. 295, 302-03 (1993); Ramirez & Ronner, *supra* note 95, at 121.

¹¹⁷ Ramirez & Ronner, *supra* note 95, at 121; Ronner & Winick, *supra* note 105, at 502. See generally David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743 (2005) (exploring the ways criminal defense lawyers can integrate therapeutic jurisprudence into their practice).

The proceedings in *The Crucible* epitomize what is anti-therapeutic and corrosive of the social fabric.¹¹⁸ All of those accused, especially protagonist John Proctor, are coerced not just into giving false confessions, but also into implicating others. Proctor learns in this process that he is bereft of control, voiceless, and invalid. Danforth's court divests him of any opportunity to tell his truth to a decision-maker. For Proctor, there can be no validation in this sham tribunal where adjudicators do not listen, hear, or even pretend to entertain his position.

Part of the problem here is what Professor Samuelson describes as "little justice in a scenario that seems to determine guilt almost solely on the basis of accusations."¹¹⁹ Proctor's defenses and those of others are simply doomed to fall on deaf ears because the accusations are so innately intangible that they ward off any disproof. By way of example, Giles Cory's wife is allegedly in cahoots with the devil because by reading books at night, she casts death spells on her neighbor's pigs.¹²⁰ Rebecca Nurse's supposed witchery is responsible for the demise of Mrs. Putnam's babies and Abigail attributes her pain to Elizabeth Proctor, who has been putatively poking "poppets" with pins.¹²¹ The Salem court, untethered to any reasonable doubt standard or even evidentiary rules, elevates such incredulity into not just presumptions, but ones impervious to rebuttal. In this anti-therapeutic arena, with no legal counsel, the prey are coerced and play no role in the judicial pronouncement. The witch hunters have created a court that does not merely silence and invalidate voices, but also impairs civilization by decimating the rule of law and the judicial system.

Significantly, in order to survive *The Crucible* hunt, those who are accused have to choose between two equally dreadful options: they can futilely try to hide and evade the inquisition, or they can save their lives through lying about

¹¹⁸ See Pether, *supra* note 52, at 326 ("Not only does Danforth make justice openly partisan, . . . not only does he deny Proctor legal representation; and not only does he conduct his questioning of Elizabeth Proctor about her husband's adultery in such a way as is designed to elicit not the facts but the evidence he wants. His speech in the prison is also the articulation of a cynical travesty of justice; evidence of the perversion of the course of justice; a textbook of judicial corruption . . .").

¹¹⁹ Samuelson, "I Quit this Court," *supra* note 19, at 638.

¹²⁰ Miller, *The Crucible*, *supra* note 1, at 85-87 (Corey defending the accusations against his wife).

¹²¹ *Id.* at 39-47 (Mrs. Putnam accuses Rebecca), 103-04 (Proctor defending his wife against accusations of poppet-poking).

themselves and others. But if they persist in speaking truth, they must face execution. This tragic dilemma presents itself vividly in the final scene in which Proctor refuses to sign his confession, to fix his name to lies, and to falsely incriminate others. Proctor, realizing that what Danforth demands—the demise of his integrity and identity—is worse than death, proclaims:

Because it is my name! Because I cannot have another in my life!
Because I lie and sign myself to lies! Because I am not worth the
dust on the feet of them that hang! How may I live without my
name? I have given you my soul; leave me my name!¹²²

Professor Samuelson, one of Proctor's critics, who suggests that he "must be counted a moral failure throughout most of the play," actually identifies what makes this protagonist a successful character—his human fallibility.¹²³ Samuelson is correct that, at least in the beginning, Proctor appears rough around the edges: he is indeed "arrogant and socially disconnected" and lives to control others.¹²⁴ He trifles with Abigail and then commands her to retreat and likewise expects his betrayed wife to just forgive and forget at the drop of a hat. He threatens to whip Abigail and similarly bullies Mary Warren when he drags her into court.¹²⁵ And because Parris represents authority, Proctor abhors him, avoids church, and refrains from baptizing his own son.

Proctor's idiosyncrasies, however, fuel his own tragedy, that is, his compulsion to control others paradoxically leads him to loss of self control.¹²⁶ None of this, however, renders Proctor a malefactor, but rather earns him our sympathy for another imperfect being, someone who, like us, fumbles, makes mistakes, and grows. In the play, Proctor confronts his own frailty, comes to regret his adulterous slip, seeks in his own clumsy way redemption from his wife, and repels both Abigail's plots and the court's chicanery. In the end, what heroic Proctor

¹²² Miller, *The Crucible*, *supra* note 1, at 143.

¹²³ Samuelson, *Hart, Devlin, and Arthur Miller on the Legal Enforcement of Morality*, *supra* note 19, at 206.

¹²⁴ *Id.*

¹²⁵ *Id.* ("[N]ote his curt dismissal of Abigail in Act One, and further how he answers her criticisms of Elizabeth with threats of whipping. He uses the same threat against Mary Warren in Act Two when he scolds her for leaving the Proctor house against his orders.")

¹²⁶ *Id.* at 207 ("Proctor thereby has permitted his conduct, by turns reckless and unresponsive, to be a source of his own and of others' undoing. . . . Proctor has come to understand the fruits of his hypocrisy and so has the audience.")

sees is that all roads essentially lead to his own demise. If Proctor takes the Danforth route and adopts the damned document, he is left voiceless, invalidated, and nameless, which for him is life devoid of life. Consequently, Proctor, rebelling against Danforthism, opts for a modicum of life in the form of an honest death.

The most poignant tragedy in *The Crucible* is that those “weird and mysterious” forces¹²⁷ invert reality and engender a topsy-turvy world in which victims die for truth and culpable liars go free. Paradoxically, Proctor’s tragic flaw, his obsession with control, molts into his heroic act of penultimate self control. Proctor, refusing to be shackled to the witch hunt mentality, sticks to plain truth, thereby thwarting what has become an institutional apotheosis of lies. Miller’s play, exploring that irreconcilable tension between the individual spirit and an oppressive social context, portrays the witch hunt, the participants, and the damage so vividly that we can recognize a kindred atrocity in other contexts.

II. THE WITCH HUNT IN *HARVARD’S SECRET COURT*

In *The Crucible*, Parris brags, “I am not some preaching farmer with a book under my arm; I am a graduate of Harvard College.”¹²⁸ William Wright, author of *Harvard’s Secret Court*, might chuckle at that ironic nexus between Salem and Harvard, with its brutal purge of homosexuals that parallels Miller’s witch hunt.¹²⁹

Like playwright Miller, journalist William Wright explores that irreconcilable tension between individuals and an oppressive institution. *Harvard’s Secret Court* reports the events that unexpectedly came to light when a researcher for *The Harvard Crimson* stumbled upon a restricted archive labeled “the Secret Court of 1920.”¹³⁰ Those files, consisting of about five hundred pages, delineate Harvard’s persecution and

¹²⁷ See *supra* text accompanying notes 35-36.

¹²⁸ Miller, *The Crucible*, *supra* note 1, at 29.

¹²⁹ See generally WRIGHT, *supra* note 14.

¹³⁰ *Id.* at 276. As Wright explains, a writer for *The Crimson* was “[i]ntrigued by the title” and when he “made a request to see the material” he was told that “the files were sealed on the grounds that the papers concerned disciplinary matters.” *Id.* After a “formal request” to the dean of the college, Harry R. Lewis, was also rejected, the entire *Crimson* staff “worked for two months for the release of the files” and eventually, Harvard formed an advisory committee that released the files with the names “blacked out.” *Id.* Through incredible detective work, however, *The Crimson* learned the students’ names. *Id.* at 277.

harassment of students they believed were homosexuals. After obtaining information for his book from documents stored in the Records of the Dean of Harvard College, from the research in *The Harvard Crimson*, and from his own investigations, Wright describes the victims and, endowing them with voice, magnificently tells their stories.

Wright's book does not merely contain a gripping account of how Harvard destroyed careers and the lives of talented men, but bears an almost spooky resemblance to *The Crucible*: that is, while *Harvard's Secret Court* portrays Harvard's Salem-like McCarthyistic pulverization of gayness, its real genius, like that of *The Crucible*, is its Janus timelessness, its ability to look backward and forward at once.

A. *The Witch Hunt*

The 1920 Harvard witch hunt was born when the family of Cyril Wilcox, a student suspended from Harvard for poor academic performance, smelled gas emanating from his bedroom.¹³¹ After resuscitation failed, the family had to face the fact that Cyril committed suicide.¹³² But as Wright tells us, this single incident, like the Salem girls' woodland romp, ended up inaugurating a cataclysm:

The death of this one insignificant and emotionally troubled Harvard student would have enormous ramifications lasting decades and would impact immeasurably the lives of many people, including a Boston political boss, a federal judge, a Broadway producer, three Harvard deans, and the university's president.¹³³

In the wake of the suicide, some letters arrived for Cyril that revealed his interactions with homosexuals at Harvard. Brother Lester Wilcox, "stunned and horrified by the [first] letter," was convinced that Cyril "had been an inexperienced and innocent victim of an unscrupulous and predatory pervert."¹³⁴ The second letter intensified his brother's rage and fortified his resolve to visit Harvard's dean to demand that the school take immediate action.¹³⁵

Lester Wilcox inaugurated the witch hunt by meeting with Chester Greenough, Harvard College's Acting Dean at the

¹³¹ WRIGHT, *supra* note 14, at 9-10.

¹³² *Id.* at 10.

¹³³ *Id.* at 11.

¹³⁴ *Id.* at 18.

¹³⁵ *Id.* at 21-22.

time.¹³⁶ Greenough was receptive to Lester's "thesis of contagious evil spreading fires of moral corruption," ones which allegedly killed Cyril.¹³⁷ As Wright tells us, Greenough, who "[l]ike many men of [his] day, especially those in august positions, . . . saw a logical link between homosexuality and suicide," immediately contacted Harvard's staunch Republican president, A. Lawrence Lowell.¹³⁸ Lowell, whose "feelings were raised to a near frenzy of vindictiveness," promptly assembled a court to cleanse Harvard of its homosexuals and presided as its 1920s version of Miller's Danforth.¹³⁹

Lowell appointed Acting Dean Greenough as head jurist until Dean Henry Yeomans returned from Europe.¹⁴⁰ Somewhat analogous to Hale in *The Crucible*, Greenough "in some of his dealings with individual students . . . revealed hints of compassion and misgivings about the harshness of the Court's sentence. Other judges were Matthew Luce, a regent and prominent Boston businessman, and Dr. Roger I. Lee, a physician and head of Harvard's department of hygiene, a selection that apparently belied Lowell's view of homosexuality as a pathological disease.¹⁴¹ Wright, moreover, kids us not when he tells us that another judge's name was Dean Edward R. Gay, who served along with twenty-five-year-old Assistant Dean Murdock, both of whom were close to the ages of the men whose lives they demolished.¹⁴²

After Lester Wilcox's visit, Greenough investigated a bit, latched onto Ernest Roberts, a flamboyant student who threw parties in his dorm room, branded him the gay "ringleader," and decided that the "vice" was somehow confined to the sophomore class.¹⁴³ There was also an anonymous and unsolicited letter that landed in Greenough's office, naming Roberts and listing accomplices that had indulged in the male-male festivities.¹⁴⁴

¹³⁶ *Id.* at 24.

¹³⁷ *Id.*

¹³⁸ *Id.* at 25-26.

¹³⁹ *Id.* at 28.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 30 (Wright notes that the "irony implicit in [Gay's] name seems to have run amok in this story. The full name of Roberts's fiancée [Ernest Roberts was another target of the court] was Helen Gay Smith. Irony is followed closely by confusion. One of the implicated students was named Say, another Day.").

¹⁴³ *Id.* at 45-46.

¹⁴⁴ *Id.* at 47-55.

The Harvard investigation expatiated, sweeping in not just those who were putatively gay, but also anyone merely friendly with gays or assigned a gay roommate.¹⁴⁵ Eventually twenty or so targets were summoned¹⁴⁶ into a court that resembled Salem's inquisitorial venue:

[One accused] had been seated in a darkened room with only one light burning. Since the interrogations occurred during daylight hours, the Court must have drawn curtains and reduced artificial light to a minimum—or possibly found a room with no windows. . . . The Court was . . . determined to discover exactly what had happened and to obtain tidy, easy-to-act-upon confessions of guilt.¹⁴⁷

As it turned out, one of the early interrogations exerted inexorable pressure on Ken Day, "a heterosexual who, lacking other sexual outlets, availed himself of the services of the resolutely homosexual students."¹⁴⁸ The court pounded Day, who began by denying ever having had sex with another man and wound up with the "complete reversal," of admitting having had sex with Roberts.¹⁴⁹

Day, who was brilliant, handsome, and popular, and also a great athlete, however, was not the only man expelled.¹⁵⁰ By the close of the proceedings, the court had branded fourteen men guilty and some of them were not even gay.¹⁵¹ Some of the interrogated men were not even affiliated with Harvard, but were condemned as interlopers who conspired to infect the college population.¹⁵² The main victims, however, were "alumnus Harold Saxon, Assistant Professor Donald Clark, and seven undergraduates."¹⁵³

Of the undergraduates, Roberts, Day, Edward Say and Eugene Cummings were deemed "prime offenders" who were expelled and forever barred from Harvard.¹⁵⁴ Keith Smerage, another in that category, was a year ahead of most of the students, had everything going for him, and desperately

¹⁴⁵ WRIGHT, *supra* note 14, at 137.

¹⁴⁶ *Id.* at 54.

¹⁴⁷ *Id.* at 52.

¹⁴⁸ *Id.* at 54. Wright explains that "[o]ne of the most singular assumptions that emerges [through the Secret Court] is that any male who has sexual relations with another male is ipso facto a homosexual, or at least indelibly contaminated." *Id.* at 139.

¹⁴⁹ *Id.* at 59.

¹⁵⁰ *Id.* at 54, 137.

¹⁵¹ *Id.* at 137.

¹⁵² *Id.* at 122-23.

¹⁵³ *Id.* at 137.

¹⁵⁴ *Id.*

wanted to stay in school.¹⁵⁵ When Smerage, who, in a way reminiscent of John Proctor, confessed but declined to name others, he was expelled and the “words hit him like a shovel to the back of his head.”¹⁵⁶ Three others, Stanley Gilkey, Joe Lombard, and Nathaniel Wolff, were essentially convicted of the lesser offense of fraternizing with gays.¹⁵⁷ The court gave them six months to ponder their own “indiscretions” with leeway to apply for re-admission.¹⁵⁸

As discussed below, here as in *The Crucible*, the witch hunt brought death and destruction. But at Harvard, there was something even more disgusting than in Miller’s Salem trials. That is, Harvard, not satisfied with the mere brutal expulsions, actually persecuted these men for practically the rest of their lives, prevented them from completing their educations elsewhere and frustrating their attempts to simply eke out a living.¹⁵⁹

B. *The Forces Behind the Witch Hunt*

As in *The Crucible*, “weird and mysterious” forces ignite the mass hysteria in *Harvard’s Secret Court*.¹⁶⁰ Wright is admittedly perplexed over the court’s vicious response to a few gay students and that the judges, who were, after all, “members of the Harvard elite—urbane, well-traveled, educated men of the world—would not know that, in 1920, homosexuality was rampant in all social strata of Europe and America.”¹⁶¹ Also, prevalent at the time was the view of homosexuality as a medical issue that could be treated. While Wright, of course, remonstrates such “misguided” thinking, he points out that it was at least a bit more enlightened than the conception of homosexuality as an “unspeakable sin, an offense against God, immorality of the worst sort.”¹⁶² What troubles Wright, and rightfully so, is that supposed intellects of such

¹⁵⁵ *Id.* at 101.

¹⁵⁶ *Id.* at 106.

¹⁵⁷ *Id.* at 137.

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* at 268 (discussing “the vindictive tenacity of the university in ensuring that the stigmatization of the expelled students would persist throughout their productive lives”).

¹⁶⁰ Miller, *Introduction*, *supra* note 12, at 161; *see also supra* note 35 and accompanying text.

¹⁶¹ WRIGHT, *supra* note 14, at 61.

¹⁶² *Id.*

sophistication touted Puritanical clichés and chanted biblical platitudes that were, even in 1920, considered outmoded.¹⁶³

Moreover, Harvard's 1920s homophobia is puzzling because, as Wright's research unearthed, there were "enough noteworthy Harvard homosexuals to fill a 356-page book, a record covering the 150-year period prior to the book's publication in 2003."¹⁶⁴ The question Wright thus poses is why did "President Lowell and his five-man court treat[] the homosexual circle they discovered in *one* year, centered in *one* class and in *one* dormitory, as a rare outbreak of wickedness, a unique anomaly, the elimination of which would, once and for all, rid Harvard of homosexuality"?¹⁶⁵ His posited answer echoes explanations that Miller gives for the pneumatophobia rampant in seventeenth-century Salem.

Wright traces Harvard's path through its "noble battle for independence" and its achievement of freeing itself from governmental and church oversight.¹⁶⁶ Yet, despite such independence, its stature as the pinnacle of higher learning, and the fact that President Lowell was an ombudsman of academic freedom, who "was ferocious in defending the rights of his faculty to voice the most unpopular views," the institution, like Miller's Salem, desperately clung to the safe status quo.¹⁶⁷ And for the very reason that Harvard had divested itself of external meddling into its governance, it somehow felt uniquely pressed "to keep its house in unassailable order" and thus, safeguard all it equated with societal bedrock.¹⁶⁸

Like Miller's Salem, at the time of the secret court, Harvard was not just experiencing a gust of "greater individual freedom,"¹⁶⁹ but was also opening doors to change.¹⁷⁰ At the turn of the century, Harvard was in the throes of entertaining new applicants "who in no way fit the stereotype of the consummate Harvard man . . . [like the] children of Irish, Greek, Italian and Jewish immigrants."¹⁷¹ The foreboding diversity fostered trepidation about candidates that might

¹⁶³ WRIGHT, *supra* note 14, at 61-64.

¹⁶⁴ *Id.* at 69.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 73.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See Miller, *The Crucible*, *supra* note 1, at 7.

¹⁷⁰ WRIGHT, *supra* note 14, at 75-77.

¹⁷¹ *Id.* at 75.

blemish what Wright describes as the indelible prototype: “[There was] an assumption that the raw material Harvard had to work with would be intelligent, somewhat educated, white male Protestants whose ancestors were, if not English, at least northern European. They were men who would marry, have children, and be leaders in their communities.”¹⁷²

For the institution, the accused, like Miller’s supposed diabolical dabblers, threatened the Harvard model, family values, and the sacrosanct marital unit. But the men, who were perceived as “at best [condemned] to bleak lives of suspect bachelorhood,” also purportedly impinged on not just the traditional man-plus-woman formula, but also a universe comfortably cleaved into tidy niches of right and wrong, good and bad, god and devil.¹⁷³ In essence, the gays, like Salem’s martyrs, became scapegoats for a panoply of horrors and represented a menacing rupture of an ostensibly well-ordered social and moral fabric.

Churning in Miller’s *The Crucible* are forces of repression and negation, and they were surely busy in *Harvard’s Secret Court*.¹⁷⁴ As discussed above, Freud understood negation as a way in which the “subject matter of a repressed image of thought can make its way into consciousness on condition that it is denied.”¹⁷⁵ That mechanism applies to Lowell and his witch hunters, who obsessively inquired about and devoured the descriptions of the same-sex trysts in Roberts’ dorm room, the male-male sex acts, and the details of masturbation.¹⁷⁶

The judges, who saw homosexuality as a “highly contagious” disease, manifested what Wright detects as “the faint outlines of an endorsement of the joys of gay sex.”¹⁷⁷ In essence, as Wright explains, “[t]he underlying assumption seems to have been that *all* boys would like to partake in these pleasures but are prevented from doing so by sheer strength of

¹⁷² *Id.* at 76-77.

¹⁷³ *Id.* at 77.

¹⁷⁴ See *supra* notes 60-66 and accompanying text.

¹⁷⁵ See FREUD, *supra* note 63, at 55.

¹⁷⁶ In their interrogations of Joe Lombard, the Secret Court asked whether he masturbated. WRIGHT, *supra* note 14, at 130 (the interrogation of Joe Lombard). Wright explains that the Secret Court was “intent on knowing whether or not each boy masturbated and, if so, how often. This may simply have been an effort to find out how highly sexed each student was, but the frequency of the question suggests they subscribed to the theory of a connection between masturbation and homosexuality.” *Id.* at 53.

¹⁷⁷ *Id.* at 81.

character and moral fiber.”¹⁷⁸ Thus, underlying the phobia—the dread of gayness as some disseminating epidemic—is at least an unconscious stirring of one’s own libidinous yearnings along with an equal and opposite reflex to expurgate such taboos and relegate them to the gallows. Wright thus tells us that “always lurking in much of the hostility . . . is the interesting belief that the forbidden pleasure is indeed a pleasure.”¹⁷⁹

As the hunt accelerated, the judges focused on banishing Roberts, that supposed hub of gay iniquity. This became so potent that they pursued it despite the fact that Roberts pledged to make “publicity” if he was punished, and despite the fact that Roberts had a very powerful father.¹⁸⁰ Patriarch Ernest William Roberts was, like Lowell, a Republican, and the very man that the Harvard judges did not wish to displease.¹⁸¹ The elder Roberts had served in the U.S. Congress for eighteen years, had an elite law practice in Washington D.C., and wielded considerable clout in Harvard’s state of Massachusetts.¹⁸² Lowell, however, treated the predicament much like Miller’s Danforth, who refused to pardon some after others had been executed.¹⁸³ Lowell similarly protected that gloss of just consistency, declining to show Roberts any “leniency” that would make the “harsh treatment of others . . . [seem] blatantly unfair.”¹⁸⁴

In the judges’ minds, Roberts embodied the stereotypes and their misconceptions about homosexuality. The court saw Roberts as the emblem of dangerous criminality, a perspective compatible with the recently overruled decision in *Bowers v. Hardwick*, in which the United States Supreme Court upheld the constitutionality of a statute criminalizing homosexual sodomy in the privacy of one’s home.¹⁸⁵ In fact, the irrational prejudice of the anti-gay judges essentially mimics the thinking in the *Bowers* decision, which issued more than half a century after the Secret Court, at least technically, adjourned. The *Bowers* Court distinguished between homosexual sodomy in the

¹⁷⁸ WRIGHT, *supra* note 14, at 81-82.

¹⁷⁹ *Id.* at 82.

¹⁸⁰ *Id.* at 112.

¹⁸¹ *See id.* at 113.

¹⁸² *Id.*

¹⁸³ *See supra* note 90 and accompanying text.

¹⁸⁴ WRIGHT, *supra* note 14, at 112.

¹⁸⁵ *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); *see also* RONNER, *supra* note 15, at 12-15 (discussing the *Lawrence* Court’s evaluation of *Bowers*).

home from the viewing of obscenity in the home, which was something the Court had before treated as a privacy interest.¹⁸⁶ The Court, blocking the fact that private consensual sodomy claims no victims, likened it to the possession of stolen goods or drugs and to the ownership of lethal weapons.¹⁸⁷

Harvard's court shared the *Bowers* majority's stereotype of the gay male as a deadly weapon, which harks back to an archaic distinction between crimes *malum prohibita* and those *mala in se*.¹⁸⁸ The commission of a crime *malum in se* is akin to cavorting with the devil, or in the words of Blackstone, is an offense to "those rights then which God and nature have established."¹⁸⁹

Harvard's witch hunters and the *Bowers* Court glued homosexuality onto the act of sodomy and then, in a leap, treated both same-sex orientation and sodomy as a *malum in se* amalgam.¹⁹⁰ The whole stereotype emerged for the *Bowers*

¹⁸⁶ In *Stanley v. Georgia*, the United States Supreme Court recognized individual freedom to view arguably obscene material in the home. 394 U.S. 557, 559, 568 (1969). The Court, concluding that Georgia's categorization of films as "obscene" did not justify "a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments," stated that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.* at 565. The *Bowers* Court, however, denied that *Stanley* had any real meaning outside the contours of the First Amendment and distinguished it on the purported basis that the right under review "ha[d] no similar support in the text of the Constitution." *Bowers*, 478 U.S. at 195-96; see also RONNER, *supra* note 15, at 4-5 (discussing *Bowers* and its legacy). See generally Amy D. Ronner, *Bottoms v. Bottoms: The Lesbian Mother and the Judicial Perpetuation of Damaging Stereotypes*, 7 YALE J.L. & FEMINISM 341 (1995) [hereinafter *The Lesbian Mother*] (discussing the view of homosexuality as criminality); Amy D. Ronner, *Amathia and Denial of "In the Home" in Bowers v. Hardwick and Shahar v. Bowers: Objective Correlatives and The Bacchae as Tools for Analyzing Privacy and Intimacy*, 44 U. KAN. L. REV. 263 (1996) [hereinafter *Amathia*] (dissecting the very fears that underlie homophobia).

¹⁸⁷ *Bowers*, 478 U.S. at 195; see also *The Lesbian Mother*, *supra* note 186, at 353.

¹⁸⁸ See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 1.6(b) (2d ed. 1986) (describing the difference between *malum in se* and *malum prohibitum*).

¹⁸⁹ EHRlich's BLACKSTONE 16 (1959). According to Blackstone, a crime *malum prohibitum* "enjoin[s] only positive duties and forbid[s] only such things as are not *mala in se* . . . without any intermixture of moral guilty." *Id.* at 19; see also RONNER, *supra* note 15, at 4 ("The old common law, in fact, relegated unlawful acts imperiling life or limb to the *malum in se* category.").

¹⁹⁰ RONNER, *supra* note 15, at 4 ("The whole stereotype is cast as a kind of legal-religious hybrid, with the insinuation, and sometimes an outright depiction, of the lesbian or gay male as the criminal sinner who is both *sub-silentio* charged and convicted of heinously wicked crimes."); see also Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1726

Court and also for the Secret Court as fused law, morality, and religion, with Roberts and his gay “conspirators” as criminal sinners, charged and convicted of Satanic acts. While those accused at Harvard are not Salem’s naked girls gyrating in the forbidden woods, they are, as men loving other men in the unlicensed bacchanalia of Roberts’ pad, just as seemingly life-threatening.

As discussed above, another stereotype that the Secret Court and the *Bowers* Court endorsed is an equation of homosexuality with a vile, contagious illness.¹⁹¹ They also shared an irrational belief that homosexuals are actively seeking to infect others. For the Harvard judges, Roberts epitomized the view of the homosexual as the propagator of the same-sex orientation bug:

[T]he judges had come to believe that Roberts was not just guilty of homosexual acts himself: he was a diligent proselytizer and had corrupted many students into the despicable practices. They saw him as an agent of evil on the Harvard campus, a spreader of insidious contagion. They had no choice but to deal severely and promptly with their primary adversary, a student who was working as hard to promote homosexuality as they were to eliminate it.¹⁹²

The court saw Roberts not just as the leader of some cult hungry for disciples, but also as the symbol of a lifestyle antithetical to marriage or family.¹⁹³ The same view existed in the *Bowers* decision and its homophobic progeny, which fostered the notion that gay men lack stable relationships, parlay from partner to partner, party to party, boudoir to boudoir, and immerse themselves in an ongoing orgy.¹⁹⁴ As such

(1993) (The *Bowers* Court portrays “sodomy as transhistorically stable and identical to homosexual identity.”).

¹⁹¹ See RONNER, *supra* note 15, at 4-5 (discussing the treatment of “homosexuality as some kind of dreaded plague that must be extinguished before it spread[s]” and “the related, irrational belief that homosexuals are converters seeking disciples”); see also Amy D. Ronner, *Scouting for Intolerance: The Dale Court’s Resurrection of the Medieval Leper*, 11 LAW & SEXUALITY 53, 54-55 (2002) (discussing the connection between the legislative and judicial condemnation of homosexuality and the irrational laws mandating the isolation of those afflicted with Hansen’s disease (leprosy) in the Middle Ages).

¹⁹² WRIGHT, *supra* note 14, at 112.

¹⁹³ See Ronner, *The Lesbian Mother*, *supra* note 186, at 356 (“What exacerbates the image of the dangerous *malum in se* criminal is its coexistence with another separate judicial tendency, the refusal to attribute familial attributes to the homosexual household.”).

¹⁹⁴ See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1369 (N.D. Cal. 1987), *rev’d in part, vacated in part*, 895 F.2d 563 (9th Cir. 1990) (“Many people erroneously believe that the sexual experience of lesbians and gay men represents the gratification of purely prurient interests, not the expression of mutual

the Harvard judges equated Roberts's dorm room, "the epicenter of university gayness," with raw sodomitic carnality.¹⁹⁵ And this simultaneously fascinated and repulsed them.

Roberts's infamous 28 Perkins Hall, with its "gorgeous" decor and resemblance to a "parlor of a wealthy bachelor with a refined aesthetic," was suspect because it defied categorization as hearth, home, or dormitory room:¹⁹⁶

Fringed damask curtains covered the windows; a few framed paintings featured mostly nude gods and goddesses; on a round table between two armchairs was an oriental vase converted into a reading lamp with a red silk shade, also fringed; and a tablecloth of dark green velvet showed off a collection of crystal paperweights. One corner of the sitting room was dominated by a black-lacquer folding screen, which had an inlaid oriental design in what appeared to be mother-of-pearl.¹⁹⁷

Although the court treated such unconventionality as something more debased than a brothel, these quarters quite innocuously imparted what were in reality Roberts's god-given gifts of imagination, creativity, and aesthetic sensibility. Not surprisingly, Roberts, a survivor of Harvard's purge, ended up as a successful interior decorator.¹⁹⁸

What becomes apparent here is that the witch hunters swept into their angst about gayness another corrosive campaign: they effectually undermined what was in truth Harvard's very mission—namely, to nurture uncommon talent. That compulsion to obliterate originality is reminiscent of the Salem court's proclivity to indict those who flaunt their individuality or perhaps those who read voraciously late at night. As such, like the witch hunters in Salem, what propelled the Harvard oppressors was an obsession with solidifying the putative societal bedrock, by paying lip service to family values, by safeguarding the sacrosanct marital unit with each of the genders safely cemented in place, by expunging creative originality, and by banishing unrestrained libidinous energy.

affection and love [T]o many, the very existence of lesbians and gay men is inimical to the family."); see also RONNER, *supra* note 15, at 5.

¹⁹⁵ WRIGHT, *supra* note 14, at 89.

¹⁹⁶ *Id.* at 90.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 158-59.

C. *The Witch Hunters*

Not only do the forces at work in the Secret Court mirror those that instigate the slaughter in *The Crucible*, but also there are almost uncanny similarities between the Salem and the Harvard accusers. While deranged Abigail is the trigger in Miller's *The Crucible*, Lester Wilcox instigated Harvard's Secret Court. Without Wilcox's "supercharged response to the tragedy in his life, it is unlikely the Secret Court or anything like it . . . would have" come to pass to deal with Roberts's activities.¹⁹⁹

As Wright tells us, Wilcox, like Abigail, expended the "exceptional energy and passion" that "propel[led] [the court] into existence."²⁰⁰ And Wilcox, like some of Salem's citizens, was impressed with his "own infallibility, his own rightness in all his actions and judgments."²⁰¹ Apparently, when Cyril confessed his homosexuality to his brother, Wilcox responded with censure, which later surfaced as guilt over the suicide.²⁰²

But Wright gives us the frightening facts about Lester Wilcox, the man who too easily spurred Harvard to engage in gay bashing. We learn that Wilcox, with a history of drug addiction and severe psychological problems, ended up retiring from business at the early age of thirty-eight and spent the last twenty-seven years of his life locked up in a mental hospital.²⁰³ But even before such a drastic descent, Harvard knew or should have known that the man that came to them, crazed about some deadly gay outbreak, was berserk or at least unreliable.²⁰⁴

Wilcox, who succeeded at vilifying a group of talented men because of their sexual orientation, had real skeletons in his own college closet. Initially, Wilcox attended Cornell where he was disciplined for morphine and cocaine use.²⁰⁵ During his stint at Cornell, Wilcox may have been involved with the arson of a campus building.²⁰⁶ Somehow Wilcox managed to transfer

¹⁹⁹ WRIGHT, *supra* note 14, at 224.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 226.

²⁰² *Id.* at 225-26.

²⁰³ *Id.* at 225-39.

²⁰⁴ *Id.* at 230-31 (discussing Wilcox's student file in the Harvard archives).

²⁰⁵ *Id.* at 230.

²⁰⁶ *Id.*

to Harvard in 1911, by which time he was a “full-fledged cocaine addict.”²⁰⁷

Records reveal that Harvard knew about Wilcox’s addiction, but addressed it with kindness and compassion.²⁰⁸ The dean of students had Wilcox placed in care and kept Wilcox’s father apprised.²⁰⁹ As Wright tells us, “The Harvard administrator’s letter to Lester Wilcox’s father, with its warm solicitude and strained efforts to assuage Lester’s addiction problem, stands in harsh contrast to the summary and remorseless expulsion of the gay students nine years later.”²¹⁰ The Harvard administrators thus knew that Wilcox, a serious drug addict, had broken criminal laws, but nevertheless neither expelled nor disciplined him.

What is most disturbing, however, is that Harvard’s Secret Court permitted such a dubious alumnus with a shady past to launch an official crusade resulting in the draconian pillories for others. To make matters worse, these “others” were neither arsonists, nor drug addicts, nor schizophrenics, but, more like the Salem accused, people engaged in simply being themselves.

Moreover, Wright makes it known that Wilcox’s problems were not mere youthful indiscretions, but ones so severe that they would swell during his life and eventually strangle him. In the early 1920s, Wilcox, with a prosperous career running a textile mill, had a decent wife and two children.²¹¹ But even in those good years, Wilcox could easily become enraged and violent: he beat up two black teenagers, his servant’s brothers, and whipped two Portuguese workers for being late for work.²¹² Earlier, in the wake of his brother’s suicide, Wilcox had similarly lashed Harry Dreyfus and Eugene Cummings, two of the alleged gay converters whom he blamed for his brother’s fate.²¹³

Over time, as Wilcox’s behavior became “more erratic,” he was fired from several jobs, eventually stopped working altogether, and hid in his room.²¹⁴ After stays in a mental

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 230-31.

²⁰⁹ *Id.* at 231.

²¹⁰ *Id.*

²¹¹ *Id.* at 226-27.

²¹² *Id.*

²¹³ *Id.* at 24, 121, 224.

²¹⁴ *Id.* at 227-29.

hospital, Wilcox was released, but became more violent with his wife and kids: he even “tried to burn down the farmhouse that was the haven for him and his family” and may have started another fire in a home town mill.²¹⁵ When Wilcox eventually hurled boiling water at his own mother, the family admitted defeat and had him committed to a hospital.²¹⁶

Although Wright portrays Wilcox’s protracted condition in the mental hospital as one in which he is “highly mistrustful of everyone,” it is apparent that Lester’s paranoid delusions are not about *everyone*, but more exclusively directed at women.²¹⁷ That is, “[h]e believed his wife had had him put in the hospital only to get control of his money[,] . . . felt his mother was seeking to damage his life in any way she could[, and] . . . was sure his wife was turning his children against him.”²¹⁸ Such fears, like that in seventeenth-century Salem, may be propelled by misogynistic visions replete with witches—girls, wives, and mothers—conjuring up demons, acquiring powers, and assuming command.²¹⁹ Gynephobic Lester, like the Salemites, quaked at the prospect of a female insurrection that could wreak havoc on the immaculately ordered patriarchal universe.

In Miller’s Salem, when Abigail ignites the fires of hysteria, she fortuitously finds herself in the flammable confines of Danforth’s court. Here too Lester’s spark might have perished had it not reached President Lowell, who, with his combustibility, organized the inquisition. Wright makes it plain that while Greenough and other judges were present, the real fuel was Lowell, who, like Danforth, omnipotently presided and proceeded with incendiary urgency.²²⁰

President Lowell, convinced of the rightness of his cause and believing it best for Harvard, was at the time “venerated” in his empire.²²¹ Lowell began his career as a lawyer, wrote several books on government, lectured at Harvard, attained

²¹⁵ WRIGHT, *supra* note 14, at 230.

²¹⁶ *Id.* at 232.

²¹⁷ *Id.* at 233.

²¹⁸ *Id.* One cannot help but compare Wilcox’s degeneration in a mental hospital to the demise of “an abandoned, bitter, and chronically alcoholic Joseph McCarthy,” who “died of cirrhosis of the liver at the age of 49.” Stone, *supra* note 2, at 1403.

²¹⁹ See *supra* notes 51-55 and accompanying text (describing the Salem witch hunters’ fear of women and their threat to patriarchal power).

²²⁰ WRIGHT, *supra* note 14, at 28 (“[O]f all the men who became involved in rooting out homosexuality on the Harvard campus, none was as incensed and unforgiving as A. Lawrence Lowell.”).

²²¹ *Id.* at 25-26.

full professor status in 1900, and then became the chief. Although on the surface, madman Wilcox and Lowell (“[a] distinguished scholar, a Bostonian of the bluest blood, and a man of considerable wealth, [who] seemed suited for little else but the Harvard presidency”) had little in common, there were indeed striking similarities.²²²

Lowell, like Wilcox, possessed a “fierce sense of right and wrong” and “obstinate infallibility.”²²³ Lowell, like Wilcox, had a miserable marriage and in fact, the “antagonisms between Lowell and his wife were so frequent that he spent much of his married life living at one of his Boston men’s clubs.”²²⁴ Wilcox and Lowell, moreover, were consumed with a hyperbolic abhorrence of homosexuality. It was once reported that an elderly Harvard professor, who was involved in some public homosexual scandal, came to President Lowell, asking for advice. Lowell responded, “If I were you, . . . I would get a gun and destroy myself.”²²⁵ For both Lowell and Wilcox, death was preferable to gayness.

One of the things that several legal scholars have detected in *Bowers v. Hardwick*²²⁶ is the Supreme Court’s disgust directed at the term “homosexual sodomy.”²²⁷ Professor Kendall Thomas once suggested that in *Bowers* “the claimed right to commit ‘homosexual sodomy’ [was] thought (or not so much thought as phantasmagorically represented) to be a threatening attack on patriarchal power.”²²⁸ Professor Janet Halley has agreed with Thomas’s characterization, perceiving the Court to equate the claimed right with emasculation associated with the image of “receptive anality.”²²⁹ In a similar vein, Professor Sylvia Law has attributed such anti-homosexual attitudes to a fear of the disruption of the traditional concepts of masculinity and femininity.²³⁰ Like

²²² *Id.* at 25.

²²³ *Id.* at 225 (describing Lester Wilcox).

²²⁴ *Id.* at 26.

²²⁵ *Id.* at 66.

²²⁶ 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

²²⁷ *See id.* at 187-96.

²²⁸ Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1818 (1993).

²²⁹ Halley, *supra* note 190, at 1724 (citing *id.*).

²³⁰ Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196; *see also* Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992) (connecting anti-gay bias with gender discrimination); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex*

Salem haunted by the specter of witchy women acquiring power, the homophobia embodied in *Bowers*, in Lester Wilcox, and in President Lowell is linked to some unconscious image of unmanning and a terrifying vision of a world in which the ruling patriarchy, with its trusty concepts of male and female are torn asunder.²³¹

While paranoid and delusional Lester Wilcox battled wife and mother, his own domineering demons, Lowell likewise had issues with his women—not just his wife, but also his iconoclastic younger sister, the great poet, Amy Lowell.²³² According to Wright, Amy was “extremely fat, smoked cigars, and wrote and published love poems to her live-in female secretary.”²³³ For Lowell, Amy provoked cognitive dissonance: although he loved and protected Amy, Lowell also abhorred her eccentricities, which caused him “considerable mortification and pain.”²³⁴ In fact, Lowell said of Amy, “I do not approve of women smoking in public” and even referred to her as the “fat lady.”²³⁵ But one thing Lowell had to accept was that he could

Discrimination, 98 YALE L. J. 145, 145 (1988); Ronner, *Amathia*, *supra* note 186, at 294. One form of homophobia has been described as a fear on an unconscious level “that one is not measuring up to one’s gender role: that a man does not feel like he is a ‘real man’ or a woman that she is a ‘real woman.’” Gregory M. Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 N.Y.U. REV. L. & SOC. CHANGE 923, 931-32 (1986). According to Herek, “One strategy for avoiding anxiety is . . . to project it outward onto some convenient person or object in the environment” and then “hate or fear that external object.” *Id.* at 931.

²³¹ It is, of course, interesting that this year (2007), for the first time Harvard will have a women president. See generally Ellen Goodman, *Historian Makes history at Harvard’s Helm*, LEXINGTON HERALD-LEADER, Feb. 18, 2007, at D2 (referring to incoming Harvard President Drew Gilpin Faust) (“I would have bet big money that we’d have a female president of the United States before we had a female president of Harvard University. It’s not just that Harvard predates the United States by more than a century and a half. There’s actually a higher percentage of women in the Bush Cabinet than in the tenured faculty ranks of Harvard.”). Homophobes tend to blend their misconceptions about homosexuality with their misconceptions about transgendered individuals: that is, instead of seeing gays and lesbians as men who love other men or women who love other women, they see such individuals as men parading as women or as women claiming to be men. Such notions cause discomfort, especially for the homophobes who also fear the empowerment of women.

²³² WRIGHT, *supra* note 14, at 26 (“The antagonisms between Lowell and his wife were so frequent that he spent much of his married life living at one of his Boston men’s clubs.”); *Id.* at 65 (discussing Lowell’s “disapproval” of his sister and his “thinly concealed embarrassment” of her).

²³³ WRIGHT, *supra* note 14, at 64.

²³⁴ *Id.* at 66.

²³⁵ *Id.* at 65-66. Lowell, inquiring about his sister, asked “What is this fat lady doing right now?” *Id.* at 66. Bernard Shaw’s *Saint Joan* is an analogue to *The Crucible*. See Bernard Shaw, *Saint Joan*, reprinted in WEALES ANTHOLOGY, *supra* note 1, at 427, 427-58. In the play, D’Estivet, speaking of Joan says, “First she has intercourse with evil spirits, and is therefore a sorceress. Second, she wears men’s clothes, which is

not rule Amy the way he did his Harvard fiefdom and that he could not even cajole her to “keep a low profile.”²³⁶

In *Harvard's Secret Court*, Wright suggests that there could be “a connection between [Lowell's] forbearance and tolerance toward a gay sister he loved and his implacable cruelty toward homosexual boys he did not know, students who happened to be in his charge.”²³⁷ This sister, who resisted muzzling and suppression, who broke out of the mold cast for her gender, likely stirred Lowell's anxiety about some future with muddled genders, about an earth unhinging itself from a sturdy axis. For Lowell, in a manner reminiscent of Danforth, the only way to appease such ripples of discomfort was to eradicate gayness, which for him kindled a connate fright.

D. *The Damage*

In Harvard, as it did in Salem, the witch hunt spawned death and destruction. The Secret Court likewise mocked notions of justice, condoned lies and unhealthy secrecy, and ultimately extirpated originality, intellect, talent, and creative thinking.

Eugene Cummings, one of the worst tragedies, had been at Harvard for five years before meeting the Secret Court. Cummings, unlike some others, did not come from wealth and his education posed a financial burden on his father, a school teacher. At the time, Cummings was studying dentistry and within only a few days of receiving his degree. In contrast to Roberts, who “was not happy at Harvard and did not care what the Court did with him,” “Cummings cared desperately.”²³⁸ Wright describes Cummings immediately after his expulsion:

Five years of Harvard wiped out with one sentence. His fought-for dental degree only days away, and now he had nothing. He had ruined a promising career; an assured berth of economic security, perhaps wealth; the degree for which he had worked so hard and for which his family had sacrificed much. He was branded a sexual

indecent, unnatural and abominable; and in spite of our most earnest remonstrances and entreaties, she will not change them even to receive the sacrament.” *Id.* at 445. One can not help but detect the nexus between Joan's idiosyncrasies and Amy Lowell, who did not conform to the rules for her gender.

²³⁶ WRIGHT, *supra* note 14, at 65.

²³⁷ *Id.* at 66.

²³⁸ *Id.* at 134.

pervert, a miserable degenerate who had sacrificed an auspicious future for his twisted lusts.²³⁹

Cummings, who had medical training, mixed ether with corrosive sublimate and ended his own life.²⁴⁰

Another suicide was that of Keith Smerage, who also did not have much monetary backing. His family owned a country inn and when a bad accident disabled Smerage's father, his mother took charge and worked herself to the bone to put her son through Harvard.²⁴¹ When the expulsion letter came for Keith, his mother opened it and not only "envisioned the destruction of Keith's life," but also "saw twenty years of her own life, years of struggle and thankless sacrifice, negated and discarded with one letter."²⁴²

After futile attempts to get Greenough to relent, Smerage, "blinded by his habitual optimism," set his hopes on entering another school and applied to Rutgers.²⁴³ The impasse, however, was that Harvard had a *modus operandi* for dealing with inquiries about the expulsion, one which left the men with two equally damning options: the men could try to lie about where they had been for two years and lose credit for courses passed at Harvard or they could divulge their Harvard years. But, as returning Dean Yeomans made plain to Smerage, any mention of Harvard to Rutgers or any other school would prompt a letter from Harvard divulging the facts behind the expulsion. The real catch, however, was that any unexplained gap in a curriculum vita would likewise start an inquiry, thus leading to disclosure of the facts behind the expulsion. Smerage, like some others, had to come to grips with "the reach and permanency of Harvard's wrath against him" and give up "hope of entering any other school."²⁴⁴

After a few stabs at realizing his life's dream of being an actor and after landing sporadic theater gigs in Boston—and also ironically in other towns, like Salem and Lowell—Smerage turned on the gas and put himself to sleep.²⁴⁵ As Wright points out, although we cannot tie Smerage's death directly to the Secret Court, "if the glory of a Harvard degree is held against

²³⁹ WRIGHT, *supra* note 14, at 135-36.

²⁴⁰ *Id.* at 136.

²⁴¹ *Id.* at 36, 188.

²⁴² *Id.* at 188.

²⁴³ *Id.* at 196.

²⁴⁴ *Id.* at 197.

²⁴⁵ *Id.* at 200-01.

the disgrace of a Harvard expulsion, it is hard to avoid the conclusion that his college disaster contributed strongly to his woefully unsuccessful life.”²⁴⁶

Edward Say, another expelled victim, who had a real “sense of integrity and a forthright courageousness” also did not spring from the landed gentry.²⁴⁷ Say’s father, who once owned a grocery store, but sold it and went to work for a machine company, struggled to finance his son’s Harvard education.²⁴⁸ Say, the one who had the audacity to ask the court to let him confront his accusers, perished in a “never fully explained” car crash at the tender age of twenty-nine.²⁴⁹ Before the “accident,” Say, like others, never went to another school, “whether from rejections or his own sense of futility in applying,” but unlike others, he basically “landed on his feet” as a securities salesman.²⁵⁰

Although Kenneth Day was not one of the fatalities, the expulsion diminished his life. Day, “born to an old New England family with a tradition of gentility and education, but no great wealth,” had been orphaned as a youth and taken in by a grandmother, who was raising five other grandchildren.²⁵¹ Because Day had “brains, good looks, and [a] mature sense of responsibility,” various family members pledged funds to put him through college and secure his “bright future.”²⁵²

Once expelled, Day and his cousin sent letters to Greenough begging for mercy and reconsideration. For some reason Greenough warmed up to this young man, who had a “masculine demeanor, . . . good looks . . . and proficiency at boxing and track.”²⁵³ Taking an interest in his case, Greenough actually offered Day hope, but President Lowell, who was “exclusively” responsible for the final obdurate “no,” put the kibosh on reinstatement.²⁵⁴ In the course of his research, Wright discovered Greenough’s candid letter to a colleague stating that he “found Lowell’s unmovable opposition to Ken Day ‘inexplicable.’”²⁵⁵

²⁴⁶ *Id.* at 201.

²⁴⁷ *Id.* at 87.

²⁴⁸ *Id.* at 87, 203.

²⁴⁹ *Id.* at 203.

²⁵⁰ *Id.* at 204.

²⁵¹ *Id.* at 54.

²⁵² *Id.* at 55.

²⁵³ *Id.* at 170-71.

²⁵⁴ *Id.* at 170.

²⁵⁵ *Id.*

Day, unlike others, simply proceeded with life. He married, had two children, and secured a job as a bank teller.²⁵⁶ Day, however, never finished his education and his family “never had a house, as most middle-class suburban families did, instead living in an apartment on the edge of town.”²⁵⁷ For Day, the heartbreak was that he never achieved his potential:

It cannot be said that Kenneth Day's post-expulsion life was as bleak as that of some of the others who had been found guilty, but it was not the life he would have had as a Harvard graduate or for that matter a graduate of any college. By nature of his intellect, his charm, his looks, his family background, and his drive he was clearly cut for a higher rung on the accomplishment ladder, but he spent his life in a teller's cage, somehow managing to eke out the upper-middle class existence that was rightfully his.²⁵⁸

In contrast to others, Ernest Roberts, the court's ignominious offender and its very symbol of proselytizing gayness, ended up with a pretty decent life. While at Harvard, “merrily us[ing] the Harvard dormitory as his personal homosexual high-camp, cross-dressing, straight-seducing playground,” Roberts had a long-time girlfriend.²⁵⁹ A year after his expulsion, Roberts settled down, married his girlfriend, and had a child.²⁶⁰ As Wright tells us, “[f]rom all evidence, it was a solid and happy marriage” and Roberts prospered in his chosen career as an interior decorator.²⁶¹

The three men who were convicted of mere association with gays also had better lives than most of the others. What their post-suspension sequels unmask, however, is Harvard's relentless commitment to hunting these men down and sabotaging their efforts to finish school, find work, and self-actualize.

Nathaniel Stein Wollf was one of the prey whom Harvard failed to slaughter. Wollf, expelled just a few days before obtaining his bachelor of arts degree, did something courageous: he came home and told his father everything.²⁶² Wollf's father, a wealthy banker, turned out to be a compassionate parent and even engaged in a tenacious strategy

²⁵⁶ WRIGHT, *supra* note 14, at 171.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 172.

²⁵⁹ *Id.* at 158.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 216.

to secure re-admission.²⁶³ After Wolff went off to prove himself in France by taking pre-med courses in Grenoble and informed Harvard of his accomplishments there, Greenough softened and led Wolff to believe that he might be invited back.²⁶⁴ But, as in the case of Kenneth Day, it was probably Lowell's "hard-to-explain obduracy" that once again sealed the doors to an exile.²⁶⁵

Consistent with the pattern, Harvard labored to crush any hope Wolff might have of attending another school. Dean Yeomans thus reminded Wolff that any Harvard officer asked for a reference would "make a statement embracing all the facts which appear upon our record."²⁶⁶ Harvard, in fact, made good on its threat when it quashed Wolff's application to McGill University in Montreal.²⁶⁷

Miraculously, despite such rejection and Harvard's active stigmatization, Wolff found a faculty contact who helped him get into Bellevue Medical College in New York. Wolff graduated, interned in Zurich, studied psychiatry in Berlin, and affiliated himself with different colleges for more than a decade. But, as Wright tells us, Wolff did not dedicate himself entirely to medicine, but instead embraced a life of "adventure and exotic experience" and "[w]hatever his motives, Wolff—with his brains, his good looks, his fluent French, German, and Spanish, his money—seized and savored the world's opportunities with a verve and imagination matched by few."²⁶⁸ Essentially, Wolff dashed all over the globe feasting on just about everything life could conceivably offer.

Stanley Gilkey and Joseph Lumbard, the other two suspended for having gay friends, were readmitted.²⁶⁹ But what confounds logic is that even after these men earned their Harvard degrees, Harvard kept trying to gun them down and destroy their post-graduation accomplishments.²⁷⁰

²⁶³ *Id.*

²⁶⁴ *See id.* Apparently, "Greenough suggested that Wolff go to Labrador for a year to work with Sir Wilfred Grenfell, a physician who had emigrated from England in 1882 to ease the destitution of the inhabitants by building hospitals and nursing stations," but since "Grenfell did not need anyone at that time, . . . Wolff went to France." *Id.*

²⁶⁵ *Id.* at 217.

²⁶⁶ *Id.* at 218.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 219, 221.

²⁶⁹ *Id.* at 206-07.

²⁷⁰ *Id.* at 207 (discussing Gilkey's burden of having to explain a year's absence from Harvard and having to deal with the "implacable Appointments Office."), 181-86

Stanley Gilkey, who was indeed gay, "escaped the grim fate suffered by others . . . [b]y skillfully lying and steadfastly refusing to admit to any sexual impropriety."²⁷¹ That is, when Gilkey appeared before the court, he, with a flair for the theater, snookered the judges with "preposterous lies," even attributing his redundant visits to Roberts's lair to his need to borrow dinner clothes.²⁷² Post-suspension, Greenough warmed up to Gilkey and invited him to seek readmission.²⁷³ As such, Gilkey returned to Harvard and graduated in 1923, only a year behind his peers.²⁷⁴

Wright shows us, however, that readmission did not delete "the curse from Gilkey's suspension" because "[a] year's absence from Harvard had to be explained, and those seeking an explanation, which meant anyone considering hiring the student in question, was directed to the implacable Appointments Office."²⁷⁵ Gilkey, however, ended up one of the few spared from a life of institutional disparagement because he "embarked on a career [in the New York theater] that scoffed at such puritanical condemnation."²⁷⁶ As such, Gilkey's artistic constituents could not give a damn about his gayness or about Harvard's intractable grudge. In two decades, Gilkey produced numerous Broadway shows, including several hits. He worked with major stars of American stage, became acclaimed in New York theater during its heyday, and apparently attained his goals. Harvard simply could not put the breaks on this irrepressible spirit.

Joseph Lumbard, the other suspended undergraduate that thrived, became one the most preeminent jurists of his time, and did so despite the fact that the Secret Court sought to smear his name for decades. Lumbard, who was expelled for being "too friendly with a group of homosexuals," was readmitted in 1921, but only after Greenough put him through living hell.²⁷⁷ Lumbard, a real superstar, had intended to complete his undergraduate studies in three years, and was

(describing Harvard's relentless attempts to thwart Lumbard's success throughout his career).

²⁷¹ WRIGHT, *supra* note 14, at 206.

²⁷² *Id.* at 207.

²⁷³ *Id.* at 206.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 177.

thus able to graduate a year later with his class; he then completed Harvard Law School.²⁷⁸

As Wright tells us, “[a]lthough Harvard had worked assiduously to undermine his future, [Lumbard] had a long and happy marriage, complete with children and grandchildren, and a brilliant, highly honorable career of public service in the nation’s power elite.”²⁷⁹ Ironically, Lumbard epitomized the “life for which Harvard worked so fervently to groom its students.”²⁸⁰ Wright probably could have written a separate book on just Lumbard’s post-suspension accolades. To summarize, Lumbard enjoyed a great career as a federal prosecutor, sat on the New York Supreme Court, co-founded the Office of Strategic Services (“OSS”) (the predecessor to the CIA), formed his own Wall Street law firm, and served as senior judge on the United States Court of Appeals.²⁸¹ In 1967, President Lyndon Johnson almost picked Lumbard for a vacancy on the United States Supreme Court, but named Thurgood Marshall instead. Although Lumbard made plenty of money and was politically conservative, he dedicated himself to pro bono work and tended to lock horns with right wing oppression. Moreover, as Wright tells us, “[a]long with many honors and high-level posts, the most ironic surely was Lumbard’s election to the Board of Overseers of Harvard from 1959 to 1969.”²⁸²

Despite an ostensibly unassailable career and reputation, Harvard did not stop assaulting Lumbard. The school gave the Manhattan U.S. Attorney’s Office an earful regarding Lumbard’s 1920s suspension when the office made inquiries while considering hiring Lumbard in 1931. Lumbard somehow still secured the job, even after Harvard divulged his dreadful “transgression.”²⁸³ Then, more than three decades after his suspension, Harvard tried again to derail Lumbard. In 1953, when President-elect Eisenhower sought to elevate Lumbard to the federal appellate bench, the Harvard Registrar, Sargent Kennedy, told an FBI agent about the offense of associating “spatially” with a gay coterie.²⁸⁴ Wright describes Kennedy’s “zeal to render Harvard guiltless . . . [by]

²⁷⁸ *Id.* at 178.

²⁷⁹ *Id.* at 175.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 178-81.

²⁸² *Id.* at 179.

²⁸³ *Id.* at 181.

²⁸⁴ *Id.* at 182.

perpetuat[ing] Lombard's too-deep involvement with a group of sexually active homosexuals."²⁸⁵

In his book, Wright makes the point that Harvard's "decades-long vindictiveness is the aspect that most sets this persecution apart from other gay persecutions that have always gone on and go on to this day."²⁸⁶ With respect to Harold Saxton and Donald Clark, the two convicted scholars, this is clearly an understatement.

Saxton, who was not officially connected with Harvard, earned a living by tutoring students. Saxton's status as a Harvard graduate gave the university a good excuse for sending out scathing letters about him to anyone considering him for hire. At first, when he tried for a teaching job, Dean Gay informed the potential employer, Hallock School, that Saxton was "involved with certain undergraduates of such moral turpitude . . . is regarded as highly undesirable [sic] . . . [and] should not be recommended for any position, especially that of teaching in a boys school."²⁸⁷

When Saxton tested out other options, Harvard's Appointments Office squashed those as well and Saxton had to accept that the "blemish on his record relegated him to a lifetime of job seeking with two choices: either omit any reference to his Harvard degree or restrict his job hunting to institutions not in a position to be picky."²⁸⁸ Although at first he was able to teach a little here and there, eventually Saxton just vanished without a trace.²⁸⁹

Harvard's annihilation of Donald Clark is in truth *our* loss, and one of excruciating proportion. The Secret Court, which dealt with Clark while he was on the Harvard faculty at the tender age of twenty-four, not only fired him, but also ejected him from the Ph.D. program.²⁹⁰ Because Clark was a born academician, the deprivation of that Ph.D. eviscerated him. On top of that, Harvard hounded him, successfully obstructing any posts he might secure in secondary schools.

Clark, who also managed to squeeze in some teaching, had his own book of poetry published, translated Italian and

²⁸⁵ WRIGHT, *supra* note 14, at 182.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 211.

²⁸⁸ *Id.* at 212.

²⁸⁹ *Id.* (noting that in the fifth-year Harvard report "the twenty-nine-year-old Saxton is listed as 'lost'").

²⁹⁰ *Id.* at 212-13.

German works, and composed music. While Clark “was a scholar, and, from the evidence, a very good one” and should have “become a distinguished professor of Italian or German at Harvard, Princeton, or any university he chose,” he, after contracting tuberculosis, spent his last days as librarian in the tubercular hospital until his death at the age of forty-seven.²⁹¹ The Clark tragedy is not just “Harvard’s crippling of what might have been an important academic career,” but is more precisely our loss—or specifically, society’s deprivation—of what could have been a profound scholarly and artistic legacy.²⁹²

Like *The Crucible* witch hunters, Harvard’s Secret Court, intoxicated with its own sense of power, experienced no jurisdictional bounds and spread the blight. That is, the court had the actual audacity to drag into its “sinister interrogation room” not only Harry Dreyfus, who lacked connection with Harvard and had no reason to submit to its authority, but also gay town boys.²⁹³ The court, believing that Dreyfus had seduced young Cyril Wilcox and enticed him to suicide, taunted him.²⁹⁴ And “since sodomy laws were very much in effect in 1920,” Harvard officials were “in a position to make threats that were far from idle”²⁹⁵ regarding the prospect of criminal sodomy charges. Dreyfus, as proprietor of a restaurant popular with students, could also be extorted into submission by Harvard’s ostensible power to harm him economically.²⁹⁶ With respect to the town boys, charged with partying in Roberts’ den, the Harvard judges easily intimidated them and flexed muscle with threats of lost jobs and future unemployment.²⁹⁷ As in Miller’s Salem, the poison seeped into the community.

²⁹¹ *Id.* at 213.

²⁹² *Id.* at 214.

²⁹³ *Id.* at 100. Wright explains:

It is noteworthy that the Court felt totally justified in “summoning” boys over whom it had no jurisdiction. Even more remarkable, the Court felt no hesitancy in subjecting these town boys to the same intrusive questions put to the students. The thinking seems to have been that if any person, regardless of affiliation, had dealings with Harvard students, he fell within the disciplinary reach of the university administration. North of the Charles River, Harvard was the law.

Id. at 122.

²⁹⁴ *Id.* at 100.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ WRIGHT, *supra* note 14, at 100 (“After the interrogation of Ned Courtney, one of the most frequently named local boys, the Court notes state that he worked as a

According to Wright, Harvard actually had a salutary effect on jurist Lumbard and such “excesses of the Secret Court must surely have demonstrated for him the misuse of judicial power and left him with a strong distaste for it.”²⁹⁸ Lumbard must have realized that the Secret Court, like that of Salem, exemplified a corroded, anti-therapeutic “justice” system.

In a way reminiscent of Salem, the accused boys were not just extorted into confessions, but also into implicating others. Wright explains, the students, “facing the powerful panel in a darkened room . . . were distressingly quick to condemn their classmates” and some, like the Salem accused “even voiced approval of the Court’s attack on wickedness.”²⁹⁹

As discussed above, therapeutic jurisprudence scholars underscore the role of the attorney in legal proceedings.³⁰⁰ It is the attorney who helps individuals articulate their position and tell their stories. The attorney helps effectuate the individual’s participatory interests and yield a process with voice and validation. The attorney also makes the process appear less coercive and increases the likelihood that the results will be experienced as fair.³⁰¹

In Harvard’s inquisition, as in Salem, lawyers were conspicuously absent from the very proceedings that obliterated lives. It was also quite hypocritical that sham justice could thrive in an academy with a most revered law school. Not one of the men summoned before the Harvard witch hunters came armed with defense counsel. The Secret Court surely did not recommend it and the men, who felt helpless, did not demand or even request representation.³⁰²

The targets of Harvard’s witch hunt learned, as did Salem’s John Proctor and the Scottsboro Boys, that they were voiceless, bereft of an opportunity to tell their stories to a decision-maker.³⁰³ There was no validation in Harvard’s joke of a tribunal where the judges did not listen to, hear, or take

waiter at Dreyfus café and that ‘Dr. Parmenter will see to it that he is not reemployed.’”).

²⁹⁸ *Id.* at 184.

²⁹⁹ *Id.* at 112.

³⁰⁰ *See supra* note 117 and accompanying text.

³⁰¹ *See supra* notes 105-117 and accompanying text (discussing therapeutic jurisprudence and voice, validation, and voluntary participation).

³⁰² *See supra* note 110 and accompanying text (describing “learned helplessness”).

³⁰³ *See supra* text accompanying notes 94-101 (discussing *Powell* and the Scottsboro Boys).

seriously the position of the accused. It is telling that well after their expulsions or suspensions, quite a few of the victims composed letter after letter to Greenough, pleading their case and begging to have their stories heard. All of this is indicative of the fact that these post-verdict students hungered for the therapeutic jurisprudence they never got in the toxic secret forum.

A comparison of a Salem interrogation with one before the Secret Court reveals the likeness. In *The Crucible*, an interrogation transpires in the Salem meeting house that serves as the anteroom of the General Court:

HATHORNE'S VOICE: Now, Martha Corey, there is abundant evidence in our hands to show that you have given yourself to the reading of fortunes. Do you deny it?

MARTHA COREY'S VOICE: I am innocent to a witch. I know not what a witch is.

HATHORNE'S VOICE: How do you know, then, that you are not a witch?

MARTHA COREY'S VOICE: If I were, I would know it.

HATHORNE'S VOICE: Why do you hurt these children?

MARTHA COREY'S VOICE: I do not hurt them. I scorn it.³⁰⁴

In *The Secret Court*, the interrogation of Edward Say, whose doom was already sealed by the tattling of others, is analogous:

How well did you know Ernest Roberts?

Rather well. His room was close by mine. I once played bridge with him. He never bothered me to any extent.

Didn't you once go to the theater with him?

No.

Did he ever make advances toward you?

No, he never approached me in any indecent sense.³⁰⁵

Both in Salem and at Harvard, denials are empty sounds while "rapid-fire questions" repel answers.³⁰⁶ The judges in both courts convict solely on the basis of accusations squeezed from others, who are desperately trying to save their

³⁰⁴ Miller, *The Crucible*, *supra* note 1, at 83-84.

³⁰⁵ WRIGHT, *supra* note 14, at 125.

³⁰⁶ *Id.* at 124.

own hides. The Harvard court, like that in seventeenth-century Salem, torn from the anchor of reasonable doubt, upgraded charges into presumptions that were impossible to rebut. Harvard's court coerced voicelessness, invisibility, and helplessness.

While witch hunters of Salem and the Harvard posse spawn scorn for law and justice, they both also pay homage to lies. In Harvard, as in *The Crucible*, the accused were shackled to choicelessness: they could make a futile attempt to hide and evade the inquisition or they could lie to rescue themselves. In both *Harvard's Secret Court* and *The Crucible*, the liars triumph and the truthful, like Proctor or Smerage, get the noose.

In fact, in *Harvard's Secret Court*, Wright makes this point when he contrasts Gilkey with Smerage, who were both talented men with theatrical aspirations. Gilkey, who "was indeed gay and had been sexually active through his freshman and sophomore years at Harvard" but found that "[b]y skillfully lying and steadfastly refusing to admit to any sexual impropriety, [he could] escape the grim fate suffered by others," ended up with a dazzling career.³⁰⁷ Smerage, on the other hand, who was also gay, but "naively believed that frank confessions and abject contrition would get him through the ordeal," ended in defeat.³⁰⁸ Wright thus elaborates:

It is difficult not to contrast Gilkey's forty-year joyride at the upper reaches of the New York theater with the inability of Keith Smerage to get beyond the chorus of *Blossom Time*. The Harvard degree surely helped Gilkey get past doors and, for Smerage, the lack of one surely kept doors closed. Both men, it appears, were actively gay, so their homosexuality cannot be cited as a reason for Smerage's failure. It is possible that an endorsement from Harvard in one case and a blackball in the other made all the difference.³⁰⁹

Not only did the Secret Court reward the liar, but its very ordeal fostered a life of lies or one metaphorically endured in "the closet." It is not surprising that post-verdict, many of the men spent the rest of their days masking their sexual orientation. Even Wollf, who lived with such gusto, was not technically "out," although "[h]is lifelong bachelor status, combined with his choice of locales (Marrakech is famous for its boys, not its girls), his fanciful pursuits, and his foray into the

³⁰⁷ WRIGHT, *supra* note 14, at 206-07.

³⁰⁸ *Id.* at 101.

³⁰⁹ *Id.* at 210.

nightclub business strongly suggest he was actively and probably merrily gay.”³¹⁰ With respect to supposed “ringleader” Roberts, accused of grooming disciples, Wright wonders how he could “step out of his rampant gayness like a no-longer-needed bit of Hasty Pudding drag and find happiness in the straight world of marriage and children.”³¹¹ It is thus conceivable that Roberts made a heterosexual marriage into his hideout.³¹²

Significantly three lives were cut short. Cummings killed himself before he could build a post-expulsion cocoon, but two others spent their lives in concealment: Say, who “was actively homosexual—unmarried at twenty-nine, carousing with far younger men on a weekend night,” shielded himself through an ostensible conformity with “society’s rules.”³¹³ Smerage also lived underground and after his suicide, his “roommate,” Phil, had to confront the “poignant dilemma: whether to portray the deceased to his parents as a friendless loner or as one whose only intimate companion was another male.”³¹⁴ Here Wright suggests that what such witch hunts do is commend the closet and that there is something tragic about a life forced into a bunker.

Today it is pretty well accepted that while the closet can insulate sexual minorities from discrimination and violence, it can be an unhealthy place: it can constitute internalized societal homophobia or an individual’s acceptance of his or her sexual identity as something shameful.³¹⁵ It is also basic that disavowing invisibility can be a psychological boost; it can help

³¹⁰ *Id.* at 220.

³¹¹ *Id.* at 159.

³¹² *Id.* (In a very tongue-in-cheek way, Wright suggests, “Perhaps [Roberts] hadn’t been gay at all but merely liked damask curtains.” *Id.*)

³¹³ *Id.* at 205.

³¹⁴ *Id.* at 200.

³¹⁵ See RONNER, *supra* note 15, at 8-9 (discussing the salutary effects of an individual’s decision to emerge from the closet); see also Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 120 (1998) (“Due to societal homophobia and heterosexism, which act in tandem with patriarchy, white supremacy, and class stratification, gay and lesbian experience is often shrouded in secrecy.”); Ronner, *Scouting for Intolerance*, *supra* note 191, at 104-05 (discussing the significance of “coming out”); Bruce J. Winick, *The Dade County Human Rights Ordinance of 1977: Testimony Revisited in Commemoration of Its Twenty-Fifth Anniversary*, 11 LAW & SEX. 1, 3 (2002). One of the founders of therapeutic jurisprudence, Winick asserts that ordinances must be adopted to protect gays and lesbians from discrimination and “if left unremedied, such discrimination would keep many gay individuals imprisoned in the closet, leading subterranean and secret lives that would inevitably diminish their mental health and emotional well being, as well as that of the community.” *Id.*

exorcize negativity and uplift self-esteem.³¹⁶ While self-actualization, happiness and self-definition are by themselves good enough reasons to advocate coming out, openness brings with it even more benefits. As several scholars have noted, the “coming out process has tremendous cultural and political significance.”³¹⁷ It helps homosexuals find each other so that they can fight to achieve a common goal of equality.³¹⁸

There is even more to it, however, than just the facilitation of gay and lesbian collective political activity. A hidden same-sex orientation retards progress in a more subtle way. “It is basic that people who are familiar with and interacting with homosexuals are less inclined to harbor homophobic beliefs.”³¹⁹ And, even beyond that, when individuals know and feel comfortable with out friends, co-workers, and acquaintances who are homosexuals, they also tend to put a

³¹⁶ See Hutchinson, *supra* note 315, at 121 (“A plethora of psychological data has documented the debilitating impact that ‘internalized homophobia’—or the acceptance of societal homophobia by gay and lesbian people—has upon an individual’s self-esteem, personal development, and emotional adjustment.”); see also Hurley v. Irish Am. Gay, Lesbian and Bisexual Group of Boston, Inc. 515 U.S. 557, 570 (1995). Justice Souter’s opinion in *Hurley* considered marching in the parade as a form of “coming out,” a way for individuals to “celebrate [their] identity as openly gay, lesbian and bisexual . . . [and] to show that there are such individuals in the community.” *Id.*; see Bryan H. Wildenthal, *To Say ‘I Do’: Shahar v. Bowers, Same-Sex Marriage, and Public Employee Free Speech Rights*, 15 GA. ST. U. L. REV. 381, 453 (1998) (arguing that Justice Souter’s opinion validated that speech “proclaims the innermost identity of the speaker”).

³¹⁷ See Hutchinson, *supra* note 315, at 89.

³¹⁸ *Id.* at 120-21 (“The closet harms gay communities because it hinders the ability of gays and lesbians to engage in collective political action to achieve equality.”); see also William N. Eskridge, Jr., *GayLegal Narratives*, 46 STAN L. REV. 607, 614 (1994) (noting that speaking out in the form of “gaylegal narratives” has the effect of “emphasi[zing] that we are here, there and everywhere.”); RONNER, *supra* note 15, at 9; Wildenthal, *supra* note 316, at 454 (“It is through ‘coming out’—a quintessential speech act—that gay people identity themselves” and “[f]or gay people, speech has been, if anything, an even more important device for social change.”).

³¹⁹ RONNER, *supra* note 15, at 9; see also Eskridge, *supra* note 318, at 614 (“Psychological studies suggest that people who actually know an openly lesbian or gay person are less likely to be homophobic or to accept homophobic stereotypes.”); Susan Page, *Gay Rights Tough to Sharpen into Political “Wedge Issue.”* U.S.A. TODAY, July 28, 2003, at A1 (“More gay men and lesbians are open about their sexual orientation, prompting some of their family members and co-workers to revise their views. That in turn makes it easier for others to come out of the closet.”); Rachel A. Van Cleave, *Advancing Tolerance and Equality Using State Constitutions: Are the Boy Scouts Prepared?*, 29 STETSON L. REV. 237, 241 (1999) (“[T]he law’s approval or allowance of [discriminatory] exclusion may lead individuals in the groups to conclude that they are justified in excluding those people they perceive as different and perhaps even justified in their hatred of people who are different.”).

greater premium on constitutional friends, like equal protection and the right to privacy.³²⁰

III. TODAY'S HOMOPHOBIC WITCH HUNTS

According to Arthur Miller, *The Crucible* is not just about Salem or the McCarthy era, but speaks a gnomic truth—that “there are people dedicated to evil in the world” and that “without their perverse example we should not know the good.”³²¹ Miller reminds us that the witch courts, like the mythical phoenix, can rise from the ashes, spread their wings, and renew damage.

As William Wright has suggested, the forces that propelled the witch hunt in *Harvard's Secret Court* are alive and can spring into action at any time. With respect to Harvard, he notes that even as late as 1998, when well-respected financial writer Andrew Tobias wrote his “coming-out” article for *Harvard Magazine*, a heap of mail came from irate alumni berating the journal for publishing “such filth.”³²² Wright, like Miller, knows that witch hunts are inevitably immortal:

So homophobia is still alive at Harvard and perhaps, in spite of enormous strides toward tolerance, always will be alive in some form or other. There is nothing to say that a backlash from current tolerant attitudes is impossible, even in the United States, even at Harvard. All it would take would be some Taliban-like zealots to take control, any group from the many now flourishing throughout the United States who believe they are hearing the voice of God when they are really hearing the darker corners of their Pliocene genomes.³²³

Miller and Wright are correct that sick pogroms will always exist, and lamentably they are indeed afoot today. Specifically, despite some progress, like the legal recognition of rights for same-sex couples in some states, homophobic attitudes pervade legislation and judicial decisions and withhold important rights from those of same-sex orientation.³²⁴ At the time of the writing of this Article, former Miami Heat

³²⁰ Cf. Van Cleave, *supra* note 319; see also Eskridge, *supra* note 318; *infra* notes 434-436 and accompanying text (discussing Joe Lombard's respect for the right to privacy.).

³²¹ Miller, *Introduction*, *supra* note 12, at 167.

³²² WRIGHT, *supra* note 14, at 267.

³²³ *Id.* at 268.

³²⁴ See RONNER, *supra* note 15 (addressing homophobia and the law).

guard Tim Hardaway made news when he said, "I hate gay people" and announced that he would not deal with a gay player on his team.³²⁵ This provoked outrage, censor, and even economic sanctions, which should make us wonder how our society can be so complaisant about laws that are much more homophobic and damaging than the sputtering of hate words.

A. *Today's Witch Hunt*

Today, the United States engages in a witch hunt that targets homosexuals in multiple facets of life. The institution of marriage is, of course, significant because it brings with it all sorts of monetary benefits and legal protections.³²⁶ It is, according to Professor Tom Stoddard, "the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men," signifying "social acceptance and acknowledgment of their humanity."³²⁷ Despite some progress

³²⁵ Dan Le Batard, Editorial, *Hardaway's World: 'I Hate Gay People,'* THE MIAMI HERALD, Feb. 15, 2007, at D1 (quoting Hardaway as saying, "First of all, I wouldn't want him on my team . . . Second of all, if he was on my team, I'd really distance myself from him. I don't think he should be in the locker room when we are in the locker room . . . I'd ask for him to get traded."); see also Tim Henderson, *Mayor: Get to Know Gays*, THE MIAMI HERALD, Feb. 17, 2007, at B1 (reporting that Mayor Kevin Burns of North Miami, who is gay and lives with his partner of twenty-three years and an adopted daughter, invited Hardaway to spend a typical day with his family).

³²⁶ See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1053-54 (2004) (providing a list of the "benefits and obligations conferred by marriage"); see also RONNER, *supra* note 15, at 27-65 (chapter discussing issues surrounding the legalization of same-sex marriage and also the barriers facing same-sex couples); Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, excerpted in ESKRIDGE & HUNTER, *supra*, at 818-20; David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996) (discussing same-sex marriage); Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113 (2000) (comparing the benefits of same-sex unions and the greater benefits of opposite-sex marriage); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993) (raising arguments for same-sex marriage in historical context); G.M. Filisko, *The Rites Wrangle: Same-Sex Marriage Advocates Vow to Fight On, Despite a Summer of Rulings Against Their Cause*, 92 A.B.A. J. 44 (Nov. 2006) (summarizing the recent defeats, victories, and strategies in the fight for marital benefits for same-sex couples); Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 134 (1987-88) ("[S]ame-sex marriage cases are better viewed as political efforts to raise the consciousness of the American public . . ."); Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105 (1996) (comparing early bars to interracial marriage with restrictions on same-sex marriage).

³²⁷ Stoddard, *supra* note 326, at 819. *But see* Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK: NAT'L GAY & LESBIAN Q., Fall 1989, at 9, 16-17, reprinted in WE ARE EVERYWHERE (Mark Blasius & Shane Phelan eds., 1997), at 757; Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian*

(for example, Massachusetts has validated same-sex marriage and other states have compromised by granting marital benefits to unmarried partners), most same-sex partners are still exiled from a wealth of rights, privileges, and obligations.³²⁸ Also, today's homosexuals face hurdles in the employment context. Not only do many lesbians and gays still lose their jobs when employers become aware of their sexual orientation, but the inability to marry exacerbates the injustice by making unavailable basic workplace benefits.³²⁹ For example, health care and group insurance are still inaccessible to many same-sex partners, who also cannot receive veterans' benefits or disability insurance incident to marriage. Although today some companies, universities, states and municipalities have expanded their coverage to embrace same-sex partners of their employees, such things are still the exception, not the rule. Further, there continues to be unfair treatment of homosexuals in the military.³³⁰

Another area of the law today tainted by homophobia is wills and inheritance.³³¹ Most unmarried partners can neither

Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage," 79 VA. L. REV. 1535, 1536 (1993) ("[T]he desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society . . .").

³²⁸ See ESKRIDGE & HUNTER, *supra* note 326, at 1053-54; RONNER, *supra* note 15, at 33-37 (summarizing recent developments); Filisko, *supra* note 326, at 46 (summarizing recent law); see also The Defense of Marriage Act ("DOMA"), 28 U.S.C. § 1738C (2000) ("No State, territory, or possession of the United States, or Indian Tribe, shall be required to give effect to any public act, record, or judicial proceeding of any State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or a claim arising from such relationship."); 1 U.S.C. § 7 (2000) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."); Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1436 (1997) (suggesting that Congress had no power to enact DOMA); Barbara A. Robb, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263, 269 (1997) (discussing potential constitutional challenges to DOMA).

³²⁹ RONNER, *supra* note 15, at 31, 117-60 (summarizing discrimination in the work place).

³³⁰ *Id.* at 126-29 (summarizing discrimination in the military).

³³¹ *Id.* at 161-92 (summarizing discrimination in the context of wills, trusts and estates); see also Emily Berendt & Laura Lynn Michaels, *Your HIV Positive Client: Easing the Burden on the Family Through Estate Planning*, 24 J. MARSHALL L. REV. 509, 513 (1991) (discussing how homosexual testators are vulnerable to having their wills challenged); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 458 (1996) (noting that homosexuals who attempt to leave property to their lovers risk "unfortunate" consequences from "estranged" family members); Stanley M. Johanson &

obtain a forced share in a decedent's estate nor avail themselves of the intestacy laws. The law also excludes such partners from Social Security benefits, public pensions, and income and estate tax benefits. Some case law in this area frowns on same-sex spouses by deeming them improper beneficiaries under a will.³³² Similarly, lesbian and gay "spouses" frequently cannot recover for the wrongful death of their partners, serve as their partners' conservators or guardians, or participate in their partners' health care decisions to the same extent as married couples.

Beyond this, immigration law mistreats homosexuals, sometimes prohibiting them from immigrating or seeking asylum in the United States.³³³ Sexual minorities also encounter problems with respect to legal proceedings and the criminal justice system. By way of example, there are state laws that treat a homosexual advance as justification for loss of self-control which can drop a charge from murder to manslaughter.³³⁴ As such, the law, in a way reminiscent of Harvard's court, continues to pummel homosexuals even after they have been victims of hate crimes.

Kathleen Ford Bay, *Estate Planning for the Client with AIDS*, 52 TEXAS BAR J. 217, 217 (1989) (discussing how gay testators can end up with acrimonious will contests); Amy D. Ronner, *Homophobia: In the Closet and in the Coffin*, 21 LAW & INEQ. J. 5, 77-80 (2003) (discussing homophobia in wills and intestacy law); Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 227 (1981) (exploring how homosexual testators have a greater risk of having their wills invalidated on undue influence grounds); Dominick Vetri, *Almost Everything You Always Wanted to Know About Lesbians and Gay Men, Their Families, and the Law*, 26 S.U. L. REV. 1, 88 (1989) (discussing how "families of a deceased gay or lesbian relative often seek to intervene and upset wills leaving property to long term partners of the decedents.").

³³² See Sherman, *supra* note 331, at 227.

³³³ See ESKRIDGE & HUNTER, *supra* note 326, at 1054 ("In the United States, there is no explicit federal recognition of domestic partners. Federal immigration law allows a non-American 'spouse' to receive preferential immigration treatment . . . and to become a citizen . . . but does not extend these rights to a domestic partner.").

³³⁴ RONNER, *supra* note 15, at 8; see also Casey Charles, *Panic in The Project: Critical Queer Studies and the Matthew Shepard Murder*, 18 LAW & LITERATURE 225, 225 (2006) (explaining how the persistence of the homosexual panic defense is "indicative of a larger set of social myths about gay men"); Heather C. Brunelli, *The Double Bind: Unequal Treatment for Homosexuals Within the American Legal Framework*, 20 B.C. THIRD WORLD L.J. 201, 203 (2000) (discussing difficulties homosexuals face when they are victims of crimes).

B. The Forces Behind the Witch Hunt

Discrimination against homosexuals is rampant in family law, especially when it involves children.³³⁵ Gays and lesbians struggle when they seek to adopt children or even obtain custody or visitation rights with respect to their own children. Some of the difficulties are due to the “best interests of the child” test.³³⁶ Most courts predicate parental or custodial decisions on what is in the best interests of the child. Because such a test is malleable and affords broad discretion, a judge’s personal morality and prejudices can easily enter the mix.³³⁷

Sadly, even today some judges adhere to a mindset reminiscent of Salem or the 1920s secret court: they believe that the world has one supreme order cemented in place and oppose anything that might erode that permanent structure. Typically, as with the Salemites and the Harvard judges, what is inextricably yoked to such a philosophy is reverence for the fundament of traditional family, which means a married man plus a woman plus one or more obedient offspring. A court with a witch-hunt proclivity tends to, at least on an unconscious level, perceive the homosexual parent as perilously defiant of the fixed lay of the land.

In Salem, the court likened the bewitched women to a plague that could spread. At Harvard, the Secret Court was petrified by the prospect of Roberts’ male-male orgies contaminating the student population. Similarly, some family courts equate same-sex orientation with a malady that makes the “afflicted” unstable and contagious and which could in turn defile children.³³⁸ Such a perspective is, of course, as flimsy as giving credence to a concocted claim about witches mortifying babies, or late-night readers poisoning pigs, or poppet-poking

³³⁵ See RONNER, *supra* note 15, at 67-116 (discussing how “[f]amily law terrain is loaded with land mines for gay men and lesbians seeking to adopt children or claim custody or visitation rights with respect to their own children.”); see also Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 212-16 (1999) (explaining how “[s]odomy laws are often used to deny gay and lesbian parents custody or to restrict their visitation rights.”); Ronner, *The Lesbian Mother*, *supra* note 186, at 342-46 (discussing how preconceptions about gays and lesbians surface in family law cases).

³³⁶ See RONNER, *supra* note 15, at 67; see also Amy D. Ronner, *Women Who Dance on the Professional Track: Custody and the Red Shoes*, 23 HARV. WOMEN’S L.J. 173, 179-92 (2000) (tracing the history of the best interests of the child standard).

³³⁷ See RONNER, *supra* note 15, at 67.

³³⁸ See *supra* note 191.

wives causing pain. While the notion itself is flawed because it is based on an assumption that same-sex orientation is undesirable and warrants suppression, the theory alone has been refuted: there are reliable psychological studies showing that a parent's sexual orientation has no effect on a child's sexual orientation.³³⁹

In Salem, the court associated naked girls gyrating in the forest with unleashed lust. At Harvard, the Secret Court saw their gay suspects as immersed in decadent sex and equated them with raw libidinous energy.³⁴⁰ Similarly, some family law courts, deciding not just adoption issues but also custody and visitation, subscribe to the unfounded notion that gays, supposedly lacking control over their prurient sexual urges, are more predisposed to molest children than heterosexuals.³⁴¹ Here too recent studies have shattered such silly conjectures: researchers have found virtually no cases of sexual abuse committed by homosexual parents or their partners on children and conclude that such behavior is more prevalent in heterosexual families.³⁴² Nevertheless, this myth underlies the anti-gay witch hunt and mingles with another fear, that of the deployment of some pediatric AIDS pandemic.

As discussed above, behind the Salem hysteria lurked a fear of the helter-skelter of the stayed concepts of male and

³³⁹ See LESLIE COOPER & PAUL CATES, *TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING* 85-91 (2d ed. 2006) (chapter entitled "Debunking the Myths: Arguments Against Gay Parenting and Why They're Wrong"); RONNER, *supra* note 15, at 96-98 (section entitled "Dispelling the Myths"); Robert G. Bagnall et al., *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 517-23 (1984) (noting that assumptions often lead judges to conclude that a child's relationship with a gay parent is harmful even when there is no supporting evidence); David Cramer, *Gay Parents and Their Children: A Review of Research and Practical Implications*, 64 J. COUNSELING & DEV. 504, 505 (1986) ("[T]he research seems to refute the notion that gay parents will produce gay children or disturbed children in numbers greater than might be expected of nongay parents. The logic of this argument seems further refuted when one considers that most gay men and women are probably raised by heterosexual parents."); Kathryn Kendell, *The Custody Challenge: Debunking Myths About Lesbian and Gay Parents and Their Children*, 20 FAM. ADVOCATE 21, 23-24 (1997) ("[T]he incidence of same-sex orientation among children of lesbian or gay parents is the same as that in the general population."); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD. DEV. 1025, 1031-32 (1992) ("[The] development of gender identity, of gender role behavior, and of sexual preference among offspring of gay and lesbian parents was found in every study to fall within normal bounds.").

³⁴⁰ See *supra* notes 192-195 and accompanying text.

³⁴¹ See COOPER & CATES, *supra* note 339, at 88; RONNER, *supra* note 15, at 96; see also Cramer, *supra* note 339, at 505 (explaining how sexual abuse of children "seems to be disproportionately heterosexual in nature").

³⁴² See RONNER, *supra* note 15, at 96 (discussing the fallacious belief that homosexuals are more likely to molest children).

female.³⁴³ The Secret Court also tended to vilify anything that could conceivably horn in on what was and should always be the Harvard turf of unadulterated virility.³⁴⁴ Similarly, in family law, some judges are fixed on gender identity, or a “person’s self-identification as male or female” and opine that children raised by same-sex parents will develop inappropriate gender role behavior.³⁴⁵ The whole thing is spurious because it derives from a mere conjecture that people who rebel against societal gender roles, like President Lowell’s sister, are sick or diabolical. But beyond that, here too reliable studies demolish the theory that a parent’s sexual orientation correlates with a child’s gender role behavior.³⁴⁶

Interestingly, family law judges sometimes opine that children in non-traditional families are more vulnerable to ostracism by peers.³⁴⁷ As Professor Nancy Polikoff has explained, such concerns are exaggerated and reinforce “derogatory attitudes against gay men and lesbians, . . . [when] courts place a state imprimatur on the very prejudice that facilitates the harassment.”³⁴⁸ As Polikoff notes, when courts stop discriminating against same-sex families, there will be less stigma and children will experience less discomfort about their family life.³⁴⁹

The real irony, of course, is that such courts, purporting to ward off harassment, end up implementing their own harassing hunt, and in doing so they endow it with institutional dignity. As Harvard had to learn, such purges inevitably backfire. Harvard rationalized its savagery as a

³⁴³ See *supra* notes 52, 54-59 and accompanying text.

³⁴⁴ See *supra* notes 217-237 and accompanying text (discussing both Wilcox’s and Lowell’s fear of women breaking out of their rightful roles in society).

³⁴⁵ Patterson, *supra* note 339, at 1030; see also COOPER & CATES, *supra* note 30, at 88-89; RONNER, *supra* note 15, at 96.

³⁴⁶ See *supra* note 345.

³⁴⁷ See RONNER, *supra* note 15, at 96; see also Cramer, *supra* note 339, at 505 (citing studies on peer acceptance among children of gay parents); Kendell, *supra* note 339, at 21 (discussing the “myth” that children of homosexual parents will be harassed); Patterson, *supra* note 339, at 1034 (“[R]esearch . . . suggest[s] that children of lesbian and gay parents have normal relationships with peers . . .”); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 568-70 (1990) (“In the context of myriad factors that might lead to a child being harassed or rejected, courts exaggerate the significance of parental homosexuality.”).

³⁴⁸ Polikoff, *supra* note 347, at 568.

³⁴⁹ *Id.* at 569-70 (pointing out that, in *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), the Supreme Court “decried state approval of discrimination in the context of interracial families” and stated that the law should not give effect to private biases).

necessary measure to keep inviolate the school's stature. However, in the end they irrevocably besmirched themselves and came to embody "a cautionary parable of a powerful institution run amok."³⁵⁰

In a fairly recent high profile case, *Lofton v. Kearney*,³⁵¹ some gay fathers confronted the "weird and mysterious" forces in the context of a contemporary witch hunt.³⁵² And like Salem's condemned and Harvard's victims, these men, along with their children, were rendered voiceless and invalidated.

C. *The Witch Hunters*

While some states impose impediments to gay and lesbian adoption, Florida prohibits it altogether with its statute that says: "No person eligible to adopt under this statute may adopt if that person is a homosexual."³⁵³ The legislature, however, does not and should not always have the final say.

The separation of powers is at the core of our Constitution and the judiciary plays a vital role in its tripartite structure.³⁵⁴ It is also apodictic that our Constitution contemplates individuals turning to the courts for rescue in the event that another governmental branch oversteps its bounds or abuses power.³⁵⁵ In the *Lofton* case, when families sought

³⁵⁰ WRIGHT, *supra* note 14, at 269.

³⁵¹ *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 807 (11th Cir. 2004).

³⁵² Miller, *Introduction*, *supra* note 12, at 161; *see also supra* text accompanying notes 35-36.

³⁵³ FLA. STAT. ANN. § 63.042(3) (West 2006). For a discussion of laws in other states that impede adoption by sexual minorities, see RONNER, *supra* note 15, at 41 n.105; *see also* ESKRIDGE & HUNTER, *supra* note 326, at 1192-94; RONNER, *supra* note 15, at 70 ("States that allow one-parent adoptions may make it easier for gay, lesbian, bisexual, and transgendered persons to adopt. But if that individual is in a same-sex relationship and the other partner cannot also adopt the child, then from a legal standpoint that other partner is essentially a stranger to the child.").

³⁵⁴ *See* Nicholas L. DiVita, Note, *John Locke's Theory of Government and Fundamental Constitutional Rights: A Proposal for Understanding*, 84 W. VA. L. REV. 825, 828 (1982); *see also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 67-68 (1980) ("Since, almost by definition, the processes of democracy bode ill for the security of personal rights and, as experience shows, such liberties are not infrequently endangered by popular majorities, the task of custodianship has been and should be assigned to a governing body [the judiciary] that is insulated from political responsibility and un beholden to self-absorbed and excited majoritarianism.").

³⁵⁵ *See supra* note 354; *see also* THE FEDERALIST NO. 78, at 416 (Alexander Hamilton) (J.R. Pole ed., 2005) ("The independence of the judges is equally requisite to guard the constitution and the rights of individuals . . ."); RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 119 (1973) (discussing how the drafters of our Constitution "feared Congress and trusted judges"); Amy D. Ronner,

help, the courts shirked their constitutional responsibility, failed to protect liberty, and like witch hunters, upheld majoritarian oppression.

In *Lofton*, three separate families challenged Florida's prohibition of homosexual adoption, and all of them were ideal plaintiffs.³⁵⁶ In fact, the Children's Home Society, the agency that places foster children, had actually honored one of the families, the Loftons. That is, in 1998, the agency gave the award for outstanding foster parent of the year to Steven Lofton and his partner, Roger Croteau. At that time, Steven had been a licensed foster parent for about a decade, in which he cared for eight children who either were HIV positive or had AIDS. Since his job was so demanding, the State of Florida asked Lofton to give up his career as a pediatric AIDS nurse to care for his children full time.³⁵⁷

At the time of the lawsuit, three of the children were in their early teens or pre-teens and had grown up with the Loftons. These children saw themselves as siblings to each other and knew the Loftons as their parents. Steven Lofton's affidavit described his ties to one of the children, John, stating "[he] is my son. I am committed to caring for him and providing for all his needs. I have been his parent in every way. . . . He calls me 'Dad.'"³⁵⁸ In 1994, John was three years old when his parents' parental rights were terminated and the State asked Lofton if he wanted to adopt John. Lofton applied with endorsement from caseworkers, supervisors, the district administrator, and John's attorney *ad litem*. The only reason Lofton was rejected was because of the law prohibiting adoption by homosexuals.

In 2001, after John had been part of the family for ten years, the caseworker notified Lofton that she was seeking another adoptive parent for John. The Loftons, along with two

Judicial Self-Demise: The Test of When Congress Impermissibly Intrudes on Judicial Power After Robertson v. Seattle Audubon Society and the Federal Appellate Courts' Rejection of the Separation of Powers Challenges to the New Section of the Securities Exchange Act of 1934, 35 ARIZ. L. REV. 1037, 1037-40 (1993) ("[T]he equation of unchecked power with corruption . . . is the gnomic awareness that underlies the overall structure and specific provisions of the United States Constitution."); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303-04 (1989) (explaining how the separation of powers promotes efficiency and avoids the tyranny of too much efficiency).

³⁵⁶ Most of the facts are as stated in Brief of Appellant, *Lofton*, 358 F.3d 804 (11th Cir. 2004) (No. 01-16723) [hereinafter *Lofton* Brief].

³⁵⁷ *Id.* at 7.

³⁵⁸ *Id.* at 8-9.

other similarly situated families, sued the Florida officials responsible for enforcing the law and challenged the constitutionality of the gay adoption ban.³⁵⁹ The families argued that the Florida law violated the right to equal protection of both homosexuals seeking to adopt and children being raised by homosexual caregivers, who could not be adopted by them.³⁶⁰ Plaintiffs additionally asserted that the Florida law, which disregarded a constitutionally protected family relationship, violated the Due Process Clause and the First Amendment.³⁶¹

The federal district court, entering summary judgment in the State's favor, rejected the families' position that the ban on homosexual adoption violated fundamental rights.³⁶² The court acknowledged that families may be formed from factors other than consanguinity and conceded that there existed a deep and loving relationship between the foster parents and children, yet still concluded that such bonds did not deserve that "fundamental right to family privacy, intimate association [or] family integrity."³⁶³

The district court also rejected the families' equal protection claim and essentially did so because in *Romer v. Evans*³⁶⁴ the Supreme Court had declined to apply heightened scrutiny to homosexuals.³⁶⁵ Because of the rational basis test,

³⁵⁹ *Lofton*, 358 F.3d at 808. The Houghton family was similar to the Loftons. *Id.* Doug Houghton, was a clinical nurse and legal guardian of John, who was eleven years old at the time of the litigation. *Id.* Houghton had been John's caretaker since 1996 when John's biological father voluntarily left four-year old John with Houghton. *Id.* That same year Houghton and his partner, Robert, were appointed co-guardians of John. *Id.* When John's biological father consented to termination of his son's parental rights, Houghton unsuccessfully sought to adopt John. *Id.* The other family consisted of Wayne Larue Smith and Daniel Skahen, an attorney and real estate broker, who were licensed foster parents caring for three foster children. *Id.* Their applications to serve as adoptive parents were also denied. *Id.*

³⁶⁰ *Lofton Brier*, supra note 356, at 3.

³⁶¹ *Id.*

³⁶² *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

³⁶³ *Id.* at 1379 (citing *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977)).

³⁶⁴ 517 U.S. 620 (1996); see also *infra* notes 401-407 and accompanying text.

³⁶⁵ When there is an equal protection challenge to government action targeting a class of persons, courts generally employ one of three standards: strict scrutiny, intermediate scrutiny, or rational basis. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-41 (1985). Under the rational basis test, legislation is presumed not to violate the Equal Protection Clause if the use of the classification is rationally related to a legitimate state interest. *Id.* at 440. Consequently, courts are extremely deferential to a state legislature's determination of a state interest. Strict scrutiny applies to certain classifications, including those based on race, national origin, and alienage; strict scrutiny requires that the government action is narrowly tailored to a compelling state interest. *Id.* Intermediate (or heightened) scrutiny has

the district court felt that the Florida law could be sustained if there was any conceivable basis for it. The State, like the Salemites and Harvard's Secret Court, had asserted that what was at stake was nothing less than godliness and the traditional family: they argued that homosexuality offended the Judeo-Christian tradition and that legal marriage is best because it supplies "proper gender role modeling and minimiz[es] social stigmatization."³⁶⁶ While the district court paid lip service to the bromide that morality should not justify legislation, it put its imprimatur on the State's theory that married heterosexual parents constitute the only real families that can supply children with stability.

Further, the district court discarded the families' assertion that the Florida statute was a witch hunt aimed at homosexuals.³⁶⁷ In so doing, the *Lofton* court brushed aside a case, *City of Cleburne v. Cleburne Living Center, Inc.*,³⁶⁸ in which the United States Supreme Court invalidated a zoning statute that barred the issuance of a group home license for the mentally challenged and said that "mere negative attitudes, or fear . . . are not permissible bases for [disparate treatment]."³⁶⁹ The *Lofton* court refused to force the State to bear the burden of showing that "homosexuals pose a unique threat to children that others similarly situated in relevant respects such as single parents do not."³⁷⁰ The court, putatively distinguishing *Cleburne* on the basis that the law at issue in *Cleburne* treated similarly situated groups differently, said that "[h]omosexuals are not similar in all relevant aspects to other nonmarried adults" because such other adults can get married.³⁷¹ In short, the district court felt that gay inequality simply warranted piling on more inequality.³⁷² As in Salem, as in 1920s Harvard,

been applied to classifications based on gender and illegitimacy; this standard requires such laws to substantially further an important state interest. *Id.* at 440-41.

³⁶⁶ *Lofton v. Kearney*, 157 F. Supp. 2d at 1382-83.

³⁶⁷ *Id.* at 1383 (stating that "it is unnecessary and improper for this Court to determine whether the conceived reason for the challenged distinction actually motivated the legislature").

³⁶⁸ 473 U.S. 432 (1985).

³⁶⁹ *Id.* at 448.

³⁷⁰ *Lofton v. Kearney*, 157 F. Supp. at 1384.

³⁷¹ *Id.* at 1385.

³⁷² See Timothy P.F. Crowley, *Lofton v. Kearney: The United States Court for the Southern District of Florida Holds Florida's Statutory Ban on Gay Adoption Is Not Offensive to the Constitution*, 11 LAW & SEXUALITY 253, 263 (2002) (describing the district court decision as "an unfortunate example of judicial activism, whereby the court imprinted its political and moral seal of approval on a decades old statute that stands alone in state adoption laws").

the *Lofton* targets were relegated to some contagious anomaly and then quarantined from the constitutional map.

The Lofton families did not fare any better in the Eleventh Circuit, which affirmed the decision.³⁷³ In so doing, the appellate court emphasized that because adoption is a mere "statutory privilege," the State can make classifications that "would be constitutionally suspect in many other arenas."³⁷⁴ The court, however, after admitting that adoption schemes are not totally "immune from constitutional scrutiny," entertained, but mechanically squelched, all due process claims.³⁷⁵

On appeal, the families relied on *Smith v. Organization of Foster Families for Equality & Reform*, in which the Supreme Court said that "biological relationships are not [the] exclusive determination of the existence of a family."³⁷⁶ They asked the Eleventh Circuit to employ a functional definition of family that hinges on "the emotional bond that develops between and among individuals as a result of a shared daily life."³⁷⁷ The court, like the trial court, declining to read *Smith* "so broadly," construed it as fortifying legislative power to set parameters and define the justifiable expectations of families.³⁷⁸

The Eleventh Circuit bolstered its own narrowing of *Smith* with a case from the former Fifth Circuit, *Drummond v. Fulton County Department of Family & Children's Services*, which rejected a due process and equal protection challenge brought by foster parents when Georgia had refused to let them adopt a mixed-race child that they had loved and parented for two years.³⁷⁹ The *Lofton* court, in rejecting the position that Lofton and the other families were advancing, cited both *Drummond* and *Smith* as authority.³⁸⁰

³⁷³ *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004).

³⁷⁴ *Id.* at 810.

³⁷⁵ *Id.* at 811.

³⁷⁶ 431 U.S. 816, 843 (1977).

³⁷⁷ *Lofton*, 358 F.3d at 813.

³⁷⁸ *Id.*

³⁷⁹ 563 F.2d 1200 (5th Cir. 1977). In *Bonner v. Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to September 30, 1981.

³⁸⁰ *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1379 (S.D. Fla. 2001). The *Drummond* court stated:

The very fact that the relationship before us is a creature of state law, as well as the fact that it has never been recognized as equivalent to either the natural family or the adoptive family by any court, demonstrates that it is

Although the *Lofton* court recognized that neither *Smith* nor *Drummond* “categorically foreclosed the possibility that . . . a foster family could possess some degree of constitutional protection,” it concluded that Lofton and the other families failed to present the requisite “exceptional circumstances.”³⁸¹ The court told the families that they had “no justifiable expectation of permanency in their relationships,” especially when they lived under the aegis of the very nonadoption provision they were challenging.³⁸² The court also rebuked the families for “misconstru[ing] the nature of the liberty interest [involved].”³⁸³ In the court’s view, the families had confused a conceivable but impermissible entitlement to “procedural due process” with the unavailable “substantive right to be free from state interference.”³⁸⁴

Significantly, the families came to the Eleventh Circuit armed with the new Supreme Court decision in *Lawrence v. Texas*, which had overruled the *Bowers* case and had invalidated the Texas sodomy law on the basis of a right to private sexual intimacy.³⁸⁵ The families asserted that denying individuals who engage in homosexual conduct the ability to adopt “impermissibly burdens” a fundamental right.³⁸⁶ In its treatment of *Lawrence*, the Eleventh Circuit, in disconcerting mimicry of Salem’s Danforth or Harvard’s Lowell, lifted itself above the law and effectually rescinded binding Supreme Court precedent.³⁸⁷

not a protected liberty interest, but an interest limited by the very laws which create it.

563 F.2d at 1207.

³⁸¹ *Lofton*, 358 F.3d at 814.

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.* at 814-15.

³⁸⁵ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

³⁸⁶ *Lofton*, 358 F.3d at 815.

³⁸⁷ See generally RONNER, *supra* note 15, at 75-76 (discussing the *Lofton* court’s derogation of *Lawrence*); Megan Backer, Comment, *Giving Lawrence Its Due: How The Eleventh Circuit Underestimated the Due Process Implications of Lawrence v. Texas in Lofton v. Secretary of the Department of Children & Family Services*, 90 MINN. L. REV. 745 (2006) (discussing how the *Lofton* court misinterpreted *Lawrence*); Christopher D. Jozwiak, Article, *Lofton v. Secretary of the Department of Children & Family Services: Florida’s Gay Adoption Ban Under Irrational Equal Protection Analysis*, 23 LAW & INEQ. 407, 427 (2005) (“[T]he *Lofton* court does not address the fact that it is not constitutional after *Lawrence* to criminalize homosexual activity. . . . [and] does not respond to the problem that the Florida statute is denying a privilege to a single category of persons based solely on their practice of a legal activity. . . . Even if *Lawrence* does not represent the end to all ‘morality’ legislation, it certainly does not allow the government to disadvantage people engaging in a constitutionally protected

The *Lofton* court negated the fact that *Lawrence* had characterized private sexual intimacy as a “fundamental right” because the Supreme Court had “treated it as the by-product of several different constitutional principles and liberty interests.”³⁸⁸ The court wrote, “We are particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis.”³⁸⁹ As such, the court essentially jettisoned *Lawrence* because it disagreed with the *Lawrence* majority and instead hung its hat on Justice Scalia’s dissenting opinion.³⁹⁰ Like the Salem court and the Secret Court, the federal appellate court silenced voices, branded them “strained and ultimately incorrect,” and plugged its ears to the issue before it:³⁹¹ namely, whether the adoption bar impermissibly impinges on the exercise of the right to private sexual intimacy, the very protection that the Supreme Court explicitly recognized in *Lawrence*.³⁹²

The Eleventh Circuit also rejected the families’ equal protection challenge.³⁹³ Because, as the court had decided, the Florida prohibition did not burden a fundamental right and because homosexuals do not comprise a suspect class, the applicable question was whether the law was rationally related

practice.”) (footnotes omitted); Mark Strasser, *Lawrence, Lofton, And Reasoned Judgment: On Who Can Adopt and Why*, 18 ST. THOMAS L. REV. 473, 474 (2005) (“Regrettably, the *Lofton* court’s characterization of *Lawrence* was simply implausible, making the United States Supreme Court’s denial of a petition for a writ of certiorari all the more unfortunate.”).

³⁸⁸ *Lofton*, 358 F.3d at 816.

³⁸⁹ *Id.*

³⁹⁰ See RONNER, *supra* note 15, at 75 (discussing the *Lofton* court’s excessive reliance on Scalia’s dissent in *Lawrence*); Backer, *supra* note 387, at 764 (discussing the *Lofton* court’s reliance on Scalia’s dissent).

³⁹¹ *Lofton*, 358 F.3d at 817; see Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1848 n.207 (2004) (“[T]he Eleventh Circuit proceeded to uphold the Florida ban on grounds that cannot survive under the most toothless rationality standard imaginable . . .”). The *Lofton* court stressed that the case before it, unlike *Lawrence*, did not implicate a criminal prohibition, but instead involved what the court labeled a “grant of a statutory privilege.” *Lofton*, 358 F.3d at 817. For the court, this meant that *Lawrence* did not apply to the claimed right to adopt. As Tribe explains,

If the holding in *Lawrence* had rested on a theory peculiar to the criminal context . . . then one might be able to credit the *Lofton* court’s contention that *Lawrence* did not speak to the problem of making sexually active gays and lesbians ineligible for the privileges and responsibilities of adopting a child But *Lawrence* obviously rested on no such theory”

Tribe, *supra*, at 1948 n.207.

³⁹² *Lawrence*, 539 U.S. at 578.

³⁹³ *Lofton*, 358 F.3d at 817-18.

to a legitimate state interest.³⁹⁴ Here, in a manner reminiscent of Salem or of 1920s Harvard, the court acquiesced in Florida's incantations that the law puts children into the "optimal family structure . . . in homes that have both a mother and father" and thus perpetuates what is and should always be the cushy status quo.³⁹⁵

The *Lofton* court was also quite intent on rebuffing the families' efforts to deflate Florida's preference for marital adoptive families as a legitimate state interest. The families pointed out that under Florida law, unmarried individuals could adopt while similarly situated homosexuals could not.³⁹⁶ The court, however, found a rational basis in such "disparate treatment" because heterosexuals could eventually create a marital household and provide that supposedly preferable "dual-gender parenting environment."³⁹⁷ The court also opined that a legislature could rationally believe that heterosexual singles, even those that stay single, are by nature better parents.³⁹⁸

Not only did the court dismiss the families' position that the current foster care backlog rendered the statute irrational, but it also turned its back on a flagrant inconsistency: that is, as the families' pointed out, since Florida let homosexuals serve as foster parents and permanent guardians, the State could not genuinely believe that life in a same-sex household is unhealthy.³⁹⁹ The court again mechanically said that an inconsistency between a law and its enforcement is irrelevant to rational-basis review and that adoption, unlike foster care and guardianships, entails greater permanency.

The families' lawyers informed the court of the social science research, studies by mental health professionals, and opinions of child welfare organizations that debunk the myths about same-sex parents and conclude that there is no

³⁹⁴ *Id.* at 818.

³⁹⁵ *Id.* at 818-19.

³⁹⁶ *Id.* at 820-21.

³⁹⁷ *Id.* at 821-22.

³⁹⁸ *Id.* at 822.

³⁹⁹ See Jozwiak, *supra* note 387, at 425 ("The state, not wanting to grant legal parental rights to gays and lesbians, but desperately needing foster homes, denies legal parental rights to gays while simultaneously employing them as parents to take care of Florida's foster children. These are the precise makings of animus."); Melinda Young, Comment, *Discrimination for the Sake of the Children* [*Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004)] 44 WASHBURN L.J. 247, 266 (2004) ("The State cannot believe that homosexuals are capable of serving the best interests of the child in foster care, but not as adoptive parents.").

legitimate reason to exclude homosexuals from adoption. The court once again raised the rational-basis shield, accepting “any conceivable rational reason that the legislature might have for choosing not to alter its statutory scheme in response to social science research,” and finding such studies to be too fledgling to be reliable.⁴⁰⁰

Like the district court, the appellate court felt that the Supreme Court decision in *Romer v. Evans*⁴⁰¹ was inapposite. *Romer* also involved a witch hunt, but one in the guise of Colorado’s “Amendment 2,” a referendum that rescinded all protections for homosexuals and banned all legislative, executive, or judicial action designed to grant such rights. The Supreme Court found that Amendment 2 failed the rational basis test by imposing a “broad and undifferentiated disability” on a single group and by harboring “animus” toward a class of people.⁴⁰² The *Romer* Court said loud and clear that a “State cannot so deem a class of persons a stranger to its laws.”⁴⁰³

Here again the *Lofton* Court eschewed precedent by straining to narrow it to a near dud: the court said that unlike *Romer*’s Amendment 2, Florida’s statute was not really “sweeping and comprehensive,” but confined itself to a supposedly minuscule area—the privilege to adopt.⁴⁰⁴ The court, however, slighted the fact that Florida’s law indeed has a far-reaching effect on sexual minorities because it can and does impair something mammoth—their ability to form families.

The *Lofton* court also said that the real defect of Amendment 2 was its targeting of not just conduct, but of status as well.⁴⁰⁵ For the court, Florida’s adoption ban was distinguishable from the situation in *Romer* because it focused only on conduct.⁴⁰⁶ Although that putative membrane between status and conduct has always been tenuous at best, the court’s implication here, disturbingly reminiscent of both Salem and

⁴⁰⁰ *Lofton*, 358 F.3d at 825; see also RONNER, *supra* note 15, at 76; Mark Strasser, *Rebellion in the Eleventh Circuit: On Lawrence, Lofton, and the Best Interests of Children*, 40 TULSA L. REV. 421, 439-40 (2005) (discussing how the Eleventh Circuit dismissed the studies and also “underplayed those studies suggesting that children living with same-sex couples do better than children living with single parents, suggesting that even if that is so the court’s analysis would not be altered”).

⁴⁰¹ 517 U.S. 620 (1996).

⁴⁰² *Id.* at 632.

⁴⁰³ *Id.* at 635.

⁴⁰⁴ *Lofton*, 358 F.3d at 826.

⁴⁰⁵ *Id.* at 826-27.

⁴⁰⁶ *Id.*

Harvard's Secret Court, is that telling the truth is the crime.⁴⁰⁷ Essentially, the *Lofton* court admonished gays and lesbians that they might be parents only if they suppress or lie about their true sexual identity. For the *Lofton* court, the law can only choke an honest John Proctor, a candid Keith Smerage, or an "out" Steven Lofton.

D. *The Damage*

The *Lofton* witch hunt is destructive on multiple levels. It patently deprecates the families before the court. One of the strengths of the plaintiffs' cases in *Lofton* was the factual scenario—the emotional bonds between the parents and their children. In the trial court, since the case was resolved on summary judgment, the State could stipulate that Lofton and John had "significant emotional ties," thus eliminating the nature of the relationship as a dispute to be fleshed out in trial.⁴⁰⁸ The procedural posture fended off the presentation of evidence of strong familial ties and consequently, such matters became in effect extraneous.

In reality, the opposite should have happened: the *Lofton* trial court should have welcomed the emotionally charged facts into the calculus and should have facilitated the creation of a full-blown record developing the families' stories. In omitting this or relegating it to the back burner, the decision becomes icy and cruel.

In *The Crucible*, Arthur Miller speaks of a "sadism . . . that was breathtaking" when "Rebecca Nurse, a pious and universally respected woman of great age, was literally taken by force from her sickbed and ferociously cross-examined."⁴⁰⁹ In *Harvard's Secret Court*, Wright expresses astonishment at

⁴⁰⁷ See RONNER, *supra* note 15, at 77; see also Jozwiak, *supra* note 387, at 425-26 (discussing the *Lofton* court's meaningless distinction between homosexual conduct and homosexual identity and how such a distinction does not even work with respect to the adoption process itself). As Jozwiak explains, "it is not workable to demand celibacy from a potential homosexual applicant in exchange for a child," and an applicant in Florida's adoption process must check a box stating whether he or she is a homosexual, and there is no box for a "nonpracticing homosexual." *Id.* at 426. Also, because of house visits, the law might work to deny homosexuals the right to adopt even if they lie about their sexual identity. *Id.* Mark Strasser made a similar point, stating that "gays or lesbians who [are] celibate are not precluded from adopting—only those sexually active in the past year, i.e., engaging in the behavior protected by *Lawrence*, may be precluded from legally establishing parental relations with the children whom they are raising." Strasser, *supra* note 387, at 477.

⁴⁰⁸ *Lofton* Brief, *supra* note 356, at 8-9.

⁴⁰⁹ Miller, *Introduction*, *supra* note 12, at 166.

Greenough's "cold-bloodedness," or the fact that he, as the scrivener, ends his interview with Cummings "abruptly" by jotting down and underlining, "Proved guilty," and later inserts the perfunctory addendum, "But took ether and corrosive sublimate upon receiving news from Dean Smith."⁴¹⁰ As such, all of the witch hunts—the one in Salem, at Harvard, and in Florida's judicial arena—share the same frigid, inhuman recoiling from love and matters of the heart.

Ruthlessness in *Lofton* emerges in the courts' closing their hearts to loving families, proclaiming that homosexuals are "different," and deeming them incapable of providing nurturing homes. What exacerbates the frigidity of the *Lofton* witch hunt is the fact that there were no biological parents competing for these children and the children themselves, with such serious health problems, had been fortunate to find not just foster parents, but actual health specialists as their caregivers. The judicial homophobia here is so strong that it makes the court recoil from the very blessings it should hasten to embrace.

Like the Salem and Secret Court trials, the *Lofton* decision harms more than just the litigants before it. It transmits a message to other gays and lesbians seeking to create families that one avenue, that of adoption, is closed to them. This is especially caustic for one class of people who live in a society that repeatedly plugs family values and children as the cherished prize. Moreover, for sexual minorities, parenting often has special layers of significance: For same-sex couples, who deal with discrimination on a daily basis, the presence of a child can alleviate pain, endow them with a deeper sense of family, and afford them more opportunity to express love and commitment.⁴¹¹ Further, such individuals feel that their children can help integrate them into their community, paving the way for more inclusion in neighborhood, school and civil

⁴¹⁰ WRIGHT, *supra* note 14, at 136.

⁴¹¹ See RONNER, *supra* note 15, at 68; see also Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 148 (2000) (discussing the meaning children have for adults in non-traditional families); Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 6 S. CAL. REV. L. & WOMEN'S STUD. 173, 183 (1996) ("Parenting provides a means for women to pass their attitudes, values and beliefs to the next generation.").

events.⁴¹² Also, a shared child can solidify a union by encouraging partners to work together toward a common goal. Witch hunts, like that in *Lofton*, hush such whispers of hope for individuals of same-sex orientation.

Beyond that, the witch hunt in *Lofton*, as do others, spreads its blight to the community. It is undisputed that there are so many children, lacking love, parents, and good homes, and as advocate Rosie O'Donnell has put it so well, the adoption ban scalds them most of all:

There are thousands of children in foster care who are waiting to be adopted today. They need adults who can provide guidance and support and stability. They need someone who will listen to them and talk to them. They need someone who will be with them, sitting quietly or cheering on the sidelines. They need someone to help them grow up. They need good parents. Limiting the pool of qualified adoptive parents won't help them.⁴¹³

In Miller's Salem and during the reign of the Secret Court, the punitive tribunals not only convinced themselves of their moral imperative, but also immunized themselves from inconvenient, tempering restraints, like the rule of law. As therapeutic jurisprudence scholars point out, when individuals participate in judicial proceedings, what has the greatest impact on them is not entirely the result, but their assessment of the fairness of the process itself.⁴¹⁴ When individuals believe that a judicial decision ensues from unfairness, they tend to lose respect for the law and legal authorities. As is evident in Miller's Salem and in *Harvard's Secret Court*, unfair proceedings can also engender "learned helplessness," promote apathy, retard change, and cause individuals to basically give up.⁴¹⁵ With respect to Harvard, the anti-therapeutic tribunal literally caused or contributed to the suicides of gifted, guiltless men.

Although the Lofton families had superb legal representation, they were essentially nullified and rendered as

⁴¹² See DeLair, *supra* note 411, at 148 (discussing the importance of children to same-sex families); Harlow, *supra* note 411, at 183 (discussing why people want to be parents).

⁴¹³ COOPER & CATES, *supra* note 339, at iv (1st ed. 2002); see also Strasser, *supra* note 400, at 440 ("Florida has an overabundance of children in need of adoption [The *Lofton*] policy virtually assures that some of these children will never be adopted, a result which simply cannot be viewed as promoting their interests.").

⁴¹⁴ See *supra* notes 105-117 and accompanying text.

⁴¹⁵ See *supra* note 110 and accompanying text.

voiceless as those on trial in Salem or facing Harvard's Secret Court. By labeling adoption a "statutory privilege," the court pulverized viable due process claims.⁴¹⁶ By turning the *Smith* ally into an enemy and refusing to acknowledge that "biological relationships are not [the] exclusive determination of the existence of family,"⁴¹⁷ the court muted the families' voices. By renouncing the *Lawrence* decision, and in so doing, pretending that *Bowers* was still good law, the court derogated precedent. By defying the reasoning in *Romer*, the court denied the very kinship between the Colorado amendment and the Florida adoption statute, which in its own "sweeping and comprehensive" way is "inexplicable by anything but animus"⁴¹⁸ directed at a whole class of parents.⁴¹⁹ Because of the disingenuousness of the *Lofton* decision, it is unlikely that the families or their attorneys experienced the tribunals as genuinely listening to, hearing, and taking seriously their stories.

The only way the accused could survive *The Crucible* witch hunt was to tell lies. The young men facing inquisition in *Harvard's Secret Court* had a similar albatross around their necks: they could, like Gilkey, opt for life by deftly torturing the truth. In essence, both tribunals prized confabulation over honesty. And, as discussed above, one of the unfortunate legacies of the Secret Court was to endorse a life of lies or a life lived in the closet.⁴²⁰

The *Lofton* court also applauded the closet and encouraged lies. The court, by contending that Florida's prohibition is only about conduct, hinted that gay or lesbian parents, by not being true to themselves, can claim the adoption right. That is, the court implicitly invited candidates to suppress or conceal their identities and even conceivably perjure themselves in adoption proceedings.⁴²¹ As discussed above, the closet can be a nasty place: it can be psychologically damaging; it can frustrate efforts to unite in a fight for equality; and it can deprive others of the kind of exposure to and interaction with gays and lesbians that changes attitudes

⁴¹⁶ *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 809 (11th Cir. 2004).

⁴¹⁷ *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 843 (1977); see also *Lofton*, 358 F.3d at 812-15 (rejecting the *Smith* analogy).

⁴¹⁸ *Romer v. Evans*, 517 U.S. 620, 627, 632 (1996).

⁴¹⁹ See *Lofton*, 358 F.3d at 826-27 (rejecting the applicability of *Romer*).

⁴²⁰ See *supra* notes 310-320 and accompanying text.

⁴²¹ See *supra* note 407 and accompanying text.

and halts discrimination.⁴²² For the *Lofton* court, it is rational to enact a law that limits homosexuals' adoption rights to good liars or those living in subterranean suffocation. This surely does not and can not minister to the best interests of children.

CONCLUSION

The Crucible portrays the Salem witch hunt and analogizes it to the 1950s when, in the words of Professor Geoffrey R. Stone, McCarthy "ruthlessly pursued his targets in a marble caucus room that . . . 'stank with the odor of fear.'"⁴²³ But there is much more to *The Crucible* than the seventeenth-century hysteria or the 1950s ouster of Communists from the government and the ranks of our artistic and intellectual elite. In his play, Miller transcends time and place, introducing us to the "weird and mysterious" forces behind all irrational persecutions.⁴²⁴ He also depicts the warped psyches of those who pursue such campaigns of terror. Most significantly, Miller discloses the results of witch hunts: death, destroyed lives, blighted communities, illegitimated judicial systems, and deified lies.

Miller, moreover, tells us something else, something far more important. He alerts us to the hazards of kowtowing to absolute morality: in *The Crucible*, the perpetrators believe in the existence of an air-tight order for all things and fear individuality or anything that might conceivably topple the one rightful structure. The Salemite backbone is the traditional family, one in which men and women function within the tight contours of gender. Anything perceived as defying such strict stereotypes must be expunged.

Miller also equates tragedy with the commingling of law and absolute morality.⁴²⁵ What drives the Salem judges, especially Danforth, is the fallacious conviction that they are empowered and entitled to render correct moral judgments.⁴²⁶ For Miller, it is the individual that has exclusive jurisdiction

⁴²² See *supra* notes 315-320 and accompanying text.

⁴²³ Stone, *supra* note 2, at 1399.

⁴²⁴ Miller, *Introduction*, *supra* note 12, at 161.

⁴²⁵ Samuelson, *I Quit this Court*, *supra* note 19, at 641 ("On the topic of law and morality, Miller offers only a single, and mundane, observation: never should a society, as did Salem, permit such discord to arise between the administration of justice and the cardinal principle that the innocent shall be set free.").

⁴²⁶ *Id.* ("Requiring that law be joined with morality leads to an insistence that the law be capable of rendering correct moral judgments.").

over his or her own private moral domain and any institutional trespass there is verboten. After all, John Proctor literally fights to the death for his autonomy as a free person. What matters most in the end of *The Crucible* is Proctor's asserted choice to be the master of his own destiny in his own private parlor. Significantly, his wife, Elizabeth, has a similar epiphany when she, accepting a modicum of responsibility for their marital discord, says, "I have sins of my own to count. It needs a cold wife to prompt lechery."⁴²⁷ For the Proctors, no courts can impose their moral strictures on the individual, or judge what transpires in their conscience or private retreat. The very triumph of the Proctors, and Miller as well, is their vindication of the dignity of the private sphere, one which is and must be protected from the encroachment of the likes of Danforth and his lackeys.

Like Miller, Wright also explores the irreconcilable tension between individuals and an oppressive institution. In *Harvard's Secret Court*, Wright tells the story of Harvard's brutal purge in the 1920s of alleged homosexual students, one which ended lives and annihilated promising careers. Although the book's parallel to *The Crucible* is almost uncanny, there is a distinction. Miller, speaking of Danforth, regrets that he did not make his villain "evil enough" and that he failed to "clearly demarcate the point at which he knows what he has done, and profoundly accepts it as a good thing" because "[that] alone is evil."⁴²⁸ As Wright stresses, one of the things that sets the Harvard purge apart from the genre of such crusades was "the vindictive tenacity of the university in ensuring that the stigmatization of the expelled students would persist throughout their productive lives."⁴²⁹ As such, what Wright discloses—a sick, relentless implacability on the part of Lowell and his klan—amounts to what Miller equates with evil itself.

At the time of the Secret Court, Harvard, like its Salem counterpart, was obsessed with preserving what it deemed the societal bedrock. The Secret Court felt that the targets sniped at the institutional prototype, family values, and the secure male and female pigeonholes.⁴³⁰ For the court, the accused also menaced that vision of a world, tidily cleaved into its components of good and bad, god and devil. The Secret Court,

⁴²⁷ Miller, *The Crucible*, *supra* note 1, at 137.

⁴²⁸ See *supra* notes 85-87.

⁴²⁹ WRIGHT, *supra* note 14, at 268.

⁴³⁰ See *supra* Part II.B.

like the Justices in *Bowers v. Hardwick*, a case decided more than half a decade later, attacked gayness as a vile, contagious disease, one in which the afflicted actively seek to infect others.⁴³¹

At Harvard, as they did in Salem, the witch hunters spawned death and devastation. They also hurt society by depriving us of what should have been the scholarly and artistic contributions of the impaled men. The court that Lowell and his cronies convened at Harvard, like the one in Salem, epitomizes all that can be anti-therapeutic and corrosive of a justice system. Harvard's victims found, as did Salem's John Proctor, as did McCarthy's putative subversives, and as did the railroaded Scottsboro Boys, that they were voicelessly divested of an opportunity to tell their stories to a decision maker. The judges simply refused to listen to, hear, or take seriously the position of the accused.⁴³² The Secret Court, like the one in Salem, also excoriated truth and exalted lies. And, as Wright suggests, the ordeal itself effectually promoted a post-expulsion closeted life of lies.⁴³³

As Miller did in *The Crucible*, Wright alerts us to the kind of dangers posed by cults of absolute morality and admonishes that the joinder of law and morality is the recipe for disaster. What propelled the Harvard judges, especially Lowell, was their fallacious conviction that they alone could render correct moral judgments. Wright counsels, as did Miller, that such an office resides exclusively with the individual and thus, should be immune from institutional incursion.

Protagonist, Joe Lumbard, is Wright's case in point. For Lumbard, the Harvard witch hunt "did not serve to develop a horror of homosexuality, as Harvard had hoped."⁴³⁴ The great jurist, who gained "a strong distaste" for the abuse of power, was fine with gayness and "felt that two people getting together and doing whatever they wanted was no one else's business and never should be in question."⁴³⁵ According to his grandson, Lumbard said, "No people should fear to do what they want as long as it doesn't hurt anybody."⁴³⁶ Lumbard, like

⁴³¹ See *supra* notes 185-195 and accompanying text.

⁴³² See *supra* notes 303-306 and accompanying text.

⁴³³ See *supra* notes 307-312 and accompanying text.

⁴³⁴ WRIGHT, *supra* note 14, at 184.

⁴³⁵ *Id.*

⁴³⁶ *Id.*

Proctor, realized that witch courts most insidiously crucify not just individuals, but also sacrosanct privacy.

The *Bowers* Court, suggesting that laws can be based on the supposed longstanding moral and religious condemnation of same-sex relations, served to catalyze witch hunts for almost two decades.⁴³⁷ In the fairly recent decision, *Lawrence v. Texas*, which overruled *Bowers*, the Supreme Court defended the very private sphere that resides at the core of both *The Crucible* and *Harvard's Secret Court*.⁴³⁸

The *Lawrence* case arose when police, responding to a reported weapons disturbance, entered an apartment and saw Lawrence making love with another man.⁴³⁹ The police arrested the men, who were ultimately convicted of deviate sexual intercourse in violation of the Texas sodomy statute.⁴⁴⁰ The state court of appeals, following *Bowers*, affirmed the convictions.⁴⁴¹

The case went to the Supreme Court, which predicated its reversal on a right of "privacy" under the Due Process Clause. In the majority opinion, authored by Justice Kennedy, the Court recognized that the *Bowers* Court had failed to "appreciate the extent of the liberty at stake"⁴⁴² and that criminalization of consensual sodomy has "more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home."⁴⁴³ The Court said that adults have the right to choose to enter into relationships within the privacy of their own homes, which is inherent in "their dignity as free persons," and that our Constitution gives homosexuals the liberty to make the same choice.

The *Lawrence* Court relied on *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁴⁴⁴ and *Romer v. Evans*⁴⁴⁵ as cases enervating *Bowers*.⁴⁴⁶ In *Casey*, the Court had confirmed

⁴³⁷ *Bowers v. Hardwick*, 478 U.S. 186 (1986); see also RONNER, *supra* note 15, at 4-6 (discussing *Bowers* and its legacy).

⁴³⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴³⁹ *Id.* at 562.

⁴⁴⁰ *Id.*

⁴⁴¹ *Lawrence v. State*, 41 S.W.3d 349, 362 (Tex. App. 2001), *rev'd*, *Lawrence*, 539 U.S. 558.

⁴⁴² *Lawrence*, 539 U.S. at 567.

⁴⁴³ *Id.*

⁴⁴⁴ 505 U.S. 833 (1992).

⁴⁴⁵ 517 U.S. 620 (1996).

⁴⁴⁶ *Lawrence*, 539 U.S. at 573-74.

that individuals enjoy broad constitutional protection with respect to marriage, procreation, contraception, family relations, child rearing, and education.⁴⁴⁷ The *Lawrence* Court said that homosexuals can and should exercise the same autonomy.⁴⁴⁸ Although the Court hung its hat on the Due Process Clause, not equal protection, it nevertheless cited *Romer* and repeated that a law “born of animosity toward the class of persons affected” lacked the requisite rational relation to a legitimate governmental purpose.⁴⁴⁹

From the vantage point of a post-*Lawrence* world, it is all too easy to dismiss Salem witch hunts and Harvard’s Secret Court as mere relics from the past. It is likewise a little too convenient to relegate Tim Hardaway’s hate words to the genre of vulgar ignorance, as an anomaly in a diversified today.⁴⁵⁰ As discussed above, homophobic witch hunts are still with us, gunning at minorities and effectively depriving them of basic rights and benefits.⁴⁵¹ There are also judicial witch hunts in the form of decisions like the one in *Lofton v. Secretary of the Department of Children and Family Services*, in which a federal appellate court rejected a constitutional challenge to a state ban on homosexual adoption.⁴⁵²

Courts have for a long time justified discrimination against gay and lesbian parents on the basis of sodomy laws, which as Justice O’Connor said in *Lawrence*, criminalize conduct “closely correlated with being homosexual.”⁴⁵³ The *Lawrence* Court’s invalidation of such laws, protection of the right to privacy, and overruling of *Bowers* should have eliminated any such pretext for depriving homosexuals of adoption rights. As Professor Laurence H. Tribe has pointed out, the beauty of the *Lawrence* decision is its broad “protecti[on of] the right of adults to define for themselves the borders and contents of deeply personal human relationships”

⁴⁴⁷ *Id.*

⁴⁴⁸ *But see* *Washington v. Glucksberg*, 521 U.S. 702 (1997) (upholding a law prohibiting assisted suicide and rejecting a claim that the Constitution protects a “right to die”). The *Glucksberg* Court had a perspective on the Due Process Clause similar to *Bowers* (compare *Glucksberg* at 710-11 with *Bowers*, 478 U.S. at 192-95) that is in conflict with the *Lawrence* decision, which did not cite *Glucksberg*, although it might have implicitly undermined it. *See Lawrence*, 521 U.S. at 578-79.

⁴⁴⁹ *Lawrence*, 521 U.S. at 574 (citing *Romer*, 518 U.S. at 634).

⁴⁵⁰ *See supra* note 325 and accompanying text.

⁴⁵¹ *See supra* notes 322-331 and accompanying text.

⁴⁵² *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004).

⁴⁵³ 539 U.S. at 583 (O’Connor, J., concurring).

along with “the right to dignity and self-respect of those who enter into such relationships.”⁴⁵⁴

After *Lawrence*, the *Lofton* court should have held that the Due Process Clause entitles homosexuals to enjoy their private sphere, along with their intimacies and family bonds free from governmental interference. When courts trample on that innermost sanctum, they not only pander to the very spirit of the evil Danforths and the odious Secret Courts, but also revive their kind of wreckage.

⁴⁵⁴ Tribe, *supra* note 391, at 1915; see also Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL RTS. J. 1429, 1436 (2006) (“*Lawrence*, by creating a space for the protection of private space, allows for a kind of sexual sovereignty that comprises the intersectional prism of privacy, autonomy, and liberty.”); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 60 (2003) (“My guess is that *Lawrence* will . . . inaugurate a set of judgments, from lower courts and the Court itself, that go, in case-by-case fashion, toward eliminating the most arbitrary and senseless restrictions on liberty and equality.”).