SECONDARY EFFECTS: AIDS AND QUEER IDENTITY

JOE ROLLINS*

I. INTRODUCTION

Pornography has been a favorite target of state and local censure for some time, but using AIDS as a reason to regulate adult theaters presents a novel approach to an old policy problem. Regulating public spaces in which HIV transmission might occur was a hotly contested policy option during the early years of the AIDS crisis,[1] and for a while it appeared that the storm had passed, at least at the epicenters of the epidemic. Recently, the "bathhouse" controversy seems to have reignited in New York,[2] but in other places the debate never went away. Throughout the last fifteen years, state and local governments across the United States have used AIDS as a justification for regulating spaces within which male-male sex might occur.[3] The resultant policies are heteronormative, homophobic, and ineffectual. Although they purport to slow the spread of HIV, these policies operate best as a legal means to institutionalize the closet while symbolically purifying a normative and socially constructed heterosexuality.[4] In the end, the impact of such policies on the spread of HIV is slight.[5]

An analysis of policies designed to contain HIV might usefully include a number of variables, and the standard approach operates within

---

* B.A., City University of New York, Hunter College; M.A., C. Phil., University of California, Santa Barbara. I wish to thank Mark Kerr for introducing me to the theories and arguments that give this Essay structure and for patiently indulging my argumentative discussions of its content. I am also grateful to the following individuals for their input and suggestions: Madelyn Detloff, David Lynch, Peter Digeser, Margaret Searles, and Ronda Rollins-Ellison.

1. *See* RONALD BAYER, PRIVATE ACTS, SOCIAL CONSEQUENCES (1989); RANDY SHILTS, AND THE BAND PLAYED ON (1988) (chronicling the controversy surrounding the regulation and closure of bath houses).

2. *See* Sara Miles, *And the Bathhouse Plays On*, OUT, July/August 1995, at 87.

3. *See infra* note 12 and accompanying text.

4. This process of symbolic purification is eloquently explained by Mary McIntosh in her seminal article *The Homosexual Role*, *in* FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY 25, 25-42 (Edward Stein ed. 1990).

5. New HIV infection rates continue to increase each year and women are one of the groups becoming infected most frequently. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL HIV SEROPREVALENCE SUMMARY: RESULTS THROUGH 1992 (1994).

a framework of civil rights, constitutional law, or criminal procedure.[6] Too frequently, however, these discussions overlook the subtleties of identity construction,[7] an oversight that marks most legal discourse concerning AIDS with a distinctively binary conceptualization of sexuality (i.e., gay vs. straight), thereby taking sexual orientation and identity categories as given.[8] This heteronormative approach has three symbolic consequences: first, it produces the subject of a fictitiously stable gay-AIDS identity; second, as a result of the first, it produces the

---

6. *See generally* MICHAEL L. CLOSEN ET AL., AIDS: CASES AND MATERIALS (1989); NAN D. HUNTER & WILLIAM B. RUBENSTEIN, AIDS AGENDA: EMERGING ISSUES IN CIVIL RIGHTS (1992) (surveying issues involving demographics and access to health care in the context of HIV and AIDS); Barry D. Adam, *The State, Public Policy and AIDS Discourse*, 13 CONTEMP. CRISES 1 (1989); Mark Barnes, *AIDS and Mr. Korematsu: Minorities at Times of Crisis*, 7 ST. LOUIS U. PUB. L. REV. 35 (1988); Deborah J. Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739 (1986) (discussing the fine line between regulations protecting public health and those intruding on personal liberties); Comment, *Fear Itself: AIDS Herpes and Public Health Decisions*, 3 YALE L. & POL'Y REV. 479 (1984-85) (discussing states' use of their constitutional police power in AIDS-related actions); Peter B. Kunin, Note, *Transfusion-Related AIDS Litigation: Permitting Limited Discovery from Blood Donors in Single Donor Cases*, 76 CORNELL L. REV. 927 (1991) (arguing that discovery should be denied in multiple-donor cases and limited in single-donor cases to protect donor privacy); Ann Marie LoGerfo, Note, *Protecting Donor Privacy in AIDS Related Blood Bank Litigation*—Doe v. Puget Sound Blood Center, 67 WASH. L. REV. 981 (1992) (arguing the *Doe* court's failure to limit blood donor privacy was incorrect and infringed on both privacy interests of donors and society's interest in adequate blood supply); David Kennnon Moody, Note, *AIDS and Rape: The Constitutional Dimensions of Mandatory Testing of Sex Offenders*, 76 CORNELL L. REV. 238 (1990) (discussing First and Fourth Amendment restrictions on mandatory AIDS testing); Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274 (1986) (arguing the First, Fifth, and Fourteenth Amendments require narrowly-tailored and medically-compelled AIDS regulations); Michael Kirby, *Aids and Law*, 118 DAEDALUS 101 (1989).

7. *See* Anne Schneider & Helen Ingram, *Social Construction of Target Populations: Implications for Politics and Policy*, 87 AM. POL. SCI. REV. 334 (1993) (arguing that effective policy analysis must account for the social construction of the population toward which policy is directed); *see also* Mark C. Donovan, *The Politics of Deservedness: The Ryan White Act and the Social Constructions of People with AIDS, in* AIDS: THE POLITICS AND POLICY OF DISEASE (Stella Z. Theodolou ed., 1996) (applying social constructionist theory to AIDS and public policy).

8. The distinction between identity construction and behavior patterns has been explored at length elsewhere. Some of these more notable works are GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940 (1994) (describing the establishment of the gay community in turn-of-the-century New York); DAVID M. HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY: AND OTHER ESSAYS ON GREEK LOVE (1990); GILBERT H. HERDT, GUARDIANS OF THE FLUTES: IDIOMS OF MASCULINITY (1981) (examining the sexual development and formation of gender identity of the Sambia people in New Guinea); TOMÁS ALMAGUER, *Chicano Men: A Cartography of Homosexual Identity and Behavior in* THE LESBIAN AND GAY STUDIES READER 255 (Henry Abelove et al. eds., 1993) (studying the Chicano male's reconciliation of "gay" behavior adopted from the European-American social system with a Latino culture which does not recognize such a construction).

subject of a fictitiously stable AIDS-exempt heterosexual identity;[9] and third, it ignores the fact that sexual behavior transmits HIV while sexual identity does not. Policies premised upon and directed towards identity-based assumptions rather than actual behaviors will fail. A "straight" reading of AIDS law and policy indicates that governmental attempts to stop new HIV infections have been largely unsuccessful. Unpacking the sexual baggage of this discourse—i.e., undertaking a "queer" reading of AIDS law and policy—suggests an explanation for this lack of success and points to a more effective approach to AIDS policymaking.

But what does it mean to "queer" legal discourse? Martha Umphrey summarized the queer position clearly:

> [T]o talk about "queerness" is to talk about a relation between something perceived to be solid or stable and its destabilization into something else. The "solid" need not be the "normal" and the something else need not be the "pathologized." Rather, the solid is the commonly understood, the taken-for-granted in any given context, standing in relation to its distortion. One focuses not on the identities of those labeled normal and those labeled abnormal, but on the oblique relation between two (or more) identities, positions, or practices that have no certain and timeless definition or content. . . . Thus, the "queered" position is related to and dependent upon the stable position, rather than being a separate position in itself. It undermines the stability of the primary term and opens up the possibility that the solid has never been solid at all.[10]

The oblique relationship between homo- and hetero-identity forms the center of the present analysis, and whereas sexual identity categories are usually included as independent variables, the argument here assumes that they are dependent and volatile variables.

The first part of this Essay examines four case opinions that resulted from regulations purportedly designed to stop HIV transmission. The next section distills from these opinions the models of HIV transmission apparent in each regulation. The final section argues that the HIV transmission models apparent in each opinion are based on a

---

9. See Janet E. Halley, *The Construction of Heterosexuality*, *in* FEAR OF A QUEER PLANET 82 (Michael Warner ed., 1993), for an excellent treatment of the homo/hetero binarism in legal discourse, especially as it impacts equal protection analysis.

10. Martha Umphrey, *The Trouble With Harry Thaw*, 62 RADICAL HIS. REV. 8 (1995).

heterosexist and heteronormative construction of gay male sexuality and therefore mask the very real potential for heterosexual HIV transmission.

II. CASE LAW

Each of the four cases[11] examined below was generated by a statute or ordinance passed in one of the following locations: The State of Delaware, the county of Marion, Indiana, and the cities of Dayton, Ohio and Minneapolis, Minnesota.[12] Since each law regulated the adult-entertainment industry, lawsuits challenging the regulations were brought by the owners and customers of adult-entertainment establishments in each jurisdiction.[13] All four laws stated containment of HIV as a primary objective and, in each case, building codes were the policy tools of choice.[14] In other words, the legislative bodies set out to contain HIV by regulating the design, structure, and lighting of buildings within which high-risk sex might occur.[15]

The design of the physical structures was similar in all four cases. Each theater containing viewing booths like those described in *Bamon Corp. v. City of Dayton*—"totally enclosed, constructed with floor-to-ceiling walls, and contain[ing] a full length door that [could] be locked by the patron from the inside."[16] Judge Gibson's opinion in *Doe v. City of Minneapolis* provided a synopsis of the ordinance in that case which accurately summarizes the laws challenged in each of the other three. In each instance, the law:

> (1) prohibited the construction, use, design, or operation of a commercial building for the purpose of engaging in, or permitting persons to engage in, sexual activities which include high risk sexual conduct; (2) specifically prohibited partitions between subdivisions with apertures designed or constructed to facilitate sexual activities

---

11. *See* Mitchell v. Comm'n on Adult Entertainment Establishments, 10 F.3d 123 (3d Cir. 1993); Bamon Corp. v. City of Dayton, 923 F.2d 470 (6th Cir. 1991); Berg v. Health and Hosp. Corp., 865 F.2d 797 (7th Cir. 1989); Doe v. City of Minneapolis, 898 F.2d 612 (8th Cir. 1990).

12. *See* Adult Entertainment Establishments Act, DEL. CODE ANN. tit. 24, §§ 1601-1635 (1984); Marion County Ind. General Ordinance No. 5-1985(A); DAYTON, OHIO, CODE OF GENERAL ORDINANCES §§ 136.08-09; MINNEAPOLIS, MINN., CODE OF ORDINANCES §§ 219.500-.530.

13. The cases were selected through a Westlaw search using the terms "acquired immune deficiency," "HIV," and "video." A search for these terms yielded several unrelated cases but the four examined here are a representative sample of federal appellate court cases dealing with the same policy for regulating HIV as of mid-1995.

14. *See supra* note 12 and accompanying text.

15. *Id.*

16. *Bamon*, 923 F.2d at 472.

> between persons on either side of the partition; and (3) provided that booths or stalls have at least one side open so that the area inside is visible to persons in the adjacent public room if the booth is used to view motion pictures or other forms of entertainment.[17]

The laws also regulated the intensity of the lighting within the theaters. In *Bamon*, the ordinance required lightbulbs of twenty-five watts or greater,[18] and in *Berg*, the ordinance required that lighting must be such that persons in the viewing booths would be visible to persons in the adjacent rooms.[19] Additionally, the statute in *Mitchell* restricted operation to "the hours between 10:00 a.m. and 10:00 p.m. Monday through Saturday" and required the business to remain closed on Sundays and legal holidays.[20]

The plaintiffs in all four cases challenged the new regulations on First Amendment grounds, alleging that the statutes presented a prior restraint on expressive activities.[21] Central to this line of argument, therefore, was the distinction between content-based and content-neutral regulations. Although the United States Supreme Court has afforded some First Amendment protection to sexually explicit, nonobscene performances,[22] the Court in *Barnes v. Glen Theatre, Inc.* determined that some expressive activities were only "marginally" protected.[23] While the Court did not grant states *carte blanche* authority to prohibit sexually explicit performances, "the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."[24]

The resulting classification scheme makes it possible for legislative bodies to impose regulations on "adult" businesses, defined by the type of materials they disseminate, without impinging on the First Amendment rights of "legitimate" business owners. Businesses that

---

17. *Doe*, 898 F.2d at 613-14.

18. *Bamon Corp.*, 923 F.2d at 471.

19. Berg v. Health and Hosp. Corp., 865 F.2d 797, 806 (7th Cir. 1989) (App. A: legislative findings).

20. Mitchhell v. Comm'n on Adult Entertainment Establishments, 10 F.2d 123, 128 (3d Cir. 1993).

21. *See, e.g.*, *Berg*, 865 F.2d at 801-02.

22. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (granting First Amendment protection to some forms of nude dancing); Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (affording First Amendment protections to live entertainment including nude dancing); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (providing First Amendment protections to public movies containing nudity).

23. *Barnes*, 501 U.S. at 566.

24. Young v. American Mini Theatres, Inc., 427 U.S. 50, 70-71 (1976).

disseminate sexually explicit fare can be regulated on that basis alone without references to the content of the materials that define them as adult businesses. Furthermore, although the states may not expressly prohibit sexually related expression, they may regulate other socially adverse conditions arising from the operation of adult businesses. Conceptually, this requires the assumption that adult businesses are the cause of other social ills like litter, traffic, noise, and crime. As Judge Hutchinson asserted in *Mitchell*:

> [I]f the regulation of sexually explicit materials is aimed primarily at suppression of First Amendment rights, then it is thought to be content-based and so presumptively violates the First Amendment. But if the regulation's predominate purpose is the amelioration of socially adverse secondary effects of speech-related activity, the regulation is content-neutral and the court must measure it against the traditional content-neutral time, place, and manner standard.[25]

Accepting the stated purpose of these four laws—containment of HIV—the judges in each case used HIV as an additional factor, a secondary effect, to support the logic of their decisions upholding the regulations.[26] While the First Amendment questions in these cases are not novel, relying on HIV as a secondary effect of pornography is an innovation.[27] Although First Amendment issues clearly dominate all four opinions, the plaintiff in *Doe* also asserted that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment because the restrictions applied only to bookstores and not to hotels, motels, and condominiums. The latter three could fall within the ordinance as locations facilitative of high-risk sexual activity.[28]

In each case the judges found that the laws in question were directed at the secondary effects of pornography and not at the pornography itself. Thus, their opinions reviewed the time, place, and

---

25. 10 F.3d at 130 (citation omitted).

26. In *Young*, 427 U.S. at 84-88, Justice Stewart argued in dissent that the ordinance at issue in that case was not content-neutral because it classified theaters based upon the content of the films shown. Thus, the specious neutrality of content-based classification of theatres has not gone unnoticed at the level of the Supreme Court. This same argument appears more forcefully in Justice Brennan's dissent in *City of Renton v. Playtime Theaters*, 475 U.S. 41, 55-65 (1986) (Brennan J., dissenting).

27. The judges in each case make references to HIV as the secondary effect of pornography. *See Mitchell*, 10 F.3d at 129; *Bamon*, 923 F.2d at 473; *Berg*, 865 F.2d at 799; *Doe*, 898 F.2d. at 614.

28. *See Doe*, 898 F.2d at 621-22.

manner restrictions established by the laws. The applicable test was drawn from *Ward v. Rock Against Racism*:

> [T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided restrictions "are [1] justified without reference to the content of the regulated speech, that they are [2] narrowly tailored to serve a significant governmental interest, and that they [3] leave open ample alternative channels for communication of the information."[29]

The first hurdle of this test was easily cleared in each case. In *Berg*, Judge Manion opined that the ordinance was clearly content neutral because it "would apply to a showing of 'Rebecca of Sunnybrook Farm' as well as any other film or performance."[30] Given the wording of the ordinance, however, this would depend on whether "Rebecca of Sunnybrook Farm" was being shown in a manner or structure intended to facilitate sexual activity. The finding of content neutrality prevailed in all four opinions, and Judge Manion's reference to "Rebecca of Sunnybrook Farm" is quoted by Judge Hutchinson in *Mitchell*.[31]

The second hurdle of the First Amendment test was cleared by each of the laws as well. As Judge Manion stated in *Berg*:

> The ordinance also serves a legitimate government objective. HHC [Health and Hospital Corporation] has the responsibility "[t]o protect, promote or improve public health" and to "control disease" within Marion County . . . . Further, combating the spread of a deadly disease which has no known cure doubtless constitutes a legitimate governmental objective.[32]

While stopping the spread of HIV is unarguably a significant government interest, the second prong of the test requires narrowly tailored laws. This posed no problem in any of the opinions, however, and Judge Manion confidently asserted, "Berg identified no less restrictive

---

29. 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)); *see also* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).

30. *Berg*, 895 F.2d at 802 (quoting Doe v. City of Minneapolis, 693 F. Supp. 774, 780 (D. Minn. 1988)).

31. *Mitchell*, 10 F.3d at 140.

32. *Berg*, 865 F.2d at 803 (citing IND. CODE § 16-12-21-28 3(i) (1976)). This quotation is thick with the social construction of AIDS. Stopping the "spread" of a "deadly disease" with "no known cure" implies that AIDS was previously confined to a natural (homosexual) population which is irrevocably doomed. *See* JAN ZITA GROVER, *AIDS: Keywords*, *in* AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM 17 (Douglas Crimp ed., 1988).

alternatives, nor do we think any exist."[33] Accordingly, the judges upheld the laws and implied that building codes are an effective and nonintrusive means of slowing the spread of HIV. The resultant rhetorical maneuvers are designed to convince the reader that AIDS is being regulated, not pornography, and certainly not sex.

The third hurdle of the *Ward* test is met when the law leaves open ample alternatives for the expressive activity in question by adopting the least restrictive means available for achieving its goals. This requirement received considerable attention from Judge Hutchinson in *Mitchell* and Judge Gibson in *Doe*. In *Mitchell* the plaintiffs attempted to find a less restrictive means of stopping high-risk sex by offering to install saloon-type doors on video booths.[34] Theoretically, this would allow persons outside the booth to see the legs of whoever was inside, thereby allowing enumeration of occupants so that a "one customer per booth" rule could be enforced. The plaintiffs also proposed spacing the booths one foot apart from each other so that interactive sex could not take place through apertures in the walls separating the booths. The plaintiffs in *Doe* made similar arguments, but in each case the judges were unpersuaded. As Judge Hutchinson stated in *Mitchell*:

> Delaware did not have to adopt the means Adult Books preferred to regulate the undesirable health effect of the marginally protected speech and expression it purveys. The state must be allowed a reasonable opportunity to experiment with solutions to problems. . . .[35]

Presumably, AIDS is the "undesirable health effect" at issue and is, according to the structure of this statement, caused by pornography. The rhetorical mechanism of the "secondary effect" slips into the background and the "open door" regulations stand. The judges reasoned that the showing of films within the booths would be unimpaired by the lack of

---

33. *Berg*, 865 F.2d at 804.

34. *Mitchell*, 10 F.3d at 129.

> The express purpose of the open-booth amendment was to prevent high-risk sexual contact. Adult Books therefore asked the Commission to rule that booths equipped with doors that would conceal a patron's head, arms and torso but expose his legs would comply with the new open-booth requirement. . . . The Secretary . . . notified Adult Books . . . that "'Dutch doors,' saloon style swinging doors, and doors with a 24-inch plexiglass panel at the bottom are not 'open to an adjacent public room,'" as the text of the open-booth amendment requires. *Id.* (quoting Appellant's App. at 249-50).

35. *Mitchell*, 10 F.3d at 143.

doors, while the secondary effect—HIV transmission—could be stopped by allowing employees and police to monitor patrons using the booths.

III. JUDICIAL MODELS OF HIGH-RISK SEX

These types of regulations have a history of success in constitutional terms and thus their legal legitimacy is beyond doubt. However, the models of HIV transmission present in each case and the ways in which those models are employed merit closer attention. Two questions guide this analysis. First, what is the legislature attempting to stop in each of these cases? Second, how has the legislature attempted to stop it? As a prelude to this examination it is useful to reiterate that HIV is transmitted through an exchange of bodily fluids—blood, semen, vaginal secretions, or breast milk.

In *Berg*, Judge Manion stated that the ordinance was designed to combat "high risk sexual activity with multiple partners."[36] He also observed that it was designed to "curtail anonymous high-risk sexual activities and, thus, the spread of AIDS."[37] In a footnote, Judge Manion quoted the ordinance's definition of high-risk sexual activity as "fellatio and anal intercourse."[38] Judge Gibson, also in a footnote, stated: "The city council defined high risk sexual conduct as: (1) fellatio; (2) anal intercourse; or (3) vaginal intercourse with persons who engage in sexual acts in exchange for money."[39] In *Mitchell*, Judge Hutchinson construed the statute as an attempt to curb "unprotected promiscuous sexual activity."[40] This reference to the concept of "protected" sex is unusual in these opinions.[41] Quoting from Delaware Senate Bill No. 164, the opinion stated:

> Magazine and newspaper articles, from time to time, contain articles relating to "anonymous sex" which takes place within certain adult entertainment establishments or similar places. It is the basic premise of this Act that such conduct is conducive to the spread of communicable disease; and is not only a danger to persons frequenting

36. *Berg*, 865 F.2d at 799.
37. *Id.* at 800.
38. *Id.* at 799.
39. Doe v. City of Minneapolis, 898 F.2d 612, 614 (8th Cir. 1990).
40. *Mitchell*, 10 F.3d at 140.
41. References to "unsafe" and "unprotected" sexual activity appear at *Mitchell*, 10 F.3d at 140, 143; *Doe*, 890 F.2d at 621; *Berg*, 865 F.2d at 804. References to "safer" or "protected" sexual activity are completely absent.

> the adult entertainment establishment, or those engaged in such conduct, but it is also of danger to the [public].[42]

Presumably, the persons using these theaters are not part of the public, which logically means that they are part of some "other" identifiable subgroup, most likely, homosexuals.[43]

Taken as a group, these laws designate four specious components of high-risk sex which are examined repeatedly throughout the opinions; references to exchanging bodily fluids are notably absent. The first specious component of high-risk sex, according to these opinions, is multiple partnering or promiscuity. Judge Manion's opinion in *Berg* cited testimony from a Marion County Health Official who attested to the rapid increase in the spread of AIDS due to "engaging in high-risk sexual activity with multiple partners."[44] In *Mitchell*, Judge Hutchinson stated that the ordinance would deter "promiscuous sexual contacts that can spread deadly disease."[45] The possibility of high risk sexual activity with a single partner does not raise any concern. Neither the laws nor the opinions acknowledge that AIDS can be spread to nonpromiscuous, monogamous partners who may be waiting at home.

A second component of unsafe sex, according to these opinions, is anonymity.[46] Once again the judges have included something not essential for HIV transmission in a definition of high-risk sex. People can have anonymous sexual encounters without transmission of HIV and, conversely, HIV is transmissible between people who know each other quite well.

A third component of unsafe sex as defined in these opinions references specific sexual acts. In *Berg*, Judge Manion defined "high risk" sexual activity, for the uninformed reader, as "fellatio and anal intercourse."[47] These acts were also specified in *Doe*. Once again, the acts themselves were defined as high risk without any qualification regarding how body fluids are exchanged or how such exchanges can be prevented. The only qualification in these opinions exempts vaginal (heterosexual) intercourse from the repertoire of high-risk sexual activities, provided it is noncommercial. Realistically, the acts outlined in the laws pose no particular risk for the transmission of HIV and are

---

42. *Mitchell*, 10 F.3d at 141.

43. See GROVER, *supra* note 32, at 17 for an analysis of this rhetorical removal of Persons with Aids (PWAs) from an ostensibly "general public."

44. *Berg*, 865 F.2d at 799 (footnote omitted).

45. *Mitchell*, 10 F.3d at 143.

46. This component appears in *Berg*, 865 F.2d at 803, and in *Mitchell*, 10 F.3d at 143.

47. *Berg*, 865 F.2d at 799 n.3.

possible during male-female sexual intercourse. However, the statutory construction of risk is associated only with acts that fall outside the purview of reproductive intercourse. As so often in AIDS legal discourse, the subjects are male; women, aside from sex workers, are conspicuously absent.[48]

According to the *Doe* opinion, money is a fourth component of high-risk sex.[49] This aspect of the statute is apparently directed at heterosexual prostitution. Although prostitution involves numerous and varied risks, an exchange of money is neither necessary nor sufficient for transmission of HIV. Presumably, the risks of HIV transmission from male-male prostitution would be included by references to fellatio and anal sex, but this gender configuration is oddly exempted by the definition explicitly linking monetary exchange with vaginal intercourse. As described here, the act of prostitution assumes a male consumer who must be protected from a possibly infectious female vendor. Aside from this reference to commercialized male-female sex, the obvious association of HIV with male-male sexual behavior is pervasive, and each statute contains provisions designed to allow the state to monitor individuals engaging in such behavior.

Taken together, these aspects of the statutes and ordinances suggest that the state has chosen to regulate male-male sex, with surprisingly Foucaultian results. Each statute contains "open door" provisions intended to facilitate police scrutiny. Combined with the lighting requirements and restrictions on the hours of operation, it becomes apparent that the purpose of these regulations is identification of adult theater patrons. The state insures that it has access to the booths within the theaters, that police officers will be able to identify the occupants within the booths, and that traffic into and out of the theaters will be restricted to times that are convenient for surveillance. These requirements echo Foucault's discussion of the Panopticon, the spatial and architectural arrangement designed to extend the reaches of state

---

48. That the government should seek to protect prostitutes from HIV is never suggested. As in much sociolegal discourse, prostitutes are rhetorically deprived of their status as citizens and instead are constructed primarily as vectors of disease. For more detailed analysis of this construction and its attendant policy ramifications, see CINDY PATTON, INVENTING AIDS (1990), BETH E. SCHNEIDER & NANCY E. STOLLER, WOMEN RESISTING AIDS: FEMINIST STRATEGIES OF EMPOWERMENT 100 (1995) and ALLAN M. BRANDT, NO MAGIC BULLET: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880, 19-40 (1985) (arguing that the spread of venereal disease from prostitutes to other women was additional ammunition for the puritan crusades against prostitution).

49. Doe v. City of Minneapolis, 898 F.2d 612, 614 (8th Cir. 1990).

power by expanding the mechanisms of surveillance.[50] For Foucault, the possibility of continual state surveillance signaled the deployment of a subtle, pervasive, and constant mode of power that began with the architecture of the prison but was soon incorporated into the design of the hospital, the school, the mental institution, and the factory, "induc[ing] in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power."[51] Thus, knowing that he is always being watched, the subject will conform to regulatory dictates and the actual brute usage of power becomes unnecessary. By adding the adult theater to the list of institutions that facilitate surveillance, the state can enforce a heterosexual norm without exposing the process by which it attempts to do so. In theory, surveillance is sufficient to insure compliance.

In response to the plaintiff in *Mitchell* who offered to put saloon doors on the booths in his establishment, Judge Hutchinson, employing contortionist judicial imagination, offered the following: "a partial door would not necessarily prohibit an individual from engaging in sexual intercourse with others in the same booth because he could simply hold his or her [sic] partner so that his or her legs would not be exposed."[52] The logic behind this response is questionable. The owners of the establishments offered to make modifications that would be much more expensive than simply removing existing doors. Spacing the booths apart and changing the doors altogether would undoubtedly incur great costs to the owners. It would, however, circumvent an unstated purpose of the regulations—the identification of patrons using the booths. Surveillance and identification are unrelated to stopping HIV; they are necessary, however, to the maintenance of the closet and to the construction of heterosexuality. In order for the state to enforce a heterosexist norm,

---

50. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 200 (Alan Sheridan, trans., Vintage Books 1979) (1975).

> Bentham's *Panopticon* is the architectural figure of this composition. We know the principle on which it was based: at the periphery, an annular building; at the centre, a tower; this tower is pierced with wide windows that open onto the inner side of the ring; the peripheric building is divided into cells, each of which extends the whole width of the building; they have two windows, one on the inside, corresponding to the windows of the tower; the other, on the outside, allows the light to cross the cell from one end to the other. All that is needed, then, is to place a supervisor in a central tower and to shut up in each cell a madman, a patient, a condemned man, a worker or a schoolboy. . . . The panoptic mechanism arranges spatial unities that make it possible to see constantly and to recognize immediately. . . . Visibility is a trap.

51. *Id.* at 201.

52. Mitchell v. Comm'n on Adult Entertainment, 10 F.3d 123, 143 n.21 (3d Cir. 1993).

sexual transgressors must see themselves as deviant subversives who resist identification. Ergo, the state redesigns the video arcade in the service of panopticism.

IV. THE CLOSET AND AIDS POLICY: A QUEER ANALYSIS

If these laws are incapable of achieving their stated purpose, what else might they accomplish? Perhaps the intended but unspecified target of these regulations was pornography. However, this seems improbable since neither the laws nor the rulings attempt to stop the dissemination of pornographic material. It is also conceivable that these laws were designed to supplement ineffectual laws prohibiting sodomy or prostitution, but fellatio and anal intercourse were already illegal in Minnesota at the time *Bamon* was filed,[53] and prostitution was illegal in all four jurisdictions long before any of these cases came to court.[54] Given the statutes already in existence, it seems that additional regulations would be redundant.

In these opinions anonymous sex, multiple partnering, fellatio, anal sex, and prostitution are marked as the causes of AIDS, not because they are acts or circumstances that necessarily facilitate the transmission of HIV, but because their exclusion from the dominant sexual system is necessary for the maintenance of a positively constructed heterosexual identity and its attendant privileges. Each of the specified sexual acts is regulated because it falls outside the norm of reproductive male-female intercourse and, with the exception of clauses directed at prostitution, each is associated with the dominant construction of gay male sexuality. All of the acts specified could occur during male-female sexual encounters, and prostitution occurs between men as well, but designating these acts as definitively gay reinforces the discourse of "punitive fidelity."[55] The monogamous, reproductive, heterosexual union is symbolically situated as the only place to remain safe from AIDS.

Regulating all sex acts is impossible and sharply at odds with American standards of democracy and liberty. Furthermore, it is unlikely that most policymakers truly want to prohibit the sex acts in question. What policymakers actually regulate are identity categories and what is required, therefore, are policy tools that will effectively regulate sexual

---

53. *See* MINN. STAT. ANN. § 609.293 (1987).

54. *See* DEL. CODE ANN. tit.11, § 1342 (1953); IND. CODE § 35-45-4-2 (1976); MINN. STAT. § 609.32 (1976); OHIO REV. CODE ANN. § 2907.25 (1972).

55. This is Simon Watney's phrase. *See* POLICING DESIRE: PORNOGRAPHY, AIDS AND THE MEDIA (1987).

identity without encroaching upon the private space established to protect the sanctity of reproductive heterosexual unions. Statutes designed to regulate and enforce the homo-hetero-binarism depend upon a hierarchically organized system of sexuality and require effective operation of the closet.

At the beginning of *Epistemology of the Closet* Eve Sedgwick argues that "many of the major nodes of thought and knowledge in twentieth-century Western culture as a whole are structured—indeed, fractured—by a chronic, now endemic crisis of homo/heterosexual definition, indicatively male, dating from the end of the nineteenth century."[56]

The closet defines the relationship between what is known and what is unknown in our culture—that which is explicit as opposed to that which is inexplicit.[57] Sedgwick's theory places the closet at the center of sexual definition in our culture, and thus heterosexuality is defined in bas relief, positioned against is binary opposite, homosexuality. This epistemological process places heterosexuality in a position of cultural superiority by granting benefits and privileges to persons identified as heterosexual, holding up heterosexual unions as paradigmatic positive social goods, and relegating homosexuality to a cultural position of shame, illegality, and moral opprobrium. AIDS legal discourse relies upon this homo-hetero binarism in order to produce a Foucaultian juridical subject and then regulate it.[58] As Judith Butler argues, "[t]he question of 'the subject' is crucial for politics, because juridical subjects are invariably produced through certain exclusionary practices that do not 'show' once the juridical structure of politics has been established."[59] The closet allows the state to promote the privileges and benefits of heterosexuality while penalizing alternative variations on sexual identity and behavior. The AIDS crisis lends itself to the furtherance of these heterosexist interests when specious public health measures are concocted and aimed at specific segments of the population.

A process of erasure is at work here and the closet functions as the operative exclusionary mechanism; a heteronormative and heterosexist construction of identity categories does not "show" when homosexuality is conspicuously situated as the target of regulation.

---

56. EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 1 (1990).

57. *See id*. at 3.

58. *See* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: VOLUME 1, AN INTRODUCTION 83 (Robert Hurley, trans., Vintage Books 1990) (1976).

59. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 2 (1990).

Heterosexual behaviors and identities are absent from these statutes and opinions but are constructed by designation and regulation of what they are not; thus, the regulatory mechanisms are erased. Furthermore, the statutes, ordinances, and opinions examined here are nonsensical absent the closet. In other words, they fail to function if their intended targets are immune to or not intimidated by the prospect of surveillance and identification. This is also made clear by what these statutes and opinions omit as targets of regulation: noncommercial heterosexual transmission between partners who know each other—the group, one might argue, the state would most want to protect from HIV. These statutes, ordinances and opinions primarily serve to ritually purify the male-female nexus of the traditional heterosexual reproductive family unit by constructing a diseased homosexual who is ostensibly not a member of the desirable social group.[60] Preventing HIV transmission is the stated target of these regulations, but they are incapable of achieving their goal. Gay male sexual identity is reified through the process of public identification and the heterosexual penis maintains its position of cultural privilege behind a cloak of privacy; it remains invisible to and exempt from the gaze of the state.

Gayle Rubin's hierarchy of sexual value casts "good sex" as "heterosexual, marital, monogamous, reproductive, and non-commercial."[61] "Bad sex," she argued, is constructed as "homosexual, unmarried, promiscuous, non-procreative, or commercial. It may be masturbatory or take place at orgies, may be casual, may cross generational lines, and may take place in 'public,' or at least in the bushes or the baths."[62] This distinction assumes a theory of sexual peril. Ergo, "if anything is permitted to cross this erotic DMZ" between good and bad sex, "the barrier against scary sex will crumble and something unspeakable will skitter across."[63] In order to maintain heterosexuality, the border between heterosexual and homosexual identity must be patrolled. Homosexual and heterosexual identities must occupy positions on opposite sides of a border which is buttressed into place by the closet. Assigning value to what is defined as "good sex" cloaks "bad sex" with an aura of shame. "Good sex" is so private, so sacrosanct, so necessary to our political system that it has become invisible and is conspicuously

---

60. See CHAUNCEY, *supra* note 8, for an application and demonstration of this process and its use of Sedgwick's thesis.

61. Gayle Rubin, *Thinking Sex*, *in* THE LESBIAN AND GAY STUDIES READER 13 (Henry Abelove et al. eds., 1993).

62. *Id.* at 14.

63. *Id.*

absent from the above opinions. Male same-sex interaction is constructed as shameful, wrong, immoral, and disgusting. It is assumed that men who engage in such activity will fall prey to the self-flagellation deemed appropriate of porn consumers. Adult theater patrons are men who engage in "bad sex" and must see their behavior as consonant with this construction for the policies discussed here to be effective. In other words, the patrons must subscribe to cultural norms. Sexuality is arranged according to Rubin's hierarchy and the closet is the epistemological structure that keeps the system in check.

The individuals who patronize adult-entertainment theaters are assumed to fall within the boundaries of gay identity because they engage in same-sex behavior. The argument looks like this: (1) Gay men require a closet; (2) gay men have AIDS; (3) remove the closet; (4) stop gay men; (5) stop AIDS. But engaging in same-sex sexual activity does not necessitate adopting a gay identity as it is constructed. The policies discussed require a gay identity that is predicated upon adopting a socially constructed role,[64] but without the stigma and shame the dominant heteronormative culture assigns to that role the policies cannot achieve their stated purpose. Policymakers assume that adult theater patrons suffer the ignominy of the closet and will strive to avoid identification. They assume that people outside the closet neither identify as homosexual nor commit homosexual acts.[65] But as the gap between behavior and identity widens, these underlying assumptions appear to be false. Coming out as gay or lesbian is a process of rejecting the stigma and shame that the dominant culture assumes gay men and lesbians should feel. Being "out" means moving freely in public space while identifying oneself as gay or lesbian. By definition, men who remain in the closet are those who publicly identify themselves as heterosexual while engaging in sexual activity with other men. Within the sexual system established by these statutes, ordinances, and opinions, the ostensibly "straight" patrons of adult theaters who do not adopt a gay identity can continue to perceive of themselves as exempted from AIDS and may exempt themselves from HIV prevention education as well.[66]

---

64. *See* WILLIAM H. DUBAY, GAY IDENTITY: THE SELF UNDER BAN 111-29 (1987) (discussing social role adoption).

65. *See* Halley, *supra* note 9.

66. Studies of the linkages between identity construction and propensity for engaging in high-risk sexual behaviors indicate that ego-dystonic homosexuality may be correlated with high-risk sexual behavior. *See* GREGORY M. HEREK & BEVERLY GREENE, AIDS, IDENTITY, AND COMMUNITY: THE HIV EPIDEMIC AND LESBIANS AND GAY MEN 74-77 (1995).

In *Doe*, an appellant named Campbell, described as a gay activist, testified regarding the "sexual habits" of the gay community. He stated that "the booths were a physical setup that [could] be converted to that [sexual] use. The bookstore cubicle is best for watching a movie in, but an alternative use is highly possible and frequently seen in my experiences for uncommitted, anonymous pseudo sex [sic].' Campbell also stated that bookstore sex has a legitimate function in that '[i]t provides people with an opportunity to try it and see if they like it, to try a form of pseudosex to get their toes in the water.' Campbell concluded that the new ordinance would not decrease the number of sexual encounters considered to be high risk, but would only push them into more dangerous situations."[67]

This testimony, offered in defense of the adult entertainment establishment, is clearly intended to support and protect the sexually "unsure." Campbell's testimony is driven by an understanding of the coming-out process and the need to maintain opportunities for disseminating information on safer sexual practices. Judge Gibson responded by stating, "[t]he net result of this testimony is clear; sexual encounters occur in bookstore booths."[68] The import of Campbell's testimony was ignored and Judge Gibson concluded that the "health risk results from the booth being closed."[69] Safer sex becomes irrelevant; identification and border patrol emerge as dominant themes.

The appellants in *Doe* raised an argument unique to that particular case. They asserted that the ordinance denied the bookstore owner equal protection because it applied only to bookstores. Hotels, motels, condominiums, and rooming houses were specifically excluded from the ordinance despite the fact that unsafe sexual practices would likely occur in such locations.[70] Judge Gibson's response upheld the trial court's rejection of this claim, arguing that "the difficult nature of the health problem presented by the AIDS virus" justifies "giving the City a reasonable opportunity to deal with it."[71]

Judge Gibson also acknowledged that the ordinance does not classify commercial establishments by those that distribute protected material and those that do not. In a footnote, he asserted that the ordinance was "crafted to apply to commercial establishments where high

---

67. Doe v. City of Minneapolis, 898 F.2d 612, 619 (8th Cir. 1990) (alterations in original) (citations omitted).

68. *Id.*

69. *Id.*

70. *Id.* at 621

71. *Id.* at 622.

risk sexual activity is known to occur . . . and those establishments that, by design or use, promote such behavior."[72] The distinction here is between those establishments which might promote high-risk sexual contact and those wherein it might simply happen. Judge Gibson thus implicitly admitted the absurdity of attempting to stop HIV by imposing regulations on all environments wherein high-risk sex might occur. He failed to recognize that HIV can be transmitted by any act of unprotected sex when one partner is HIV positive, in any environment, whether the act is being promoted or simply occurring.

Allowing the trope of the closet to shape fundamentally AIDS-prevention policies is not only ineffective, it is also dangerous. The conflation of AIDS and homosexuality produces policies that are not only incapable of achieving their stated purpose, but also construct a second closet, one containing heterosexual HIV.[73] What Rubin referred to as "good sex" is symbolically and rhetorically exempted from the possibility of HIV transmission despite the unrealistic nature of such an assertion. Human reproduction requires an exchange of bodily fluids and the procreative potential in sexual activity is largely what makes bad sex good.[74] This procreative aspect of "good sex" necessitates constructing a heterosexual-AIDS closet if the dominant sexual and reproductive system in Western culture is to maintain a position of privilege. The non-AIDS versus AIDS binarism currently places heterosexual AIDS into a confined conceptual space that allows the reproductive system outside to exist unfettered by a need to prohibit exchanging bodily fluids. As with the heterosexual-homosexual binarism, the second term must exist as an open secret in order for the first term to make sense.

If state AIDS policies were to acknowledge the necessity of preventing the exchange of bodily fluids, condom distribution or needle exchange programs would take center stage. Policy debates surrounding these alternatives are fraught with moralistic rhetoric, and politicians opposed to such alternatives worry about promoting homosexuality. Such arguments assume that people will begin using illegal drugs and engaging in same-sex sexual activity if they have access to the means of protecting themselves from HIV. This argument seems to assume, somewhat ludicrously, a widespread desire to inject drugs and engage in same-sex sexual activity. Is the public so desperate for intoxication? Is heterosexuality such a fragile institution? Possibly, but this reading

---

72. *Id*. at 622 n.19.
73. Credit for this observation must be given to my friend and colleague, Madelyn Detloff.
74. *See* RUBIN, *supra* note 61; *see also supra* notes 61-63 and accompanying text.

trivializes the magnitude of what is at stake. In order to maintain its position of dominance in the sexual and gender hierarchy, the heterosexual penis must retain unfettered privileges. Honest and realistic attempts to regulate the exchange of bodily fluids would seriously impede the processes of gender dominance and subordination; ergo, identity replaces behavior where state AIDS policy is concerned.

It would be lunacy to suggest that the state should combat unwanted pregnancy by regulating the design, structure, and lighting of all spaces within which heterosexual intercourse might occur. Still, the argument in favor of regulating HIV by regulating gay spaces continues. The effect of this policy approach is to maintain heterosexist legal and legislative norms that rely on and perpetually construct the closet, but fail to recognize the queer perspective: sexuality is fluid and the boundaries between gay and straight are seldom as concrete as they are imagined to be. Men who patronize the establishments targeted by these policies move between the closet and the presumptively heterosexual space outside.[75] The need to maintain the closet as a border between gay and straight identity constructs a gap between identity and behavior, and HIV continues to move through this gap.

It is extremely unlikely that building codes will slow the course of the AIDS pandemic. At a time when the Centers for Disease Control and Prevention report that new seroconversion rates are rising more quickly among women than any other population group,[76] one must stop and wonder if the closet is undermining policy. Men who identify themselves as gay eschew the confines of the closet and are the demographic group least likely to have sex with women. Men who identify themselves as bisexual admit their sexual attraction to other men and also reject the closet.[77] Opening or removing the door to the closet allows its symbolic presence to be maintained while the "dangerous" occupants inside are identified and regulated. What policymakers fail to notice, however, is that the men inside the closet identify themselves as straight despite their sexual activity with other men. If AIDS-prevention policies are to be effective, distinctions between identity and behavior must be taken into account. Policies must be designed to target behaviors

---

75. *See supra* note 4 and accompanying text; *see also* LAUD HUMPHREYS, TEA-ROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES (1970).

76. *See supra* note 5.

77. As Jan Zita Grover argues, the bisexual has been constructed as the true bugaboo of AIDS. The fluidity of his (male pronoun intentional) sexuality is perceived as the reason HIV is transported across the invisible barrier between hetero- and homo-sexuality. *See* GROVER, *supra* note 32.

while avoiding false assumptions about the solidity of categories built around sexual identity. Legally institutionalizing the closet only perpetuates the construction of a divisive hetero/homo binarism, and, to borrow from Rubin's eloquent language, something unspeakable continues to skitter across the fictional DMZ between "good" and "bad" sex.