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FUCKING WITH DIGNITY: PUBLIC SEX, QUEER INTIMATE
KINSHIP, AND HOW THE AIDS EPIDEMIC BATHHOUSE
CLOSURES CONSTITUTED A DIGNITY TAKING

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I. INTRODUCTION

On Friday, March 11, 2016, just before Nancy Reagan’s funeral began, Hillary Clinton offered an unprompted assessment of the former first-lady’s advocacy on AIDS: “It may be hard for your viewers to remember how difficult it was for people to talk about HIV/AIDS in the 1980s. And because of both President and Mrs. Reagan—in particular Mrs. Reagan—we started a national conversation.”¹ This comment unleashed a fury of rebukes on social media.² Within hours, Clinton offered a brief apology.³ This “strange half-apology”⁴ hardly calmed the uproar, with some in the lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) communities

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1. Abby Phillip & Anne Gearan, *Hillary Clinton Apologizes for Praising Nancy Reagan’s Response to HIV/AIDS*, WASH. POST (Mar. 11, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/03/11/hillary-clinton-apologizes-for-praising-nancy-reagans-response-to-hiv-aids/> [<https://perma.cc/C8NH-S7K6>].

2. Peter Staley’s response is illustrative: “Thank god I’m not a single issue voter, or she would have lost my vote with this insulting and farcical view of early AIDS history. Hillary just said that the Reagans helped start a “national conversation” about AIDS. WTF!!!!” Mathew Rodriguez, *Ronald and Nancy Reagan Ignored the AIDS Crisis and You Know It, Hillary Clinton*, MIC (Mar. 11, 2016, 4:35 PM), <https://mic.com/articles/137718/ronald-and-nancy-reagan-ignored-the-aids-crisis-and-you-know-it-hillary-clinton#.kXEj2Ek5p> [<https://perma.cc/9BTA-2FVR>].

3. Phillip & Gearan, *supra* note 1.

4. David Atkins, *How Clinton’s Reagan-AIDS Gaffe Helps Explain Why Populism Is Rising*, WASH. MONTHLY (Mar. 12, 2016, 1:31 PM), <http://washingtonmonthly.com/2016/03/12/how-clintons-reagan-aids-gaffe-helps-explain-why-populism-is-rising/> [<https://perma.cc/5F9X-QX9S>].



calling it “making matters far worse.”⁵ On Saturday, Clinton issued a second statement that more fully recognized the history of LGBTQ activism to combat HIV as well as offered a set of policy proposals that would guide her potential presidential administration’s aims of eradicating HIV.⁶ She called her praise of the Reagans “a mistake, plain and simple.”⁷ Her initial gaffe and her responses raise a set of questions. Why did her original statement provoke such anger, frustration, and pain? Why was her first apology considered insufficient? Why was the second apology considered better?

Clinton’s unwarranted praise of the Reagans on HIV/AIDS activism, the limits of her first apology, and her expanded second apology lay bare the dynamics of how dignity can be taken and the efforts by which it may be restored through apology, accountability, and action. To erase the efforts of LGBTQ persons who had worked tirelessly to respond to the HIV/AIDS crisis, to offer praise to the individuals who ignored, if not exacerbated, the crisis, and to call this revisionism an error of misspeaking all assaulted the dignity of LGBTQ communities. Her original statement about the Reagans perpetuated the “painful experience of non-recognition that lesbians and gay men sometimes experience in heteronormative society,” which sociologist Deborah Gould names “social annihilation”⁸ and which is evidenced by the simple fact that President Reagan refused to even publicly mention the disease until 1987.⁹ Overall, the Clinton fiasco reflects a broader legacy of denying gay men’s dignity within the context of the HIV/AIDS epidemic.

Socio-legal scholar Bernadette Atuahene’s notions of “dignity taking” and “dignity restoration” provide some analytical leverage to make sense of the emotions triggered by Clinton’s statement and subsequent apologies. Atuahene contends that dignity takings are “when a state directly or indirectly destroys property or confiscates various property rights from owners or occupiers and the intentional or unintentional outcome is dehumaniza-

5. Kevin Naff, *Hillary’s Painful Mistake*, WASH. BLADE (Mar. 14, 2016, 10:38 AM), <http://www.washingtonblade.com/2016/03/14/hillarys-painful-mistake/> [https://perma.cc/LXU5-VJKV].

6. Hillary Clinton, *On the Fight Against HIV and AIDS—and on the People Who Really Started the Conversation*, MEDIUM (Mar. 12, 2016), <https://medium.com/hillary-for-america/on-the-fight-against-hiv-and-aids-and-on-the-people-who-really-started-the-conversation-7b9fc00e6ed8#.50yhaalcy> [https://perma.cc/Q3K4-V8GM].

7. *Id.*

8. DEBORAH GOULD, MOVING POLITICS: EMOTION AND ACT UP’S FIGHT AGAINST AIDS 58 (2009).

9. JENNIFER BRIER, INFECTIOUS IDEAS: U.S. POLITICAL RESPONSES TO THE AIDS CRISIS 7 (2009).



tion or infantilization.”¹⁰ Dignity restoration is “a remedy that seeks to provide dispossessed individuals and communities with material compensation through processes that affirm their humanity and reinforce their agency.”¹¹ Atuahene moves the concept of takings beyond its traditional connection with property and with private ownership. First, takings not only deprive individuals or communities of physical property but they also rob people of dignity in that the confiscation creates or perpetuates both dehumanization or a “failure to recognize an individual or group’s humanity” and infantilization or a “restriction of an individual’s or group’s autonomy based on the failure to recognize and respect their full capacity to reason.”¹² The taking assaults the dignity of the individual who is connected with the confiscated property. Second, a taking may affect more than just the owner of the property. Individuals who utilize the property as a critical site for self-, cultural-, and community-development can also be affected by the confiscation.

This article explores these dynamics of offense, apology, and restoration as they are evident in a particular episode of HIV/AIDS history: when, in the name of public health, municipal authorities in San Francisco and New York City pursued the closure of gay bathhouses in 1984 and 1985, respectively. This paper does not contend that the bathhouses should not have been shut down. Instead, we seek to show how the debate and processes that followed violated the dignity of gay men by 1) seeking to blame them for the epidemic, 2) ignoring community-based efforts to regulate the baths, and 3) refusing to engage in the queer logics that articulated the communal value of these spaces. To entertain any notion that closures damaged the gay community and psyche, we must resist the urge to pathologize public, anonymous, casual sex. As queer theorist Tim Dean reminds us, while “it would be a mistake to idealize gay sex institutions as utopian spaces liberated from the conflicts that permeate the world outside their walls,” we can still posit “that institutions sponsoring such play should not be considered automatically as pathological spaces.”¹³ These complicated, dynamic spaces were very much a part of a vibrant, safe, and prideful gay

10. Bernadette Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 ANN. REV. L. & SOC. SCI. 171, 178 (2016) [hereinafter Atuahene, *Takings as a Sociolegal Concept*].

11. Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework to Understanding Involuntary Property Loss and the Remedies Required*, 41 LAW & SOC. INQUIRY 796, 818 (2016).

12. Atuahene, *Takings as a Sociolegal Concept*, *supra* note 10, at 178–79.

13. TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING 35 (2009).

male sexual culture; they contributed to the development of emotional empowerment and were a site of community-building.

Even as gay bathhouses had always been subject to state harassment under the guise of public morals regulation, this moral panic took on new urgency during the early years of the HIV crisis.¹⁴ Often, public officials' first response to the crisis was to invade community institutions as sites of the problem at the very time they were under-spending on HIV education, prevention, and resources.¹⁵ State policies revealed a desire to lay accountability for the crisis with gay men, who had long been considered threats to the state.¹⁶ The dominant historical narrative that justified these closings, which has been promoted by historians and public officials alike, has been ostensibly epidemiological: bathhouses were sites of unsafe sex, unsafe sex is linked to the transmission of HIV, and thus these institutions needed to be closed in the name of public health.¹⁷

While the protection of public health has long been understood as a legitimate government objective within the Anglo-American legal tradition, we still ask the following: can these closures be conceptualized as a dignity taking, and if so, how might that reconceptualization affect our understandings of contemporary efforts to restore dignity, such as the use of dignity as the constitutional foundation to recognize same-sex marriage?¹⁸ To answer these questions, we challenge the dominant public health narrative by illustrating how bathhouses were critical sites of community development, including community-based responses to the HIV epidemic and crucial spaces for queer kinship.¹⁹ We contend that these closures ruptured com-

14. See MARC STEIN, *RETHINKING THE GAY AND LESBIAN MOVEMENT* 148 (2012). See generally FRED FEJES, *GAY RIGHTS AND MORAL PANIC: THE ORIGINS OF AMERICA'S DEBATE ON HOMOSEXUALITY* (2008).

15. See William J. Woods & Diane Binson, *Public Health Policy and Gay Bathhouses*, in *GAY BATHHOUSES AND PUBLIC HEALTH POLICY* 1, 10 (William J. Woods & Diane Binson eds., 2012).

16. See generally MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* (2009); STEPHEN M. ENGEL, *FRAGMENTED CITIZENS: THE CHANGING LANDSCAPE OF GAY AND LESBIAN LIVES* (2016).

17. See RONALD BAYER, *PRIVATE ACTS, SOCIAL CONSEQUENCES: AIDS AND THE POLITICS OF PUBLIC HEALTH* 29-30 (Rutgers Univ. Press 1991). See generally Eric Rofes, *Context is Everything: Thoughts on Effective HIV Prevention and Gay Men in the United States*, 10 *J. PSYCHOL. & HUM. SEXUALITY*, no. 3/4, 1998, at 133; GABRIEL ROTELLO, *SEXUAL ECOLOGY: AIDS AND THE DESTINY OF GAY MEN* (1997); RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* (1987).

18. See generally WILLIAM NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

19. Even as only eight trial or appellate decisions were brought by governing authorities in New York and San Francisco seeking to close establishments where public sex was alleged to have occurred, and clientele participated in only two of these (one in San Francisco and one in New York), this lack of participation suggests more about heteronormative mores in an era of homosexual oppression and the dominant public health narrative than about the value of these institutions to some within queer com-

munities whereby “community members are dehumanized or infantilized, involuntarily uprooted, and deprived of the social and emotional ties that define and sustain them.”²⁰ Because many, although not all, governing authorities neither considered the value of these institutions nor grappled with queer understandings of space, contact, intimacy, and belonging, many bathhouses were shut down. Others were unable to sustain themselves under the guidelines that obliterated the queer logics that defined these spaces. And this failure to engage with queer approaches to intimacy places inherent limits on what appear as contemporary efforts of dignity restoration for the gay and lesbian communities. These efforts, such as same-sex marriage, reinforce the very same heteronormative notions of privacy, sexual contact, and intimacy that privileged a narrow set of relationships and which underlay the political public health narrative that justified the bathhouse closures. In short, dignity restorative measures that rely upon and reinforce these heteronormative conceptions prove inadequate. Such measures reveal the limits of dignity, for they only reify the logic queers have always already fucked with well before HIV/AIDS.

II. THE QUEER LOGICS OF THE BATHHOUSE: HOW THE SYMBOL AND SITE CHALLENGED HETERONORMATIVE NOTIONS OF PRIVACY AND INTIMACY

While many bathhouses in urban centers were not for the purpose of men to seek out sexual encounters with each other, historian Alan Bérubé notes that, by the turn of the twentieth century, some became known as “favorite spots” where same-sex sexual relations were not discouraged, and other bathhouses were specifically created to attract gay men.²¹ He suggests that these baths fostered a prideful gay male identity precisely because men would go to gay bathhouses rather than furtively seek out same-sex encounters in establishments not intended for this activity: “At a time when no one was saying “gay is good,” the creation of an institution in which gay men were encouraged to appreciate each other was a major step toward gay pride.”²² Precisely because the gay baths were sites where the sex was understood by patrons as “overt expressions of homosexual interest,” these establishments provided the space for men to socialize with one

munities. See Scott Burris, *Legal Aspects of Regulating Bathhouses: Cases from 1984 to 1995*, in *GAY BATHHOUSES AND PUBLIC POLICY*, *supra* note 15, at 131, 134–35.

20. Atuahene, *Takings as a Sociolegal Concept*, *supra* note 10, at 179.

21. Allan Bérubé, *The History of Gay Bathhouses*, in *POLICING PUBLIC SEX: QUEER POLITICS AND THE FUTURE OF AIDS ACTIVISM* 190 (Dangerous Bedfellows et al. eds., 1996).

22. *Id.* at 195.



another as identifiably gay men.²³ The gay bathhouse took on even more symbolic value within the context of the 1970s post-Stonewall era of gay liberation, particularly as queer sex acts themselves were articulated as liberation from heteronormative constraints. The act of choosing non-normative sex while watched and often affirmed by others, was, for many of these men, considered a liberating experience.²⁴

Beyond this emotional impact, gay baths evolved during the 1970s to provide a wider array of non-sexual activities, attesting to their growing role in defining gay cultural practice. The Continental Baths on Manhattan's Upper West Side had a dance floor, a Saturday night cabaret, and a pool, as well as hosted entertainment by Bette Midler and Barry Manilow. Bathhouses scheduled movie nights where campy cult classics were screened. They hosted benefits for the Gay Activists Alliance and provided onsite STD testing; the New St. Mark's Bath in the East Village also worked with the League of Women Voters to register gay men to vote in the 1984 election.²⁵ The baths were sites of community and kinship formation that included a variety of ways for gay and queer men to interact beyond the carnal encounter.

The debate over whether bathhouses should remain open, which defined HIV policy discussion in San Francisco in 1984 and in New York City in 1985, failed to acknowledge this role that the baths played in community development. To better understand the functions and benefits of these public institutions for gay male communities and to assess why they were viewed as threatening by broader heteronormative publics, we must recognize how these institutions and the activities that occurred within them adopted specific queer logics of time/space, contact, intimacy, and kinship/cultural belonging.²⁶ These queer understandings ruptured the conventional orientations that bolster heteronormative logics of order, stability, and safety.²⁷ Consequently, institutions that nourished oppositional queer logics had to be surveilled, critiqued, and snuffed for state authority to persist. Whether our critical eye turns to the architecture, actions among bodies, or activities housed within these spaces, what becomes clear is that the bathhouses served as what queer theorist Michael Warner calls a counter-

23. GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF A GAY WORLD, 1890–1940* 19–20, 207 (1994).

24. See Ira Tattleman, *Speaking to the Gay Bathhouse: Communicating in Sexually Charged Spaces*, in *PUBLIC SEX/GAY SPACE* 73 (William Leap ed., 1999).

25. Bérubé, *supra* note 21, at 200–06.

26. See generally JUDITH HALBERSTAM, *IN A QUEER TIME AND PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES* (2005).

27. See SARA AHMED, *QUEER PHENOMENOLOGY: ORIENTATIONS, OBJECTS, OTHERS* (2006).

public.²⁸ Counterpublics are alternative spaces that probe and resist normativity to offer subordinated communities different possibilities and divergent logics. Thus, these counterpublics are vital sites of contestation, possibility, and reformulation.²⁹ And, this queer counterpublic of the bathhouse assumed vast importance, especially during such a fraught era for gay males and their fight to reclaim and nourish open, safe, and healthy expressions of sexuality; to build like-minded collectives; and to assert a stake in broader conceptualizations and deployments of public space.

A close examination of these counterpublics reveals how their patrons and supporters radically reconfigured what it means to inhabit public space or to perform “acceptable” publicness. Simply put, as the men who populated the bathhouses wrestled for their right to space and exhibited their determination to fuck boldly, they challenged the supposedly neat, tidy boundaries that separate “public” from “private,” and they spotlighted the problematic politics of taking up public space. Instead of hiding in the throes of sexual repression or attempting sexual expression in spaces that they considered unsafe or — worst — unavailable (like a “home”), they opted to venture into public space and to seek refuge in the bodies and the conversations of their like-minded peers.³⁰ Where public space became the safe location for intimacy, where darkness and anonymity provided security, and where personal nakedness provided the public foundation for community, the constitutional legal logic of heterosexual sexual privacy behind the bedroom door seemed hardly relevant to queer experience.

Gay and queer men’s interactions within the bathhouses also defied normative dictations of contact because they refused to observe social propriety; in other words, bathhouse patrons engaged with one another’s bodies without formal introductions, without the imperative to follow social protocol, without the expectation of monogamous commitment, and even without the promise of a protracted interaction beyond those immediate moments of pleasure and mutual exchange.³¹ In so doing, they demonstrated a divergent value system that rethinks how people negotiate what can happen in and through available physical space and how bodies can and should interact.

28. See generally MICHAEL WARNER, *PUBLICS AND COUNTERPUBLICS* (2005) for further theorizations on performing publicness.

29. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999).

30. See Joseph Beam, *Brother to Brother: Words from the Heart*, in *IN THE LIFE: A BLACK GAY ANTHOLOGY* 230–242 (Joseph Beam ed., 1986) (discussing constructions of “home” and “safety”).

31. For both an account and an analysis of interpersonal contact in public sex institutions, see generally SAMUEL R. DELANEY, *TIMES SQUARE RED, TIMES SQUARE BLUE* (1999).

To borrow from writer Samuel Delany, these men engaged “in thinking through the problem of where people—with their bodily, material, sexual, and emotional needs—might discover (or even work to set up) varied and welcoming harbors.”³² As they developed these harbors, they created alternatives to heteronormative relationship-building and kinship formation to experience a cultural belonging that was not readily available elsewhere. Delany explains the possibilities of these sites of gay male contact and details how they offer ethically sound democratic exchange.³³ Interested in how and why people come together and what happens when they do or do not, Delaney delineates between contact and networking—the former a more organic, accidental interclass collision fraught with potential and the latter a calculated, ordered, and perhaps even stifled system of interaction that supports entrenched divisions among folks. Michael Rumaker similarly reflected on how nakedness produced a safety and camaraderie beyond identity within the Everard Baths:

Here, we were our naked selves, anonymous, wearing only our bodies, with no other identity than our bare skins, without estrangements of class or money or position, or false distinctions of any kind, not even names if chose none. Myself, the other naked men here, were the bare root of hunger and desire, our prime need to be held, touched and touching, feeling, if only momentarily, the warmth and affectionate response of another sensuous human. Here, was the possibility to be nourished and enlivened in the blood—heat and heartbeat of others, regardless of who or what we were. Nurturing others we nurture ourselves.³⁴

Additionally, since the interactions do not demand or even regularly offer future commitment, they reformulate configurations of time in queer ways. Instead of experiencing time according to narratives of productivity and responsibility that align with the goals of the state and with capitalistic functionality, patrons of public sex institutions adopt and practice a kind of queer futurity.³⁵ They probe, resist, and offer alternatives for how we understand time beyond reproductive logics and heteronormative standards—children, marriage, and so on.³⁶ Rather than take refuge in a seemingly stable fantasy of the future, queers frequenting public sex institutions could embrace an abandonment of order—the promise of a tomorrow. While queer time is often mischaracterized as immature, irresponsible, or even narcissistic, these temporal decisions amplify the possibility of an alterna-

32. *Id.*

33. *Id.*

34. MICHAEL RUMAKER, A DAY AND A NIGHT AT THE BATHS 13 (1979).

35. LEE EDELMAN, NO FUTURE: QUEER THEORY AND THE DEATH DRIVE (2004).

36. HALBERSTAM, *supra* note 26, at 1–21.

tive relationship to “progress” or a divergent relationship to constructions of time—how we calculate it, how we fill it, and how we measure its productive usage.³⁷

Of course, seeking contact with otherness—especially in public space—in non-normative time sequence is a fundamentally queer endeavor because it subverts a variety of normative discourses that delimit where bodies can go, when, and what they can accomplish.³⁸ Thus, queer contact is often attacked and misrepresented as dangerous or irresponsible precisely because it threatens to rupture and dissolve the barriers that hegemonic structures police steadfastly to order bodies, actions, and discourses.³⁹ A conservative discourse of safety, i.e., public health, emerges to discourage such queer orientations. Without these subversive spaces that offer unmediated contact with otherness, patrons of these counterpublics ask when, where, and how to achieve the kind of contact that they deeply value and need. When gay men were already acculturated to distrust and suspect one another, the impairment or destruction of the physical spaces upon which contact depends left queer men without a fundamental resource.

III. HOW QUEERS MOBILIZED TO SAVE THE BATHHOUSE AMID THE CRISIS

Histories of the early HIV/AIDS crisis detail how gay men mobilized to understand, educate, and prevent disease transmission when governing authorities at the municipal, state, and federal level ignored the spreading epidemic. These histories, of which Randy Shilts’ *And the Band Played On* is illustrative, characterize early AIDS activists, such as the writer Larry Kramer or Michael Callen and Richard Berkowitz, who together drafted the first safer sex manual, *How to Sex in an Epidemic*, as rejecting the sexual libertarianism associated with gay liberation and as advocating closures of the baths.⁴⁰ Yet, these tellings leave underexplored the efforts many within the gay community employed to self-regulate the baths, partnering with these businesses to promote safer sex, and thereby maintaining an institution critical to gay identity and community. Indeed, Callen and Berkowitz’s publication of “Two Gay Men Declare War on Promiscuity,” in a Novem-

37. *Id.* at 152–88.

38. AHMED, *supra* note 27, at 1–24.

39. For the deployment of “danger” to police bodies, see generally SIMON WATNEY, PRACTICES OF FREEDOM: SELECTED WRITINGS ON HIV/AIDS (1994).

40. Shilts writes of Kramer, “Larry Kramer was growing more militant in this stance . . . [to] tell people that, if they wanted to survive, they should just stop having sex.” SHILTS, *supra* note 17, at 210. See also LARRY KRAMER, REPORTS FROM THE HOLOCAUST: THE STORY OF AN AIDS ACTIVIST (1989).

ber 1982 edition of *The New York Native* is often cited as laying the foundation for a community-based effort to close the baths and to curb the promiscuity with which baths were negatively associated.⁴¹ Callen and Berkowitz held to the reigning theory of the disease at the time, namely the multiple infections theory, which posited that through promiscuity, gay men compromised their immune systems by overexposure to common infections. By provocatively claiming that “our lifestyle has created the present epidemic of AIDS,” Callen and Berkowitz challenged key tenets of gay liberation and triggered a reply by Charles Jurist in the next issue of the *Native*. In his “In Defense of Promiscuity,” Jurist accused his fellow AIDS activists of “unleashing hysteria within our community.” Callen and Berkowitz, according to Jurist, declared war on gay liberation, shamed gay men, and called for a monogamy that aped heterosexual norms: “They seem to be saying that anything other than monogamy or sex restricted to two or three ongoing, tightly controlled relationships constitutes promiscuity and ought to be avoided.”⁴² For Jurist, Callen and Berkowitz denigrated the very queer ways of being that gay men invented as alternatives to combat heteronormative oppression, to oppose the social structures of straight society.

Yet a closer reading of the Callen and Berkowitz essay suggests that fostering monogamy—

something that has been judicially endorsed in the battle for and approval of same-sex marriage in the United States—was not their objective. The authors stated, “We are not suggesting legislating an end to promiscuity. Ultimately, it may be more important to let people die in the pursuit of their own happiness than to limit personal freedom by regulating risk.”⁴³ Callen and Berkowitz advocated regulation over closure.⁴⁴ And, deeply aware of the history of government raids of gay safe-spaces such as bars and baths, they favored community-led regulation over government imposition: “It would be preferable to avoid further governmental interventions [Instead] the gay community must take responsibility of providing its members with clear and unequivocal warnings about the health risks of promiscuity.”⁴⁵ In short, their call was less for monogamy than it was for a community-based response to the crisis before straight

41. See generally Michael Callen & Richard Berkowitz, *We Know Who We Are: Two Gay Men Declare War on Promiscuity*, N.Y. NATIVE, Nov. 8–21, 1982, at 23.

42. See generally Charles Jurist, *In Defense of Promiscuity: Hard Questions about Real Life*, N.Y. NATIVE, Dec. 6–19, 1982, at 27.

43. Callen & Berkowitz, *supra* note 41.

44. *Id.*

45. *Id.*

government would invade and thereby undo the cultural gains made since Stonewall. It is this call for community-based action that is often lost when the bathhouse debate is limited to the tidy but limited dichotomy of libertarianism versus public health. By drawing attention to the call and to the efforts that follow, both the extent of the dignity taking committed by government authorities and the politicized nature of the public health rationale become apparent.

Community organizations, such as the Gay Men's Health Crisis ("GMHC"), produced educational materials that did not advocate bathhouse closure, but recommended safer-sex practices within the baths. By late 1983, AIDS activists in New York City, including Berkowitz, Callen, Keith Lawrence, Joseph Sonnabend, and Roger Erlow, among others, created a Committee on Safer Sex. That committee established a subcommittee on bars and baths, and their recorded meeting notes capture their efforts to establish community-based regulation of the baths. For example, notes from a December 30, 1983 meeting indicate that the goals include "education" and "effective behavior modification not just in bars and baths." They noted that GMHC was already working on an "info piece" to this end. There was acknowledgment of civil liberties, and Jim Furratt noted a concern that "baths just want business," and that discussion of infection "must precede civil liberties." Furratt also suggested that the group needed to "look at lifestyles and the institutions that perpetuate them." But David V. cautioned the group that whatever educational campaign or other actions to be developed could "not just [be] a physical approach" and that the group should avoid "jumping to conclusions on what's going on in backrooms, etc." And, emphasizing the ongoing fear and history of government intervention, the notes stress that all actions to regulate the baths and attempts to educate for safer sex must be seen as a gay community initiative. Otherwise, what "would be seen as govt [sic] intervention" would mean "political death" of this group. Instead, it must be clear that this initiative is "gays helping gays."⁴⁶

The Committee on Safer Sex describes in a January 14, 1984 memo the development of six items for community education: 1. a bathhouse poster with pamphlets and phone numbers, 2. the same poster for "bookstores" and bars, 3. subway posters with the phone number of the subcommittee, 4. Posters for public places such as post offices, 5. Public service announcements on television and radio, and 6. other pamphlets that

46. Notes from Meeting of the Bars & Baths Subcomm., Comm. on Safer Sex (Dec. 30, 1983) (on file with the LGBT Community Center National History Archive, New York AIDS Network, Keith Lawrence Papers, Record 77, Box 1, Folder 66).*

lay out answers to basic questions like “what is the immune system?” and a glossary of AIDS terms. The committee emphasized that “pamphlets provided with poster will describe healthy low-risk sexual practices, give appropriate phone numbers, etc.” The memo also indicated that the committee is seeking funding from the NYC health department via its Office of Gay and Lesbian Health Concerns, suggesting an early effort to partner with public health officials. The proposed mock-up for the poster embraced sex-positivity. In bold letters, it proclaimed, “SEX IS WONDERFUL!” and then below, it warned, “BUT DON’T LET AIDS KILL YOU!” It then laid out a set of high-risk activities to be avoided: “DON’T RIM, DON’T LET HIM COME IN YOUR ASS. MAKE SURE YOU DON’T COME IN HIS. DON’T COME IN HIS MOUTH, AND DON’T LET HIM COME IN YOURS.”⁴⁷ This phrasing reaffirms the relational aspects of sexual encounter; it refutes the sexual libertarianism of individual pleasure, and reminds the reader that we must take care of one another. The poster affirms the importance of community, connection, and, indeed, brotherhood among gay men. The poster exemplifies what historian Jennifer Brier described as the richer notion of gay liberationism and how it enabled community response to AIDS: “The language of brotherhood also invoked a communal responsibility for AIDS that provided the grounds for men not blaming one another for the diseases that they had transmitted, knowingly, unknowingly, or in ignorance of the ultimate consequences.”⁴⁸ The proposed mock-up became the GMHC poster, “Great Sex is Healthy Sex.” It reminded its viewer that “Great Sex is *Healthy* Sex.” Across the top, the poster read “Great Sex! Don’t Let AIDS Stop It.” And it included warnings against high-risk activities. It promoted the low-risk act with “Jacking off is hot and safe,” and it added “Affection is our best protection.”⁴⁹ The final poster also dropped the threatening language of AIDS will kill you in favor of acknowledging the fear of AIDS but reminding the viewer that there were lots of ways to embrace a healthy sexuality.

By late February 1984, the subcommittee on baths and bars of the Committee on Safer Sex recommended a sequence of outreach efforts, beginning with working with the Community Council of Lesbian & Gay Organizations, then coordinating with the Greater Gotham Business Council, and then hosting meetings with bar and bathhouse owners and managers. It would reach out to gay media, including the *Advocate*, the *Native*,

47. Memorandum from Comm. on Safer Sex (Jan. 16, 1984) (on file with the LGBT Community Center National History Archive, Joseph Sonnabend Papers, Record 120, Box 5, Folder 55).

48. BRIER, *supra* note 9, at 39.

49. *Id.* at 40–41.

and *NYC Gay News*. The outreach “would update them on our current efforts and intentions, to reiterate our invitation to participate in our efforts and meetings, and to seek their support in whatever ways they deem appropriate.”⁵⁰ In short, gay men led an effort to educate one another about high-risk and low-risk sexual activities, emphasizing that particular acts—not the location of those acts—were to be avoided.

In December of 1984, the Coalition for Sexual Responsibility (“CSR”), a group of “gay men interested in engaging establishments where on-site sex occurred in AIDS education/prevention efforts . . . [which] represented a wide spectrum of views, ranging from closing all establishments with on-premise sexual activity from making changes in how these businesses operated,” was established.⁵¹ In their interim report released in October 1985, the CSR listed its objectives as “encouraging commercial establishments whose primary purpose is to permit high-risk sexual activities to occur on their premises to provide an environment where safer sex is encouraged and promoted” and “encouraging these same establishments to help educate the community about AIDS and safer sex.”⁵² The report defined these establishments as gay bathhouses, gay bars with “back rooms,” gay movie houses, and some gay bookstores where on-site sex occurred. Not listed among the CSR’s objectives was advocacy for closure. The CSR sought to prevent unsafe activities within these establishments; it did not seek to shut them down.⁵³

The CSR developed nineteen educational, hygienic, and structural recommendations for the bathhouses. It then invited bathhouse owners and managers to a February 11, 1985 meeting facilitated by the directors of Lambda Legal Defense and the National Gay Task Force. The CSR noted in its interim report that it supported community self-regulation under the assumption that “if the government decided to regulate (including closure) the baths . . . [then] restaurants and other places frequented by gays where no on-premise sex occurs could become vulnerable to government regulation.”⁵⁴ The committee sought to enlist participation of the bathhouses out of a fear that if they “failed to comply with our modest recommendations

50. Memorandum from Comm. on Safer Sex (Feb. 27, 1984) (on file with the LGBT Community Center National History Archive, Joseph Sonnabend Papers, Record 120, Box 5, Folder 55).

51. See generally COAL. FOR SEXUAL RESPONSIBILITY, INTERIM REPORT (1985) (on file with the LGBT Community Center National History Archive, New York AIDS Network, Keith Lawrence Papers, Record 77, Box 1, Folder 8).

52. *Id.*

53. *Id.*

54. *Id.*

then they would be inviting government intervention by their action.”⁵⁵ In short, the CSR aimed to avoid direct government intervention, in part because such action had long been associated with repression and denigration of gay sexuality.

After receiving written consent from ten NYC bathhouses, the CSR organized a schedule of three inspections to be carried out by volunteers throughout 1985. Volunteers would enter the bathhouses armed with a clipboard and checklist of the CSR’s 19 recommendations and evaluate whether bathhouse owners were in compliance. On June 4, 1985, the CSR sent letters indicating “poor results and requesting that they take immediate remedial action.” The Committee convened a meeting with seven of the ten owners on June 13, which was followed by a letter to all bathhouses urging “full compliance as soon as possible.” A second round of inspections occurred in June and July, which revealed that “while the results were somewhat better with some of the establishments there were still no establishments in full compliance.” There was also some resistance to the inspection regime. The Barracks refused to participate after the first inspection. The CSR then partnered with GMHC, and GMHC worked with the bathhouses to set up on-site tables where GMHC members could distribute safer sex pamphlets to patrons. The second round of inspections saw only modest improvements in compliance. The third round, which took place in October, again saw modest improvements, but noted only “full compliance in two of the ten bathhouses in the city.” The report concluded by noting that city and state authorities were now considering direct actions against the bathhouses and lamented that community efforts had fallen short. It did note that a majority of the NY AIDS Institute Advisory Board (discussed further in the next section) endorsed the CSR’s inspection regime be adopted by city and state officials rather than close the bathhouses entirely. But even the CRC concluded by noting, “the response from the bathhouses has been, for the most part, irresponsible and disappointing.”⁵⁶

The aim of laying out all of this evidence of how gay men, in their attempts to respond to the HIV crisis with little to no support from public authorities, developed methods of regulating bathhouse usage to educate men about HIV is to reveal how proactive the community, in fact, was. Furthermore, the community, early on and quite contrary to the government action described in the next section, distinguished between low and high-risk sexual activities, recognizing that this approach would be far more

55. *Id.*

56. *Id.*

effective than banning the baths and bars that were so critical to gay identity and community. The comprehensive regimes of inspection innovatively developed by community members, even as they were endorsed by some officials, were often disregarded by authorities. Instead, elected officials, in the debates that raged in San Francisco and New York City, painted gay men as depraved, oversexed animals incapable of responding to the crisis. In other words, the debates and the closures that followed did substantial cultural and political work to render gay men culpable for their own community's sudden and relentless demise. Moreover, they were grounded in a long history of medicalization of homosexuality and a pervasive cultural tendency that would consider homosexuals either "sub persons" or refuse to consider homosexuality as a personhood status altogether.⁵⁷ As such, these closures were part of a larger anti-gay and anti-HIV cultural discourse that dehumanized and infantilized men who have sex with other men. The bathhouse closings fostered and perpetuated a narrative of culpability, ignited intense divisions within the gay and lesbian communities, and produced within gay men a deep distrust and even fear of governing institutions and of one another.

IV. THE MORALIZING PUBLIC HEALTH NARRATIVE: INFANTILIZATION, DE-HUMANIZATION, AND CONFLATION OF QUEER SEX WITH DISEASE

The debate over bathhouses spilled beyond the boundaries of the gay community as the AIDS epidemic raged in San Francisco and New York City. The bathhouses became an easy target for authorities who had dragged their heels on formulating a response to the crisis. Closing the bathhouses served at least three goals: 1) it was a visible action, and government officials could cite concrete steps taken against the disease, 2) it foisted blame for the epidemic on an already despised minority, and 3) it shut down institutions that straight majorities saw as neighborhood blight and impediments to economic development. Public officials long considered bathhouses a nuisance, and the public health rationale that was fully articulated in both cities by 1986 proved a seemingly apolitical basis to achieve moral imperatives against homosexuality.⁵⁸ The narrative of public health ignored new discoveries about viral transmission, divided the queer community, and ultimately ignored all of the efforts already undertaken

57. See BERNADETTE ATUAHENE, WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM 3 (2014).

58. See generally FEJES, *supra* note 14.



within that community to regulate the bathhouses in the service of promoting public health.

The debate over whether the bathhouses should remain open began in San Francisco and dominated that city's public AIDS discourse during 1984. It culminated with Dr. Mervyn Silverman, the city's Director of the Department of Public Health ("SFDPH") calling for their closure on October 9, 1984. NYC officials were stunned by San Francisco's actions. These officials contended, at the time, that such action either violated privacy rights or would simply fail to achieve the stated objective of curbing the spread of HIV.⁵⁹ Ironically, a year later, they would follow in San Francisco's footsteps.

Early on in San Francisco's public debate, Silverman maintained that it was "inappropriate and in fact illegal for me to close down all bathhouses and other such places" and that such action would "insult the intelligence of many of our citizens, and it would be an invasion of their privacy" Instead, he advocated that the DPH work with the baths and gay community leaders "to educate the public, both gay and straight" about how the disease was spread.⁶⁰ By mid-1984, the San Francisco AIDS Foundation released a chart that ran in gay newspapers throughout San Francisco, which categorized various sex acts as either "safe," "possibly safe," or "unsafe."⁶¹ In April of 1984, scientists announced they had discovered the viral agent that caused AIDS, what would be named HIV in 1986.⁶² As such, the multiple infections theory that often justified bathhouse closure was undercut. Nevertheless, that same month, Silverman took a different position, announcing on April 9, that "all sexual activity between individuals [is to] be eliminated in public facilities in San Francisco where the transmission of AIDS is likely to occur." This ban was aimed at those locations—baths, backrooms of adult bookstores, and sex clubs—where men could "indulge in multiple sexual encounters."⁶³ Silverman's reversal followed meetings with Mayor Diane Feinstein, who, the *San Francisco Ex-*

59. See generally Peg Byron & Steve C. Arvanette, *New York Shocked by Proposed S.F. Bath Ban*, N.Y. NATIVE, Apr. 9–22, 1984, at 51.

60. Christopher Disman, *The San Francisco Bathhouse Battles of 1984: Civil Liberties, AIDS Risk, and Shifts in Health Policy*, in GAY BATHHOUSES AND PUBLIC HEALTH POLICY, *supra* note 15, at 80 (2012) (letter from Dr. Mervyn Silverman to Littlejohn dated May 10, 1983).

61. AIDS-Awareness Chart, San Francisco AIDS Foundation, Mid-1984, which ran in local San Francisco gay newspapers in 1984 and 1985, listed a range of 21 sexual practices and rated them as either "safe," "possibly safe," or "unsafe." *Id.*

62. SHILTS, *supra* note 17, at 448–51.

63. Press Release, Dr. Mervyn Silverman, Director, S.F. Dep't of Pub. Health (April 9, 1984) (on file with the LGBT Community Center National History Archive, Joseph Sonnabend Papers, Record 120, Box 4, Folder 60). *Accord* SHILTS, *supra* note 17, at 446.

aminer revealed in a May 1984 issue, had ordered on-duty plainclothes police officers to pose as bathhouse patrons to gather information about the sexual activities that took place within.⁶⁴ Within two months of the April 9 announcement, four bathhouses in San Francisco—the Liberty Baths, the Catacombs, the Caldron, and the Sutro Baths—closed their doors. Others challenged the ban with an ad that ran in the local gay press, declaring “baths . . . not the problem but part of the solution.”⁶⁵ The baths could promote safer sex awareness and activities among gay men.

City officials were at cross-purposes. In August, the city’s Human Rights Commission unanimously adopted a resolution opposing any prohibition or regulation of “private consensual sexual activity in any bathhouse or sex establishment, absent a showing that it is a necessary and essential measure supported by clear and convincing medical and epidemiological evidence.” Attesting to the growing awareness of the viral agent theory and calling for more nuance than a blanket ban, the Commission noted that “health professionals cite types of sexual behavior, and not location, as the causative factors in the transmission of AIDS.”⁶⁶ To satisfy this demand, Silverman hired four private investigators to document the goings-on within six bathhouses, four sex clubs, two adult bookstores, and two adult theaters in September 1984.⁶⁷ According to historian Ronald Bayer, these reports “achieved the desired impact. Whatever the actual tabulations of safe, unsafe, and possibly safe acts observed might have revealed, the descriptions portrayed the existence of activity that would serve to shock the sensibilities of the conventional and disturb those concerned with the transmission of a deadly disease.”⁶⁸

On October 9, 1984, Silverman ordered fourteen baths to close: “These businesses have been inspected on a number of occasions and demonstrate a blatant disregard for the health of their patrons and of the community. . . . Make no mistake about it: These fourteen establishments are not fostering gay liberation. They are fostering disease and death.”⁶⁹ The statement captures how officials only understood the baths as commercial enterprises; their role in fostering community and their potential to promote public health went unacknowledged. Bathhouse patrons were to be monitored by the state as they were incapable of responsible action, i.e.,

64. Disman, *supra* note 60, at 99.

65. *Id.* at 93.

66. See generally *Human Rights Commission Opposes Bathhouse ‘Sex Ban’*, BAY AREA REP., Aug. 30, 1984.

67. Disman, *supra* note 60, at 106.

68. BAYER, *supra* note 17, at 44.

69. SHILTS, *supra* note 17, at 489.

infantilized, as unable to protect themselves and were primarily viewed as disease carriers, i.e., de-humanized.

Silverman's ban was stopped by a preliminary injunction from Judge Roy Wonder, who ruled that the baths could remain open "as long as they contained no private rooms operated without a hotel license, and removed the doors of their rooms, booths, and video cubicles. The baths were also to employ at least one monitor for an average of every twenty patrons, who would circulate every ten minutes, watching for 'high-risk sexual behavior' as the phrase was defined by the AIDS Foundation, and expelling patrons who engaged in it."⁷⁰ Wonder's injunction shifted the emphasis from location to sex acts as the appropriate public health concern. Nevertheless, the proposed regime of surveillance smacked of infantilization; it assumed gay men were incapable of altering their behavior unless compelled by the watchful eye of the state. It also illustrated how public officials never considered bathhouses to be valuable or valued institutions. As the defense lawyer for the bathhouses, Merial Burtle pointed out, "the city is taking advantage of a certain distaste that some straight people have for gay sex . . . many straight people are tolerant of gays as long as they don't have to think about or read about what they do in bed."⁷¹ This "ick" factor is the foundation for the de-humanization that is a hallmark of dignity-taking.⁷²

Additionally, the surveillance undercut the spatial logics of desire and anonymity that provided the safety that made the baths valuable. The operating logic of the bathhouse is "the notion of drift [which] is essential to the experience of a sex club, where fluidity facilitates passing into an aimless 'let's see what happens' state of mind . . . [where] one browses, in search of something vaguely determined."⁷³ Queer theorist Leo Bersani notes that the bathhouse created a safety precisely because "in addition to the opportunity anonymous sex offers its practitioners of shedding much of the personality that individuates them psychologically, the common bathhouse uniform—a towel—communicates very little . . . about our social personality."⁷⁴ This safety was no longer possible in a context of bright lights and roaming monitors. In short, support for the bathhouse closure was premised on the

70. Disman, *supra* note 60, at 112.

71. Michael Helquist & Rick Osmon, *The City vs. The Sex Businesses*, COMING UP!, Nov. 1984.

72. As Gary Mucciaroni writes, "The 'ick factor' reflects the taboo of gay sex, much of it fed by centuries of religious injunctions against sexual conduct between same-sex partners." GARY MUCCIARONI, *SAME SEX, DIFFERENT POLITICS: SUCCESS AND FAILURE IN THE STRUGGLES OVER GAY RIGHTS* 23–24 (2008).

73. John Lindell, *Public Space for Public Sex*, in *POLICING PUBLIC SEX: QUEER POLITICS AND THE FUTURE OF AIDS ACTIVISM*, *supra* note 21, at 73, 75.

74. LEO BERSANI, *Sociability and Cruising*, in *IS THE RECTUM A GRAVE?: AND OTHER ESSAYS* 45, 60 (2010).

notion that “anonymity and impersonal contact,” so crucial to the liberationist ethos of the 1970s, had “become deplorable as sexual values in the 1980s.”⁷⁵

When the public debate in San Francisco had seemingly reached its conclusion, it was just beginning in NYC. Just as in San Francisco, NYC officials did not initially favor a ban.⁷⁶ David Sencer, the New York City Health Commissioner, opposed banning the bathhouses.⁷⁷ A variety of physicians who played critical roles in the treatment of AIDS patients and the development of AIDS policy in NYC, including Joseph Sonnabend, Lawrence Mass, Alvin Friedman-Kein, and Stephen Ciazza, also opposed blanket bathhouse bans.⁷⁸ And, in 1985, Gay Men’s Health Crisis came out forcefully against closure. The GMHC maintained that the gay community itself was responsible enough to self-regulate; it thereby refuted the ongoing criticisms implicit in governing officials’ and others’ support for the ban that gay men were simply incapable of responsible behavior.⁷⁹

In February 1985, the New York State Department of Health established the Bathhouse Subcommittee to consider whether the state should take action. The committee included Dr. Stephen Ciazza, Michael Callen, GMHC member Robert Lee Cecchi, Richard Failla, a New York state Judge, Dr. Jeff Laurence, Dr. Mathilde Krim, who was chair of the AIDS Medical Foundation, and David Leven, who would chair the committee.⁸⁰ The committee released its findings in June 1985. The committee, like the San Francisco Human Rights Commission, opposed closure. According to the Subcommittee, “state closure of the bathhouses is simply a means of controlling and regulating consensual sexual relations between gay men, and there is not currently a compelling need so great to justify government interference of this magnitude.”⁸¹ Furthermore, the committee was concerned with a slippery slope: should the bathhouses be shut down, “then,

75. Yannick LeJacq, *Love Becomes Possible: The Transformation of Gay Male Sexuality and Identity in the AIDS Crisis* 98 (Apr. 2011) (unpublished B.A. thesis, Wesleyan University), http://wescholar.wesleyan.edu/cgi/viewcontent.cgi?article=1775&context=etd_hon_theses [<https://perma.cc/2ZQL-V343>].

76. See generally Edward Koch, *The Mayor Responds*, N.Y. NATIVE, July 15–28, 1985.

77. Joyce Purnick, *AIDS and the State*, N.Y. TIMES (Oct. 30, 1985), <http://www.nytimes.com/1985/10/30/nyregion/aids-and-the-state.html> [<https://perma.cc/FAD5-HPXE>].

78. See generally Lawrence Mass, *Cancer in the Gay Community*, N.Y. NATIVE, July 27–Aug. 9, 1981, at 1.

79. See generally David France, *Albany Creates Bathhouse Sub-Committee*, N.Y. NATIVE, July 1–14, 1985.

80. Letter from Paul Moore, Jr., Bishop of N.Y., to David Leven (Feb. 8, 1985) (on file with the LGBT Community Center National History Archive, Joseph Sonnabend Papers, Record 120, Box 4, Folder 60) (listing full committee membership).

81. France, *supra* note 79.

perhaps, few obstacles would exist to further regulation of such relations in other locations, perhaps even in private homes.”⁸² Nevertheless, the commission did recommend that the bathhouse owners should post safer-sex information, maintain hygienic conditions, provide condoms, and ensure adequate lighting. In fact, in an April 1985 memo outlining the Subcommittee’s likely recommendations, the Subcommittee adopted the full nineteen recommendations from the Coalition for Sexual Responsibility. The state agency essentially coopted the community’s efforts at self-regulation. According to David Leven, author of this memo, “this statement is almost identical to the draft proposal of the Coalition for Sexual Responsibility, except that the language is suggestive rather than mandatory. The [CSR] statement simply makes recommendations. It does not require anything.”⁸³ Leven maintained that the community efforts had failed and that “the bathhouses, to date, have not voluntarily taken reasonable steps which might lead to a decrease in the spread of AIDS.”⁸⁴ Note that this assessment contradicts the community-organized Coalition for Sexual Responsibility’s findings, which documented increasing compliance over time, even as full compliance was not achieved. Consequently, Leven contended that “the time has come to strongly recommend responsible government action.”⁸⁵

In late October 1985, the New York State Public Health Council approved an emergency addition to the state Sanitary Code. One new section, 24-2.2, stated that “No establishment shall make facilities available for the purpose of sexual activities where anal intercourse, vaginal intercourse or fellatio take place. Such facilities shall constitute a threat to the public health.” And section 24-2.3 provided that “the State Health Commissioner, local health officers and local boards of health may close any such facilities or establishments as constituting a public nuisance.”⁸⁶ Similar to Silverman’s blanket ban in San Francisco, Section 24-2.2 employed a circular logic by defining the baths to be a public health threat and by empowering public officials to close all public health threats. It contained no acknowledgement that these institutions could be anything other than a threat to the public and that the activities within them could be anything other than

82. *Id.*

83. Memorandum from David C. Leven to the AIDS Advisory Council, Subcomm. on Bathhouses, Subject: Recommendations (Apr. 5, 1985) (on file at the LGBT Community Center National History Archive, Joseph Sonnabend Papers, Record 120, Box 4, Folder 60).

84. *Id.*

85. *Id.*

86. Mark E. Elovitz & P.J. Edwards, *The D.O.H. Papers: Regulating Public Sex in New York City*, in *POLICING PUBLIC SEX: QUEER POLITICS AND THE FUTURE OF AIDS ACTIVISM*, *supra* note 21, at 295, 299.

spreading contagion. Furthermore, the provision, like the San Francisco ban, made no distinction between high-risk and low-risk activities. The measure ignored the recommendations of the AIDS Advisory Council's bathhouse subcommittee and contemporary medical science.

Bathhouse owners attempted to comply with the new directive. Bruce Mailman, the owner of the New St. Mark's Baths, provided condoms, safer sex information, and required patrons to sign a pledge indicating they would observe guidelines banning oral and anal sex.⁸⁷ Nevertheless, Mailman opposed the state's emergency measure, editorializing in the *New York Times* that closure served no health purpose as unsafe sex would occur elsewhere, that the state violated the constitutional privacy rights of his clientele, and that the policy focused on location rather than regulate sex acts: the policy "fails to distinguish between safe and unsafe sex, the amendment takes us a step backward in the highly successful educational effort that we and other responsible establishments have undertaken." He castigated Axelrod: "What he's doing isn't medical. It's political. He's using the office of the health department as a political forum."⁸⁸

Mailman's editorial was published a month after the New York State Supreme Court issued the first order to close a bathhouse, the Mineshaft.⁸⁹ City inspectors who surveilled the Mineshaft reported witnessing anal intercourse (as well as the distribution of condoms). They reported hearing whips (hardly surprising as this establishment catered to men interested in sadomasochism). Mayor Koch's assessment of the findings degraded queer sex: "It's tough stuff to read. It must be horrific, horrendous in its actuality to witness."⁹⁰ On November 7, 1985, when the injunction to close the Mineshaft was issued, Koch applauded the court order for "bring[ing] to the consciousness of those who have a predilection to engage in this suicidal behavior how ridiculous it is. Maybe it will deter them as well. We don't know. But we're going to do the best we can."⁹¹

87. See generally Darrel Yates & Barry Adkins, *State to Regulate Gay Sex*, N.Y. NATIVE, Nov. 4–10, 1985.

88. Bruce Mailman, *The Battle for Safe Sex in the Baths*, N.Y. TIMES (Dec. 5, 1985), <http://www.nytimes.com/1985/12/05/opinion/the-battle-for-safe-sex-in-the-baths.html> [<https://perma.cc/39E2-T3N6>].

89. Joyce Purnick, *City to Seek to Close AIDS-Risk Place*, N.Y. TIMES (Nov. 7, 1985), <http://www.nytimes.com/1985/11/07/nyregion/city-seeks-to-close-aids-risk-place.html> [<https://perma.cc/YC27-T4HD>]; Barry Adkins, *Judge Orders Mine Shaft Closed*, N.Y. NATIVE, Nov. 18–24, 1985.

90. Joyce Purnick, *City Closes Bar Frequented by Homosexuals, Citing Sexual Activity Linked to AIDS*, N.Y. TIMES (Nov. 8, 1985), <http://www.nytimes.com/1985/11/08/nyregion/city-closes-bar-frequented-by-homosexuals-citing-sexual-activity-linked-to-aids.html> [<https://perma.cc/2LKQ-UFYW>].

91. *Id.*

Less than two weeks later, the New York City Council passed Resolution 1685A, which directed Commissioner Sencer to “close down bathhouses and other public heterosexual and homosexual establishments which make facilities available for certain high risk practices . . . known to contribute to the spread of AIDS.”⁹² Since the Resolution reiterated what Section 24-2 already provided, it had no real effect other than putting Sencer, who continued to oppose closure, in an untenable position. On December 4, 1985, Sencer announced he would resign on January 3, 1986.⁹³ Two days later, the New York State Supreme Court closed the St. Mark’s Baths.⁹⁴ The closure order came one day after the St. Mark’s proprietor, Mailman, published his criticism of the emergency measure.

That closure was based on inspections held between November 2 and December 4, 1985, which described banned activities occurring on the premises. The *New York Native* characterized the evidence as circumstantial. The report even acknowledged inconclusive evidence: “I could not observe any activity as the door was closed” and “several used condoms [were] on the floor.”⁹⁵ On December 16, signaling his complete reversal on the issue, much as San Francisco’s Silverman had done, Mayor Koch, when asked if he would continue to close bathhouses, replied, “I hope so. We are monitoring institutions which, we believe, are allowing unsafe health practices to continue.”⁹⁶ On January 6, 1986, just over a year since the public debate began, the city sought an injunction to close the St. Mark’s Baths for up to a year.⁹⁷ Despite repeated appeals, which often rested on patrons’ constitutional right to privacy, the St. Mark’s Bath never reopened.⁹⁸ Affirming the state’s complete lack of comprehension of queer notions of privacy, autonomy, and safety developed in the context of the bathhouse and public sex, the New York Supreme Court ruling against the

92. See generally John A. Fall, *Council Passes Bathhouse Resolution*, N.Y. NATIVE, Dec. 2–8, 1985; Sarah Schulman, *Committee Resolve Close Baths*, N.Y. NATIVE, Dec. 2–8, 1985, at 11.

93. See generally Barry Adkins, *Sencer Resigns*, N.Y. NATIVE, Dec. 16–22, 1985.

94. John A. Fall, *City Moves to Close St. Marks Baths*, N.Y. NATIVE, Dec. 16–22, 1985; John A. Fall, *St. Marks Baths Closed*, N.Y. NATIVE, Dec. 23–29, 1985 [hereinafter Fall, *St. Marks Baths Closed*]; Joyce Purnick, *City Shuts a Bathhouse as Site of ‘Unsafe Sex’*, N.Y. TIMES (Dec. 7, 1985), <http://www.nytimes.com/1985/12/07/nyregion/city-shuts-a-bathhouse-as-site-of-unsafe-sex.html> [https://perma.cc/6XPZ-ZXWQ].

95. Fall, *St. Marks Baths Closed*, *supra* note 94.

96. See generally Sarah Schulman, *Koch Requests Action on Health Services and Insurance*, N.Y. NATIVE, Jan. 27–Feb. 2, 1986.

97. Barry Adkins, *Bad News for St. Marks*, N.Y. NATIVE, Jan. 20–26, 1986; *City of New York v. New St. Mark’s Baths*, 562 N.Y.S.2d 642 (App. Div. 1986).

98. *City of New York v. New St. Mark’s Baths*, 497 N.Y.S.2d 979 (Sup. Ct. 1986), *aff’d*, 505 N.Y.S.2d 1015 (App. Div. 1986); *City of New York v. New St. Mark’s Baths*, 562 N.Y.S.2d 642 (App. Div. 1990); *City of New York v. New St. Mark’s Baths*, 572 N.E.2d 53 (N.Y. 1991).

St. Marks Baths refuted the privacy claim by relying on liberal heteronormative conceptions of the private sphere: “it is by no means clear that defendant’s rights will, in actuality, be adversely affected in a constitutionally recognized sense by closure of St. Mark’s. The privacy protection of sexual activity conducted in a private home does not extend to commercial establishments simply because they provide an opportunity for intimate behavior or sexual release.”⁹⁹

Just over a year later, with the Mineshaft, the St. Mark’s, and the Evarard Baths all closed, Commissioner Axelrod declared, “Today, many of the baths openly encourage safe-sex practices. And based on our observations, dangerous sexual activities are no longer being encouraged and, in fact, are not occurring. We believe the remaining bathhouses have acted very responsibly.”¹⁰⁰ By 1987, four bathhouses remained open, and none were in violation of sanitation measure 24-2. All had posted signage advertising safer sex practices, hosted workshops and showed films on such practices, and distributed condoms. Axelrod’s claim that the bathhouses acted responsibly, only after the state action, tellingly ignores that many of these same bathhouses were operating with the same safer-sex measures in place via community self-policing that preceded state action. Importantly, the compliance rates that the New York State Health Commissioner had achieved were not remarkably different than those of the community-based efforts; community efforts recognized these same four bathhouses were complying with safer-sex measures at the time of their own inspections.¹⁰¹ In short, the state may have accomplished little other than erasing the actions that gay community members had already taken by themselves and ultimately claiming the community’s accomplishment as its own. The processes of dignity-taking that involve infantilization are in full view.

V. THE LIMITS OF DIGNITY: SAME-SEX MARRIAGE FAILS AS DIGNITY RESTORATION

If the bathhouse closures can be considered a dignity taking, then we must ask if dignity restoration is possible and of what it might entail. Dignity, as a legal concept, has been the foundation of much U.S. pro-gay rights jurisprudence. While the Supreme Court’s decisions beginning with *Lawrence v. Texas* and culminating most recently in *Obergefell v. Hodges*

99. *New St. Mark’s Baths*, 497 N.Y.S.2d at 982–83.

100. Scott Bronstein, *4 New York Bathhouses Still Operate Under City’s Program of Inspections*, N.Y. TIMES (May 3, 1987), <http://www.nytimes.com/1987/05/03/nyregion/4-new-york-bathhouses-still-operate-under-city-s-program-of-inspections.html> [<https://perma.cc/2PTV-UVCX>].

101. See COAL. FOR SEXUAL RESPONSIBILITY, *supra* note 51.



could be understood as “dignity-restorative”—indeed, legal scholar Dale Carpenter characterized *Lawrence* to be “as close as the Court would ever get to an apology to gay and lesbian Americans for the wrong, and for the harm, it had done to them”¹⁰²— these rulings ultimately fail to compensate for the takings embodied in the bathhouse closures.¹⁰³ They fail because they refuse to engage with queer values. Insofar as the Supreme Court’s gay rights jurisprudence premises dignity upon the state’s reinforcement of heteronormative, and often private, couplings, they deny the history and value of more radical ways of being.

On June 27, 2015, the *New York Times* ran the banner headline “EQUAL DIGNITY” across its front page. The phrase was taken from the Supreme Court’s decision in *Obergefell v. Hodges*, which struck down state bans on same-sex marriage. By pursuing a right to marry, “They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”¹⁰⁴ The *Obergefell* decision invoked the phrase “equal dignity” twice. The phrase, “equal dignity,” was utilized once in *United States v. Windsor*, the 2013 ruling that struck down the federal Defense of Marriage Act.¹⁰⁵ The word “dignity” appeared twice in *Lawrence*, nine times in *Windsor* and nine times in *Obergefell*.

Writing for the majority in *Windsor*, Justice Anthony Kennedy stipulated that when the state recognizes marriage, it “confer[s] upon them a dignity and status of immense import.”¹⁰⁶ He considered New York’s decision to recognize same-sex marriage as constituting “further protection and dignity to that bond,” and that it represented a determination by the state that same-sex couples were “worthy of dignity in the community equal with all other marriages.”¹⁰⁷ He argued that marriages “enhance the dignity and integrity of the person,” which DOMA denies.¹⁰⁸ Finally, he declared the statute invalid because “no legitimate purpose overcomes the purpose

102. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 259 (2012).

103. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In another working essay, we explore why increased access to Pre-Exposure Prophylaxis or PrEP may also fail as a measure of dignity restoration. Just as evaluating how the bathhouse closures constitute a dignity-taking has compelled us to re-evaluate the limited dignity-restorative potential of same-sex marriage recognition, so too does it compel us to consider advocacy of PrEP. While the FDA approval of the medication offers much to celebrate and plenty about which to theorize, similar heteronormative complications and governmental regulations are evident in the approval and prescription of PrEP.

104. *Obergefell*, 135 S. Ct. at 2608.

105. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

106. *Id.* at 2681.

107. *Id.* at 2692.

108. *Id.* at 2694.

and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”¹⁰⁹

On June 26, 2015, the second anniversary of *Windsor* and the twelfth anniversary of *Lawrence*, the Court, led by Kennedy, ruled in *Obergefell*. And just as in *Lawrence* and *Windsor*, Kennedy again premised this ruling on claims to dignity; he said that marriage “always has promised nobility and dignity to all persons, without regard to their station in life.”¹¹⁰ He detailed how marriage has transformed over time to recognize the “equal dignity” of women in cross-sex marriages.¹¹¹ He defined state recognition of marriage as a “basic dignity.”¹¹² And, he characterized the petitioners as “ask[ing] for equal dignity in the eyes of the law. The Constitution grants them that right.”¹¹³

The rhetoric of these decisions, for those of us who have fought for LGBT equality before the law, is uplifting. And yet the parameters of dignity as Kennedy defines it are potentially quite narrow. Writing prior to *Obergefell*, legal scholar Noa Ben-Asher contended that *Windsor* “completed a three-decade transformation of the legal homosexual from an individual whose sexual conduct the state could punish as morally blameworthy, to a couple whose marriage the State can find ‘worthy of dignity.’”¹¹⁴ Ben-Asher criticizes the “dignity” that is articulated in *Windsor*—and that is re-stated in *Obergefell*—as weak because the Court does not see dignity as inherent in the individual, but a status conferred and reinforced by state recognition and because the Court determines that non-recognition of same-sex relationships by the state constitutes injury and humiliation.¹¹⁵

To suggest that dignity is conferred by the state through marriage recognition implies that those who are unmarried are somehow not fully dignified, or, alternatively, that certain relationships must be privileged above others. Certain forms of connection and kinship-making go unrecognized and are debased. Insofar as the kinds of connections at the heart of a queer ethic of public sex—anonymous, present, and momentary—embrace a sense of time and space antithetical to the supposed commitment inherent in marriage, the reification of marriage within LGBT communities counters

109. *Id.* at 2696.

110. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).

111. *Id.* at 2596.

112. *Id.* at 2606.

113. *Id.* at 2608.

114. Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 245 (2014).

115. *Id.* at 246.

queer logics. Marriage recognition is, in other words, the legal means to transform the transgressive potential of queer politics into a narrow notion of homonormativity.¹¹⁶ The dignity of queer relations remains unrecognized, and even as we may recognize the momentous achievement that marriage recognition represents as a constitutional matter, the corresponding privileging of marriage perpetuates the indignity of refusing to recognize queer logics of intimacy.

VI. CONCLUSION: MODELS OF DIGNITY RESTORATION

By considering the bathhouse as a dynamic community institution, we have re-examined the public debate around their closures. Rather than pit moralizing public health against civil libertarianism and privacy right, we not only maintained that bathhouses were community institutions that could serve the public health—an argument that many gay rights advocates and medical professionals made throughout the closure debates—but also that these public commercial establishments provided safety and anonymity when oppressive regimes of homosexual criminalization reigned and when daily life was replete with aggression toward gay men. As such, they facilitated intimacy that transgressed the liberal jurisprudential tradition of constitutional privacy and individual right as it had been taking shape since the 1960s, a concept which relied on heteronormative boundaries between private and public space. As the HIV/AIDS crisis decimated gay male communities in San Francisco and New York, many gay men worked to retain the bathhouses given their value, creating systems of education and self-regulation that differentiated among various forms of sexual practice rather than entirely shuttering a site so critical to queer identities. While the bathhouses were private business enterprises and the closings constituted a taking from business owners, this essay moved beyond this conventional taking to draw attention to how these institutions served gay male communities by providing spaces for intimacy, kinship, and safety. These closures had either the unintentional or deliberate effect of destroying community, depriving gay men an important source of emotional sustenance and connection, and ignoring the community-based work accomplished, thereby showcasing how state authorities infantilized gay men.

Gay men, in their attempts to respond to the HIV crisis with little to no support from public authorities, developed methods of regulating bathhouse

116. See Lisa Duggan, *The New Homonormativity: The Sexual Politics of Neoliberalism*, in MATERIALIZING DEMOCRACY: TOWARD A REVITALIZED CULTURAL POLITICS 175 (Russ Castronovo & Dana D. Nelson eds., 2002).



usage. Such innovation was disregarded by authorities who refused to acknowledge the dynamic character of these physical spaces and instead rendered them *diseased* locales in which nothing productive could occur. They flattened the diverse dimensions of bathhouse culture, ignored intra-communal efforts that preceded state-directed ones, and—ultimately—painted gay men as depraved, oversexed animals incapable of responding to the crisis. When we examine the archival evidence of the gay male community’s thoughtful, detailed plans to self-regulate and their subsequent progress and then cross-reference those findings with the state’s own efforts and the state’s simultaneous mischaracterization of supposed gay male inertia, it becomes clear that both parties achieved similar results without equal authority or credit. In fact, the community and the state-sponsored actions have much in common, but the fundamental difference is that the state had different goals and strategies. Instead of approaching the bathhouses with an ethos of care and attention to the logic that shaped the spaces, the state continued its historical assault on gay male bodies and spaces by deploying a narrative of public health to destroy an “eyesore” despised long before the onset of HIV/AIDS. In short, the state’s efforts were overwhelming political as evidenced by their neglect to heed scientific advice and their unwillingness to distinguish between particular sex acts and the locales in which sex acts might take place. The community, however, tried to balance health and wellness with the tenets of sexual freedom to produce a sound and communally-specific public health approach. Unfortunately, the state’s public health narrative received traction, while the community’s efforts were disregarded and erased. As a result, the state achieved their pre-calculated goals to eradicate these troubling queer counterpublics and emerged as champions of public health. In other words, these closures did substantial cultural and political work as part of a larger anti-gay and anti-HIV cultural discourse that dehumanized and infantilized men who have sex with other men. The closings fostered and perpetuated a narrative of culpability, ignited intense divisions within the gay and lesbian communities, and produced within gay men a deep distrust and even fear of governing institutions and of one another.

Appropriate dignity restoration requires that bathhouses be reconceptualized as critical resources for safety and connection, for queer kinship and community. Two apologies to the LGBTQ communities issued only a few months after Hillary Clinton offered hers are exemplary in this regard. First, on June 22, 2016, the Toronto Police Chief, Mark Saunders, apologized for the event that catalyzed the first gay pride parade in Toronto: the raiding of four Toronto gay bathhouses in one night and the arrest of 286

patrons in February 1981. Saunders' statement recognized how the state action assaulted dignity: "The 35th anniversary of the 1981 raids is a time when the Toronto Police Service expresses its regrets for those very actions. It is also an occasion to acknowledge the lessons learned about the risks of treating any part of Toronto's many communities as not fully a part of society."¹¹⁷

Second, five months after Clinton's gaffe, the Prime Minister of Canada, Justin Trudeau, announced an intent to apologize "on behalf of all Canadians to those who were imprisoned, fired from their jobs or otherwise persecuted in the past because of their sexuality."¹¹⁸ The apology is part of a set of reforms that the Trudeau administration is undertaking following a report drafted by Egale, a Canadian interest group for sexual minorities. The report calls for dignity-restorative measures, such as apologizing to all arrested for homosexuality prior to its decriminalization in Canada in 1969, apologizing to all dismissed from public and military service due to their sexuality, evaluating whether compensation is feasible for those who suffered past discrimination for their sexuality, and eliminating all laws that criminalize those who visit a bathhouse.¹¹⁹ The apology and proposed reforms are notable because they highlight why Clinton's apology falls short. Trudeau's apology was not reactive. It was not compelled under duress, and it was not issued within a competitive electoral context. Furthermore, Clinton's policy objectives—ranging from securing equal treatment for same-sex couples to access to the anti-HIV medication known as Pre-Exposure Prophylaxis or PrEP—are premised upon heteronormative notions of sexual intimacy and dignity. Egale's objectives do not contain this heteronormative bias. The explicit demand for elimination of laws that impede the sexual kinship at the bathhouse suggests the very engagement with queer logics that both the dignity-taking ignored and that the dignity-restoration pursued by U.S. state officials lacks.

By contrasting the U.S. and Canadian efforts to restore dignity, we can approach a theory of appropriate dignity restoration for LGBTQ communities. Such restoration can likely follow only if officials adopt policies informed by "benign sexual variation" or if sexual subcultures can be

117. *Toronto Police Chief Mark Saunders Apologizes for 1981 Gay Bathhouse Raids*, CBC NEWS (June 22, 2016, 4:50 PM), <http://www.cbc.ca/news/canada/toronto/police-apology-raids-1.3647668> [https://perma.cc/U2M9-F9C7].

118. John Ibbitson, *Justin Trudeau to Apologize for Historic Persecution of Gay Canadians*, GLOBE & MAIL (Aug. 11, 2016), <http://www.theglobeandmail.com/news/politics/justin-trudeau-to-apologize-for-historic-persecution-of-gay-canadians/article31376155/> [https://perma.cc/AMF3-G9FP].

119. *Id.*

recognized in a non-hierarchical way.¹²⁰ One of the largest mistakes that characterize responses to HIV/AIDS remains the profound collision of politics and public health or the deployment of a life-threatening virus to do substantial cultural and political work against a subjugated community. If we hope to achieve something that resembles restoration, appropriate governing bodies would need to depoliticize public health policies, meaning a thoughtful reconsideration of what constitutes sexual health and who gets to decide. Additionally, these efforts should contest the privatization of health resources and, more broadly, resist heteronormativity as the framework through which gay rights/gay identity achieves legibility and approbation. Finally, restoration must involve a reevaluation of community-building habits and kinship structures that do not bolster heteronormative logics. Similar to the Canadian government's proposed plans to begin making amends, U.S. governing authorities should issue an unprompted apology that takes accountability for the harm inflicted and do the necessary work to offer respect, inclusion, and protection. Whether or not complete restoration can be provided by the very authorities responsible for the takings is debatable. Nevertheless, dignity restoration cannot be contingent on the abandonment of queer ways of knowing and being and thereby requiring the wholesale adoption of the heteronormative logics that stripped us of dignity initially. A more thoughtful strategy rooted in the recognition of queer particularity is perhaps the only route toward fuller dignity restoration, and maybe it is the best we can hope for.

120. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 283 (Carole S. Vance ed., 1992).

