

SEXUALITY'S LAW[†]

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For J.T.

To die for the love of boys: What could be more beautiful?

—Michel Foucault¹

*Il m'aime signifie en clair: il accepte que je le capture,
l'apprivoise, et le viole, et le tue, et l'enterre.*

—Tony Duvert²

I. Introduction

The contemporary history of gay sexuality—the full history—has not been written. Within it, increasingly attested to in various ways, appears an ideology of sexual freedom that has played a significant role in shaping, conditioning, controlling, and defining the sweep of gay sexuality, identity, and social life. This Article describes the ideology of sexual freedom, including its valorization of sexual violence, abuse, and injury, up to and including death, traces the ideology's implications for HIV/AIDS, and documents its actual operation in theorizing about sexuality by and among gay men in the “high” years of the

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1 JAMES MILLER, *THE PASSION OF MICHEL Foucault* 350 (2000).

2 TONY DUVERT, *ABÉCÉDAIRE MALVEILLANT* 11 (1989). Lawrence Schehr translates this as: “*He loves me means plainly: he accepts that I capture him, tame him, rape him, kill him, and bury him.*” LAWRENCE R. SCHEHR, *PARTS OF AN ANDROLOGY: ON REPRESENTATIONS OF MEN'S BODIES* 152 (1997).

epidemic.³ After that, it examines some ways in which the ideology of sexual freedom has shaped some more recent debates about same-sex sex and its proper relation to law, proposing that in a number of ways this ideology has been sexuality's "tougher and truer law,"⁴ more important than the formal legal rules promulgated and enforced by the political State. In consequence, it is suggested, efforts to understand and address same-sex sexual violence and its consequences both for individuals and society, more generally, need to grapple with the ideology of sexual freedom directly—and not ignore it—if there is to be any realistic hope for the liberal State to satisfy its obligations to protect private individuals against interpersonal harms.

Before coming to that, some preliminary facts that frame a puzzle. Since the earliest known days of the HIV/AIDS epidemic in the United States, more than 555,000 men diagnosed with AIDS—many of them gay—were infected with HIV through sex with other men.⁵ Also since the earliest known days of the HIV/AIDS epidemic, legal rules, both criminal and civil, have been able to capture many forms of the sex-based transmission of HIV as an individual harm.⁶ Nevertheless, the number of cases seeking legal redress for HIV-transmission by gay men against one another has remained very small, both in

3 Roughly the period that extended from the mid-1980s through to the days in the 1990s when so-called HIV drug "cocktails" were first widely introduced for those who could afford them.

4 *Poe v. Ullman*, 367 U.S. 497, 502 (1961) (Frankfurter, J., plurality opinion).

5 23 CTRS. FOR DISEASE CONTROL & PREVENTION, HIV SURVEILLANCE REPORT: DIAGNOSES OF HIV INFECTION AND AIDS IN THE UNITED STATES AND DEPENDENT AREAS, 2011, at 21 tbl.2a (2012), available at http://www.cdc.gov/hiv/pdf/statistics_2011_HIV_Surveillance_Report_vol_23.pdf (Table 2a: Stage 3 (AIDS), by year of diagnosis and selected characteristics, cumulative for the United States; the exact number in the table is 555,032) [hereinafter CTRS. FOR DISEASE CONTROL & PREVENTION, DIAGNOSES OF HIV INFECTION]. This number is conservative, particularly as a reflection of the number of cases of male-male, sex-based transmission of HIV. As of 2009, there were approximately 592,100 men-who-have-sex-with-men living with HIV, including approximately 123,500 living with undiagnosed HIV infection. 17 CTRS. FOR DISEASE CONTROL & PREVENTION, HIV SURVEILLANCE REPORT: MONITORING SELECTED NATIONAL HIV PREVENTION AND CARE OBJECTIVES BY USING HIV SURVEILLANCE DATA, 2010 SUPPLEMENTAL REPORT 22 tbl.5a (2012), available at http://www.cdc.gov/hiv/pdf/statistics_2010_HIV_Surveillance_Report_vol_17_no_3.pdf. These numbers do not include, as of 2010, the estimated 302,148 cumulative deaths of men-who-have-sex-with-men with AIDS. CTRS. FOR DISEASE CONTROL & PREVENTION, DIAGNOSES OF HIV INFECTION, *supra*, at 44 tbl.12a.

6 On the criminal law side, HIV-transmission may (circumstances depending) implicate common law rules against, among other things, murder (from first degree to "depraved heart or reckless murder"), criminal homicide, attempted murder, reckless endangerment, battery, and various sex crimes. Memorandum from Joshua Dressler to Marc Spindelman (Jan. 12, 2009) (on file with author); see also, e.g., Kathleen M. Sullivan & Martha A. Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139, 162–86 (1988) (discussing various possible HIV/AIDS-related criminal offenses); Harlan Dalton, *Criminal Law*, in AIDS LAW TODAY: A NEW GUIDE FOR THE PUBLIC 242–63 (Scott Burris et al. eds., 2d ed. 1993) [hereinafter AIDS LAW TODAY] (same).

absolute and relative numbers.⁷ Why? Why have gay men not regularly laid claim to what was done to them as an injury that the law's remedial harm provisions should recognize and address?

From the top, some conventional explanations that might appear to solve the puzzle, in whole or in part. Comparisons to cross-sex transmissions aside, given the special meanings and experiences of HIV/AIDS to gay men,⁸ in the early days of the epidemic, few gay men could say (and fewer say with certainty) what exact sexual event (or events) had, some time (often years) before, caused them to become infected with HIV. Transmission of the virus was commonly and practically thought to be a doer-less deed. Even in those instances in which a doer could be identified, he was regularly not seen as responsible for what he did. Nobody back then knew what he was doing, gay sex being generally seen, by gay men at least, as essentially consequence-free.⁹ If anyone were to be legally liable for inflicting this injury, then practically anyone who was sexually active and versatile could be. It is, then, as Robin Hardy reports:

I have chosen to think that Rollo is my murderer, but I attach no blame to him. I only love his memory more. Everyone was ignorant then. It was no fault of his. It could have just as easily been me, because I'm certain

On the civil side, there are the derivative torts, along with more properly sex-based torts, including torts involving the sexual transmission of disease, that, starting in the 1970s, were becoming increasingly available as a practical matter. See, e.g., Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 811–13 (1988) (sketching the doctrinal development). Robert A. Prentice & Paula C. Murray, *Liability for Transmission of Herpes: Using Traditional Tort Principles to Encourage Honesty in Sexual Relationships*, 1 J. CONTEMP. L. 67 (1984), and Louis A. Alexander, Note, *Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law*, 70 CORNELL L. REV. 101 (1984), map possible tort actions for the sexual transmission of herpes, itself a non-life-threatening disease, available *a fortiori* for the transmission of HIV/AIDS, including deceit, assault and battery, intentional infliction of emotional distress, and negligence, available at or around the time HIV/AIDS was becoming or had become a full-blown epidemic; see also Donald H.J. Hermann & Scott Burris, *Torts: Private Lawsuits about HIV*, in AIDS LAW TODAY, *supra*, at 334–66.

⁷ See *infra* Appendix.

⁸ Comparisons between the “gay” and the “straight” experiences with HIV/AIDS are immensely complicated, not least of all since both shake out differently and in complex ways along different identity lines, including those of race, class, disability, age, and sex. For present purposes, the question of why gay men have not used legal tools formally at their disposal to address HIV-transmission is treated as interesting fully on its own terms. This is not to say that the analysis developed here does not have implications for other identity (including sexual identity) groups, including heterosexuals, and in particular straight victims—female and male—of sex abuse. It does. See *infra* Conclusion.

⁹ This is to bracket some comparatively minor and treatable sexually-transmitted diseases and other views of sex at its best as risk and danger, more about which anon.

that in those years of ignorance, through no intention of my own, I was a bringer of disease to other men.¹⁰

No doubt, countless other gay men, speaking for themselves, would agree. Or would have, had they lived.

In the early years of the HIV/AIDS epidemic, ignorance of HIV and its ordinary modes of transmission could thus supply a norm of blamelessness that defined gay life across the sexual and social board, accounting for why gay men did not tap into the legal system to name what was done to them as an injury inflicted on them by other gay men. Holding through time, this norm of blamelessness, in turn, could have primed later waves of newly HIV-infected gay men not to see those who infected them as having done them a wrong. If so, HIV-infection rates could skyrocket, while gay men did not legally complain.

Or take another explanation. In the early days of the epidemic, gay men were living as social pariahs of high rank, a status that the appearance of HIV/AIDS, with its formative identification as a gay disease, only intensified. The Supreme Court's decision in *Bowers v. Hardwick*,¹¹ handed down at the height of the epidemic, may not have mentioned HIV/AIDS expressly, but driving its conclusion that sodomy remained subject to criminal prohibition may well have been a *realpolitik* sense of the headwinds the Court would have faced if it had constitutionalized a right to engage in sexual intimacies that included gay men's anal sex, pervasively associated with disease, contagion, and death.¹² How could the Constitution sanction *that*? At the same time, the legal system, so conspicuously drenched in homophobia, shown by its callous indifference to gay men's intense, urgent, and often needless suffering from HIV/AIDS,¹³ gay men were practically forced to engage in a

10 ROBIN HARDY, *THE CRISIS OF DESIRE: AIDS AND THE FATE OF GAY BROTHERHOOD* 47 (1999).

11 478 U.S. 186 (1986).

12 This point is discussed in Marc Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359, 466–70 (2001); see also William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gay Legal Agenda*, 102 YALE L. J. 333, 338 n.25 (1992) (“[T]hrough the AIDS epidemic is never mentioned by the various opinions in *Bowers v. Hardwick*, Posner notes that AIDS was discussed in the briefs, and is widely believed to have had some influence on the Justices who formed the majority.”) (citations and parenthetical omitted); RICHARD A. POSNER, *SEX AND REASON* 346 (1992). For a succinct statement of policy arguments for the non-criminalization of HIV-transmission when the underlying sex is consensual and noncommercial, see Sullivan & Field, *supra* note 6, at 161–62.

13 Instead of documenting the pervasive discrimination against HIV-positive gay men and gay men with AIDS during the Senate deliberations over the Americans with Disabilities Act, some Senators chose to join it. See Ruth Colker, *Homophobia, AIDS Hysteria, and the Americans With Disabilities Act*, 8 J. GENDER RACE & JUST. 33, 36–50 (2004).

massive project of community self-help, which ultimately developed, among other things, a project of safer sex. On this account, gay men did not enlist the State's remedial energies by claiming HIV-transmission as a legal injury because the State was the enemy, or at least a force that had to be treated as hostile. Collaborating with it against other gay men might only have served to tighten its already noose-tight grip over gay bodies and gay lives, among other consequences exposing the collaborators as gay, hence to arrest and other forms of ruin.¹⁴ Even worse, it might have undermined and risked defeating the gay community's capacity to take care of itself at a moment when the stakes of doing so were massively high.

So, it might be said, a thick norm of community self-governance emerged, and it operated, partly, as an injunction addressed to gay men to reject engagement with the legal system's harm provisions, most especially where sexuality was involved. From this original trauma, the norm held across space and time, gay men forswearing the legal system's injury rules throughout the crisis.¹⁵ More than a decade deep into the epidemic, David Chambers could thus confidently comment on how "inconceivable" it was that any gay organization would endorse legislation treating the failure to use a condom during anal intercourse as a petty criminal infraction akin to driving without a seatbelt,¹⁶ while, almost in passing, also describing more stringent criminal laws specifically targeting HIV-transmission as "unlikely" to "exert significant deterrent effects on [gay men's] unsafe behavior."¹⁷ The norm of community self-help, with its insistence on autonomy from the State's harm codes, explains how some gay men could simultaneously be outraged by the notion of appealing even to the modest regulatory energies of the criminal law, while knowing that, when the criminal law nevertheless addressed them, it would be practically irrelevant to their lives. Nobody would complain. If this is correct, HIV/AIDS could burst on the scene, and the numbers of gay men infected with it could balloon—but without court claims by gay men saying they were injured by infection through sex with other gay men.

Or consider a different, but related version of the account, in which gay men woke up one day to a nightmarish epidemic on their hands. Everyone was potentially implicated. Gay leaders (or some of them) realized that individual gay men could use the legal system's harm

14 Cf. Sullivan & Field, *supra* note 6, at 161–62, 190.

15 This is not to agree with Andrew Sullivan's assessment that the "twilight" of the HIV/AIDS epidemic has already long come and gone. Andrew Sullivan, *When Plagues End: Notes on the Twilight of an Epidemic*, N.Y. TIMES MAG., Nov. 10, 1996, at 52.

16 David L. Chambers, *Gay Men, AIDS, and the Code of the Condom*, 29 HARV. C.R.-C.L. L. REV. 353, 383 (1994).

17 *Id.* at 381.

tools to hold one another legally accountable for HIV-transmission. They chose, however, to spread a different message: of community solidarity as the brightest sign of hope. Too much work needed to be done to live as a house divided. The gay community, with the support of some heterosexual allies, gay elites proclaimed,¹⁸ must drive the homophobically disinterested government into action to provide desperately needed social services and to fund the scientific research needed to master the virus and cure the disease. Deploying legal harm rules would not achieve that. What is more, it might have had disastrous political effects. Those gay men who engaged the legal system in these ways, far from being politically energized, might have become locked into a “victim” mentality,¹⁹ enhancing—not reducing—their already excessive suffering and sapping their personal and political strengths. Indeed, along these very lines, HIV-positive gay men who had developed AIDS decided, in some of the epidemic’s early days, to disavow their identification as “AIDS victims,” insisting on being called instead “People with AIDS.”²⁰ The idea of the new appellation was, in part, precisely to direct HIV-positive gay men’s attentions away from self-pity and resentment, with their potential to occupy a life, and toward political efforts dedicated to pursuing the pressing community-based projects that required large-scale political mobilizations to succeed. Of course, once the gay “AIDS victims” disappeared as a social personage, so too, by extension, did the AIDS “perpetrator,” the one who giveth HIV. The identarian shift, which made it somewhat easier to breathe as a person with AIDS, simultaneously made it harder, indeed politically fraught, even disloyal, to think of oneself as someone victimized by the virus or its associated diseases, far less by the guy or guys who passed it on.²¹ Against all this, how much worse would it have been to break faith by attacking another gay man living with HIV/AIDS through a suit painting him a grim reaper? That’s treason. Gay men, in a great, collective act of self-empowerment and solidarity, focused by the pain of shunning or exclusion from the tribe, thus decided to fight homophobia rather than one another. And this norm of solidarity governed gay men’s

18 Backed in important ways (especially over time) by a swell built from the ground up. See DEBORAH B. GOULD, *MOVING POLITICS: EMOTION AND ACT UP’S FIGHT AGAINST AIDS* (2009).

19 See generally WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* (1995).

20 See Statement from the Advisory Committee of the People with AIDS, *The Denver Principles*, June 1983 reprinted in RAYMOND A. SMITH & DONALD P. HAIDER-MARKEL, *GAY AND LESBIAN AMERICANS AND POLITICAL PARTICIPATION: A REFERENCE HANDBOOK* (2002). These impulses are found in any number of sources, including SUSAN SONTAG, *AIDS AND ITS METAPHORS* (1988) [hereinafter SONTAG, *AIDS AND ITS METAPHORS*], the AIDS-sequel to SUSAN SONTAG, *ILLNESS AND ITS METAPHORS* (1977) [hereinafter SONTAG, *ILLNESS AND ITS METAPHORS*]. D.A. Miller attacks *AIDS and Its Metaphors* for what he perceives to be the homophobic design and implications of its ostensibly pro-gay, humanist claims. D.A. Miller, *Sontag’s Urbanity*, in *THE LESBIAN AND GAY STUDIES READER* 212 (Henry Abelove et al. eds., 1993).

21 Cf. *infra* note 138.

actions across space and time. Even as the numbers of HIV-infected gay men swelled, gay men collectively and pervasively chose to pursue political actions with—rather than leveling lawsuits against—one another.

Or take one final (and still related) perspective. This version focuses on gay men's deep skepticism about what the legal system was ready to do for them in the early years of the HIV/AIDS epidemic, even allowing that it formally offered rules by which to treat sex-based HIV-transmission as a harm. To think that the courts were really open for the business gay men might bring them—even this—was not to think at all, but to forget how thorough-going the legal system's homophobia was.²² True enough, gay men could try to hold one another to account for their injuries. But with what results? "Problems of proof," some of them "insuperable,"²³ aside, what fact-finder in a civil case would have held an alleged perpetrator liable? And precisely what for? How many legal actors, like everyone else, believed that when gays consented to sex—and when didn't they?—they consented to all its risks?²⁴ How many believed gays had only themselves—individually or collectively—to blame when they contracted HIV or went on to develop AIDS?²⁵ At some point, knowing of the risks, they should have protected themselves. On the criminal law side, what prosecutor would have prosecuted? What jury, convicted? How many judges and *veniremen* could be counted among the moralists who saw HIV and AIDS as the wages

22 Rhonda Rivera's scholarship unhappily documents important dimensions of this record. See, e.g., Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979); Rhonda R. Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311 (1980–81); Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties (Part I)*, 10 U. DAYTON L. REV. 459 (1985); Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties (Part II)*, 11 U. DAYTON L. REV. 275 (1986). Some, including Richard Mohr, saw the legal system's homophobia as so bleak, it gave rise to a right to disobey its rule, subject to expression through civil disobedience. RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 315–37 (1988).

23 THOMAS J. PHILIPSON AND RICHARD A. POSNER, *PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE* 146–47 (1993). No reference to this book should appear without also recognizing David Charny's brilliant, angry denunciation of it. David Charny, *Economics of Death*, 107 HARV. L. REV. 2056 (1994) (book review).

24 Though this has often been treated as a homophobic stance, and often is, it is not always only that, at least not in any simplistic way. Not a few gay men have themselves espoused this view with different sorts of ends in mind. Richard Mohr, for instance, discussed below, see *infra* Part III.C, handles the idea in surprising ways in the context of arguing for a broad right to sexual autonomy. Larry Kramer, by contrast, used it as a way (as he saw it) of undersponsibilizing gay sex as part of a larger effort to get gay men to stop, in his view, killing one another sexually, ideas encapsulated in the title of one of his most powerful essays, *Who Killed Vito Russo?*, OUTWEEK, Feb. 20, 1991, at 26, but also found throughout LARRY KRAMER, *REPORTS FROM THE HOLOCAUST: THE MAKING OF AN AIDS ACTIVIST* 274 (1990) [hereinafter KRAMER, *REPORTS FROM THE HOLOCAUST*].

25 For a view from within the gay community, see *infra* text accompanying notes 381–389 (discussing Richard Mohr's position that HIV-transmission should be understood as a form of self-harm).

of sexual sin?²⁶ Either way, so long as death and dying were socially understood, including by law, to be the *telos* of gay life,²⁷ what would the legal claim be for? What was the harm? The wrong?²⁸ Even the laws that a number of states eventually enacted criminalizing HIV-transmission were not chiefly designed to keep gay men—but rather heterosexuals, the “general community” or “general public”—“harm-free.”²⁹

To be sure, the verdict that Marc Christian, Rock Hudson’s ex-lover, received—initially, a cool \$21.75 million, including \$7.25 million in punitive damages, later reduced to \$5 million in compensatory damages and \$500,000 in punitive damages—might have diminished some of the skepticism that regarded the legal system’s homophobia as a sure bet, keeping the scales of justice from ever tipping harmed gays’ way.³⁰ Alternatively, of

26 See, e.g., EARL E. SHELPE & RONALD SUNDERLAND, AIDS AND THE CHURCH: THE SECOND DECADE 22 (2d ed. 1992) (“Patrick Buchanan fanned the flames of AIDS hysteria and homophobia when he wrote in 1985 that the ‘essence’ of homosexual life is ‘runaway promiscuity,’ which leads to illness and death. ‘Call it nature’s retribution, God’s will, the wages of sin, paying the piper, ecological kickback, whatever phraseology you prefer[.]’”); TIMOTHY F. MURPHY, GAY ETHICS: CONTROVERSIES IN OUTING, CIVIL RIGHTS, AND SEXUAL SCIENCE 204 (1994) (describing the “the slogan ‘the wages of sin is death’” used by televangelists Jerry Falwell and Pat Robertson as “code” referring to the connection between homosexuality and AIDS).

27 Judith Butler, *Sexual Inversions*, in DISCOURSES OF SEXUALITY: FROM ARISTOTLE TO AIDS 344, 360 (Domna C. Stanton ed., 1992) (describing the view of death “as the *telos* of male homosexuality, its genesis and its demise, the principle of its intelligibility”).

28 There are parallels here to men’s rape of, and other sexual assaults on, women. Since sex is widely seen to be what women are *for*, it has been difficult as a practical matter—it has required, where successful, considerable effort—to get the harms women experience when they are used this way, against their will, to register legally.

29 Some of the history of legislative action in the United States to address HIV-transmission through the criminal law, including some useful state survey information, is in Leslie E. Wolf & Richard Vezina, *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?*, 25 WHITTIER L. REV. 821, 844–51, 853–55, 855–61 (2004). Matthew Weait’s thoughtful and important study of the criminalization of HIV-transmission in the United Kingdom is in MATTHEW WEAIT, INTIMACY AND RESPONSIBILITY: THE CRIMINALISATION OF HIV TRANSMISSION (2007). Interestingly, Weait reports that, “[t]o date [May 2007], 14 people have been tried for, or pleaded guilty to, charges relating to the transmission of HIV in the United Kingdom.” *Id.* at 27. The total number of HIV diagnoses to the end of March 2007 was 86,738, “45 per cent of which were among men who have sex with men (MSM), 40 per cent among heterosexuals, and 5 per cent among injection drug users.” *Id.* at 4. Breaking the numbers down a little further still, the total numbers of MSM diagnoses is approximately 39,032. Of the cases prosecuted that Weait counts, two—specifically, the cases of Mark James, from August of 2006, “the first gay man to be convicted for recklessly transmitting HIV to a partner,” *id.* at 32, and Matthew Collins, also from August of 2006, “the second gay man to be charged with reckless transmission,” who “was also the first person in the UK to be acquitted at trial”—involved gay men. *Id.*

30 See *Hudson’s Lover Wins \$7 Million More*, N.Y. TIMES, Feb. 18, 1989, at A7 (“The jury that awarded Rock Hudson’s lover \$14.5 million for emotional distress awarded him \$7.25 million more today in punitive damages.”); *Jury Award Is Sharply Cut in Hudson AIDS Suit*, N.Y. TIMES, Apr. 22, 1989, at A7 (“The Superior

course, it might have been thought to show that the legal system was overly-sensitive to seeing HIV-infection as a sexuality-based harm to a person, at least in certain cases of same-sex transmission. How difficult was it to imagine that the real reason Hudson's estate was found liable was that Hudson himself—or more exactly, his homosexuality and his presumed willingness to abdicate his masculinity through anal sex³¹—was such a colossal disappointment? Or that holding his estate legally liable might have been more a way of posthumously punishing Hudson for perpetrating a fraud of heterosexuality on the

Court judge in a landmark AIDS lawsuit today drastically reduced a jury award to the late Rock Hudson's companion, ruling that Marc Christian should receive only \$5 million in compensatory damages and \$500,000 in punitive damages. The judge's decision gave Mr. Christian less than a third of the \$21.75 million that the jury had decided he should receive as compensation for the actor's decision not to tell him of his AIDS diagnosis."); AETNA Cas. & Sur. Co. v. Sheft, 756 F. Supp. 449, 450 (C.D. Cal. 1990) ("The jury rendered a verdict against [Hudson's] Estate in the sum of \$14,500,000 for intentional misrepresentation, concealment, and intentional infliction of emotional distress."); AETNA Cas. & Sur. Co. v. Sheft, 989 F.2d 1005, 1006 (9th Cir. 1993) (noting that the \$14,500,000 figure was an award of compensatory damages). After the jury handed in its verdict, Steven Petrov, "[a] spokesman for the San Francisco AIDS Foundation, said Mr. Christian had a right to know that Mr. Hudson had AIDS. 'We find it a troubling case because it places the entire burden of safe sex on one individual and not the two,' Mr. Petrov said." *Rock Hudson's Lover Wins Suit*, N.Y. TIMES, Feb. 16, 1989, at A22. The case eventually settled. Lee A. Daniels, *Chronicle*, N.Y. TIMES, Aug. 31, 1991, at A22 ("The lawsuit filed by Rock Hudson's male lover against the late actor's estate ended last week with a settlement, said the lawyer for Marc Christian, who was Mr. Hudson's companion. The lawyer, Kent L. Richlend, said yesterday that the amount of the settlement would not be disclosed."); *Larry King Live: Rock Hudson's Ex-Lover Speaks Out* (CNN television broadcast Mar. 29, 2001), available at <http://transcripts.cnn.com/TRANSCRIPTS/0103/29/lk1.00.html> ("MITCHELSON: I didn't tell them we won, we just settled it. But we settled it for just about what . . . KING: Just about what the appeal was."). As of 2001, Christian reported "I'm still HIV negative." *Id.* In a tell during his interview with Larry King, Christian reported that "the gays" were "especially" mad when he won the case: "I found out that I got a lot more vitriolic hatred from liberal gays than I did from conservative straight people. Straight people were great to me, because I think they found themselves in a position of, gee, if my wife or my husband hadn't told me, I'd know how he would feel. . . . I think that liberal gays think that if you had AIDS, you couldn't do any wrong. You could go out and infect anyone you want, you're the victim." *Id.*

31 See, e.g., DAVID A.J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES* 98 (1999) (proposing that one of the traditional reasons for the moral condemnation of male homosexuality is "the degradation of the passive male partner to the status of a woman"); JEAN-PAUL SARTRE, *ST. GENET: ACTOR AND MARTYR* 110 (Bernard Frechtman trans., 1963) (1952) ("This is a murder: submissive to a corpse, neglected, unnoticed, gazed at unmindfully and manipulated from behind, the girl queen is metamorphosed into a contemptible female object."); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 240–41 (1994) (anal receptivity as emasculating is discussed); see also *infra* Part III.D (discussing Leo Bersani's engagement with these associations). But see SCHEHR, *supra* note 2, at 161 ("For Hocquenghem, even if anal intercourse seems to imitate the domination pattern of heterosexuality, the two actions are not the same because 'it is still one man butt-fucking another.' There is a difference: 'shit will never be menstrual blood.'") (citations omitted).

American public than for injuring Christian?³²

Whatever the actual facts of homophobia were, the legal system may still have seemed so inhospitable to gay men and their claims that it was not worth testing it out, except for those rare individuals who, like Marc Christian, stood to recover sizeable legal awards. Particularly not when viewed against the possible economic and social perils in store for anyone who so publicly came out as being HIV-positive or worse, as having AIDS, in a world in which there were no assurances one would not lose one's livelihood (including one's insurance), one's home, one's family, one's friends—in a word, everything—as a result of simply being gay. Lawsuits might very well not have seemed worth the risks of bringing them, even if won. Homophobia might well have made the legal system seem sufficiently hostile to gay men, hence to the possibility of seeing and responding to their injuries, that the appearance of being effectively closed was taken as—and thus became—its truth. If so, gay skepticism could keep gay men from engaging the legal system's individual harm rules while HIV-infection rates ticked constantly upward.³³

These accounts—with the norms of blamelessness, community self-help, political solidarity, and skepticism of law that emerge from them—do not, of course, exhaust the full range of predictable explanations gay men might have given, or might now give, if pressed to explain why the legal system's harm rules have never systematically been seized as a means of coming to terms with HIV/AIDS inside the gay community.³⁴ Recognizing that the moving pieces of these accounts can be disassembled and reassembled, added to or subtracted from in any number of ways, they aim only to sketch some understandings that virtually all gay men are aware of, or can readily apprehend, from social experiences that many (if not most or all) gay men share. In this sense, these accounts are useful—as far as they go. It is just that they do not go far enough. Among other things, they avoid some disquieting truths about gay sexual life—increasingly coming into view³⁵—that must

32 See, e.g., SIMON WATNEY, PRACTICES OF FREEDOM 65 (1994) ("The AIDS agenda requires, however, that AIDS should reveal itself as the stigmata of the doomed and the damned, the concrete visible evidence of the deserts of depravity. Hence the tremendous emphasis on the physical transformation of Rock Hudson's face and body, when the entire story of his fight against AIDS was venomously constructed as the wages of sin and hypocrisy."). Cf. Douglas Crimp, *Introduction*, 43 OCTOBER 3, 4 n.4 (1987).

33 The legal system still has difficulties in apprehending wrongs between intimates. There are also ways in which gay men's social pariah status may have played a role in gay men's self-conception as injured. What can injury be when one is nothing? There is also, of course, the way in which gender norms fit in here. How can gay men as men be harmed? If they are, what is to be said of the wrong they have suffered? If they did not protect themselves from it, they must have wanted it? There is a mythic dimension to male autonomy at work here. On some of this, see *infra* Conclusion.

34 Some smart, related thoughts are found, among other places, in Sullivan & Field, *supra* note 6.

35 As discussed in Marc Spindelman, *Sexual Freedom's Shadows*, 23 YALE J.L. & FEMINISM 179 (2011).

be aired to understand the full story of why the sex-based transmission of HIV has never widely been imagined or treated as a legal problem among gay men, and also why, over the years, gay men have undertaken various interventions to keep it that way.³⁶

A number of these neglected truths,³⁷ collected and presented in these pages as the ideology of sexual freedom, an ideology that is barely recognized despite its longstanding

36 Except in truly exceptional cases. For an example, see Scott Burris & Edwin Cameron, *The Case Against Criminalization of HIV Transmission*, 300 JAMA 578, 579 (2008) (urging that the only time the sex-based transmission of HIV should be subject to criminal law is when transmission is (specifically) intended and accomplished: “Liability based on something less than achieved intent to harm another is inconsistent with a rational, desirable norm of personal responsibility in matters of sexual risk. Sexually transmitted infections are sufficiently prevalent that in most settings rational people operating with genuine autonomy should recognize exposure as a normal risk of sexual behavior. Except where coercive sexual subordination is present, the focus should be on both sexual partners’ responsibility, not that of the partner with HIV alone.”). Even in actual cases, such as the case in Georgia against Gary Wayne Carriker, in which he was held criminally liable for his failure to disclose his HIV-status to sexual partners, Laura Douglas-Brown, *HIV-positive Man Sentenced Again*, S. VOICE (Nov. 25, 2005), http://web.archive.org/web/20061125214115/http://sovo.com/2005/11-25/news/localnews/localnews_carriker.cfm (“Carriker did not disclose his HIV status before he engaged in consensual oral and anal sex with Jordan Myers between June 1 and Aug. 31, 2004, according to his May 10 indictment in Fulton Superior Court. He also did not disclose his status before engaging in consensual oral sex with Don McDaniel between Jan. 8 and Jan. 25, 2005, according to the indictment.”); *id.* (reporting that Carriker “plead[ed] guilty voluntarily to two felony counts of reckless conduct,” and was sentenced “to 10 years, with only two to serve in prison, followed by eight years of probation”); see also Kevin Duffy, *Ex-Med Student Pleads Guilty in HIV Exposures*, ATLANTA J.-CONST., Nov. 8, 2005, at 3B; Kai Wright, *Super Infector*, COLORLINES MAGAZINE, Dec. 22, 2005, at 16, the outpouring of hostility directed at the State’s intervention to regulate sex can be palpable even when qualified. See, e.g., Chris Crain, *Free Gary Wayne Carriker!*, S. VOICE, (Nov. 18, 2005), <http://web.archive.org/web/20051130035050/http://www.sovo.com/2005/11-18/view/editorial/editorial.cfm> (mounting a powerful attack on the prosecution of Carriker, but also drawing attention to the “ethical and moral” obligations of “someone with more information about the risk of exposure”—“always disclose it to the person with less information,” is the motto—and likewise noting the author’s previous endorsement of laws “prohibiting someone who knows he is HIV positive from having unprotected, insertive anal sex with a man or woman without first disclosing his status”).

37 Tim Dean’s work on the connections between gay sexuality and death in the context of HIV/AIDS, see especially Tim Dean, *The Psychoanalysis of AIDS*, 63 OCTOBER 83 (1993) [hereinafter Dean, *Psychoanalysis of AIDS*], and TIM DEAN, *Safe Sex Education and the Death Drive*, in BEYOND SEXUALITY 134 (2000), remains a rare counter to this point. In these works, Dean offers and insists upon a psychoanalytic perspective on HIV/AIDS, through which he generates powerful insights into the social and political, sometimes including the ideological, dimensions of gay male sexuality that others have refused to see, much less publicly discuss. It is a must-read for anyone interested in these topics. Just so, the approach to these matters in these pages is not, as will become clear, a psychoanalytic one. In this limited sense, it joins with David Halperin’s efforts urging the production of ways to talk about gay sexuality in the context of the ongoing HIV/AIDS epidemic in non-psychoanalytic terms. See DAVID M. HALPERIN, *WHAT DO GAY MEN WANT? AN ESSAY ON SEX, RISK, AND SUBJECTIVITY* (2007). Halperin’s own proposal, which gives analytic priority to gay men’s inner lives, and offers a model of abjection as a counterpoint (maybe even an antidote) to psychoanalysis, misses the ways in which it itself does and does not line up with the ideology of sexual freedom here. An exposition of what that relationship is, another day, except to say here that it provides a backdrop against which Halperin’s work can be situated.

animation of, and grip on, the realities of gay sex, sexual identity, and social life, sheds a powerful, new light on the virtual invisibility of the sex-based transmission of HIV among gay men as a legal harm.³⁸ So far from being an injury the law should address, within this ideology, it is seen as proof of sex's great powers, themselves why sex must not be cabined, but freed. At the same time, the ideology of sexual freedom unfolds a broader vista on to the more general invisibility of sexual violence and injury among gay men, including as a matter of law, where cases of conventional sex-based harm, such as sexual harassment, sexual assault, and rape, as with claims for the sex-based transmission of HIV, are practically unknown. In this light, the ideology of sexual freedom begins to take shape as a powerful shadow law, a (perhaps the) real law of gay sexual life, a fact about the social world that the other accounts, and indeed, much of what has been and is lately being said in the law-and-sexuality debates, entirely leave out.

The next part, Part II, turns to an elaboration of the ideology of sexual freedom and its theoretical implications for thinking about HIV/AIDS. Following that, Part III considers at length the question of how the ideology of sexual freedom actually operated in the high years of the HIV/AIDS epidemic to shape thinking about sexuality. Finally, the Conclusion closes with thoughts on the larger implications of the ideology of sexual freedom for gay sexual life and the law.

II. The Ideology of Sexual Freedom Described

The ideology of sexual freedom is less commonly written down than simply lived.³⁹ Perhaps, as with Georges Bataille's description of a pure Sadism, this is because "[s]uch a strange doctrine could obviously not be generally accepted, nor even generally propounded, unless it were glossed over, deprived of significance, and reduced to a trivial piece of pyrotechnics. Obviously, if it were taken seriously, no society could accept it for a single instant."⁴⁰ No community, inside or outside society, could—not openly—either. That it has

38 Ideology, in the sense regularly used in these pages, is a collection of related ideas that amount to a worldview that coheres and gives direction and meaning to certain social ideals, norms, attitudes, politics, institutions, practices, texts, *see infra* note 41 and discussion *infra* Part III, and even individual acts. As an ideology, its terms may or may not be visible to those whose lives it governs, in much the same way that other ideologies, including sexual ideologies—male supremacy, for instance—operated before being exposed as such.

39 See, e.g., James Miller, *Foucault's Politics in Biographical Perspective*, 97 SALMAGUNDI 30, 32 (1993) ("Foucault sought out 'limit experiences' for himself, trying to glimpse Dionysus beneath Apollo, hazarding the risk of 'a sacrifice, an actual sacrifice of life,' as he put it in 1960, 'a voluntary obliteration that does not have to be represented in books because it takes place in the very existence of the writer.'").

40 GEORGES BATAILLE, *EROTISM: DEATH AND SENSUALITY* 180 (Mary Dalwood trans., 1986) (1957) [hereinafter BATAILLE, *EROTISM*]. Generalization aside, discussion of some serious and open advocacy is in Spindelman,

not generally been openly propounded or accepted does not mean it cannot be advocated or lived in less direct and different ways.⁴¹

In one version, the ideology of sexual freedom grows from the soil of an intense homophobia, a miserable view of who gay men are, what we desire, and what we will do

supra note 35.

41 A full genealogy of the ideology of sexual freedom is beyond the scope of this effort. Some important pieces are found (among other sources) in Jean-Paul Sartre's masterwork on Jean Genet, SARTRE, *supra* note 31, and also throughout Michel Foucault's *oeuvre* (broadly defined to include not only his own writings, but also interviews and work about him, particularly in a biographical mode), which is, according to Foucault, deeply influenced by the work of Friedrich Nietzsche, Georges Bataille, Maurice Blanchot, and Pierre Klossowski. MICHEL FOUCAULT, REMARKS ON MARX: CONVERSATIONS WITH DUCCIO TROMBADORI 29–30 (R. James Goldstein & James Cascaito trans., 1991) [hereinafter FOUCAULT, REMARKS ON MARX] ("As far as I'm concerned, the most important authors who have—I won't say formed me—but who have enabled me to move away from my original university education are: Friedrich Nietzsche, Georges Bataille, Maurice Blanchot, Pierre Klossowski."). MILLER, *supra* note 1, along with other works by Miller, including Miller, *supra* note 39, and James Miller, *Carnivals of Atrocity: Foucault, Nietzsche, Cruelty*, 18 POL. THEORY 470 (Aug. 1990), are indispensable after initial engagement with Foucault's own writings. At the risk of oversimplification, Miller's case seems to be that Foucault had an intense and nearly constant psychological attachment to a death drive that finally did him in. Seen in this light, Foucault's ideas about sexuality can be rendered both pathological and autobiographical in ways not intended here. Understood as maxims in the direction of an ideology of and for sex and freedom, they are some of the moving parts of what can now be articulated as the ideology of sexual freedom. Putting Sartre's *St. Genet* and Foucault's *oeuvre* with their own antecedents in German Romanticism, see Isaiah Berlin, *Joseph de Maistre and the Origins of Fascism*, N.Y. REV. BOOKS, Sept. 27, 1990, at 57 (describing the project as "dedicated to a rejection of all that is tranquil, solid, luminous, intelligible," in favor of an "infatuation] with darkness, the night, the unconscious, the hidden powers which reign equally within the individual soul and in external nature," and "a condition both of ironical detachment and of violent discontent, melancholy, and exalted, fragmented, despairing, and yet the source of all true insight and inspiration, at once destructive and creative"), aside, the ideology of sexual freedom can also be found operating in the literature describing and imagining and redeeming same-sex, including gay male, sexual life, including, nearly at random, but hardly limited to, JEAN GENET, *THE MIRACLE OF THE ROSE* (Bernard Frechtman trans., 1966) (1951); ANDRÉ GIDE, *CORYDON* (Richard Howard trans., 2001) (1924); ANDRÉ GIDE, *THE IMMORALIST* (Stanley Applebaum trans., 1996) (1902); JIM GRIMSLEY, *DREAM BOY: A NOVEL* (1995); LARRY KRAMER, *FAGGOTS* (1978); YUKIO MISHIMA, *CONFESSIONS OF A MASK* (Meredith Weatherby trans., 1958); YVES NAVARRE, *SWEET TOOTH* (Donald Watson trans., 2006) (1973); JAMES PURDY, *NARROW ROOMS* (1978); JOHN RECHY, *THE SEXUAL OUTLAW: A DOCUMENTARY* 28 (1977); GORE VIDAL, *THE CITY AND THE PILLAR* (1948); EDMUND WHITE, *THE FAREWELL SYMPHONY* (1998) [hereinafter WHITE, *FAREWELL SYMPHONY*], EDMUND WHITE, *MY LIVES: AN AUTOBIOGRAPHY* (2006). See generally NORMAN W. JONES, *GAY AND LESBIAN HISTORICAL FICTION: SEXUAL MYSTERY AND POST-SECULAR NARRATIVE* (2007) (for an analysis of some gay historical fiction that is continuous, in certain ways, with the ideology of sexual freedom). Though a range of works that instantiate the ideology of sexual freedom will be discussed here, it must be pointed out that the readings provided do not depend on their authors' express acknowledgment or embrace of the ideology of sexual freedom as such.

for—and in—sex.⁴² Noticing the non-reproductivity of same-sex sex,⁴³ this homophobia imagines the normative arc of gay life, its most felicitous reason-for-being, is found in decadence, waste, dissipation, disease, degeneration, and death, all of which are ruinous both for individuals and civilization, more generally.⁴⁴ Forced outside society's bounds,

42 If homophobia is a form of male supremacy, which is to say a function of sexism, the lessons being drawn out here about what the ideology of sexual freedom is may have applications to male sexuality, more generally. The same may be said of the relation between homophobia and white supremacy. For some interesting connections, including the suggestion that homophobia has itself in important ways been determined by white supremacy, see Siobhan Somerville, *Queer Loving*, 11 GLQ: J. LESBIAN & GAY STUD. 355 (2005) (suggesting some ways in which homophobia has historically been constituted by white supremacy); see also SIOBHAN B. SOMERVILLE, *QUEERING THE COLOR LINE: RACE AND THE INVENTION OF HOMOSEXUALITY IN AMERICAN CULTURE* (2000).

43 See, e.g., RICHARDS, *supra* note 31, at 98 (discussing “the grounds traditionally supposed to rationalize the condemnation of homosexuality,” and including first on the list “its nonprocreative character”) (citing, *inter alia*, Plato, *Laws*, Book 8, 835d–842a, in *THE COLLECTED DIALOGUES OF PLATO* 1401–02 (Edith Hamilton & Huntington Cairns eds., 1961)); NICHOLAS C. BAMFORTH & DAVID A.J. RICHARDS, *PATRIARCHAL RELIGION, SEXUALITY, AND GENDER: A CRITIQUE OF NEW NATURAL LAW* (2008) (discussing the views of prominent “New Natural Law” thinkers who focus on procreation as a central distinguishing feature of homosexuality); JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* 148, 155, 202, 210, 329 (1981) (discussing sources framing homosexuality as unnatural because non-procreative). Cf. Butler, *supra* note 27, at 345 (In Michel Foucault’s first volume of *The History of Sexuality*, “[s]ex” is not only constructed in the service of life or reproduction but, what might turn out to be a logical corollary, in the service of the regulation and apportionment of death.”).

44 On “waste,” see DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 78 (1998) (discussing the work of Paul Cameron and co-authors, regularly cited, claiming “that 75% of gay men regularly ingest fecal material”) (citing, *inter alia*, Paul Cameron et al., *Sexual Orientation and Sexually Transmitted Disease*, 70 NEB. MED. J. 292 (1985)); Paul Friedman, *Sexual Deviations*, in 1 AM. HANDBOOK OF PSYCHIATRY 589–613 (Silvano Arieti ed., 1959) (discussing homosexuality, along with coprophilia, and other sexual conditions as forms of “sexual deviation[.]”); GRAHAM ROBB, *STRANGERS: HOMOSEXUAL LOVE IN THE NINETEENTH CENTURY* 54 (2005) (“[In 1906,] Freud’s disciple, . . . Sándor Ferenczi . . . urged his colleagues in Budapest to accept ‘uranism’ as a naturally occurring form of sexuality [following the publication of Freud’s *Three Essays on the Theory of Sexuality* in 1905] and called for decriminalization. The following year, he discovered Freud, decided that uranism was a kind of neurosis, and began to develop theories of his own[.] . . . conclud[ing] that homosexuality was a form of coprophilia . . . , expressed in a fondness for perfume and the arts.”). On “dissipation,” see, for example, DONALD WEBSTER CORY & JOHN P. LEROY, *THE HOMOSEXUAL AND HIS SOCIETY* 224 (1963) (“Sexual activities and relations that were not procreative in aim were seen as deliberate waste of seed[.]”); JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* 128 (1995) (“The early American colonies, for example, provide a sharp contrast to the modern era . . . ; in those colonies the sodomitical act of man with man was not thought to demasculinize either party, but was condemned as waste of procreative seed.”) (discussing KATE MILLETT, *SEXUAL POLITICS* (1970)). On “disease,” see, for example, CARL F. STYCHIN, *LAW’S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE* 134–37 (tracing out the relation of homosexuality to disease and contagion). On “degeneration,” see HERMAN, *supra*, at 47 (“Romans 1:18–32 shows that homosexuality is contrary to nature, and that it is part of the degeneration of man that guarantees ultimate disaster in the

into exile, by a society hoping to protect itself,⁴⁵ homosexuality is cast as sexuality that is insatiable, indiscriminate, violent, wild, untamable, and untamed.⁴⁶

From these descriptions, all that homosexuality has been allowed to be, if pervasively oppressed,⁴⁷ the ideology of sexual freedom builds an affirmative theory of sex. In it, same-sex sex takes on the monumental powers—outside and so opposed to society—that it has been storied to have. Loosely speaking, this sex is re-imagined as prior to the social world, including its values and institutions, themselves including marriage, family, fatherhood, neighborhood, church, and state, as well as, wherever they pop up, medicine,⁴⁸

life and the life to come.”) (quoting Editorial, *The Laws Against Homosexuals*, 14 CHRISTIANITY TODAY 32 (1969) (internal quotation marks omitted)). Finally, on “death,” see, e.g., Butler, *supra* note 27, at 358 (“Jeff Nunokawa argues that a long-standing discursive tradition figures the male homosexual as always already dying, as one whose desire is a kind of incipient and protracted dying.”) (citing Jeff Nunokawa, *In Memoriam and the Extinction of the Homosexual*, 58 ENG. LIT. HIST. 427 (1991)).

45 Thus, Harry Hay:

It would be true to say that—traditionally—the Homosexuals have lived outside the village, have been thrust “outside” the protecting sanctions, and “outside” the scope of benevolent and supportive institutional rewards of praise and status. Yet that traditional “outside” place of exile must be understood as a defined and special place . . . a consecrated institution in itself . . . the Temenos, the Acropolis, the Sacred Cave of Cleft, the high places, the riverside, the cross-roads, the ford, the burial place, the Temple. The Homosexuals’ “outside place” has always been a special, though proscribed-for-the-unconsecrated section, of the village space . . . a space to be inhabited by what might be seen as one of pre-history’s early non-productive Specialists. Begrudged a subsistence, but quite counted upon in turn to repay in selfless thankless servitude, the deviant was expected to observe, and predict, with objective detachment, potential ways and means of easing the convulsive interflows in the subject-to-subject relationship between Gods and men.

HARRY HAY, *RADICALLY GAY: GAY LIBERATION IN THE WORDS OF ITS FOUNDER* 164–65 (Will Roscoe ed., 1996).

46 See, e.g., HERMAN, *supra* note 44, at 80 (noting ways in which “gay sexuality is represented as masculinity out of control, as aggressive, powerful, unrestrained. It is an inherently ‘anarchic impulse’”) (citing WILLIAM DANNEMEYER, *SHADOW IN THE LAND: HOMOSEXUALITY IN AMERICA* 25 (1989)).

47 Larry Kramer, for instance, registers the idea this way: “The concept of making a virtue out of sexual freedom, i.e., promiscuity, came about because gay men had nothing else to call their own *but* their sexuality.” KRAMER, *REPORTS FROM THE HOLOCAUST*, *supra* note 24, at 274.

48 Any number of gay writers have railed against the medicalization, and in particular, the psychologization of homosexuality. High-theoretic sources include Michel Foucault, see, e.g., 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (Robert Hurley trans., 1978) (1976) [hereinafter 1 FOUCAULT, *HISTORY OF SEXUALITY*]; MICHEL FOUCAULT, *The Birth of Social Medicine*, in 3 *THE ESSENTIAL WORKS OF MICHEL FOUCAULT 1954–1984: POWER* 134 (James D. Faubion ed., 2000); Eve Sedgwick, see, e.g., EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 2–3 (1990); and David Halperin, see, e.g., HALPERIN, *supra* note 37; GUY

morality,⁴⁹ and law.⁵⁰ In the forest's fresh air, sex, unrestrained, must be allowed to be what it is, found in its becoming, unknown and unknowable before it is.⁵¹

Sex in this account is the value of all values. But, importantly, not because it is good.⁵² Sex's measure does not emerge from or correspond to any given moral code, customary norm, or man-made law. The ideology of sexual freedom does not herald sex because it expresses affection or caring or nurturing or compassion, much less because of how it builds or affirms friendship, community—or love.⁵³ Sex's value is found in what caused society to cast it out. It is an awesome power that commands esteem because it is selfish and wasteful and degenerate and wicked and violent and cruel and irresponsible and

HOCQUENGHEM, HOMOSEXUAL DESIRE 73–77 (Daniella Dangoor trans., 1993) (1972).

49 In John Rechy's words, for instance, "[t]he promiscuous homosexual is a sexual revolutionary. Each moment of his outlaw existence he confronts repressive laws, repressive 'morality.' Parks, alleys, subway tunnels, garages, streets—these are his battlefield." RECHY, *supra* note 41, at 28.

50 See, e.g., *id.*

51 For an analysis of sex as a natural force that both creates and destroys, and which should, for that reason, be embraced and released, see generally Pierre Klossowski, *Nature as a Destructive Principle*, in MARQUIS DE SADE, *THE 120 DAYS OF SODOM AND OTHER WRITINGS* 65 (Austryn Wainhouse & Richard Seaver trans., 1966) (analyzing de Sade's views).

52 For that view, see, for example, CARLOS A. BALL, *THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY* 101 (2003) (venturing gay as "good" in terms of a Nussbaumian "capabilities" approach); Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 15 GEO. L.J. 1871 (1997); Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1 (2005) (advancing homosexuality's goodness largely on an analogical model, by virtue of its likeness to heterosexuality); Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005).

53 See *infra* Part III.D (discussing Leo Bersani's work). Compare, e.g., BATAILLE, *EROTISM*, *supra* note 40, at 167 ("Communion between the participants is a limiting factor and it must be ruptured before the true violent nature of eroticism can be seen, whose translation into practice corresponds with the sovereign man. The man subject to no restraints of any kind falls on his victims with the devouring fury of a vicious hound."), with RICHARDS, *supra* note 31, at 74 ("The right to intimate life protects these moral resources as they bear on the role of loving and being loved in the tender and caring exfoliation of moral personality, morally finding one's self, as a person, in love for and the love of another moral self."); *id.* at 160 ("[N]o compelling argument of public reason exists in contemporary circumstances that could justify the abridgment of the right to love of homosexuals."); *id.* at 195 (The "choice of gay and lesbian identity is, in its nature, an empowering ethical protest of conventional gender stereotypy that enables homosexuals, like heterosexuals, to live as individuals with hearts and minds authentically open to the grace of love.") and BAMFORTH & RICHARDS, *supra* note 43, at 212 ("[T]he importance of autonomy in intimate life[] focus[es] centrally on the crucial value for human beings of reciprocal love. For most adults, sexual freedom of action is one of the most powerful means of expressing affection within a loving emotional relationship, and is of fundamental importance for this reason[.]").

criminal.⁵⁴ The ideology of sexual freedom thus deems the value of sex is found significantly, if not exclusively, in its “dark” side,⁵⁵ beyond good and evil and right and wrong. Freed from morality’s grip, so, too, from society’s remaining rules. Within the ideology of sexual freedom, sex, hence its value, is in its nature: sheer power.⁵⁶

Suggesting the insult about homosexuality’s barrenness is not forgotten is the emphasis the ideology of sexual freedom places on homosexuality’s capacity to generate effects,⁵⁷ at least equal to heterosexuality’s, if it doesn’t surpass it. Freed from the ordinary burdens of species reproduction, sex, in a creative frenzy, can endlessly breed.⁵⁸

54 See *infra* text accompanying notes 514–570 (discussing Bersani’s normative view of sex as “anticommunal, antiegalitarian, antinurturing, antiloving”); see also *infra* note 68 (quoting Pierre Klossowski).

55 See, e.g., Janet Halley, *Sexuality Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 182, 195 (Catharine A. MacKinnon & Reva Siegel eds., 2004) (describing the desire for “a full-face encounter with . . . the pleasure and the danger of sexuality”).

56 See, e.g., 1 FOUCAULT, HISTORY OF SEXUALITY, *supra* note 48, DUNCAN KENNEDY, *Sexy Dressing*, in SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY 126 (1993) (analyzing how various legal rules do and do not contribute and in what ways to the sexual inequality of women; law is power, law shapes sexual relations and sexual inequality, hence sex, hence sex is about power relations, hence power); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) (treating sex, including sex inequality, as a form of power, hence relations in sex as power relations); Mary Jo Frug, *Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1991) (discussing, throughout, ways in which women’s power, including sexual power, is constructed in relation to men’s); Naomi Mezey, *Legal Radicals in Madonna’s Closet: The Influence of Identity Politics, Popular Culture, and a New Generation of Critical Legal Studies*, 46 STAN. L. REV. 1835 (1994) (reviewing KENNEDY, *supra*); Robin West, *Deconstructing the CLS-FEM Split*, 2 WISC. WOMEN’S L.J. 85 (1986) (locating sexual relations in matrices of academic power, and academic power in the matrices of sexual relations: it is all power). Still, one of the most colorful articulations of the point from anywhere inside the gay male community, which proceeds on the assumption that sex is power, must be Guy Hocquenghem’s “bald statement[.]” SCHEHR, *supra* note 2, at 161, that “our assholes are neither shameful nor personal; they are public and revolutionary.” *Id.* (citation omitted).

57 See, e.g., JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 119–20 (2006) [hereinafter HALLEY, SPLIT DECISIONS] (Michel Foucault’s *History of Sexuality, Volume I*, is introduced, and its theory of power is described this way: “Foucault had a different idea. Power is not *puissance* but *pouvoir*—the capacity to produce effects—and if at one time it could install itself only in high places whence it lorded itself over low ones, that time is over. . . . [A]t the onset of the modern age[,] power learned to move from high centers to the population, to the whole social array as it is regulated by itself.”) (footnote omitted).

58 See, e.g., HAY, *supra* note 45, at 81 (“In heterosexuality it is to be expected that there should be a stress on sexual matters because this is connected with their primary concern—reproduction—and thus is directive. The Homosexual copies this pattern and because it is not applicable, and non-directive, he is considered loose and degenerate. When this sex urge is thus not meaningfully used for procreation, this energy should be channelized [sic] elsewhere where its end can be creativity.”).

Sometimes sex's effects are imagined to be small, "private" and personal, immediate for the individual, as in bodily pleasures.⁵⁹ Without question, the ideology of sexual freedom holds pleasure in high esteem. But this is not simply, or ultimately, a hedonistic program.⁶⁰

Beyond conventional pleasures, the ideology of sexual freedom has a mystical strain.⁶¹

59 Foucault's "bodies and pleasures," 1 FOUCAULT, HISTORY OF SEXUALITY, *supra* note 48, at 157 ("The rallying point for the counterattack against the deployment of sexuality ought not to be sex-desire, but bodies and pleasures."), has often been central to queer analysis, and thought central, even final, within the queer project. See Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1, 28–42 (2004) (discussing this point and collecting sources).

60 Hedonistic defenses of sex allied in various ways with the ideology of sexual freedom do abound. See, e.g., Scott O'Hara, Editorial, *Exit the Rubberman*, 3 STEAM: A Q.J. FOR MEN (1995), at 254 ("Men who orient their entire life around a desperate struggle to stay negative—and then have the gall to complain about it!—are akin . . . to those unhappily married men who . . . avoid acknowledging their attraction to men. It's an effort to deliberately eliminate pleasure from life. . . . One of my primary goals is the Maximization of Pleasure . . . I believe that Positives have learned to have much more fun than Negatives."); *id.* at 254–55 ("Fucking with condoms isn't worth the work to me; it isn't even exciting. . . . The essence of fucking . . . is not penetration per se, but trust: I trust you . . . enough to want your cum up my ass. Wearing a condom negates those feelings. . . . I want a man—but not a Negative any longer, not a man who's scared of the juices of my body. . . . So herewith, I make a Declaration of Independence: I'm tired of using condoms, and I won't. . . . I don't feel the need to encourage Negatives to stay negative. If it's truly important to them, they'll stay out of my bed. . . . Everyone knows [my sero-status]."). But see SARTRE, *supra* note 31, at 111 (describing sex in ceremonial terms and then offering that "[s]ensual pleasure [for at least one of the participants can be] excluded from this ceremony," in which both parties "exhaust themselves amidst violence and pain, in serving it; they both sacrifice themselves so that the absolute, namely, the male's orgasm, may come into being").

61 Sometimes, this mysticism, in the form of a certain spiritualism, comes through directly and unequivocally. See, e.g., generally HAY, *supra* note 45 (articulating, repeatedly, a spiritualized version of same-sex relations); see also *id.* at 194–95 ("For all of us, and for each of us, in the dream of Love's ecstasy—the God descends—the Goddess descends—and for each of us the transcendence of that apotheosis is mirrored in the answering glances of the lover's eyes. . . . Heterosexuals do not partake of such a communion of spirit. . . . But—to tyrants, and to alien usurping Gods, the clear unflagging flame of our Dream was, and remains still, heresy, treason, witchcraft—the unforgivable sin. Toward the expropriators of the Spirit of Man we Homosexuals are forever alien; in their eyes we are forever Anathema!"); *id.* at 199 ("Our Homosexual Liberation Ideal mandates such a community of Free Spirits. . . . We come together in a voluntary sharing of a spiritual outlook. We touch hearts."); Will Roscoe, *in id.* at 248 ("Hay refers to gay men's sexuality as 'our gateway to spirit,' our insistent sexual drive as a 'question' demanding an answer. For Hay, even our occasional, instantaneous connections with strangers can involve almost telepathic communication and the exchange of intense and affirmative erotic energies."); HAY, *supra* note 45, at 254–55 ("I should explain what I mean by Fairy Spirituality. To me the term 'spiritual' represents the accumulation of all experiential consciousness from the division of the first cells in the primeval slime, down through all the biological-political-social evolution to your and to my latest insights through Gay Consciousness just a moment ago. What else can we call this overwhelmingly magnificent inheritance—other than spiritual?"); *id.* at 272 (suggesting that gays have been, through time, the "MEDIATORS between the seen and the unseen" . . . "between the make-believe and the real" . . . and "between the Spirit and the flesh," and then asking, "in Twentieth-century America—how do we differ?—and how do we remain the same?"); see also, e.g., FRANK BROWNING, *Spirit and Transgression: Looking for Ecstasy*

Sex is a power standing as a Godhead, a queer version of the divine, capable of miracles.⁶² As it sheds its civilizing constraints, energies beginning fully to pulse, sex can be nothing less than a portal to new ways of being, to new ways of life, even to new social worlds.⁶³

in the Penetrated Man, in *THE CULTURE OF DESIRE: PARADOX AND PERVERSITY IN GAY LIVES TODAY* 74, 80–81 (1994) (“In the baths, [Armistead Maupin] found remarkable qualities of communication with men whose names he never knew, men with whom he did not even have sex, with whom he embraced and then moved on, all of which left him with a nearly religious feeling. ‘I felt very close to God,’ he says. Then, perhaps mindful that our conversation is being recorded for radio broadcast, he breaks the mood and adds, ‘My friends say that’s because I was always on my knees.’ . . . How could anyone suppose that falling into a darkened, anonymous orgy room could be elevated into a religious experience? . . . And yet, as anyone could hear, there wasn’t the slightest hint of sacrilege in his tone. His words seemed like a genuinely spiritual confession to which his droll passing remark had been offered only as comic relief.”); *id.* at 81–82 (discussing views of Bruce Boone that equate gay sex with religious experience); *id.* at 92 (“But as I explored the subject over the next two years with homosexual and heterosexual men and women, the association between sex and God came to seem extraordinarily common.”). Other times, the suggestion of the mysticism, in the form of spiritualism, about same-sex sex is found in between the lines. *See infra* Part III.C (Richard Mohr, treating it this way).

62 *See, e.g.*, Paul Morris, *No Limits: Necessary Danger in Male Porn*, at para. 44 (1998) (unpublished manuscript), available at http://www.treasureislandmedia.com/TreasureIslandMedia_2007/paulsPapers.php?article=noLimits (“As a people, we do believe in miracles.”); *see also, e.g.*, BATAILLE, *EROTISM*, *supra* note 40, at 185 (Sadism “bestows a kind of divine or, more accurately, sacred significance on that excess and that harmony. Our desire to consume, to annihilate, to make a bonfire of our resources, and the joy we find in the burning, the fire and the ruin are what seem to us divine, sacred.”); GEORGES BATAILLE, *THE TEARS OF EROS* 70 (Peter Connor trans., 1989) (1961) [hereinafter BATAILLE, *THE TEARS OF EROS*] (“The meaning of eroticism escapes anyone who cannot see its *religious* meaning.”).

63 For one vivid illustration, consider: “The sexualization of the world heralded by the gay movement pushes capitalist decoding to the limit and corresponds to the dissolution of the human; from this point of view, the gay movement undertakes the necessary dehumanization.” HOCQUENGHEM, *supra* note 48, at 145; *see also* SCHEHR, *supra* note 2, at 157 (“When libidinal energy is no longer shunted away from the anus, when it reaches its goal, then and only then will we all be liberated from the structures of capitalist thought and ideology, and more importantly from the hegemony of the heterocratic order that is the supremely reductive and reproductive sign of that ideological system.”) (characterizing an argument from *Homosexual Desire*). Wayne Hoffman brings this dynamic back to earth, only to set it loose again, where he writes:

The fantastic—the vision of how things *could* be, not just how they *were*—had fueled gay liberation and the sexual revolution gay men enjoyed in the 1970s[.] . . . Idealism and utopianism were essential to early gay liberation thinking, and the hopes and dreams inspired by the articulation of a new sexual order helped a generation of gay men strive to change their sexual worlds, to improve their sexual lives, to move beyond the heterosexist restrictions American society placed on gay sexuality. The ability to create new queer lifeworlds hinged on this ability to see beyond reality into the world of the fantastic.

A key element of this fantastic vision was the explosion of a public sexual culture for gay men. . . .

Wayne Hoffman, *Skippping the Life Fantastic: Coming of Age in the Sexual Devolution*, in *POLICING PUBLIC*

Sometimes, this is because sex changes how individuals see and experience themselves and how they know and relate to one another in sex—and if there is a “beyond” it, beyond it.⁶⁴ Surpassing the boundaries of the self and of the home and existing social institutions, sex can transform society and thus the world.⁶⁵ Sometimes, this is because sex is believed to be a way of “playing” with the existing net of power relations currently laid over the entire social field.⁶⁶ Here, in altering its warp and weave in one corner, sex can give rise to new configurations or arrangements of power with far-reaching consequences on other parts of the social grid.⁶⁷ A more concrete rendition of the same thing is sex being vaunted as a conduit for alterations in the social world, because with the new power relations that emerge from sex come new forms of knowledge, fresh truths.⁶⁸ These social changes

SEX: QUEER POLITICS AND THE FUTURE OF AIDS ACTIVISM 337, 338–39 (Dangerous Bedfellows eds., 1996). With thanks to Robin West, affinities appear to exist between the ideology of sexual freedom and the drug ideology of the early 1960s.

64 Some of this can be found in “coming out” stories, which are often seen as transformational, though for many, they are transformational in the sense of a discovery about oneself that changes how one relates to one’s internal truth, rather than a new orientation toward the world, including a particular kind of creative engagement with it. That, more properly, is a Foucaultian line.

65 Hence Michael Warner’s angry, mournful meditation on the worldmaking power of gay sex and the public sex culture that once existed around it in MICHAEL WARNER, *THE TROUBLE WITH NORMAL* (1999) [hereinafter WARNER, *THE TROUBLE WITH NORMAL*]. (But see *infra* note 362.) It is also an idea found and embraced in a particular kind of way in Leo Bersani, *Is the Rectum a Grave?*, 43 OCTOBER 197 (1987), discussed *infra* Part III.D.

66 Michel Foucault put the point this way: “Homosexuality is a historic occasion to reopen affective and relational virtualities, not so much through the intrinsic qualities of the homosexual but because the ‘slantwise’ position of the latter, as it were, the diagonal lines he can lay out in the social fabric allow these virtualities to come to light.” MICHEL FOUCAULT, *Friendship as a Way of Life*, in 1 *THE ESSENTIAL WORKS OF MICHEL FOUCAULT 1954–1984: ETHICS: SUBJECTIVITY AND TRUTH* 135, 138 (Paul Rabinow ed., 1997). A slightly different translation appears as MICHEL FOUCAULT, *Friendship as a Way of Life*, in *FOUCAULT LIVE: COLLECTED INTERVIEWS 1961–1984*, at 308, 311 (Sylvère Lotringer ed., 1989). For his part, Jeffrey Weeks has ventured that the sexual is a product of the social, which is itself constituted in part by the sexual this way: “‘Society’ is . . . an intricate web of institutions, beliefs, habits, ideologies and social practices that have no *a priori* unity and whose actual relationships have to be unraveled rather than taken as read. If we transfer this view of ‘the social’ to sexual activities, we will see that . . . what we describe as sexual is constructed through a complexity of social relations[.]” JEFFREY WEEKS, *SEXUALITY* 52 (1989). Following the reason-chain, change the sexual and you might just change the social as well, with boomeranging effects on sex. See also, e.g., DENNIS ALTMAN, *GLOBAL SEX* (2001).

67 This is a theme found, among other places, in WARNER, *THE TROUBLE WITH NORMAL*, *supra* note 65; HALLEY, *SPLIT DECISIONS*, *supra* note 57.

68 On the relation between sexuality and knowledge in this vein, SEDGWICK, *EPISTEMOLOGY OF THE CLOSET*, *supra* note 48, is still a classic. As Michael Warner has explained: “One of Sedgwick’s best known theses is that ‘homosocial’ forms of domination are constituted in part by the repudiation of erotic bonds among

are thought capable of cascading, precipitating others, in a series of endless waves.⁶⁹ All these pathways and possibilities—and more, which cannot yet be imagined—being open, available, within reach, in and through sex, the last thing it is, certainly at its best, is what it is sometimes thought to be: a purely self-regarding, hermetically-contained, private, asocial act.⁷⁰

Common to these possibilities, with their obscure conduits for personal and social change flowing from sex, is that they are available only when certain sexual intensities are reached and surpassed, when that threshold that makes sex what it now largely “is”—locked down by the dreary, straight-laced shackles that aim to keep sexuality’s true power and all that can follow from it firmly out of our reach—is traversed and transcended.⁷¹

men. . . . A more recent addition to this view is her argument that the strategic separation of mutually implied knowledges—secret knowledge, superior insight, disavowal, science, coded knowledge, open secrets, amnesia, the unsayable—is a medium of domination not reducible to other forms of domination, and the one that finds its paradigmatic case in the homosexual and the closet.” Michael Warner, *Introduction*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* vii, xiv (Michael Warner ed., 1993). From sex, in this view, new understandings of domination emerge, and along with that, new possibilities for resistance and social change. A more dramatic example comes in Pierre Klossowski’s discussion of de Sade: “What I should like to emphasize here . . . is the idea of a crime-information relationship, a notion strikingly represented in Sade’s thought[:]. . . . If knowledge ends by becoming a crime, what we call crime must contain the key for knowledge. As a result, it is only by extending the sphere of crime further and further that mind, reaching those *extraordinary crimes*, will recover its lost knowledge—that knowledge which is infinitely greater than what we have.” Klossowski, *supra* note 51, at 75. To look ahead, on the connection of the will to knowledge and the will to death, compare GIANNI VATTIMO, *NIETZSCHE: AN INTRODUCTION* 175 (2002) (“Ultimately, though, the will to knowledge triumphs in Nietzsche, even if this will should turn out to be a will to death.”); *id.* at 179 (“At the heart of Jaspers’ interest is a will to truth inherent in Nietzsche’s thought, which corresponds to a will to death. Nietzsche’s whole thought, which is light and labyrinth, spirit and Being, circles around this ambiguity of truth. Truth’s ultimate secret, at which Nietzsche arrives via myth, is that truth is death and that concealed in the passion for truth there is again only death.”).

69 One version is from de Sade, in the voice of “Clairwill, the heroine Juliette’s companion in debauch, [who] says ‘I’d like to find a crime that should have never ending repercussions even when I have ceased to act, so that there would not be a single instant of my life when even if I were asleep I was not the cause of some disorder or another, and this disorder I should like to expand until it brought general corruption in its train or such a categorical disturbance that even beyond my life the effects would continue.’” BATAILLE, *EROTISM*, *supra* note 40, at 174. As Bataille, in his own voice, continues: “To reach such impossible peaks is indeed no less formidable an undertaking than the ascent of Everest; no one can do it without a colossal concentration of energy.” *Id.* The vision is not inherently dark, though it can obviously be turned that way. ALTMAN, *supra* note 66, seems to turn it—at least sometimes—in more pleasant and reassuring directions.

70 SCHEHR, *supra* note 2, at 189 (“For Foucault, the problem of homosexuality is not the sexual act itself, but the possibility that this sexual act is not a self-contained unit, but something with a consequence: the result being the formation of lines of order, power, and communication distinct from those of society at large[.]”).

71 Hence Michel Foucault’s notion of the “limit experience,” which he himself associates with the works of Friedrich Nietzsche, Georges Bataille, and Maurice Blanchot. FOUCAULT, *REMARKS ON MARX*, *supra* note 41, at

Only when the world of sexual freedom opens up to us, labyrinths appearing,⁷² sensations occurring, bodies colliding,⁷³ with nothing limiting sex, nothing, including no social knowledge or institution, mediating or channeling our experience of it, when it has brought us out of our usual slumber, half (or more) dead, are we allowed, which is to say, forced, to truly *be*. Missing this, sex is submitted to the authority of a thousand conventions that make it seem to be what they will it to be, not what it actually is.

31. He once described it this way:

Nietzsche, Bataille, and Blanchot, on the contrary, try through experience to reach that point of life which lies as close as possible to the impossibility of living, which lies at the limit or extreme. They attempt to gather the maximum amount of intensity and impossibility at the same time . . . [in order to] “tear[]” the subject from itself in such a way that it is no longer the subject as such, or that it is completely “other” than itself so that it may arrive at its annihilation, its dissociation.

Id. (footnote omitted); *see also id.* at 46 (“[T]o call the subject into question had to mean to live it in an experience that might be its real destruction or dissociation, its explosion or upheaval into something radically ‘other.’”). Thoughts on what precedes one of these “limit experiences” are found, for example, in GEORGES BATAILLE, *The Use Value of D.A.F. de Sade (An Open Letter to My Current Comrades)*, in *VISIONS OF EXCESS: SELECTED WRITINGS, 1927–1939*, at 99 (Allan Stoekl, ed. and trans., 1985) (“To the extent that man no longer thinks of crushing his comrades under the yoke of morality, he acquires the capacity to link overtly not only his intellect and his virtue but his *raison d’être* to the violence and incongruity of his excretory organs, as well as to his ability to become excited and entranced by heterogeneous elements, starting in debauchery.”), and also AUDRE LORDE, *USES OF THE EROTIC: THE EROTIC AS POWER* 5–6 (1978) (“Our erotic knowledge empowers us, becomes a lens through which we scrutinize all aspects of our existence, forcing ourselves to evaluate those aspects honestly in terms of their relative meaning without our lives. And this is a grave responsibility, projected from within each of us, not to settle for the convenient, the shoddy, the conventionally expected, nor the merely safe. . . . I find the erotic such a kernel within myself. When released from its intense and constrained pellet, it flows through and colors my life with a kind of energy that heightens and sensitizes and strengthens all my experience.”).

72 Fascination with the labyrinth is found, among other places, in Nietzsche, *see, e.g.*, FRIEDRICH NIETZSCHE, *THE ANTICHRIST* (R.J. Hollingdale trans., 1990); Bataille, *see, e.g.*, GEORGES BATAILLE, *The Labyrinth*, in *VISIONS OF EXCESS: SELECTED WRITINGS, 1927–1939*, *supra* note 71, at 171–77; and Foucault, *see, e.g.*, MICHEL FOUCAULT, *DEATH AND THE LABYRINTH: THE WORLD OF RAYMOND ROUSSEL* 7 (Charles Ruas trans., 1986) (1983) [hereinafter *FOUCAULT, DEATH AND THE LABYRINTH*].

73 *Cf.* RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* 24 (1987) (Of a certain bathhouse scene involving fist-fucking, it is asked: “Where was the affection? . . . Where was the interaction of mind and body that creates a meaningful sexual experience? It was as if these people, who had been made so separate from society by virtue of their sexuality, were now making their sexuality utterly separate from themselves. Their bodies were tools through which they could experience physical sensation. The complete focus on the physical aspect of sex meant constantly devising new, more extreme sexual acts because the experience relied on heightened sensory rather than emotional stimulation.”).

Recognizing these possibilities, the ideology of sexual freedom speaks not just to how sex is had, but to how the world is lived.⁷⁴ It urges an orientation—a desire—that aims toward a full embrace of the uncertain,⁷⁵ the unfamiliar, the unrealized, the irrational,⁷⁶ the unknown, leaving the authority that dulls sense and mind behind. The hope and appeal is that, in doing so, through experience, something truly spectacular may be discovered. The ideology of sexual freedom thus constitutes more than a way of being sexual, it is a *modus vivendi*, truly a style, or an erotic style, of and for an entire life.⁷⁷ Michel Foucault captures the trajectory thus:

Sexuality is something that we ourselves create—it is our own creation, and much more than the discovery of a secret side of our desire. We have to understand that with our desires, through our desires, go new forms of relationships, new forms of love, new forms of creation. Sex is not a fatality; it's a possibility for creative life.⁷⁸

74 This is a regular theme in Foucault. Janet Halley picks up on it in the introduction to HALLEY, *SPLIT DECISIONS*, *supra* note 57, at 7 (“[M]y desire is for a pragmatic posture, a sense of being *in relation* to problem seeing and problem solving; and for an existentialist attitude that understands being as just the appearance of phenomena to a being. My desire is a posture, an attitude, a practice, of being in the problem, not being in the theory.”).

75 See, e.g., David Kennedy, *The Spectacle and the Libertine*, in AFTERMATH: THE CLINTON IMPEACHMENT AND THE PRESIDENCY IN THE AGE OF POLITICAL SPECTACLE 279, 291 (Leonard V. Kaplan & Beverly I. Moran eds., 2001) (“For the Libertine, moreover, there is no reader of last resort, no place from which we could know if this was desire, was sex, was good, was mistaken. . . . We/I/they just don’t know, didn’t know for certain then and still don’t. The Libertine remembers about sex what we know of the spectacle—the experience that one knows intensely, that one is sure, is the canary in the coal mine.”).

76 Hence the palpable impulse to smash a certain hyper-rationalism sometimes encountered in law and economics scholarship that is found in Charny, *supra* note 23, at 2058 n.6 (noting, in a mode of seeming praise and even embrace, D.H. Lawrence’s maxim: “Never ‘use’ venery at all. Follow your passionate impulse . . . but never have any motive in mind, neither offspring nor health nor even pleasure, nor even service. Only know that ‘venery’ is of the great gods. An offering-up of yourself to the very great gods, the dark ones, and nothing else.”).

77 See, e.g., Lawrence D. Kritzman, *Introduction*, in MICHEL FOUCAULT, *POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977–1984* xxiii (Lawrence D. Kritzman ed., 1990) (“Gay sexuality is to be thought of as a dynamic mode in which the refusal of a more traditional lifestyle emanates from a sexual choice that transforms one’s own mode of being The transgressive behavior in question here can only be realized through the exuberant delights of Nietzschean free play.”). Cf. Kennedy, *supra* note 75, at 279, 289 (“Libertinism is not just a position about sex—it is also a position about government, about the centrality and seriousness of society’s meaning machine, about what I have been calling the spectacular.”); see also *infra* note 79.

78 Bob Gallagher & Alexander Wilson, *Michel Foucault: An Interview: Sex, Power and the Politics of*

In this view, homosexuality is not about ends, but beginnings. In it, and from it, the “possibility for creative life” may be found: a life that, in *extremis*, may rise above death itself, and be born, a permanent fixture in the starry night.

To accept the gauntlet the ideology of sexual freedom throws down requires a willingness to give one’s back to the world, including its knowledges and its tables of value. In exchange, what is promised is a return to being awake to the shuddering delight, excitement, shock, embarrassment, even joy and pain, anywhere and everywhere—of sex, hence one’s greatest self. In constantly putting one on the edge of experience and possibility and sensations, it promises a way of being fully human, of having and living a fully realized life, if not by conventional lights. The centrality of pleasure entails a bid—and an active desire—for more, for greatness in life. It is a way of turning life and death itself—through sex, through a constant sensuality, a permanent erotic state—into a magnificent work of art.⁷⁹ Who knows what this will bring? What shape it will take? What it will do? No one can know in advance. The risk, for those who see it and open themselves to it, is its own marvel, splendor, and thrill.

It is at the point of its price—what will this all cost?—that the ideology of sexual freedom takes a darker and more secretive turn.⁸⁰ For the conversion of erotics to life, sex

Identity, THE ADVOCATE, Aug. 7, 1984, at 27; see also, e.g., RECHY, *supra* note 41, at 71 (“I see the sexhunt [sic] as an artform, too. The beautiful abstract choreography, balletic, symphonic. . . . ‘Though sometimes,’ I hear myself add, ‘after a night of hustling and dark cruising alleys, I think of suicide.’ . . . ‘But when I’m caught up in the beautiful hunt, I know it’s the most exciting experience in the world—and at those times I wouldn’t trade it for any other.’”).

79 See generally, e.g., ANTONIN ARTAUD, THE THEATRE AND ITS DOUBLE 84–104 (Mary C. Richard trans., 1958) (discussing the “theater and cruelty”); *id.* at 103 (“There is in life’s flame, life’s appetite, life’s irrational impulsion, a kind of initial perversity: the desire characteristic of Eros is cruelty since it feeds upon contingencies; death is cruelty, resurrection is cruelty, transfiguration is cruelty, since nowhere in a circular and closed world is there room for true death, since ascension is a rending, since closed space is fed with lives, and each stronger life tramples down the others, consuming them in a massacre which is a transfiguration and a bliss.”); MICHEL FOUCAULT, *On the Genealogy of Ethics*, in 1 ESSENTIAL WORKS OF MICHEL FOUCAULT 1954–1984: ETHICS: SUBJECTIVITY AND TRUTH, *supra* note 66, at 253, 260 (“The idea of the *bios* as a material for an aesthetic piece of art is something that fascinates me.”); James Miller, *The Prophet and the Dandy: Philosophy as a Way of Life in Nietzsche and Foucault*, 65 SOC. RES. 871, 878 (1998) (Miller, discussing Michel Foucault’s essay “What Is Enlightenment?”, rehearses Foucault’s explanation that the dandy “lays his heart bare, making manifest (in Foucault’s words) ‘the essential, permanent, obsessive relation that our age entertains with death.’ Revolting, in turn, against this fascination with death, he imposes on himself ‘a discipline more despotic than the most terrible religions,’ making ‘of his body, his behavior, his feelings and his passions, his very existence a work of art.’”).

80 See *infra* note 101; see also, e.g., MICHEL FOUCAULT, *On the Genealogy of Ethics*, in 1 THE ESSENTIAL WORKS OF MICHEL FOUCAULT 1954–1984: ETHICS: SUBJECTIVITY AND TRUTH, *supra* note 66, at 253, 254

into art, to work, there must be artists, and above all, artists ready to sacrifice themselves completely to their craft. As an ideal, the ideology of sexual freedom demands nothing less. If the social, including the institutional, forces that keep sex's power largely beyond reach are ever to be overcome so that sex achieves its great potential, individuals must be willing to put their bodies entirely, hence their very lives, on the sexual line.⁸¹

A long and proud history of ideological projects driving toward freedom imagines it is worth more than life itself. "[L]iberty or . . . death!"⁸² But more particular reasons in the ideology of sexual freedom demand life itself be put on the line. Only if individuals are willing to sacrifice life for sex can its true powers be exposed. Anything less than blood oath isn't serious.

As surely as the ideology of sexual freedom imagines the need for some to give their lives for sex's powers and truths to be freed, it also affirms that there must be those who stand ready to take life for sex and all its possibilities. Ideological projects regularly imagine soldiers prepared to die for them and, under appropriate circumstances and with proper training, to kill for them, as well.⁸³ Again, particular reasons in the ideology of sexual freedom demand that the ordinary revulsion and horror at taking human life must be overcome in order fully to serve sex's power. Without those who will kill for sex, its ultimate boundaries will never be known, much less exceeded. Sex will forever be trapped by society's usual pieties, its usual moralities, its usual norms, which, written upon the

(suggesting parallels to "the Stoic ethics," described as chiefly "an aesthetic one," "reserved for a few people in the population," "a small elite" that could exercise "the will to live a beautiful life and to leave to others memories of a beautiful existence").

81 See Morris, *supra* note 62, at para. 4; see also *supra* note 71 (Foucault, linking the "limit experience" to the possibility of the subject's "annihilation, its dissociation," repeated later as its "real destruction or dissociation"); see *infra* note 88.

82 JACOB AXELRAD, PATRICK HENRY: THE VOICE OF FREEDOM 110–11 (1947). To similar effect is Martin Luther King, Jr.: "I submit to you that if a man has not discovered something that he will die for, he isn't fit to live." DAVID L. LEWIS, KING: A BIOGRAPHY 211 (1978) (excerpting a speech King delivered in Detroit on June 23, 1963).

83 The theme emerges in the context of "barebacking subculture," as discussed in Spindelman, *supra* note 35. Cf. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 343–44 (1990) (Stevens, J., dissenting) ("Our ethical tradition has long regarded an appreciation of mortality as essential to understanding life's significance. It may, in fact, be impossible to live for anything without being prepared to die for something. Certainly there was no disdain for life in Nathan Hale's most famous declaration or in Patrick Henry's; their words instead bespeak a passion for life that forever preserves their own lives in the memories of their countrymen. From such 'honored dead we take increased devotion to that cause for which they gave the last full measure of devotion.'") (footnotes omitted); see also *supra* note 82; BATAILLE, EROTISM, *supra* note 40, at 81–93 (discussing the limits of what old religions held in the context of religious sacrifices).

body,⁸⁴ define its meanings, constrain its pleasures, and limit its uses and sensations, keeping both sex's powers and their corresponding truths hidden, forever. Never fully awakened or alive, one might as well already be dead. In a sense, we all already are.

This is why the ideology of sexual freedom entails a right to die for sex and also a right to kill in its name. Only when the flames of sex may burn gently enough to warm or suddenly explode, becoming a funeral pyre, will sex be truly free.⁸⁵ This may not quite be the Marquis de Sade's vision of "an all-powerful monstrosity" as Foucault described it:

In Sade, sex is without any norm or intrinsic rule that might be formulated from its own nature; but it is subject to the unrestricted law of a power which itself knows no other law but its own; if by chance it is at times forced to accept the order of progressions carefully disciplined into successive days, this exercise carries it to a point where it is no longer anything but a unique and naked sovereignty: an unlimited right of all-powerful monstrosity.⁸⁶

But it moves in its direction. This ideology of sexual freedom embraces a certain form of self-sovereignty, which flows from a view of sovereignty that holds the sovereign himself, who is—or is above—the law, possesses (and sometimes actually does) a "right of death and a power over life."⁸⁷ The ideology of sexual freedom transposes that right to the

84 Cf. FRANZ KAFKA, *In the Penal Colony*, in THE COMPLETE STORIES 140 (Nahum N. Glatzer ed., 1995).

85 See, e.g., BROWNING, *supra* note 61, at 88 ("Only by acknowledging and searching out that framework of taboo, and then by entering *into* its violation, by feeling its fire, is there the possibility of shattering the self and gaining rebirth—not some distant rebirth into an eventual eternity, but a continuous rebirth that comes of touching the eternal in the present.") (discussing and advancing views of George Bataille).

86 FOUCAULT, *Right of Death and Power Over Life*, in 1 FOUCAULT, HISTORY OF SEXUALITY, *supra* note 48, at 149. But see MILLER, *supra* note 1, at 244 ("Sade too, after all, expressed an 'oneiric exaltation' of savagery. Celebrating the convergence of eros and thanatos in his endless fantasies of unrestricted slaughter, he asserted the 'unlimited right of an all powerful monstrosity.' This fantasy, of 'an all-powerful monstrosity,' had once seemed to Foucault to offer a usefully 'total contestation' of Western culture. No more."); *id.* at 278 ("As he had conceded in the last chapter of *The Will to Know*, an 'oneiric exaltation' of 'the unlimited right of an all-powerful monstrosity' linked the death-haunted lusts of the Marquis de Sade to the death camps of the Nazis."). For Foucault at least, it seems there may be limits we may properly impose on ourselves in sex that may make it something less—or other—than "an unlimited right of an all-powerful monstrosity." See generally 2 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: THE USE OF PLEASURE (Robert Hurley trans., 1990) (1985).

87 1 FOUCAULT, HISTORY OF SEXUALITY, *supra* note 48, at 134; see also *id.* at 138 ("One might say that the ancient right to take life or let live was replaced by a power to foster life or disallow it to the point of death."). "Sovereignty" is a key concept in BATAILLE, EROTISM, *supra* note 40, at 164–96; see also SARTRE, *supra* note 31, at 115–16 (discussing the relationship between sexual "toughs and softs" as "naturally" one of "vassalage," and suggesting that, as part of this relationship, the tough "'is his own heaven[.]" and that "[h]e decides alone, he is his own witness, legislator and judge," "[l]aw does not exist for him[.]" [i]t is he who gives law to others").

individual level to ask, What better affirmation of sex's power than facing that sex is worth dying, hence killing, for? "[T]hese murders are the pretext for and means of a higher life."⁸⁸

However painful, however detumescent a thud back down to earth, it is important to bear witness to how these ideals pay out. Those whose lives sex snuffs out as part of this endeavor are not to be seen, as they normally would be, as victims of crime. If anything, they are to be recognized as freedom fighters, martyrs for a cause (or sacrificial lambs or human sacrifice). Their deaths do not speak the unspeakable horrors of sex. They herald its true value: the terror, the wonder, the power it has to rip through a life itself. The memories of those whose lives sex fells should thus be hallowed, flags planted and manned at their graves. Their sexual deeds, including the ways they experienced power, how it was configured to produce its pleasures and its agonies, along with the knowledges to which they gave rise, like the indictments of the existing order they thus leveled, must be storied, remembered in new Homeric tales. Glory in death for sex, sex as the battlefield, in the name of new ways of being, of new forms of social relations, new configurations of power, and of knowing. Within this ideology, there is no ignoble march to the hereafter for the fallen, no matter how anguished the paths some individuals take might be or seem. Suffering, too, testifies to sex's amazing, unrelenting power. To misunderstand that is to betray it, and for the anointed, the *cognoscenti*, oneself, and everyone's ultimate possibilities.⁸⁹

88 SARTRE, *supra* note 31, at 164 (quoting Jean Genet). For an explicit framing of murder as an aesthetic practice, see *id.* at 97 ("The murderer . . . is 'a being who can exist only in accordance with a beautiful gesture': he is hungry because he must stab. The murder becomes an *aesthetic gesture*."). An even more "desperate, nihilistic estheticism" is found in JOHN NATHAN, *MISHIMA: A BIOGRAPHY* 97 (1974) ("I had taken to jotting down epigrams such as 'Whether another A-bomb falls or not is no concern of mine. All that matters to me is whether the shape of the globe would become even a little more beautiful as a result.' I knew I couldn't continue in this vein; sooner or later I felt I would have to analyze comprehensively the root source of this desperate, nihilistic estheticism of mine.") (quoting Yukio Mishima) (internal quotation marks omitted).

89 As Georges Bataille put it at one point:

The *participation* in everything that, among men, is horrible and allegedly sacred can take place in a limited and unconscious form, but this limitation and this unconsciousness obviously have only a provisional value, and nothing can stop the movement that leads human beings toward an ever more shameless awareness of the erotic bond that links them to death, to cadavers, and to horrible physical pain. It is high time that human nature cease being subjected to the autocrat's vile repression and to the morality that authorizes exploitation. Since it is true that one of a man's attributes is the derivation of pleasure from the suffering of others, and that erotic pleasure is not only the negation of an agony that takes place at the same instant, but also a lubricious participation in that agony, it is time to choose between the conduct of cowards afraid of their own joyful excesses, and the conduct of those who judge that any given man need not cower like a hunted animal, but instead can see all the moralistic buffoons as so many dogs.

BATAILLE, *supra* note 71, at 101.

Some sincere regrets may sometimes be expressed within the ideology of sexual freedom, but only for not going far enough in paying sex its due.⁹⁰ Never, or practically never, for going too far in those directions, except from those who have forgotten what their purpose was and how they came to be where they are, having sacrificed what they did for what it was that they were doing. Reminders should largely suffice as this amnesia's cure. For those who continue to choose to forget, who want to erase their own victories over life in their life's decline, what concern is there in that? They—like the others who never comprehended the project—must not have really understood it either. But the true value of what they died for, why they died, does not change no matter their change of heart. “What greater honour is there . . . for an individual without genius than to be a means to it?”⁹¹

Of those who prove their mettle by bringing life sexually to an end, this: no victims, no crime, hence no criminals either.⁹² Their only wrongdoing is living in a world that scorns sex's power to be a source of life even in death, who live in a world that cheapens sexuality's name and seeks to cage it, hence everyone else. To be sure, killing for sex is not a project for the masses or the uninitiated, who might mangle the elegant syntax of the “morbid poetry”⁹³ of sex. That special task is properly reserved for those who have already learned to master—who intimately know—the erotic arts.⁹⁴ They must know how to dance with death, court it, draw out its mysteries, its possibilities, its truths both known and unknown, its capacity to liberate us from our ordinary bodily sensations, to produce the experiences sex can yield, pass them on to, and share them with, others, discovering and transmitting a knowledge that few are bold enough even to dare dream might exist. In the right hands, sex can be forced to give itself up to—to prove—its own monumentality “as a blinding, captivating[] force.”⁹⁵ Sex itself is its own proof of why it is so pervasively

90 Cf. Klossowski, *supra* note 51, at 85 (“Remorse here is only the other side of enjoyment, and the two are only different forms of behavior which have their sources in the same drives.”).

91 BERNARD YACK, *THE LONGING FOR TOTAL REVOLUTION: PHILOSOPHIC SOURCES OF SOCIAL DISCONTENT FROM ROUSSEAU TO MARX AND NIETZSCHE* 322 (1992).

92 See, e.g., MOHR, *supra* note 22, at 12 (“There is, for instance, no such thing currently as a gay traitor. Gays let anything pass, no matter how harmful or insulting one gay's actions may be to other gays as gays.”).

93 Simone de Beauvoir, *Must We Burn Sade?*, in DE SADE, *supra* note 51, at 3, 16 (“Sade's sexuality was not stilled by age and fatigue alone; the guillotine killed the morbid poetry of eroticism.”).

94 Foucault spends some time talking about the *ars erotica* in *The History of Sexuality: Volume I*. For discussion, see 1 FOUCAULT, *HISTORY OF SEXUALITY*, *supra* note 48, at 57–71. Paul Morris has something to say about it, too, in Morris, *supra* note 62.

95 Charny, *supra* note 23, at 2058 (“Sex is for pleasure, and people rationally make choices about sex to maximize that pleasure. It is all in the spirit of Ben Franklin's celebrated maxims. Rage, obsession, brutality,

seen as sacred, yet everywhere bolted down in advance, routinized, scheduled, everywhere dimly perceived as properly shrouded in mystery because of how it can explode, how it can utterly decimate individuals, transgress personal limits, destroy them, and remake them—all in a single event. True, some lives may be—indeed, may have to be—sacrificed in order to obtain this knowledge, and to keep producing it. But that’s a price that must be paid.

From within the ideology of sexual freedom, this is not seen as sex gone wrong. It can be sex gone perfectly right. In its most delicious, savory, and unrestrained forms, sex does and should slaughter “with the devouring fury of a vicious hound.”⁹⁶ One must know it may do so literally for it to work. One should want it to—that is what must be desired, at least sometimes—if one wants to know what it is to be fully alive, to experience desire satisfied on the thin, sharp edge of life itself, to breathe the pure air of “fearless freedom.”⁹⁷ Else, what is on the other side of power—death being its now-known limit—may never be known.

To be liberated not to suffer this, to be able to be awakened, to be sensitive, alive!, once again, to the possibilities of sex, to be truly in and part of the world, to be in a world worth being part of, some—the real artists, these masters of the *ars erotica*⁹⁸—must be made untouchable by ordinary social rules, bound only to serve sexuality’s laws. These are the Supermen,⁹⁹ “with impunity in their omnipotence.”¹⁰⁰ It is their greatness, their genius, that is to be unleashed, or initiated, or approached. Everything else on the level of the quotidian

and jealousy make no appearance in the book’s numerous graphs. Philipson and Posner, in developing their argument, have no use for the West’s rich and moving meditations—from Euripides, Plato, and Catullus to Freud—on the darkness and irrationality of sexual passion, on sex as a blinding, captivating, force—‘Vénus toute entière à sa proie attachée,’ in Racine’s image. Sex in Hyde Park, by contrast, is a tedious affair.”).

96 BATAILLE, *EROTISM*, *supra* note 40, at 167 (“Communion between the participants is a limiting factor and it must be ruptured before the true violent nature of eroticism can be seen, whose translation into practice corresponds with the notion of the sovereign man. The man subject to no restraints of any kind falls on his victims with the devouring fury of a vicious hound.”).

97 de Beauvoir, *supra* note 93, at 29. This quote comes as de Beauvoir is beginning to venture a challenge to the notion that “murder was the supreme end of sexuality in Sade,” a common enough view. Here, it is murder that she says “represents the exacerbated demand for unrestrained and fearless freedom.” *Id.*

98 For discussion, see I FOUCAULT, *HISTORY OF SEXUALITY*, *supra* note 48, at 57–58, 70–71.

99 See, e.g., FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA* 41–49, 296–306 (R.J. Hollingdale trans., 2003).

100 BATAILLE, *EROTISM*, *supra* note 40, at 166 (“The privileges de Sade visualized were outrageous compared with those of kings and lords. They were such as wicked kings and nobles might be expected to possess with impunity in their omnipotence according to the romantic idea.”). In the context of de Sade’s work, according to Jane Gallop, Maurice Blanchot describes figures like these as “peerless men.” JANE GALLOP, *INTERSECTIONS: A READING OF SADE WITH BATAILLE, BLANCHOT, AND KLOSSOWSKI* 36 (1981) (quoting Blanchot).

is a condition for this possibility, which as the Holy of Holies, must not be revealed.¹⁰¹ It is why the philosophers for whom the City is built must make their real teachings esoteric, telling their noble lies.¹⁰² Expose the truth and it will be lost, dooming the City and the philosopher both.¹⁰³

101 Indeed:

In the erotic art, truth is drawn from pleasure itself, understood as a practice and accumulated as experience; pleasure is not considered in relation to an absolute law of the permitted and the forbidden, nor by reference to a criterion of utility, but first and foremost in relation to itself; it is experienced as pleasure, evaluated in terms of its intensity, its specific quality, its duration, its reverberations in the body and the soul. Moreover, this knowledge must be deflected back into the sexual practice itself, in order to shape it as though from within and amplify its effects. In this way, there is formed a knowledge that must remain secret, not because of an element of infamy that might attach to its object, but because of the need to hold it in the greatest reserve, since, according to tradition, it would lose its effectiveness and its virtue by being divulged. Consequently, the relationship to the master who holds the secrets is of paramount importance; only he, working alone, can transmit this art in an esoteric manner and as the culmination of an initiation in which he guides the disciple's progress with unfailing skill and severity. The effects of this masterful art, which are considerably more generous than the sparseness of its prescriptions would lead one to imagine, are said to transfigure the one fortunate enough to receive its privileges: an absolute mastery of the body, a singular bliss, obliviousness to time and limits, the elixir of life, the exile of death and its threats.

1 Foucault, *HISTORY OF SEXUALITY*, *supra* note 48, at 57–58. A notion of esoteric sexual practice is also in Pierre Klossowski, *A Destructive Philosophy*, 35 *YALE FRENCH STUD.* 61, 66 (1965) (“[T]he libertine[] belie[ves] that his superior social position gives him special rights. Chief among these is his right to revise the notion of what man is. It is an *experimental right*, one which could not be extended to common mortals without danger. It is precisely the exercise of this *right to conduct forbidden experiments* which, born from the libertine conscience, will form one of the fundamental commitments of the Sadian conscience.”).

102 See, e.g., LEO STRAUSS, *PERSECUTION AND THE ART OF WRITING* 22–37 (1952); LEO STRAUSS, *Exoteric Teaching*, in *THE REBIRTH OF CLASSICAL POLITICAL RATIONALISM, AN INTRODUCTION TO THE THOUGHT OF LEO STRAUSS* 63–71 (Thomas L. Pangle ed. 1989). Cf. Foucault, *DEATH AND THE LABYRINTH*, *supra* note 72, at 7 (“No doubt [Roussel] meant several things other than the obvious meaning, which is secret until death: that death was a ritual part of the secret, its prepared threshold and its solemn conclusion. Perhaps he meant that the secret would remain secret even in death . . . or even better, death would reveal that there is a secret without showing what it hides, only what makes it opaque and impenetrable.”).

103 See, e.g., LEO STRAUSS, *THE CITY AND MAN* 121–27 (1978) (noting the tensions between philosophy and politics); LEO STRAUSS, *WHAT IS POLITICAL PHILOSOPHY? AND OTHER STUDIES* 31–32, 137, 229–30 (1988) (same); see also SHADIA B. DRURY, *THE POLITICAL IDEAS OF LEO STRAUSS* 18–36 (2005) (discussing Strauss's understanding of the relation of the philosopher to the city). If philosophy is seen as *eros*, on which, see, e.g., *id.* at 85 (“Strauss understands *eros* as desire; more specifically, it is a longing for immortality that ranges from the desire for offspring and the desire for fame, to the desire for immortality by participation in the philosophic *eros* by which we are united with the ‘unchangeable things.’ *Eros* threatens the city. The city cannot exist unless

Thus comes full circle the ideology of sexual freedom's origins as homophobic nightmare. The greatest horrors of the homophobic fantasy of gay men—that their lust is for men's sexualized deaths, murder being sex's natural extreme¹⁰⁴—are transvalued, reworked, to become an erotics of death, its sexual ideal's highest high, sex's hoped-for truth.

Seen in this light, the question of why gay men have not regularly turned to the legal system claiming HIV-transmission as a sex-based harm takes on a new cast. It is entirely the wrong question. Within the ideology of sexual freedom, who could imagine the legal system being called on to deal with the “problem” of HIV-transmission through rules naming it an injury accomplished by sex? What would the harm rules be a remedy for? Experiments in greatness that, however momentarily, elevated those now cast as “injured” above life and death? Are we now to regulate old-world-destroying and new-world-creating creativity? Are we to litigate art?¹⁰⁵ For gay men to seek to hold one another accountable for practicing

eros is repressed. As Strauss writes, ‘there is a tension between *eros* and the city and hence between *eros* and justice: only through the deprecation of *eros* can the city come to its own.’” (footnote omitted), the idea of the will to truth, even unto death, through sex, found in the ideology of sexual freedom, should come as no surprise, some of its dimensions having truly ancient roots. Cf. PLATO, *Crito*, in EUTHYPHRO, APOLOGY, CRITO, PHAEDO, PHAEDRUS 147 (Harold N. Fowler trans., 2005) (1914). And who are philosophers in Strauss's view? According to Drury, “Strauss leads us to the conclusion that philosophers are ‘real mean’ in Callicles's sense of the term,” DRURY, *supra*, at 85, men “who have a healthy disdain for civil society, and live a life of pleasure according to nature,” *id.* at 91, even “in the context of the unnatural conditions of civil society,” *id.* at 92. “They are natural men who have not been duped by the conventions of the city; they are free of the charms that hold other men captive, the charms that transform men into husbands and citizens, the charms that facilitate servitude, the charms that make men ‘obtuse’!” *Id.* at 85 (a related point is found in *id.* at 94). Thus, “[p]hilosophical justice is indistinguishable from the hedonistic or erotic life of the philosopher. It transcends the city, and with it, the whole domain of morality itself. Even though it threatens the city, the philosophical life is the true or natural end for which the city exists.” *Id.*

104 See Geoffrey Roche, *Black Sun: Bataille on Sade*, 9 JANUS HEAD 157, 160–61 (2006) (“Bataille holds that ‘[p]hysical eroticism has in any case a heavy, sinister quality,’ that sexuality, when taken to its natural limit, leads to murder and that Sade was the great pioneer who affirmed this ‘truth.’”) (citing BATAILLE, *EROTISM*, *supra* note 40, at 19, and BATAILLE, *THE TEARS OF EROS*, *supra* note 62, at 140; see also, e.g., 1 FOUCAULT, *HISTORY OF SEXUALITY*, *supra* note 48, at 138–39 (“Now it is over life, throughout its unfolding, that power establishes its domination; death is power's limit, the moment that escapes it; death becomes the most secret aspect of existence, the most ‘private.’ It is not surprising that suicide . . . became . . . one of the first conducts to enter . . . sociological analysis; it testified to the individual and private right to die, at the borders and in the interstices of power that was exercised over life.”).

105 See, e.g., OWEN FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 102–06 (1996) (discussing the controversy surrounding Robert Mapplethorpe's work). Interestingly, even Fiss paves the way for the move: Mapplethorpe's subject matter—sexuality—can, presented as art, “open[] our eyes and thereby transform[] our understanding of the world.” *Id.* at 105. As he goes on: “Walking through the exhibit, one was led to wonder whether social marginalization had been internalized in homosexual practice—

sex that toys with death is to forget what sex is about: not the petty moralism of “injury,” including sexual injury,¹⁰⁶ but power, real power that transcends law’s rules. By design or in effect, the legal rules being imagined when one is puzzled that gay men did not turn to the law’s harm rules to address HIV-infection would, if actually deployed, in the view of this ideology, keep us all, potentially, firmly trapped within the current regimes of power and its authorized knowledges. From the perspective of the ideology of sexual freedom at least, the prospects are potentially disastrous. What sex *is*, with its effects, is incomprehensible—ineffable—as legal injury. The ideology of sexual freedom explains why one might want to

whether homosexual self-understanding had been marred and distorted by public loathing and opprobrium. Mapplethorpe’s photographs . . . invited us—all of us—to reconsider our understanding of, and attitude toward, homosexual orientation and practice. . . . Mapplethorpe’s photographs were, at once, great art and a great lecture, an inspired contribution to a public debate that promises to be ‘uninhibited, robust, and wide-open.’” *Id.* Art here is sexual expression. Its message? “[V]iolent sex,” according to Rochelle Gurstein. Camille Paglia, *The Beautiful Decadence of Robert Mapplethorpe: A Response to Rochelle Gurstein*, in *SEX, ART, AND AMERICAN CULTURE: ESSAYS* 38, 42 (1992) (quoting Gurstein) (internal quotation marks omitted). Or, as Camille Paglia herself observes:

We must frankly face the mutilations and horrors in Mapplethorpe’s sexual world and stop trying to blandly argue them away as fun and frolics of “an alternative lifestyle.” His grim sadomasochists are not lovable, boppy Venice Beach eccentrics on roller skates. Gurstein correctly speaks of the “brutality” and “degradation” in Mapplethorpe’s pictures. Degradation is at the heart of his eroticism. To deny the degradation in the photos of one man urinating into the mouth of another is to remove all their erotic charge. Such acts have never been sanctioned in any culture. This is why they are now and will remain radical.

It is foolish and naïve to claim, as has repeatedly been done, that the discomforting or painful features of Mapplethorpe’s sexual tastes reflect the unjust oppression of a homophobic society. This reduces Mapplethorpe’s work to a tedious, one-issue, social-welfare activism; it imprisons him in the contemporary; it destroys him as an artist. I would argue, on the contrary, that the stringent sexual repressions and yet high sensory stimulation of Catholicism gave Robert Mapplethorpe his special vision; these tensions and limitations allowed him to look directly into universal sexual reality. He saw and accepted the cruelty and aggression in our animal nature, our unevolved link with the pagan and primeval past. Mapplethorpe was not a liberal. Sadomasochism is not liberal. It is rigorously hierarchical and coldly ritualistic. In my analysis of history, sadomasochism always returns when moral codes and social institutions weaken. It returns because it is our deepest nature. Mapplethorpe’s liberal supporters do not understand him. His work is a scandal to all their progressive humanitarian ideals.

Id. at 43–44. What is to be made of that?

106 Janet Halley, for instance, partly rejects Robin West’s “politics of injury” mounted for victims of sexual violence as so much slave moralizing in Janet Halley, *The Politics of Injury: A Review of Robin West’s Caring for Justice*, 1 UNBOUND 65 (2005). West answers in Robin West, *Desperately Seeking a Moralist*, 29 HARV. J.L. & GENDER 1 (2006).

say, as Michel Foucault once did, that “[o]ne can always produce the theoretical discourse that amounts to saying: in any case, sexuality can in no circumstances be the object of punishment.”¹⁰⁷ The notion is: It never should be.

But the ideology of sexual freedom does not only potentially erase the sexual transmission of HIV as injury or harm. If HIV-transmission should not be regulated because it is not seen as harm, and if it is not seen as harm because harm is a moral concept, it ceases to be entirely clear why the HIV/AIDS epidemic itself should be seen, either for individuals or in its larger terms, as a catastrophe. Nor even why the so-called immoral or criminal delays in governmental funding for education to stop the spread of the virus, and for research to end its reign, or for care to ease the suffering of those who are HIV-positive or who have developed AIDS, are either. These are all nothing more and nothing less than ways of exercising—or not exercising—power. More perversely yet,¹⁰⁸ in contributing to converting the HIV/AIDS epidemic into what has been described as a Holocaust, these moves, on closer inspection, likewise expose the truth of sex’s power, a truth that the ideology of sexual freedom at least welcomes and recognizes. In slightly different terms, the HIV/AIDS Holocaust, which the powers of government inaction fanned, proves the truth of what the ideology of sexual freedom knows: Sex is mighty. When it eviscerates us, as it can, completely, it can wipe out vast segments of the herd. Against that, our lives are, in actuality, very small. What the conventional ways of understanding the HIV/AIDS epidemic often miss is that, from the ashes of this great devastation, this hecatomb, from all the suffering it generates, something truly great, something unprecedented, something of world-changing historic proportions, may be born. Destruction precedes generation, as dark precedes dawn.¹⁰⁹

107 Michel Foucault, *Confinement, Psychiatry, Prison, in POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977–1984*, *supra* note 77, at 178, 200. In context, Foucault was speaking of rape. But the point was and is more general than that.

108 And the ideology of sexual freedom relishes perversity. For thoughts in these directions, see, e.g., Janet E. Halley, *David Charny: In Memoriam*, 114 HARV. L. REV. 2232 (2001) (“Now that word [perverse] is typically used to condemn—and I’ve wondered why, every time I wanted to praise David [Charny], the word ‘perverse’ came to mind entirely in the mode of eulogy. . . . [W]hen I went back to the verb *perverto* in Latin, my confidence that David’s perversity was *affirmative* found some supports. To pervert, in Latin, meant ‘to overturn, upset, knock down; . . . to turn about; reverse[.]’”).

109 See FOUCAULT, REMARKS ON MARX, *supra* note 41, at 121–22 (“[T]his production of man by man . . . [is] a question rather of the destruction of what we are, of the creation of something entirely different, of a total innovation.”). Following a reminder from Don Herzog, it may be useful to distinguish between two sorts of views here. In the first, the full horrors of HIV/AIDS are recognized, though so are its contributions to art. This view is hardly uncommon. See, e.g., Crimp, *supra* note 32, at 4 (quoting David Kaufman quoting “Michael Denney of St. Martin’s Press as saying, ‘We’re on the verge of getting a literature out of this that will be a renaissance.’”); *id.* at 5 (quoting Richard Goldstein, “writer for *the Village Voice* and a committed activist on

From within the ideology of sexual freedom, it looks as though dawn started to break a number of years ago. There is, of course, first the horrific spectacle of suffering itself, which should not be overlooked, a great *Guernica* or triptych by Bosch, painted in human form across the expansive canvas of time and space. What do these horrors cause? Inspire? Drive us mad to do? Who can miss the renaissance of artistic form that this disaster set off?¹¹⁰ Who, the new forms of political organization, political engagement, strategy and tactics—sometimes sorely missed today—to which it gave rise?¹¹¹ Even the most conservative gay rights advocates must admit the rights that they themselves tout—the right to marriage, above all¹¹²—became thinkable as a practical matter (even if sometimes mistakenly thought of as an imperative) in no small part as a result of the AIDS crisis.¹¹³ Every gay marriage is thus inevitably, in truth, a dual celebration: of love, but also of death. And the remarkable effects of sex, traceable through the Holocaust, including its anguish and rot, have not

the subject of AIDS”: “In an ironic sense, I think that AIDS is good for art. I think it will produce great works that will outlast and transcend the epidemic.”). In the second view, harder to find in print, but which is the view the ideology of sexual freedom itself drives toward, the HIV/AIDS epidemic *is* a form of art, a great artistic or literary event, the monumentality of which proves the epic powers of sex, both for destruction and creativity, if such proof were needed. *Cf., e.g.,* DAVID CARON, AIDS IN FRENCH CULTURE: SOCIAL ILLS, LITERARY CURES 117 (2001) (“Taken to its extreme, however, that is, as the definitive interpretation of [Hervé] Guibert’s work, such a position can be a rather repulsive justification of the disease [AIDS] in the name of great art, as when Dominique Fernandez states: ‘AIDS made a great writer out of a gifted but futile Hervé Guibert.’”); Adam Block, *Interview with Edmund White*, OUT/LOOK, Fall 1990, at 57, 58 (discussing Dominique Fernandez’s “book *The Pariahs*, which argues that it’s good that AIDS came along to keep us from becoming ordinary bourgeois people, and that there has been no good gay art since 1960, but that now with AIDS, we can look forward to being outcasts again”); *see also* LUCILLE CAIRNS, PRIVILEGED PARIADOM: HOMOSEXUALITY IN THE NOVELS OF DOMINIQUE FERNANDEZ 149 (1996) (“The interest of Aids as the basis of Fernandez’s novel lies chiefly, then, in its metaphysical dimension. For the reasons advanced, Aids represents for Bernard paradise regained, after the paradise lost in an era tolerant of homosexuality. The illness is valued not in itself but as a carrier of his now etiolated glory of bygone days.”); *id.* at 151 (“Marc asks Bernard whether he would like adultery still to be a matter for scandal and disgrace, simply so that a new *Madame Bovary* would be possible. In *Le Rapt de Ganymède*, Fernandez answers Marc’s question by saying that as a citizen he is delighted adultery no longer incurs tragedy, but that as a reader he regrets that no book like *Madame Bovary* is possible any more. Marc imputes to Bernard Fernandez’s view that while tolerance of the previously scandalous, such as adultery and homosexuality, is to be welcomed in terms of civil liberties and freedom of the individual, such tolerance renders impossible books depicting these phenomena as transgressions, since such books could no longer have any meaning.”).

110 See *supra* note 109.

111 See, e.g., Jason Deparle, *Rude, Rash, Effective, Act-Up Shifts AIDS Policy*, N.Y. TIMES, Jan. 3, 1990, at B1. See generally GOULD, *supra* note 18.

112 For a critical perspective, see Marc Spindelman, *Homosexuality’s Horizon*, 54 EMORY L.J. 1361 (2005).

113 For some thoughts on the role of HIV/AIDS in the gay marriage movement, see GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY 96–104 (2004).

yet been fully tolled or told.¹¹⁴ They are too many, too far flung, still casting waves in the world, to begin a final summation. If this is right, why shouldn't HIV/AIDS be heralded as sex gone right? Be appreciated, even cherished, precisely as a Holocaust? Why should its value—really the value of sex that got it rolling—not be seen and celebrated? Those whose sexual conduct led to other men's suffering and death need not be saved from villainy by petty moralisms like "intent" (they did not *intend* to transmit HIV) or by notions of chance like "bad luck" (for the guy who "caught" it). They should be received as heroes. Those who died: Why should they not be seen as martyrs for a sexual cause? Why should their lives, and their deaths, not be given meaning this way? Did they or did they not live for sex? Was sex not the centerpiece of their lives when it was? And if they happened to die for it, or to kill for it, whether wittingly or not, why should it not be treated and valued just the same as dying or killing for love of country is? The secret of the *ars erotica*—not as secret, but as a fact—has gotten out.¹¹⁵

This is the view on the sexual world—and parts of its recent history—available from within the ideology of sexual freedom. For some, including some number of gay men who lived through the darkest days of the AIDS crisis, this may be enough reason to reject it out of hand. But before evaluating the ideology of sexual freedom for what it does—and reframing the AIDS Holocaust is hardly all, but only a start—it must first be established in a more concrete way that it exists as a worldly force.¹¹⁶ The readings that follow, analyzing four texts by gay men, theorizing about gay sexuality, begin to do that. The four texts are Douglas Crimp's *How to Have Promiscuity in an Epidemic*, David Chambers' *Gay Men, AIDS, and the Code of the Condom*, sections of Richard Mohr's *Gays/Justice: A Study of Ethics, Society and Law*, and Leo Bersani's *Is the Rectum a Grave?*. Individually and together, they show some of the ways gay male theorizing about sex—at least theorizing that affirmatively recognizes gay sex's value—both was and was not continuous with the ideology of sexual freedom at a particular moment in time, during the high years of the AIDS epidemic,¹¹⁷ when one might have expected it would have had scarcely any traction, if any at all.

114 Some tallies of the global effects of HIV/AIDS, some of them decidedly positive, are in ALTMAN, *supra* note 66.

115 Including in barebacking subculture, as traced in Spindelman, *supra* note 35.

116 Another study, Spindelman, *supra* note 35, establishes the materiality of the ideology of sexual freedom in a different way, by examining its operation in and as and through barebacking subculture, itself studied and detailed in TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING (2009), a work that was published after this article was substantially written.

117 See *supra* note 3.

III. The Ideology of Sexual Freedom: Proofs

A. Douglas Crimp, *How to Have Promiscuity in an Epidemic*

Douglas Crimp's *How to Have Promiscuity in an Epidemic* appeared in a special issue of *October*, dated Winter 1987,¹¹⁸ which Crimp edited, and was republished in a volume dated 1988, also edited by Crimp, called *AIDS: Cultural Analysis/Cultural Activism*.¹¹⁹ This volume remains one of the most important—certainly, one of the most engaging—collections of intellectual interventions into the HIV/AIDS epidemic ever published.¹²⁰ It deserves its stature.

At the heart of the bid Crimp ventures in this essay is a flourishing gay male sexual culture, built out of a profound respect for sex, a culture of various experiments in bodily pleasures. Happily, sex has produced, along with these pleasures themselves, a good deal of practical knowledge about pleasures—knowledge that behavioral therapists, attempting (mostly unsuccessfully) to change gay sexual behavior, seem never to have figured out.¹²¹ Especially helpful in the age of HIV/AIDS, gay men have learned that sex's joys come in a "great multiplicity" of forms.¹²² We know it is possible to change our sexual behaviors if we want to, including to save our own lives. Best of all, we know we can—and how to—do so without having to give sex up altogether. The idea commonly bandied about, that our sexuality, particularly in the age of HIV/AIDS, "will destroy us,"¹²³ is thus recognized by Crimp as nonsense. The truth we must heed and spread instead is that "it is our promiscuity that will save us."¹²⁴ HIV/AIDS has given us new reasons to worship the productive powers

118 Special Issue, *AIDS: Cultural Analysis/Cultural Activism*, 43 OCTOBER 1 (1987).

119 Douglas Crimp, *How To Have Promiscuity in an Epidemic*, in *AIDS: CULTURAL ANALYSIS/CULTURAL ACTIVISM* 237 (Douglas Crimp ed., 1988). It is also in DOUGLAS CRIMP, *How To Have Promiscuity in an Epidemic*, in *MELANCHOLIA AND MORALISM: ESSAYS ON AIDS AND QUEER POLITICS* 43 (2002).

120 Tim Dean similarly calls this collection "the best collection of AIDS work to date." Dean, *Psychoanalysis of AIDS*, *supra* note 37, at 102. As it happens, providing some context for Crimp's work is also to provide some context for Bersani's *Is the Rectum a Grave?*, *supra* note 65, discussed *infra* Part III.D, which appears in these same volumes.

121 Douglas Crimp, *How to Have Promiscuity in an Epidemic*, 43 OCTOBER 237, 253 (1987).

122 *Id.* at 253. For some discussion of the relation of HIV to AIDS in this article, see, for example, *id.* at 238.

123 *Id.* at 253.

124 *Id.* As Crimp registers the claim, it is unequivocal. Sex will not "destroy us." It will "save us." The idea has a certain appealing ring to it, particularly for those who have a political soft spot for sex. But as is, of course, it is overreaching. The tremulousness of Crimp's own point is nearly suggested by the support he draws on to round it out. Immediately after telling us that our promiscuity will save, not destroy us, Crimp

of sex, not to abandon it or have it with dread.¹²⁵

As much as Crimp idealizes sex, and is committed to protecting it and ensuring its proliferation, the particular version of sex he is selling is not, at least at first glance, the sex that the ideology of sexual freedom values. The sex he is interested in has no violent, destructive, “dark” side. It is only ever a force of, and for, good. This does not mean sex’s demons, such as they are, play no part in Crimp’s analysis. They are actually integral to it—but as essential features of views that Crimp sets out to reject, not positions he himself claims to espouse. Those who see and think about and talk about sex as a devastating force, those who believe it leads to human suffering, especially from HIV/AIDS, in ways that must, like sex itself, be stopped are, as sex’s enemies, the enemies of the good. They are Crimp’s enemies, too.

In this spirit, Crimp predictably offers up the work of the gay author and playwright Larry Kramer as an exhibit. Predictably, because Kramer, even before the HIV/AIDS epidemic emerged, was perhaps the most prominent gay critic of gay sexuality and gay sexual life, at least since his book *Faggots* hit the shelves in 1978.¹²⁶ With the appearance of HIV/AIDS, Kramer’s views on gay sexuality and gay sexual life were given a new stage and airing. The problems with gay sex, whatever they had been before, Kramer believed, or hoped, could not now be ignored. By having sex the way we did, by being politically committed to fucking the way we were, we were, Kramer argued in a variety of print (and other) venues, literally killing ourselves and one another. Kramer’s thought: Sex is not worth dying or killing for.

reproduces a line from Cindy Patton, in which she offers that “[t]he elaborateness of gay male sexual culture which may have once contributed to the spread of AIDS has been rapidly transformed into one that inhibits spread of the disease, still promotes sexual liberation (albeit differently defined), and is as marvelously fringe and offensive to middle America as ever.” *Id.* (quoting CINDY PATTON, *SEX AND GERMS: THE POLITICS OF AIDS* (1986)). Patton only concedes the historical role of “the elaborateness of gay male sexual culture” in the “spread of the disease.” But what was once the case—for Patton and Crimp—appears to be the case no longer. That elaborate gay sexual culture no longer “contributes” to the “spread of the disease.” It only now, as Crimp says, saves lives. Just so, the recognition of the historical role of gay sexuality in the spread of AIDS operates as an invitation to recognize its continuing role—even though neither Patton nor Crimp wishes to see, much less underline, it in those terms.

125 Heterosexuals, Crimp laments, may not recognize this. Their sexuality is “confined” within “narrow” “institutionalized” limits. *Id.* at 253. And this spells bad news for them. For it is the “lack of promiscuity and its lessons” among heterosexuals that makes it seem likely “that many straight people will have a much harder time learning ‘how to have sex in an epidemic’ than [the gays] did.” *Id.* at 253.

126 KRAMER, *supra* note 41.

Kramer's signature tone—angry, preachy, sometimes shrill—regularly obscured the larger message of his work. On a fair, substantive read, Kramer did not mean to damn gay men or gay sex in their entirety. Rather, by his own measure, he was hectoring them out of love.¹²⁷ In his own way, he was trying to point out that we could, instead of choosing what he saw as meaningless, anonymous, pointless sex, with the devastating consequences he saw it was having, choose sex, if we were to have sex, that was full of meaning, of love, of commitment, and that affirmed life, above all. In this sense, Kramer desperately wanted gay sex to be the force of, and for, good that Crimp, with a different substantive view of the good in mind, was insisting it already was.

While Kramer may well have carried a thick (if contingent) brief against gay sex, Crimp, like many others, read it uncharitably, characterizing it as simultaneously vicious and ridiculously light. Far too often, Crimp cleverly figured out, Kramer, becoming entangled in his own pitchy rhetorical escalations, and a certain penchant for traditional sexual relationships, had portrayed gay sexual promiscuity as such as responsible for the spread of HIV/AIDS. After collecting and reciting a number of examples, Crimp delivers a deft reply: Promiscuity does not spread HIV or AIDS as a result. That, of course, is right. It does not and never did.

More aggressively, Crimp insists that Kramer's opposition to gay male sexual promiscuity is reducible to "conventional moral wisdom: it is not safe sex, but monogamy that is the solution" to AIDS.¹²⁸ Bad enough that this makes Kramer's position completely "reactionary."¹²⁹ Worse, Crimp adds, it makes it "lethal."¹³⁰ "[M]onogamy per se provides no protection whatsoever against a virus that might already have infected one partner in a relationship."¹³¹ For Kramer to prescribe sexual monogamy against the threat of HIV/

127 A more recent example is the constant refrain of LARRY KRAMER, *THE TRAGEDY OF TODAY'S GAYS* 35–36 (2005) ("I love being gay. I love gay people. I think we're better than other people. . . . I think we're smarter and more talented and more aware. I do, I do, I totally do. And I think we're more tuned into what's happening, tuned into the moment, tuned into our emotions, and other people's emotions, and we're better friends. I really do think all these things.").

128 Crimp, *supra* note 121, at 247. Crimp himself provides some examples from Kramer's work, *id.* ("millions of [gay] men . . . have singled out promiscuity to be their principal political agenda, the one they'd die before abandoning"); *id.* ("the entire gay political platform is fucking."); *id.* ("Mickey, why didn't you guys fight for the right to get married instead of the right to legitimize promiscuity?"). There are plenty of other examples.

129 *Id.*

130 *Id.*

131 *Id.*

AIDS, Crimp thus proposes, is to embrace and promote a deadly version of sexuality rather than to overcome it, as Kramer purports.¹³²

But there is a bigger point at stake in this exchange. Following from Crimp's view of sex as thoroughly good, as that which will save us from death, any effort to condemn sex is suspect. No surprise, then, that when he takes a close look at it, Crimp can expose the ways Kramer's views—ostensibly so life-affirming—might prove deadly. Though Crimp does not put the point this directly, as he sees them, efforts aimed at regulating sex, particularly those driven by ideas that are hostile to sexual promiscuity, have a tendency toward lethality. These efforts may be lethal directly, as with monogamy, or they may be lethal indirectly, by constraining sex, and with it, its power to produce knowledge, which itself includes knowledge about how to save lives. It is to get the schedule of priorities exactly backward to think one must oppose sex to save life. To do that, we must rout the opposition to sex.¹³³

If, by engaging Kramer, Crimp can bring out the looming dangers of opposing sex, by engaging the work of *San Francisco Chronicle* reporter and author of *And the Band Played On*, Randy Shilts, Crimp can highlight the pressing perils of certain forms of sexual representation. For Crimp, this is the larger and more important offensive he wants to mount, and Shilts's book is his rallying point for counterattack.

132 This may be the closest Crimp comes to affirming that gay men might be responsible for HIV-transmission. There is one other passage where he does so, as well, but there he puts the idea in someone else's mouth. See *supra* note 124 (noting how Crimp draws on Cindy Patton's work).

133 It is at this point that it may be useful to sharpen the distinction between the ideology of sexual freedom and its political forms. If, according to the ideology of sexual freedom, sexuality regulation is anathema, those who subscribe to it should be against sexuality regulation as such. Foucault captured the idea nicely when talking about rape. "One can always produce the theoretical discourse that amounts to saying: in any case, sexuality can in no circumstances be the object of punishment." Foucault, *supra* note 107, at 200. It is easy to see how ordinary civil and criminal regulations of sexuality would come under attack on this view. They are all regulatory in conventional ways. What about education? Is it not regulatory, too? Obviously, it is. See, e.g., Pierre Bourdieu & Jean-Claude Passeron, *Reproduction in Education, in EDUCATION, SOCIETY AND CULTURE* 32 (Richard Nice trans., 1990) (noting the relation of education to *habitus*, itself a form of regulation). So, how can Crimp be so cheery about safer sex? Even viewed as an education campaign, which is how he mostly views it, it is regulation. Why not thus be skeptical about it, if not against it? Indeed, why not cheer the federal government's efforts not to fund it? How, in theory, is it different from a law criminalizing same-sex sex? Why, then, condemn Senator Jesse Helms and the rest of the U.S. Senate and the House of Representatives, for not doing more to fund safer-sex education? See *infra* text accompanying note 176. The answer here is that there is a split between the politics of sexual freedom and its ideal forms. Within the politics of sexual freedom, certain practical accommodations may sometimes be made to keep the project alive that are inconsistent with the project's principles.

Famously, *And the Band Played On* is a journalistic documentary of the early years of the AIDS crisis and all the significant social, cultural, and political events that came with them.¹³⁴ Crimp himself describes the book as “extremely useful.”¹³⁵ But, he adds, it is “also extremely dangerous—and thus has to be read very critically.”¹³⁶ And Crimp gives the book a very critical reading. Every turn in his analysis beats with passion, violence, and anger. While this makes Crimp’s analysis absolutely gripping, and leads him to some stunning insights, it also drives his analysis, at certain moments, sort of mad.¹³⁷

What really rattles Crimp’s cage about Shilts’s book, what Crimp cannot abide, is how Randy Shilts has chosen to tell the story of—how Shilts represents—HIV/AIDS. To Crimp, Shilts has outrageously endorsed a homophobic point of view in *And the Band Played On*. It is written in ways that represent gay men themselves as bearing a certain responsibility for the spread of AIDS.¹³⁸ This representation operates, however inchoately, as a form

134 SHILTS, *supra* note 73.

135 Crimp, *supra* note 121, at 240.

136 *Id.*

137 See *id.* at 239–40. Take, for instance, Shilts’s seemingly minor, descriptive claim about the language public health officials, particularly at the U.S. Centers for Disease Control and Prevention (“CDC”), developed and deployed during the early years of the AIDS crisis. Shilts maintains that this language was carefully crafted to deal with the public health crisis while not setting off unnecessary political explosions. “Don’t offend the gays and don’t inflame the homophobes.” *Id.* at 239. Shilts writes, “These were the twin horns on which the handling of this epidemic would be torn from the first day of the epidemic.” *Id.* The CDC’s aspirations notwithstanding, Shilts’s description of this language protocol clearly upsets Crimp. After giving some concrete examples of it drawn from Shilts’s book, Crimp concludes that they establish “Shilts’s contempt for gay political leaders, AIDS activists, and people with AIDS, and his delusions about their power to influence public health policy.” *Id.* at 240. This is all, he continues, “deeply revealing of [Shilts’s] own politics.” *Id.*

Now, it is certainly true that Shilts describes the CDC’s concerns, when navigating pro-gay and anti-gay political forces, as symmetrical: “Don’t offend the gays and don’t inflame the homophobes.” *Id.* at 239. These were “the twin horns on which the handling of this epidemic would be torn from the first day of the epidemic,” *id.* (emphasis added), after all. Crimp would undoubtedly have been right if he had pointed out that the concern had to be (and should have been described in terms that were) decidedly more variegated than that. But Crimp departs from a finely measured reply. He is disturbed by Shilts’s “contempt” for the gays shown, in substantial part, by Shilts’s “delusions” about our power. But soon it is Crimp himself who is boasting, with evident and well-founded pride, that “the gay movement is responsible for virtually every positive achievement in the struggle against AIDS during the epidemic’s early years.” *Id.* at 250. So much for the idea that Shilts is delusional for not thinking gays are lacking in political power. Another example might be his suggestion that monogamy is a sexual danger in ways that promiscuity is not. See *supra* text accompanying notes 128–132.

138 This notwithstanding the reference in *And the Band Played On* to People with AIDS as “AIDS victims.” Crimp, *supra* note 121, at 240 (“A new lexicon was evolving. Under the rules of AIDSpeak, for example, AIDS victims could not be called victims. Instead, they were to be called People With AIDS, or PWAs, as if contracting this uniquely brutal disease was not a victimizing experience.” (quoting SHILTS, *supra* note 73, at

of sexual regulation and that, in Crimp's view, is bad: homophobically bad. By Crimp's own estimation, Shilts's book does more than simply offer an anti-gay account of HIV/AIDS. Crimp acknowledges that it recognizes and painstakingly recounts the widespread government nonfeasance, really homophobic malfeasance, and the same on the part of the press, in the early years of the epidemic. Although he is very angry at Shilts, Crimp goes out of his way to take note of all this. But what lathers Crimp up is that the early history of AIDS in Shilts's hands also—importantly—remains the story that homophobes have wanted it to be, and stay, all along: “the dirty little story of gay male promiscuity and [murderous] irresponsibility.”¹³⁹

Crimp believes Shilts has found a convenient shill for the homophobic yarn he wants to spin in the villainous anti-hero of *And the Band Played On*, a French Canadian flight attendant named Gaetan Dugas, more famously “Patient Zero,”¹⁴⁰ the “man who gave us AIDS.”¹⁴¹ Dugas's sexual adventures, woven throughout vast portions of Shilts's book, provide him, in Crimp's estimation, a vehicle for blaming AIDS on gay men.

Fortunately, they also provide Crimp a useful handle he can grab onto to challenge Shilts for venturing such a proposition. The tale of Patient Zero is one that the homophobic, mainstream press could not possibly resist recounting once Shilts had given it to them.¹⁴² Or at least they could not resist recounting it after the publishers of *And the Band Played On* dangled it under their noses.¹⁴³ The “publisher's ploy” was a phenomenal success.¹⁴⁴

315)). For himself, Crimp remarks: “The passage from *And the Band Played On* quoted above—and indeed the entire book—is written in flagrant disregard for [people living with AIDS]. Their first principle, that they not be called victims, is flaunted by Shilts. I will concede that people living with AIDS *are* victims in one sense: they have been and continue to be victimized by all those who will not listen to them, including Randy Shilts.” *Id.* But see SHILTS, *supra* note 73, at 274 (recognizing this first principle in the context of ongoing organizing efforts by PWAs).

139 Crimp, *supra* note 121, at 241. The addition of “murderous” to “irresponsibility” follows from how Crimp understands Shilts to portray gay sexuality later on. As Crimp writes: “Thus, ‘Patient Zero,’ the very figure of the homosexual as imagined by heterosexuals—sexually voracious, murderously irresponsible—is Shilts's homophobic nightmare of himself, a nightmare that he must constantly deny by making it true only of others.” *Id.* at 244.

140 *Id.* at 241.

141 *Id.* at 242.

142 See, e.g., the language in the press release from St. Martin's Press, the publisher of *And the Band Played On*, quoted in Crimp. *Id.* at 241.

143 *Id.*

144 *Id.* at 242.

Virtually instantaneously, Patient Zero was one of the country's most famous men. As Crimp reminds us, "*People* magazine made 'Patient Zero' one of its '25 most intriguing people of '87,' together with Ronald Reagan, Mikhail Gorbachev, Oliver North, Fawn Hall, Princess Diana, Vincent van Gogh, and Baby Jessica."¹⁴⁵ The media that this story received ensured it would "overshadow his book's other 'revelations,'"¹⁴⁶ but more importantly, it also "ensure[d] that the blame for AIDS would remain focused on gay men."¹⁴⁷

Shilts describes Gaetan Dugas as having once been "what every man wanted from gay life[.]"¹⁴⁸ In a passage that Crimp does not quote, Shilts elaborates that Dugas was

the ideal for this community, at this time and in this place. His sandy hair fell boyishly over his forehead. His mouth easily curled into an inviting smile, and his laugh could flood color into a room of black and white. He bought his clothes in the trendiest shops of Paris and London. He vacationed in Mexico and on the Caribbean beaches. Americans tumbled for his soft Québécois accent and his sensual magnetism.¹⁴⁹

Crimp quibbles over whether Dugas was, in fact, what every gay man wanted.¹⁵⁰ Who can disagree? Dugas is not the ideal type for many gay men or inside many gay scenes. But this is, in the end, only a quibble. Everyone, including Crimp, knows exactly what Shilts means. More importantly, although Dugas was once what "every man wanted from gay life; by the time he died [from AIDS], he had become what every [gay] man feared."¹⁵¹ Feared, that is, in part, because he had AIDS, but also, in part, because of the ghoulish delight he is said to have taken in spreading disease. According to Shilts's report, on a number of occasions, Dugas, after tricking with a man in a bathhouse, would turn up the lights, "point[] to his [Kaposi's sarcoma] lesions"¹⁵² and say, "I'm going to die, and so are you."¹⁵³

145 Crimp, *supra* note 121, at 242.

146 *Id.*

147 *Id.*

148 *Id.*

149 SHILTS, *supra* note 73, at 21.

150 See Crimp, *supra* note 121, at 242.

151 *Id.*

152 *Id.*

153 *Id.*

Hence, as Crimp says, the “dirty little story of gay male promiscuity and [murderous] irresponsibility,”¹⁵⁴ neatly, all at once.

It is largely because Shilts chose to chalk up some portion of the blame for HIV/AIDS to gay men themselves—the very same men whose ranks were being wiped out by the disease—that the “criticism most often leveled against Shilts’s book by its gay critics is that it is a product of internalized homophobia.”¹⁵⁵ Crimp rehearses the complaint:

In this view, Shilts is seen to identify with the heterosexist society that loathes him for his homosexuality, and through that identification to project his loathing onto the gay community. Thus, “Patient Zero,” the very figure of the homosexual as imagined by heterosexuals—sexually voracious, murderously irresponsible—is Shilts’s homophobic nightmare of himself, a nightmare that he must constantly deny by making it true only of others. Shilts therefore offers up the scapegoat for his heterosexual colleagues in order to prove that he, like them, is horrified by such creatures.¹⁵⁶

This may sound like a mere description of critical views that other people—not Crimp—have of Shilts’s book. But no sooner does Crimp explain them than he endorses them, too. “It is true,” he writes, “that Shilts’s book reproduces virtually every cliché of homophobia.”¹⁵⁷ Taking one simple example, Crimp quotes Shilts, speaking “[i]n one of his many fulminations against gay bathhouses . . . [:] ‘Just about every type of unsafe sex imaginable, and many variations that were unimaginable, were being practiced with carefree abandonment [*sic*] at the facilities.’”¹⁵⁸ For himself, Crimp adds: “[I]n resorting to such a trope [of “unimaginability”], Shilts unconsciously identifies with all those who would rather see gay men die than allow homosexuality to invade their consciousness.”¹⁵⁹ The challenge Crimp has just leveled—a charge he elsewhere repeats in different ways—is a political charge mounted in defense of gay sexuality, including gay sexual promiscuity, which is all good, against what is perceived as a homophobic attack, which is all bad.

154 *Id.* at 241.

155 *Id.* at 242–44. For another charge, see Beowulf Thorne, *Cranky Words: Eating Our Own*, 9 DISEASED PARIAH NEWS 3, 5–6 (1994) (“It’s been suggested that Randy developed his rabid anti-bath attitude only after he became too chubby to score there.”).

156 Crimp, *supra* note 121, at 244.

157 *Id.*

158 *Id.*

159 *Id.*

But rather than take this alleged homophobic attack on, head on, as a question of social fact, explaining, for example, why gay male sexual irresponsibility, whatever else it was, was not murderously irresponsible, or why gay male sexuality did not contribute to HIV-transmission and thus the spread of AIDS, Crimp presses an entirely different line of attack. Crimp tracks others hurling, and then he himself hurls, a psychological thunderbolt at Shilts. Poor Randy Shilts. He thinks that, in telling the story of Gaetan Dugas, which epitomizes gay male sexual irresponsibility for the spread of AIDS, he is reporting the facts. No. What he is *really* doing is issuing a psychological report on his own self-hating state of mind.¹⁶⁰

Crimp hints that this is worse than pitiable and more than pathetic. It is very, very dangerous. Shilts's self-study enables us to see how he has positioned himself politically. Not with the gays to protect our sex, including our sexual culture, in the face of an epidemic that is felling us. Shilts is against that, and with "those who would rather see gay men die than allow homosexuality to invade their consciousness."¹⁶¹ When *these* people use their political power to manifest their desires—when, through their political power they do not save gay men's lives and thus make gay men be dead—they are clearly guilty of homophobic murder. In Crimp's assessment, Shilts is their capo. His representation of gay men—which was originally theirs and has been theirs throughout—feeds their homophobic power, which would be pleased to see gay men gone. Notwithstanding Shilts's mental state, Crimp accuses and convicts him of multiple crimes: of complicity, of conspiracy, and of treason.¹⁶²

On a view of politics that holds it is properly no-holds-barred—that as war by any other name, it is all upon all¹⁶³—this is a fantastic knock-out punch. Brilliantly, it renders

160 This is a classic move against traitors. See *infra* note 162.

161 Crimp, *supra* note 121, at 244.

162 Crimp's view is hardly idiosyncratic. After Shilts lost his own life to AIDS, Beowulf Thorne, the oft-described hunky editor of *Diseased Pariah News*, a remarkable, at times brilliantly funny, and invariably bright "zine" written for a spell by and for HIV-positive men, including men with AIDS, spat at Shilts posthumously this way: "Really Randy, your constituents did not expect you to be perfect, but we certainly did not expect you to be a traitor. If there is an afterlife, I hope you spend it with Al Parker, both of you trying to convince each other that you two merely died of leukemia, while he fucks you with a sandpaper condom for all perpetuity. Rest in peace, you hateful little shit." Thorne, *supra* note 155, at 6. Cf. Crimp, *supra* note 121, at 240 ("*Anything said or done about AIDS that does not give precedence to the knowledge, the needs, and the demands of people living with AIDS must be condemned. The passage from And the Band Played On quoted above—and indeed the entire book—is written in flagrant disregard for these people. Their first principle, that they not be called victims, is flaunted by Shilts. I will concede that people living with AIDS are victims in one sense: they have been and continue to be victimized by all those who will not listen to them, including Randy Shilts.*").

163 This is a reversal of Clausewitz's original formulation of the point: "War is merely the continuation of

wholly unnecessary and completely irrelevant whether the homophobic fantasy of gay male sexual voracity and murderous irresponsibility Shilts is supposed to be advancing is ever manifested as a matter of social fact by anyone other than Shilts himself. Beyond that, it is neither necessary nor relevant to affirm or disprove its social truth. What is so absolutely fantastic about this is that everything that Crimp attacks Shilts for saying can be true *and* Crimp can still attack Shilts for saying it. What matters to Crimp is how Shilts has represented Gaetan Dugas, not who he was in the world or what he did while here. And that is strictly a matter of what Shilts makes him be. Dugas is “the very figure of the homosexual as imagined by heterosexuals,”¹⁶⁴ which is “Shilts’s homophobic nightmare of himself, a nightmare that he must constantly deny by making it true only of others.”¹⁶⁵ Not whether it is true, but that Shilts is “making it [be] true.”¹⁶⁶ Dugas becomes a “scapegoat”¹⁶⁷ Shilts offers up to save himself. If there is ever a violent, destructive side to sex within the gay male community, to Crimp it is what is happening inside Randy Shilts. And the sexual nightmares of himself he is having—unless we see and stop them—may prove deadly for the rest of us. Not to forget being disastrous for gay sex.

Notice how fantasy and reality stack up in this analysis.¹⁶⁸ The facts of Gaetan Dugas’s life, like those of the men he infected (or may have thought he was infecting) with HIV, which are facts according to Shilts’s book, are not realities for Crimp at all. They are “created,”¹⁶⁹ “invented,”¹⁷⁰ homophobic representations or fantasies of who gay men are—“sexually voracious”¹⁷¹ and “murderously irresponsible”¹⁷²—and what gay men are

policy by other means.” CARL VON CLAUSEWITZ, *ON WAR* 87 (Michael Howard & Peter Paret eds. & trans., 1976) (1832). Foucault suggested it in *Society Must Be Defended*. See MICHAEL FOUCAULT, *SOCIETY MUST BE DEFENDED* 15–16 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., 2003) (1997). And so did Carl Schmitt, reframing Clausewitz in terms of his own friend-enemy distinction, in CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 33–34, 34 n.14 (George Schwab trans., 1996) (1932).

164 Crimp, *supra* note 121, at 244.

165 *Id.*

166 *Id.*

167 *Id.*

168 Unexplained is why some things fall on the representational side of the line and others on the material. An answer may be sexual politics. See *supra* note 133.

169 Crimp, *supra* note 121, at 245.

170 *Id.* at 245 n.8.

171 *Id.* at 244.

172 *Id.*

homophobically imagined to be capable of doing: killing—trading life—for sex. As if to prove why he is right not to focus on the so-called realities of Dugas's life, Crimp drops an important footnote in which he suggests that Dugas did not know what he was doing when he was having sex with other men. When he found out about it, Crimp says, citing others, he is said to have “felt terrible about having made other people sick.”¹⁷³ The story Shilts has given us about Dugas is thus all a homophobic fantasy—not gay sexual reality after all.

Relief aside, there is, of course, one small problem that Crimp has not made go away. Even in his footnote, Dugas “made other people sick.”¹⁷⁴ But no matter. This “reality” does not give Crimp a moment's pause.

Now contrast with the homophobic “cliché[s]”¹⁷⁵—these fictions, these perilous representations, these unrealities—what Crimp views as the real homicidal realities that gay-haters are willing to perpetrate on the gays with or without the complicities of self-hating gay men like Shilts. The homophobes have turned their homophobic desires to see gay men die into—literally—the official policy of the State, which is making us dead. As Crimp sees it, that is what United States Senator Jesse Helms was doing, when he, along with other members of Congress, kept money out of the hands of gay rights organizations that were attempting to spread a safer-sex message to gay men.¹⁷⁶ Their policy, with the silence it meant to enforce, was, for many, a death sentence. (Remember the slogan from the era: “Silence = Death”?) What is more, these deaths were premeditated and intentional. The deliberations of the deliberative process, such as they are, helped ensure that.

The examples multiply,¹⁷⁷ but Crimp's point remains. The realities of homophobia, including internalized homophobia, along with other social forces of discrimination, including classism and racism, are the *real* culprits of death from AIDS. When the homophobic representation engages the regulatory powers of the State, they make a lethal

173 *Id.* at 245 n.8.

174 *Id.*

175 Crimp, *supra* note 121, at 244.

176 *See id.* at 256–65. Why is this bad for sex? Education is regulation. Could it be that Shilts's representation of HIV/AIDS as “caused” by gay sex—not what that did—is the real target here?

177 *See id.* at 265 (“When we see how compromised any efforts at responding to AIDS will be when conducted by the state, we are forced to recognize that all productive practices concerning AIDS will remain at the grass-roots level.”). *See, for instance,* Crimp's point that responses to HIV/AIDS undertaken by or in cooperation with the State are always basically tainted by a desire to eliminate gay men from the world. *Id.* at 256–65. This, at least, at the time he was writing.

combination. That is why it is so important to get the representations of gay men in the HIV/AIDS era down right. By negative implication, what escapes notice and political attention, and what is to be proliferated, is what is driving us to see the dangers that are defining the public realm to gay men's detriment: the idea that gay sex is good. Being thoroughly a force for good, sex can bear no responsibility for the spread of HIV, or in consequence, AIDS, or the deaths that, in turn, result from it. Again, throughout, sex is our hero.¹⁷⁸ It is going to save us from, not lead us toward, death.¹⁷⁹ To sustain this view, Crimp cannot squarely acknowledge the ways gay sex ever equates to death. He never does. If he did, he would have had to consider the possibility that what Shilts is more than tacitly suggesting about Dugas—that gay sexuality may be bound up with an erotics of death—is not only true of Dugas, but also, perhaps, more generally.¹⁸⁰ At a minimum, Crimp would not be able to claim, as he wants to (and does), that the idea that gay men have a penchant for sex that is laced with death is merely a figment of the homophobic imagination. This, of course, brings us back to the reality of what Gaetan Dugas did, which Crimp himself does not entirely deny. In the favorable telling of the story, which Crimp gives, Dugas simply “made other people sick.”¹⁸¹ Crimp's suggestion seems to be that Dugas did nothing wrong in making people sick, except in the views of those who hate gay men.

This is not because Dugas is somehow excused for having “made people sick,” on the ground, say, that he did not “know” what he was doing. That argument, although it is one Crimp tees up, is not the one he pounds out. Crimp is stalking a more fundamental claim about why Dugas—no matter what he did—did nothing wrong. And, strange as it may sound, may have done something very right.

Crimp sheds light on the contours of that claim in a talk he first presented in 1989, not too long after *How to Have Promiscuity in an Epidemic* came out, traversing much

178 See *supra* notes 124, 132 and accompanying text.

179 As Tim Dean puts it:

Shilts's tacit slogan, sex=death, is thus inverted by Crimp—(safe) sex=life—thereby providing his erotophilic rationale for the promotion of, not merely apology for, promiscuity: “Gay male promiscuity should be seen instead as a positive model of how sexual pleasures might be pursued by and granted to everyone if those pleasures were not confined within the narrow limits of institutionalized sexuality[.]”

Dean, *Psychoanalysis of AIDS*, *supra* note 37, at 113 (quoting Crimp, *supra* note 121, at 253).

180 See Spindelman, *supra* note 35, at 206–10, 222–33.

181 Crimp, *supra* note 121, at 245 n.8.

of the same terrain.¹⁸² In it, Crimp repeats the suggestion that Shilts is, at the very least, complicit with homophobic murderers, including those—both governmental officials and also members of the press—who indirectly cause “the deaths of thousands of people who are not being properly treated or educated.”¹⁸³

According to Crimp, when Shilts was confronted by the gay writer Adam Mars-Jones, who dismissed the stories about what Dugas did post-coitally in the bathhouse as false rumors, Shilts shot back: “No, it wasn’t rumors[.]”¹⁸⁴ Continuing, he said: “I talked to people he did this to. . . . I mean, he was doing it quite a bit. The fact is it all happened. The facts are not disputed.”¹⁸⁵ To which Mars-Jones replied, shifting ground: “William Darrow of the [Centers for Disease Control] does repudiate them.”¹⁸⁶

Now, at least based on what Crimp writes, William Darrow did not exactly dispute the stories of what Dugas did after sex.¹⁸⁷ What he did dispute were the results of a 1982 “cluster study, which sought to determine whether AIDS was caused by sexual transmission of an infectious agent[.]”¹⁸⁸ Evidently, in Darrow’s judgment, the results of this study called into question whether Dugas was, in fact, the agent of infection in the cases of AIDS Shilts assigns to him. If Darrow’s doubts were right, Gaetan Dugas, Shilts’s “Patient Zero,” was not “Patient Zero” at all.

Stepping back from the details, it is possible to appreciate—and marvel over—Crimp’s assessment of the situation:

182 DOUGLAS CRIMP, *Randy Shilts’s Miserable Failure*, in MELANCHOLIA AND MORALISM, *supra* note 119, at 117 (“First presented . . . [on] April 13, 1989, and published, with a postscript, in” *A Queer World: The Center for Lesbian and Gay Studies Reader* (Martin Duberman ed., 1997) (emphasis omitted)).

183 *Id.* at 118.

184 *Id.* at 121 (emphasis omitted).

185 *Id.* (emphasis omitted).

186 *Id.* (emphasis omitted). For a report on what Darrow said, see Duncan Campbell, *An End to the Silence*, NEW STATESMAN, Mar. 4, 1988, at 22–23.

187 Moreover, Crimp quotes Shilts as saying: “No, he [Darrow] does not [repudiate them]. The fact is that William Darrow saw every word that was written about him and about the study [the 1982 [Centers for Disease Control] cluster study involving the so-called Patient Zero], and he approved every word of it. Now we’re getting into very fine points of argument, and they’re not very substantial.” CRIMP, *Randy Shilts’s Miserable Failure*, in MELANCHOLIA AND MORALISM, *supra* note 119, at 121 (emphasis omitted).

188 *Id.*

The problem with the Patient Zero story is not whether or not it is true. We now know, in any case, that it is not, at least insofar as we know that Gaet[a]n Dugas had sex with the other men in the CDC [Centers for Disease Control] cluster study after they had already been infected.¹⁸⁹ Nor is it merely the problem that this story was selected by Shilts's publishers as the story that would sell the book, and that they therefore gave it pride of place in their publicity and had it serialized in *California Magazine*. The real problem with Patient Zero is that he already existed as a phobic fantasy in the minds of Shilts's readers before Shilts ever wrote the story. And, thanks in part to *And the Band Played On*, that fantasy still haunts us—as it still haunts Shilts—today. “I had written a book to change the world,” Shilts says in *Esquire*. What he forgot was that this is a world in which people's fantasies about homosexuality include gay waiters running into the kitchen to ejaculate in the salad dressing, or of gay foreigners attending health conferences with no other purpose than to infect their fellow conferees with a deadly virus. Patient Zero is just such a fantasy, and it matters not one whit whether his story is true or not.¹⁹⁰

“[I]t matters not one whit whether his story is true or not”? “It matters not one whit” whether Dugas knowingly gave HIV to other gay men? If true, Dugas would be the guy who gave the gay community—in an originary act of begetting—HIV, hence AIDS. The social realities are astounding here. When Crimp says, “it matters not one whit whether his story is true or not,” he is saying “it matters not one whit” that he might have been responsible for all the HIV infection in the gay male community, all the cases of AIDS, and all the deaths that resulted from them. By Thanksgiving 1987 alone, as Crimp elsewhere repeats, that was something like “25,644 known dead.”¹⁹¹ The United States Centers for Disease Control and Prevention recently estimated the cumulative number of deaths associated with male-to-male HIV-transmissions in the United States to be 302,148.¹⁹² Even if not

189 Note the remarkable qualification: It is not that we know the story of Dugas's “murderous irresponsibility” is simply untrue, that he did not engage in unsafe sex and then turn up the lights and utter those famous lines. It is instead that we know these men were already infected; they were already going to be dead, so Dugas was not responsible for killing them. No matter anyone else's responsibility.

190 CRIMP, *Randy Shilts's Miserable Failure*, in MELANCHOLIA AND MORALISM, *supra* note 119, at 124 (footnotes omitted).

191 Crimp, *supra* note 32, at 11.

192 U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, DIAGNOSES OF HIV INFECTION, 2011, *supra* note 5, at 44 tbl.12a. Technically, these are “deaths of persons with diagnosed HIV infection ever classified as stage 3 (AIDS)” listed in the transmission category “male-to-male sexual contact,” *id.*, not a report on mortality

“Patient Zero,” how many men did he “make sick,” and how many did they, in turn? By implication, that “matters not one whit” either.

Suggesting that Crimp knows exactly what he means and that he means exactly what he writes, is the send-up he proceeds to give in a 1996 postscript to a certain artistic critique of *And the Band Played On* that had then recently been released, a film by independent Canadian filmmaker John Greyson called “Zero Patience.”¹⁹³ (Watch how Shilts’s anti-hero, Gaetan Dugas, becomes the heroic messenger about the lessons we should learn from the AIDS epidemic.)

The film is a musical comedy that stars “a ghost named Zero and a Toronto Natural History Museum taxidermist named Dick [full name: Sir Richard Francis Burton].”¹⁹⁴ Burton is busy “constructing a ‘Hall of Contagion’ at the museum,”¹⁹⁵ and decides to make “the story of ‘the man who brought AIDS to North America’ . . . the crowning set piece of his exhibit. Zero’s story is to be presented as a spectacular music video funded by a pharmaceutical company called Gilbert and Sullivan.”¹⁹⁶

Initially, Burton sets out to portray Zero exactly the way that Shilts has, “as a sexually insatiable gay ‘serial killer.’”¹⁹⁷

At this moment in the retelling of the film’s plot, Crimp pauses to inform us that “Greyson [the filmmaker] does [unquestionably] intend to clear Zero’s name,”¹⁹⁸ and so “makes his protagonist sexy, charming and adorable, and never more so than at the moment when, having learned the truth about the [Centers for Disease Control] cluster study from none other than ‘Miss HIV,’ he [Zero] proclaims with a broad grin, ‘I’m innocent. I’m *not* the first, but I’m still the best.’”¹⁹⁹ Crimp goes on to write:

statistics for gay men with diagnosed HIV-infection or the numbers of gay men who have contracted HIV through same-sex sex. See *supra* note 5.

193 ZERO PATIENCE (Cineplex Odeon Films 1996). The postscript appears in CRIMP, *Randy Shilts’s Miserable Failure*, in MELANCHOLIA AND MORALISM, *supra* note 119, at 124–28.

194 CRIMP, *Randy Shilts’s Miserable Failure*, in MELANCHOLIA AND MORALISM, *supra* note 119, at 126.

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.*

Not only do we, the film's viewers, fall in love with Zero, but so does Burton, who decides in the end to refashion his exhibit to clear Zero's name. Recording a new narration for his [music] video, he says, "Patient Zero should be proclaimed a hero of the epidemic. Through his cooperation in the 1982 cluster study, he helped prove that AIDS was sexually transmitted. Thus Zero should be lauded as the slut who inspired safer sex."²⁰⁰

Zero refuses the honor: "Thanks for nothing."²⁰¹ "This has nothing to do with me, with what I was, with what I want. . . . This is just another of your lies."²⁰² Crimp interjects: "The point is that whatever spin Burton puts on the events, it's never Zero's story, it's Burton's."²⁰³ And "[t]his is the *real* thrust of Greyson's critique of Shilts, for unlike Shilts, Greyson makes us aware at every moment that his film is, after all, only a story."²⁰⁴ But stories—that is all we have. Thus, while Shilts's *And the Band Played On* pretends to tell us only "the facts," it does not. It can't; there are none to tell. Shilts thus misleads himself—and us—by suggesting otherwise. The filmic story of Gaetan Dugas is ever so much better. This is Crimp: "[O]ur fascination with *this* story does not return us to one we already know,"²⁰⁵ that gay men bear at least some ongoing responsibility for the AIDS crisis. Instead, "[t]his story asks us to question what we think we know, how we come to know, what and how else we might know. For Shilts, history is the story of what actually happened. For Greyson, history is what we make by telling a story."²⁰⁶ It was no mistake. The "facts" of what Gaetan Dugas actually did or did not do, do not matter one whit. "[H]istory is what we make by telling a story."²⁰⁷ There are no facts, only interpretations. The truth is ours to create.²⁰⁸

200 CRIMP, *Randy Shilts's Miserable Failure*, in MELANCHOLIA AND MORALISM, *supra* note 119, at 126–27.

201 *Id.* at 127.

202 *Id.*

203 *Id.*

204 *Id.* (emphasis added).

205 *Id.* at 128.

206 CRIMP, *Randy Shilts's Miserable Failure*, in MELANCHOLIA AND MORALISM, *supra* note 119, at 128.

207 *Id.*

208 Or in what amounts to the same thing in Crimp's own words: "[T]ruth is never unproblematic, never a simple matter of empirical facts; it is always selective, always a particular construction, and always exists within a specific context." *Id.* at 123.

What is the history of AIDS that Crimp wants to produce? Sex is ever an uplifting force responsible for life-affirming sexual and social and political changes, including the possibilities of defeating death (even as, we might say, it produces it). It is not the violent and destructive and life-negating force Shilts and Kramer believe it is, responsible for disease, suffering, and life's very end. Gaetan Dugas may not have been a hero of the epidemic—though he may have been “the slut who inspired safer sex”²⁰⁹—but he certainly was not the sexually voracious and murderously irresponsible villain Randy Shilts and, following him, the homophobic press, made him out to be. Gay men, and not just Gaetan Dugas, are not like that. Gays have not given themselves or the world HIV/AIDS, but “virtually every positive achievement in the struggle against AIDS during the epidemic's early years.”²¹⁰

What is driving these facts and what coheres the story they are arranged to convey is Crimp's sexual politics. Notice how closely these politics resemble, and rehearse parts of, the ideology of sexual freedom. For Crimp, as in the ideology of sexual freedom, sex is centrally about power—the power to produce pleasure, which in turn produces knowledge of pleasure's manifold forms. These, in turn, have the power to effectuate changes to the bodily configurations in the sexual, hence the social world. Sex, which can unleash remarkable creative forces, even mythical ones, has the power to save—and indeed has saved—countless lives. It is, *qua* sex, good. This project is ultimately about much more than sex, as Crimp's concerns with sex's opposition and how it is ultimately represented show. It is about how one can make art out of life and life out of art. It is about breaking through and experiencing the limits of the known, in sex, in life, to see what we can create, “what and how else we might know”²¹¹ in every sense of the word. It is as Foucault said: “[W]ith our desires, through our desires, go new forms of relationships, new forms of love, new forms of creation. Sex is not a fatality; it's a possibility for creative life.”²¹² But what of the ideology of sexual freedom's darker and broadly undiscussed erotics of violence and death? Because Crimp persists in defining sex as only and ever a force of, and for, good, he never expressly acknowledges its destructiveness. Indeed, he denies it outright. In consequence, Crimp never has occasion openly to celebrate the ways in which sex, as practiced, may embody the ideology of sexual freedom's darkest sides.

209 *Id.* at 127.

210 Crimp, *supra* note 121, at 250.

211 CRIMP, *Randy Shilts's Miserable Failure*, in *MELANCHOLIA AND MORALISM*, *supra* note 119, at 128.

212 Gallagher & Wilson, *supra* note 78, at 27.

One could, of course, credit the view of this that Crimp himself offers: He sees celebrating sexuality's destructiveness as a view of sex that is opposed to his own. But it is not quite so simple as all that. Crimp, far from simply disavowing sexuality's destructive powers, embraces and deploys them. Crimp's sexual politics, unlike the vision of sex he claims they support, are perfectly violent, and brutal. For Crimp, "the facts" Shilts and Kramer recount and underscore—that HIV/AIDS has exposed some ways in which gay sex can be in important respects continuous with injury and death—are so inconvenient and disturbing and dangerous they must be destroyed. Destroying these facts, of course, is not the same as disproving them—which, again, Crimp never does. Crimp wants to obliterate the idea that sex will obliterate us. Hence the unequivocal claim that our promiscuity will save us. A nuanced claim—say, that it may save us and kill us both—will not do, because of the life it breathes into, sustaining, the "fact" that gay sex can kill.

Indeed, the "facts" that Shilts and Kramer are peddling are apparently so dangerous that Crimp feels compelled to go beyond negating them by negating the possibility of their simple claims to social (or any other kind of) truth. Taking the next step, he seeks to ensure that nobody—certainly, that nobody within the gay male community—seeks ever to venture near these observations again. Speak of this, as Shilts and Kramer have, at your own peril. Break this seal of silence around this truth that is not to be named, and you, too, sign a warrant on yourself. You may even be accused, as Shilts here is, of being complicit with homophobic violence, even murder. Or worse. The notion that sex is all good, all sunny, is, apparently, to be enforced politically at the barrel of a gun.

In this light, it could properly be observed that Crimp tacitly acknowledges sexuality's penchant for violence, along with its destructive impulses, by deploying both in his own representations of it. As Georges Bataille said of similar tacit realities, "violence is silent."²¹³ It "never declares either its own existence or its right to exist; it simply exists."²¹⁴ Crimp, thus, does not need an argument for sexuality's destructiveness or about it. It simply is. He does not need an argument that gay sexuality should partake of an erotics of violence, even death. His argument for sex is that argument. For those who share his sexual politics, sexuality's dark side defines the pleasures of his text.²¹⁵

Perhaps this explains why sex is such a blindingly powerful force for Crimp—so powerful it decimates facts and arguments and the reputations of those people who stand in its way. For Crimp, it may reflect all of sex's energies, both its sunny and its dark sides. It

213 BATAILLE, *EROTISM*, *supra* note 40, at 186.

214 *Id.* at 188.

215 On textual pleasures, see ROLAND BARTHES, *THE PLEASURE OF THE TEXT* (1975).

is somewhat fitting, then, that Crimp ends his main essay by noting that we have just begun to enter “a new phase in gay men’s responses to the epidemic”²¹⁶ and by rehearsing some of the ways in which sex is and only is a force for good, pointing to the future:

Having learned to support and grieve for our lovers and friends; having joined the fight against fear, hatred, repression, and inaction; having adjusted our sex lives so as to protect ourselves and one another—we are now reclaiming our subjectivities, our communities, our culture . . . and our promiscuous love of sex.²¹⁷

The ellipsis can be read as nothing more than Crimp’s way of inserting a dramatic pause before he tells us what he most desperately wants to see gay men recover . . . : “our promiscuous love of sex.”²¹⁸ But it can also be taken as a sign that something has intentionally been left out. That, in Crimp’s view, there is something that comes after we have “reclaim[ed] our subjectivities, our communities, [and] our culture”²¹⁹ . . . but before . . . we have fully recovered our old “promiscuous love of sex.”²²⁰ If read that way, what might be being left unsaid? What else could there be to gay sexual normativity—in the age of HIV/AIDS or not—that Crimp refuses to name?

B. David Chambers, *Gay Men, AIDS, and the Code of the Condom*

David Chambers, like Richard Mohr and Leo Bersani, has an answer, and it is the most moderate of the three—by far. In his *Gay Men, AIDS, and the Code of the Condom*,²²¹ which carries a 1994 publication date, Chambers presents a legal analysis of gay men’s efforts to navigate the realities of HIV/AIDS through safer sex. Chambers is keenly aware of an unavoidable truth about the safer sex project, what he calls “the [c]ode of the [c]ondom”²²² (or, more simply, “the condom code”²²³). While some have believed that the

216 Crimp, *supra* note 121, at 270.

217 *Id.*

218 *Id.*

219 *Id.*

220 *Id.*

221 Chambers, *supra* note 16.

222 *Id.* at 354.

223 *Id.* at 365.

condom code is nothing but an education campaign designed to respect and protect and enhance gay men's sexual autonomy, Chambers understands that (whatever else it is) it is, and remains, fundamentally what its name implies: a code, a form of sexuality regulation.²²⁴ Unvarnished, it is an effort in sexual herd control.

But this is not any ordinary regulatory effort. Building on the legacy of those gay men who first brought the condom code into being,²²⁵ along with those gay organizations that have been "broadcasting"²²⁶ its message, Chambers defines and defends this regulatory project in expressly moral terms. The condom code is private sexuality regulation—written by gay men for gay men—that has secular moral bark and bite.²²⁷

From within the ideology of sexual freedom, the fact that Chambers' condom code is explicitly "imbue[d]"²²⁸ with a moral code's "force"²²⁹ renders it deeply suspect. In some ways that have already been seen, the ideology of sexual freedom is constantly on guard against—to oppose—efforts at sexual regulation, and on high alert against—to oppose—attempts to capture sex in morality's name. It does not matter for these purposes that Chambers is not an old-school moralist, not even close. Nor that he says he is putting morality to work to help, not hurt, gay men. Moralistic sexual regulation being precisely what the ideology of sexual freedom defines itself against, Chambers' condom code must be kept on watch to see if it is, as it looks to be, an enemy rather than a friend.

What does the ideology of sexual freedom's critical eye see in Chambers' analysis and defense of the condom code? It is almost as if the ideology of sexual freedom remains entirely outside of, and foreign to, Chambers' project. In those moments when Chambers engages with the powers of sex so vaunted in the ideology of sexual freedom, he does so in very different ways than one of its interlocutors might be expected to do. Chambers'

224 See *infra* text accompanying notes 404–409 (Mohr criticizing safer sex as paternalistic regulation, hence a violation of autonomy, not to mention lousy sex).

225 Chambers documents the tentativeness among early condom code advocates. See Chambers, *supra* note 16, at 354–60.

226 *Id.* at 374.

227 Having come this far, it is worth noting that Chambers does not advocate writing these moral rules into law. He sees that that would be the next, obvious step. But he stops short, on the grounds that it is currently unthinkable to most gay men (and not a few lesbians) to hand this regulatory project over to the homophobic State, particularly to the extent that it would be, as he seems to think it would be, translated into rules of the criminal law. See *infra* text accompanying notes 280–281.

228 Chambers, *supra* note 16, at 353.

229 *Id.*

descriptions of, say, sex's pleasures, its irrationality, and ultimately its daemonic powers, lack a certain color, dimension, and immediacy. When he occasionally positions us to see and understand how the powers of sex actually work, he does not seem interested in looking them square in the face. Unwilling to capture the monumentality of sex, it is as though, even when he is discussing it, he is not so much looking at sex's powers as through or past them, to the real focus of his analysis: the condom code and its regulatory aims.²³⁰ In a rare passage, Chambers speaks directly about sex in ways that make it seem to be a dark, spectral force that, in some fairly irrational ways, mixes sexual impulsiveness and pleasure with fleeting thoughts of disease and death. All of this, particularly in the age of HIV/AIDS, he effectively explains, is bound up with a particular knowledge project, which is itself bound up with a certain aspect of the will to power. Call it a will not to know what may happen to us when we give ourselves over entirely to sex.²³¹ In Chambers' own words:

It is easy to understand why [large numbers of gay men] do not [use condoms on all occasions]. For an individual, the commitment to using condoms requires much more than a single decision, such as a decision to undergo a vasectomy. It requires making the choice every time he approaches anal sex. At that moment, stopping to put on a condom interferes with spontaneity. Using one typically reduces the physical pleasure of one or both parties. Even thinking about condoms at all brings to mind the specter of disease and death, and so denial may lead to not "remembering" to think. All these impediments to invariable safety come to bear at moments of passion when thinking for most men and women, gay and heterosexual, lacks cool rationality. That's part of the pleasure of sex.²³²

230 When he does recognize the fight for "sexual freedom," *id.* at 359, he does not appear to have the ideology of sexual freedom, as described in these pages, in mind.

231 He returns to this theme elsewhere. For instance:

When two gay men have sex, they commonly engage in a delicate minuet with regard to each other's HIV status. The person with HIV does not reveal it for the reasons I have discussed previously. The uninfected partner, in return, knows that there is a risk that the person he is about to have sex with is infected, but he does not ask, in part because he does not want to disturb the passion of the moment and in part because he does not want to know the truth (believing that he himself will freeze if he learns his partner is infected). The condom permits sex to proceed, which each of them wants, while providing a high level of protection.

Id. at 379.

232 *Id.* at 363 (footnote omitted). Perhaps, Chambers will later add, never is sex more resistant to being

For Chambers, this readily apprehended evidence of why sex is so resistant to being tamed is not meant to celebrate sex's powers or to marvel at its radical insolence. In this sensual register, all Chambers offers is that the lack of "cool rationality" in sex is "part of [its] pleasure."²³³

It is in mapping out the sexual terrain his condom code must conquer to do its work, thus exposing how ambitious his regulatory effort actually is, that Chambers unavoidably comes eye to eye with the power of the sexuality he is regulating. It will not be enough simply to blast the condom code's message in gay men's ears "insistent[ly]"²³⁴ and "repetitive[ly]"²³⁵ and in socially or morally "charged"²³⁶ tones. To succeed, Chambers realizes, the condom code will have to drive deep into gay men's bodies and claim authority over their sexual constitutions to rejigger the matrix of gay desire itself. The good news Chambers finds here is that, if the social operation goes well, sexuality's demons can be dodged as the sexual plasticity inside gay men is engaged. Once all the way in, the code will fix gay men's sexual clockwork so that "the use of the condom [becomes] an automatic reflex."²³⁷ Sex's demons vanquished, gay men's sexual reflexes, hence our desires, hence our sex, will be morally (and perhaps hedonically) saved, retooled for the age of HIV/AIDS.

Viewed from the vantage point of the ideology of sexual freedom, the condom code looms ominously large as something akin to a totalitarian monster. In the name of morality, Chambers is pitching a large-scale social program in, and of, mind control. What's next, asks the ideology of sexual freedom? "Gay-affirmative" behavioral therapy that tries to get us to abandon anal sex altogether?²³⁸ Of greater concern from this perspective, Chambers

tamed than when it is gay men's sex that is coming under the leash; gay men have for some time, he notes, been engaged in a political fight for something called "sexual freedom." *Id.* at 359; *see also supra* note 230. Again, the version of sexual freedom he has in mind is not—officially, at least—the same as the version of it being discussed here.

233 Chambers, *supra* note 16, at 363.

234 *Id.*

235 *Id.*

236 *Id.*

237 *Id.*

238 Chambers recognizes that, for many gay men, "anal intercourse ranks highest in a hierarchy of sexual activities," "[e]verything else [being] merely foreplay." *Id.* at 359. As he goes on to explain: Anal sex "holds the place in their lives that vaginal intercourse holds for most heterosexual men. And for many gay men, anal intercourse is more. It is a symbol of the most powerful emotional union between men and a symbol of gay men's hard-fought battle for sexual freedom. People who hold these views understandably regard with great suspicion any suggestion to abstain from anal sex." *Id.*

recognizes the possibility that, depending on how the sexual risks associated with HIV/AIDS play out, gay men, at some point, might need to do exactly that.²³⁹ Even short of that extreme, the condom code's moralizing aim—to reconstitute gay desire—remains the antithesis of what the ideology of sexual freedom is for.²⁴⁰ It is sex that is supposed to reconstitute us and everything else.

This makes all the more surprising, on closer inspection, the extent to which Chambers' condom code turns out to be aligned with the ideology of sexual freedom, including its principle that sex is worth dying for. This, to begin, is what his condom code is:

For sexually active people, and for gay men in particular, the answer to the [AIDS] epidemic, our “magic bullet,” is the condom, a thin layer of latex to shield us from infection and death. AIDS organizations run largely by gay men announce a message that sex is fine, and that anal sex is fine—so long as a condom is used. These organizations imbue the directive about condoms with the force of a moral code. Not wearing a condom is not simply unwise; it is wrong. Not wearing a condom violates obligations to other gay men and, in the views of some, obligations to a larger gay community. Moreover, this directive sweeps beyond the sexual act itself to a range of other conduct critical to the lives of gay men. The person who assiduously uses a condom has no obligation under the rule to be tested

239 As he explains:

One alternative to the current message, politically difficult even to suggest within the gay community, would be to advise men to stop having anal intercourse altogether; use a finger or a dildo but avoid penile penetration even with a condom. Gay organizations would not hesitate to send this message if condoms had no capacity to contain the virus and if nearly every act of anal intercourse between an infected and uninfected person led to a new infection. Even though condoms provide a high level of protection if properly used, gay organizations may need to adopt this unpalatable message in the future if, irrespective of educational efforts, a high proportion of gay men (a quarter or a third, for example) become infected through unprotected intercourse by the time they are thirty or forty.

Chambers, *supra* note 16, at 374.

240 As suggested before, it is easy to imagine a difference between what is tenable within the ideology of sexual freedom viewed abstractly and what is expedient for it viewed in political terms. The condom code as Chambers defines and defends it may thus be in conflict with the ideology of sexual freedom as a matter of high principle without being or becoming an enemy of all its political forms. Indeed, certain forms of regulation, and specifically, something like the condom code, might have been and might yet be in some ways useful for the ideology of sexual freedom to be sustained as a project that is both lived and experienced. *But see generally* Spindelman, *supra* note 35.

for antibodies to the Human Immunodeficiency Virus (HIV) or to inform his prospective sexual partners of his HIV status, even when he knows himself to be infected.²⁴¹

The condom code is already envisioned to be powerfully working here to reorganize gay sexuality, sexual practice, and gay sexual life. Gone is an undifferentiated (and from within the gay male community at least, an unregulated) universe of gay sex. Gay sexuality is now divided into two basic types. On sex's "safer" side, we have sex, and in particular, anal sex, with a condom. "Unsafe" sex by contrast, is sex, and in particular, anal sex, without one.

"Safer" and "unsafe," which alone do nothing more than loosely track certain scientific and statistical probabilities, now mean more—much more. No longer only about certain risks, but "imbue[d] . . . with the force of a moral code,"²⁴² sex is normative, centrally about right and wrong. Sex, and especially anal sex, that minimizes the risk of HIV-transmission because a condom is used, is morally right, upstanding, and "wholesome."²⁴³ Sex, especially

241 Chambers, *supra* note 16, at 353 (footnotes omitted).

242 *Id.*

243 *Id.* at 361. Yes, Bill Miller, "sex between men," including anal sex, is described as "wholesome." The index of Miller's *The Anatomy of Disgust* contains no entry for homosexuality, but various passages do bring it vividly to mind. See, e.g., WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* 98–101 (1997) (discussing why the anus is disgusting). As Miller explains:

I need not spell out just how contaminating, how disgusting, the anus is. It is the essence of lowness, of untouchability, and so it must be hemmed in with prohibitions. The anus is to be properly only an exit for foodstuffs that first entered via the mouth. Of course it can be penetrated and therein lies the danger. Even those penetrations consented to and not forced lower the status of the person so penetrated. This works in a way that has something paradoxical about it. Most cultures, and surely ours, understand that the anus is not as contaminating as it is contaminatable. For the penetrator of the anus does not lose rank to the extent the penetrated does if he loses it at all. The penetrator is engaging in an act of domination, desecration, and humiliation of another and in doing so he remains relatively untainted. This suggests that the anus is in fact very sacred, even more so than the mouth. Mouths are already rather wide-ranging as to what they will admit, and things going through the mouth in the wrong direction, like vomit, do not taint the mouth for more than hours; but anuses are not to admit anything and if admitted the taint can endure for a lifetime. Mouths are also armed with teeth; the anus is rather pathetic in its defenses although the advent of AIDS effectively has transformed it into *anus dentatus*.

Id. at 100 (footnotes omitted, though the sources cited include Kari Ellen Gade, *Homosexuality and Rape of Males in Old Norse Law and Literature*, 58 SCANDINAVIAN STUD. 124 (1986), and, on "*anus dentatus*," Bersani, *supra* note 65.). And that is to say nothing of what the presence of semen might add to the picture. See, e.g., MILLER, *supra*, at 19–20 ("I argue that semen is perhaps the most powerfully contaminating emission. Semen

anal sex, that does not minimize the risk of HIV-transmission, because a condom is used, is not just bad, it is morally wrong.²⁴⁴ And wrong, in schematic terms, because it violates the “obligations”²⁴⁵ gay men owe to one another, and “in the views of some,”²⁴⁶ including Chambers, the “obligations” they owe “to a larger gay community.”²⁴⁷

So long as the condom code is honored, one’s moral obligations to others in sex are satisfied: “[T]he condom rule fully answers the obligations to others. So far as others are concerned, if we use condoms, then it does not matter whether we have the virus.”²⁴⁸ We thus need not be tested for HIV if we are prepared to use a condom every time, nor need we disclose our HIV-status if we are HIV-positive.²⁴⁹ Using a condom “exculpate[s]”²⁵⁰ us from any responsibility for transmitting HIV if that is what we should happen to do. Any HIV-transmission that results from “safer” sex is not, morally speaking, our—or sex’s—fault.²⁵¹ “Safer” sex being what gay sex is now normatively defined as, the link between gay sex and HIV/AIDS has morally been broken. The condom code, minimizing the risk of HIV-transmission, effectively justifies any residual risk that remains.²⁵² It is not only prophylaxis. It is exoneration.

has the capacity to feminize and humiliate that which it touches. And it just may be that the durability of misogyny owes much to *male* disgust for semen.”) (emphasis in original); *id.* at 103 (Miller discusses how “[s]emen pollutes in a number of ways,” and notes its power to feminize: “In a sense, semen is more feminizing than the vagina itself. Whatever receives it is made woman. The feminizing power of semen can reduce men to women, even lower than women in some moral orderings since as biological men they had the option not to become sociological women.”).

244 The condom code contains no more finely grained distinctions that might enable us to draw different “moral” lines around safer and less safe forms of unsafe sex; it, if not sex itself any more, is one undifferentiated whole.

245 Chambers, *supra* note 16, at 353.

246 *Id.*

247 *Id.*

248 *Id.* at 366.

249 *See id.*

250 *Id.* at 382.

251 For some, including Crimp, *see supra* Part III.A, and perhaps SONTAG, AIDS AND ITS METAPHORS, *supra* note 20, as well, it seems it never was.

252 There are other forms of sexual activity, not wholly risk free, that are effectively excluded from the condom code, including oral sex, which is technically within it, but not, as Chambers himself points out, really part of its moral message. *See* Chambers, *supra* note 16, at 362–63.

If the condom code is followed, the remaining risk of HIV-transmission, as Chambers sees it, is pretty small, though still “substantial.”²⁵³ As Chambers writes at one point, “gay men who have anal intercourse and plan to use a condom are still running substantial risks of infection.”²⁵⁴ And that is to say nothing of what the condom code leaves out—all the other forms of sexual conduct that also pose a risk of transmission. Along these lines, there is, he notes, some fine print in the condom code about oral sex, but it is not truly part of its (basic) moral message.²⁵⁵ Much of the residual transmission of HIV during safer sex—specifically, transmission that results from improper condom use—is written off in the code’s fine print.²⁵⁶ A stipulation bans inept condom use,²⁵⁷ making fumbling into moral lassitude the equivalent of not using a condom at all, whether it results in HIV-transmission or not. Leaving aside the lack of moral granularity of this view—there’s no moral difference between, say, inadvertently using too much lube and the most adamant refusal to follow the condom code?—what this means, as a practical matter, is that the only way HIV will likely be transmitted during safer sex is as a result of a condom breaking. This risk, too, is low but not non-existent. In one study Chambers cites, condoms break less than 3% of the time—and that is the figure for breakage and slippage both.²⁵⁸ And the risk of contracting HIV from this is, of course, below that.

253 *Id.* at 374.

254 *Id.*

255 *See supra* note 252.

256 *See* Chambers, *supra* note 16, at 371–72.

257 *See id.*

258 *Id.* at 371 n.54 (citing John L. Thompson et al., *Estimated Condom Failure and Frequency of Condom Use Among Gay Men*, 83 AM. J. PUB. HEALTH 1409 (1993) (estimate based on interviews, and noting that “not every breakage or slipping off leads to a transmission of fluids”)); *see also* Elizabeth Stone et al., *Correlates of Condom Failure in a Sexually Active Cohort of Men Who Have Sex With Men*, 20 J. AIDS HUM. RETROVIROL. 495, 497 (1999) (“Estimates of condom breakage rates among [men who have sex with men] in the 1980s ranged from 1.9 to 7.3/100 condoms used[.]”). Stone and her coauthors report a “condom failure rate of 2.1%.” *Id.* They maintain that condom failure rates in cross-sex sex “may be somewhat, but not dramatically, lower in vaginal sex, with breakage rates between 1.9% and 3.4% and slippage rates between 1.1 % and 2.0%.” *Id.* at 498. They add: “Failure rates as low as 1% to 1.5% have been reported in controlled studies of monogamous heterosexual couples, although it is unlikely that these low rates are replicated in actual practice.” *Id.* (footnotes omitted). *See also, e.g.,* L.H. D’Anna et al., *Condom Use Problems During Anal Sex Among Men Who Have Sex With Men (MSM): Findings From the Safe in the City Study*, 24 AIDS CARE: PSYCHOL. & SOCIO-MED. ASPECTS OF AIDS/HIV 1028 (2012); NAT’L INST. OF ALLERGY & INFECTIOUS DISEASES, NAT’L INSTS. OF HEALTH, DEP’T OF HEALTH & HUMAN SERVS., WORKSHOP SUMMARY: SCIENTIFIC EVIDENCE ON CONDOM EFFECTIVENESS FOR SEXUALLY TRANSMITTED DISEASE (STD) PREVENTION, July 20, 2001, at 9–10 (summarizing data on “condom slippage and breakage during use”).

The numbers being what they are, it is easy to imagine why Chambers might believe that the risk of HIV-transmission during safer sex, should it materialize, might not be seen as our—or sex’s—fault. Two possibilities, traces of which are found in Chambers’ text, immediately emerge. On the first view, contracting HIV through an act of safer sex, because a condom breaks, is simply bad luck. (If anyone is responsible, it is perhaps the manufacturer.) Those who escape this fate have no reason to breathe any sighs of relief. As Chambers writes, “[t]he uninfected may appropriately say to themselves, ‘There but for the grace of God go I.’”²⁵⁹ The second possibility holds, in what amounts to roughly the same thing, that those who contract HIV as a result of safer sex assumed the risk of condom failure. The person who does the infecting, and like him, gay sex, is not at all to blame. As Chambers observes, “[t]he uninfected partner . . . knows that there is a risk that the person he is about to have sex with is infected.”²⁶⁰ If he “does not ask, [he does not ask] in part because he does not want to disturb the passion of the moment and in part because he does not want to know the truth (believing that he himself will freeze if he learns his partner is infected).”²⁶¹ Thus, “[t]he condom permits sex to proceed, which each of them wants, while providing a high level of protection.”²⁶² Perhaps this shows how much work there is for the condom code to do. What Chambers is imagining is wanted even in safer sex is passion and uncertainty about infectious, possibly even lethal, sexual risk. Evidently, sex’s demons are hard to shake.

More importantly for now, these justifications—bad luck and choice—are incredibly volatile. Indeed, they are so volatile that they threaten to nullify the condom code in its entirety.²⁶³ But there is another reason, as significant, that they come up short. There is

259 Chambers, *supra* note 16, at 369.

260 *Id.* at 379.

261 *Id.*

262 *Id.*

263 Without much work, they can readily be expanded and mobilized to exculpate sex—any kind of sex, not just safer sex—from responsibility for HIV-transmission. If HIV-transmission is sheer misfortune, how can it ever be sex’s fault? Indeed, no one individual, no group, no society, no social institution, is responsible when it is transmitted. Nobody and nothing is. Alternatively, if responsibility for contracting HIV is squarely and exclusively on the shoulders of the one who has been infected, the one who has run the risk that is materialized, that may well be unfortunate, but it is a form of desert. It makes no difference whether the sex was safer or entirely unsafe. Once HIV-transmission is chalked up to bad luck or individual choice, no moral obligations on the part of others immediately or obviously follow. Without more, all supervening moral bets are off. Morally speaking, the presumption, if not the conclusion, is: The State has no duty to fund research or care; more to the present point, individuals have no obligation to bow to the condom code. Want to avoid being struck by lightning? Do not go out in a storm. The only possible moral rule here is even more minimal than the minima of the condom code: All there is, is self-care. If, as a moral matter, even that. For a related and a different view,

nothing “natural” about the risk of infection from condom breakage within the moral regime Chambers constructs. What that risk is, is deeply shaped, if not entirely determined, by the condom code he is embracing. Its refusal to require HIV testing, like its refusal to require disclosure of one’s HIV-status, provided a condom is used, defines the risks of condom failure. It makes bad luck and the assumption of risk mean what they do in a universe in which the condom code rules.

Chambers effectively recognizes this, and as he does, he supplies us with the real explanation he means to offer for the HIV-transmissions and the deaths that result when gay men abide by the condom code’s rules. The condom code, he explains, is “a rule that countenances the possibility that some additional lives will be lost”²⁶⁴ from the failure to require those who know they are HIV-positive to warn their sexual partners that they are before they have (safer) sex. In the very same sentence, he continues, offering that these lost lives—these expected deaths—are “the price of announcing rules that refuse to divide the [gay] community against itself.”²⁶⁵

By these terms, the condom code, minimizing the risk of HIV-transmission, justifies the risk that remains, along with the deaths that ultimately result, in the name of “refus[ing] to divide the [gay] community against itself.”²⁶⁶ Consider the logic. Individual gay men and gay men in community bear no moral responsibility for HIV-transmission or death from AIDS so long as the sex that was a factual cause of the virus’ transmission was undertaken in conformity with the condom code. The reason why is that imposing any moral responsibility under these circumstances—blaming gay men for what they did to one another—would break the community up, divide it against itself. This is a political argument dressed up as a moral claim: The reason we do not assign moral blame when the risks of safer sex materialize is the political solidarity we are trying to maintain within the gay community. Does the condom code ultimately reduce to politics? If so, its moral foundations, along with its force as a moral code, are vitiated.

At this point, it is apparent that the condom code itself carves the gay community into pieces. Not only are there the good gays who follow the code and the bad gays who do not. We also now have those who, by its express contemplation, follow the code and go on

see discussion *infra* Part III.C (dealing with Richard Mohr’s view that HIV-transmission is a form of self-harm, but that the State should anyway be understood to be obligated to fund HIV-related research and certain forms of HIV/AIDS-related care).

264 Chambers, *supra* note 16, at 383.

265 *Id.*

266 *Id.*

living, and those who follow it, but do not survive. What political value defines and coheres this community that is being preserved intact? What value, what good, makes it worth keeping it together this way? Chambers has this to say:

At least for the American gay community today, however, the ethos behind the condom code has much to be said for it. It begins with the premise that sex is good. That is a life-affirming place to start. It goes on to declare that all of us are in this together—the HIV-positive and the HIV-negative, the tested and the untested, those who fail to inform and those who are not informed. It asserts that none of us is innocent and each of us is responsible for our collective well-being. That is an especially important message in a world where the infected and the uninfected fear and mistrust each other but need to work together for their common salvation. It is nonetheless a rule that countenances the possibility that some additional lives will be lost (from failure to warn) as the price of announcing rules that refuse to divide the community against itself.²⁶⁷

Community solidarity here is defined expressly and expressly achieved in sexual terms that cognize writing off some gay men's lives. Sex is "good," but requires this trade off? The condom code willingly sacrifices some gay men's lives in order to preserve and vindicate the value of sex. Some gay men must die so that the rest of us may keep on having (safer) sex. If so, we arrive at the ideology of sexual freedom's now-familiar bottom line: Sex is worth (at least someone) dying for.

For those who wind up dead as a result of this political solidarity scheme—dead as an acknowledged term of the condom code—the fact that Chambers only wants us to be having morally upright safer sex, and in doing so, to minimize (up to a point) the number of gay men that sex kills, will be of little comfort. We are all, "all of us[,] in this together."²⁶⁸ We are, anyway, up until that moment when some of us die for the sexual benefit of the rest.²⁶⁹ But then, "none of us is innocent."²⁷⁰

267 *Id.* at 382–83.

268 *Id.* at 383.

269 In this light, the centrality of sex to Chambers' argument—largely hidden behind its embrace of a moral position—begins to come into focus.

270 Chambers, *supra* note 16, at 383. It is not entirely clear what exactly he means by this. Presumably, he does not mean to suggest that being gay as such, or even engaging in same-sex sex, causes us to lose our moral innocence.

What, ultimately, is the difference between the view that Chambers advocates for and the ideology of sexual freedom, with its willingness to trade lives for sex? In a sense, it is not so much a matter of principle as it is of price. How many lives does sex deserve?²⁷¹ How many lives may it take before it ceases being good? Chambers believes the numbers are small: only those gay men whose lives could have been saved by a different disclosure rule, one that would interfere with the sexual flow, here termed community “solidarity.”²⁷²

Is his tally right? The count only goes up from the acknowledged risks of the “don’t ask, don’t tell” disclosure rule. Think of the additional lives that might be saved by expanding the condom code’s terms, first, to require HIV-testing, then disclosure and explicit informed consent, then up to and including the unthinkable: giving up (anal) sex altogether. Had Chambers ventured such an enlarged rule, he would have been seen by many gay men as an opponent of their struggle for sexual freedom. Knowing this helps explain why he does not.²⁷³

In any event, the tradeoffs are more complex than any of this. As Chambers reminds us, the more ambitious the condom code is, the fewer the lives it might turn out to save. The more aggressive the condom code is, the more it operates as a frontal assault on the sex that gay men have, the less likely it is that gay men will buy into it, meaning: the more likely they will be to have unsafe sex. This, briefly put, is why the condom code, on Chambers’ account of it, has never entailed an onslaught against the “hegemony”²⁷⁴ of anal intercourse in the gay male community. As Chambers explains: “Advocating condom use may have been the strongest message that the gay community—[and gay AIDS educators] themselves—could tolerate politically and psychologically.”²⁷⁵ Exceed those limits, and more gay men might have wound up dead than under a less ambitious code, including his.

271 Although Chambers is clearly advocating a condom code that views sex as worth sacrificing health and life for, this hardly qualifies him as a committed sex radical. Many people might be willing to trade lives for a range of other social values, even conveniences. It may in this sense merely sound shocking to hear someone willing to trade sex for health and life. Especially since the tradeoff may not be necessary. But that, in any event, is how we know it is ultimately a political value choice. For those who remain unconvinced that Chambers’ view converges with the ideology of sexual freedom, the argument that follows is that, although he may not realize, hence intend, it, his condom code actually may trade more lives for sex than his analysis allows. For some possible limits, see *supra* note 239.

272 Chambers, *supra* note 16, at 362.

273 See *supra* note 239; see also *infra* notes 274–292 and accompanying text.

274 Chambers, *supra* note 16, at 358.

275 *Id.* at 359.

Perhaps, then, it is unfair to point out one of the ways in which Chambers may have underestimated the number of gay lives his condom code was practically offering up. But is anal sex worth the cost? Might more lives predictably be lost as a result of his code, rather than fewer? To Chambers, unsafe sex is clearly a moral taboo.²⁷⁶ He notes that violators of safer sex norms are often chock full of guilt and self-recrimination. This guilt and self-recrimination²⁷⁷ are counted among the costs—if not quite the “harms”²⁷⁸—of the condom code. These moral feelings, to Chambers, are deeply regulatory. They can be tools of self-imposed suffering. Guilt and self-recrimination are not simply costs of the condom code, but forms of punishment that come with it.

Chambers thinks it is too soon to tell whether the condom code can sustain and defend these forms of punishment. Conventionally imposed, external modes of punishment or accountability for failure to abide by the condom code’s rules are, by contrast, never seriously considered. Contemplating the possibility of making the condom code part of the criminal law, he asks: Why not impose “mild sanctions, comparable to sanctions that some states have created for failing to wear a seatbelt, on any person who fails to use a condom during anal intercourse”?²⁷⁹ While “[t]he virtue of such a statute would be to place the imprimatur of the state on a standard of mutual responsibility,” “[e]very gay man or lesbian to whom I’ve so much as suggested the possibility has been appalled.”²⁸⁰ As he continues:

As a single objection among many, we know who would enforce such laws if any were enacted. We would fear that they would be enforced by police and prosecutors not primarily in the hopes of promoting safe behavior but rather as a tool for harassing gay men and for stirring antigay sentiment. To discuss the possibility of such a law at all reminds us of how far we are from feeling secure in the embrace of the state.²⁸¹

276 At least, one might say, outside monogamous relationships. *See id.* at 372 n.59 (“Many men in long-term relationships have good reason to believe that they are taking almost no risk in having unprotected intercourse. They know that each of them has tested negative for antibodies and they are committed to a monogamous relationship. But many men in relationships engage in unprotected sex even though one or both have never been tested.”).

277 *See id.* at 368.

278 *Id.* at 370.

279 *Id.* at 383.

280 Chambers, *supra* note 16, at 383.

281 *Id.*

Without any real enforcement, even if “none of us is innocent,”²⁸² his condom code acts as if we all are. It appeals to us as if we were sexual angels who do not need its terms. While mobilizing our sense of marginality and fear, it seeks to rouse our sense of altruism, community responsibility, belonging, group loyalty, gay pride, and hope for a shared future. This is a lovely ideal, Chambers at his moral best. But what happens, in reality, when the condom code is violated? What happens, for instance, when a gay man intentionally and knowingly violates the code, asserting what gay men, in Chambers’ estimation, “only rarely”²⁸³ do: that he wants to “have intercourse without a condom because it is [his] right or desire to do so”?²⁸⁴ To Chambers, it appears we say: This man has committed a moral wrong. The end.

The condom code Chambers gives us is lenient because those who violate it—particularly the HIV-positive, who already suffer enough—should not be demonized. Choosing safer sex can be difficult,²⁸⁵ can interfere with sexual spontaneity,²⁸⁶ decrease physical pleasure,²⁸⁷ and remind us of death and disease.²⁸⁸ Judgment can be impaired when one is aroused, especially if drunk, high, or depressed.²⁸⁹ Swift and vengeful retribution is no more called for than sanctimoniousness. If that is our impulse, we should, Chambers advises, consider whether we are experiencing “a strong psychological need to condemn or avoid those who engage in unprotected intercourse, in part because [we ourselves] can so easily imagine doing the same.”²⁹⁰ If so, we should give ourselves—not the condom code’s violators—a little time out. “Almost none of these men say they wanted to harm another person.”²⁹¹ (Almost? What if, in fact, they do inflict harm?) And then there is the importance of preserving the community. We are all in this together, none of us is innocent,

282 *Id.*

283 *Id.* at 364.

284 *Id.* For an argument in exactly these directions—and beyond—as well as discussion of it, see discussion *infra* Part III.C.

285 *See* Chambers, *supra* note 16, at 363.

286 *See id.*

287 *See id.*

288 *See id.*

289 *See id.* at 368.

290 *Id.* at 370.

291 Chambers, *supra* note 16, at 368.

we must “work[] . . . for [our] common salvation.”²⁹² Community over finger-pointing; shared, collective responsibility, over scapegoating; moral understanding, compassion, and identification with those who flout the moral rules over judgment, anger, and disavowal. No wonder the condom code, if heavy on the front side, is incredibly light on the back end.

In creating a hierarchy of sex—safer sex over unsafe sex, sex that is morally good over sex that is morally bad—the condom code creates and installs a normalizing regime. It tries to drive gay men toward sex that is morally good. But this is not, Chambers in various ways suggests, already the sex that gay men most want.²⁹³ The idea is to try to make safer sex sexy, exciting, hot—a tricky task from the start. Safer sex may be the morally upright thing to do, but morally upright sex, or so the thinking sometimes is, is (or can be) a drag. The condom code is thus waging an uphill battle. It is commonly understood to set out to eroticize the antithesis of steamy sex. Precisely because so many gay men are familiar with those norms—the norms of unsafe sex—the condom code’s message must be repeated like sex itself: It must be “insistent” and “repetitive” and penetrative.²⁹⁴ It must engage us rationally and unconsciously, trying to rework what Chambers calls our “automatic reflex[es].”²⁹⁵ To succeed, it must reconstitute our desires. The condom code does not simply mark unsafe sex as wrong. By making it taboo, it underlines its dangers, its abnormality, its outlawry, the irrationality of engaging in it. Even as the condom code is hawking the thrills of safer sex, it is reminding us, guaranteeing delights, with sex that is not. As Simone de Beauvoir writes: “No aphrodisiac is so potent as the defiance of Good.”²⁹⁶ The condom code thus eroticizes unsafe sex, makes it more extreme than it already was, imbuing it with a renewed sense of its power, hence its sexiness.²⁹⁷ And this is just at a moment when—thanks to the

292 *Id.* at 383.

293 *See infra* note 407 and accompanying text (discussing the missing pleasures of unsafe sex).

294 Chambers, *supra* note 16, at 363.

295 *Id.*

296 de Beauvoir, *supra* note 93, at 28; *accord* BATAILLE, *THE TEARS OF EROS*, *supra* note 62, at 66 (“But if we do it [sex] in secret the prohibition transfigures what it prohibits and illumines it with a glow, at once sinister and divine: in a word, it illumines it with a religious glow. The prohibition gives its own value to what it prohibits.”).

297 In what may be one of the more interesting products of the ideology of sexual freedom, “barebacking,” technically unsafe anal sex that includes sex known for, and valued because of, its risk of transmitting HIV, not only exists, *but cf.* Simon Watney, *Psychoanalysis, Sexuality and AIDS*, in *COMING ON STRONG: GAY POLITICS AND CULTURE* 22, 35 (Simon Shepherd & Mick Wallis eds., 1989) (“[N]obody chooses to get sick.”), but it is converted into a positive experience. Sexually transmitting HIV is not a form of injury, a slow homicide, but rather is seen as “gift-giving,” “impregnating,” “breeding,” or “fathering” someone else’s disease. As Michael Scarce writes:

associations between sex and disease and death then being tightened—unsafe sex, left alone, might have lost, or been losing, some of its allure.²⁹⁸

In this light, the particular structure of Chambers' condom code is perfectly suited to the task of eroticizing unsafe sex. Its complete lack of sanctions for those who violate it means that it can be violated with no more punishment than individuals impose on themselves: effective impunity. What punishment there is, is strictly a matter of individual choice. Chambers' condom code thus makes unsafe sex endlessly transgressive, continually violative of the safer sex norm, without any fear of limit.²⁹⁹ Paradoxically, but predictably,

Rare exceptions to the barebacking norm, these men prize not just unprotected anal sex or even semen but HIV itself as the ultimate intimacy to share with another. In a mind-boggling feat of symbolic reversal, they have taken the dread and deadliness of the virus and transformed it into desire and regeneration. For them, sharing uninfected semen is insufficient because it provides only a temporary bond—the come dries up, leaving only the memory of the experience. But “charged loads[]” . . . offer a kind of permanent partnership, a connection outside of time. Once you're infected, you're infected for life. . . . From the science of how the virus invades—and then is incorporated into—the host cell, combining the DNA of one organism with another to make a new form of life, these men have woven a tale of romance. In this way barebacking is equated with “breeding” and infection with “impregnation.” Some HIV negative bug chasers [men who want to contract HIV] have gone so far as to attempt to consciously choose the individual gift-giver who will “father” their HIV infection. For these men, seroconversion has become a rite of passage rather than a chance occurrence, couched in metaphors of pregnancy.

Michael Scarce, *A Ride on the Wild Side*, POZ MAG., Feb. 1999, at 55, 70. Then again, the history of the transvaluation of harms, including their reinscription as romance and love, is one of some longstanding among gay men. Think of that famous scene in Jean Genet's *Miracle of the Rose* that Susan Brownmiller, and more recently, David Halperin reminded us of, in which a gang of thugs make Bulkaen, whose personality Genet assumes, eat their loads of spit:

I was hit in the face and was soon slimier than a prickhead under the discharge. I was then invested with a deep gravity. I was no longer the adulterous woman being stoned. I was the object of an amorous rite. I wanted them to spit more and thicker slime. Deloffre was the first to realize what was happening. He pointed to a particular part of my tight-fitting pants and cried out: “Hey! Look at his pussy! It's making him come, the bitch!”

GENET, *supra* note 41, at 268. More detailed accounts are in DEAN, *supra* note 116, reviewed in Spindelman, *supra* note 35.

298 All this can be true and Chambers can still be right that “[n]early all [gay men] accept the premise that protected sex is the norm.” Chambers, *supra* note 16, at 364. Indeed, the broad acceptance of the condom code underscores the point.

299 This is hardly the first time it has been noticed that safer sex “inevitably magnifies the allure of danger.” See, e.g., Morris, *supra* note 62, at para. 8.

Chambers' condom code may very well not, as he imagines, simply drive the numbers of unsafe sexual encounters down. It may drive them both down—and up. To the extent it is followed, as it reconfigures sex, it may also prolong the crisis.

While expressly affirming the sunny, safer side of sex, Chambers' condom code, in effect, in the context of the ideology of sexual freedom that helps shape the real world in which it operates, normatively protects and promotes sex that is tinged, even laced, with risk and death.

Chambers shows no signs of intending to energize the erotics of death.³⁰⁰ Nor would he likely be unmoved by a fuller tally of the lives that might be lost in the name of protecting gay sex—or even in the name of community solidarity.³⁰¹ The explanation Chambers offers

300 Relatively early on in his article, when he is trying to establish the moral underpinnings of the condom code, Chambers, with some evident approval, rehearses the views of one Charles Kaiser, who “depicts openly gay men as revolutionaries whose first obligation is to stay alive. Kaiser implies that dying is unpatriotic and spreading the disease, treason.” Chambers, *supra* note 16, at 362 (citing Charles Kaiser, *Tempting the Virus*, QW MAG., Nov. 1, 1992, at 48) (footnote omitted)). To similar effect is Chambers' willingness not only to consider recommending that gay men “desist from anal sex altogether,” *id.* at 374, but also to send out another safer sex message that illuminates the difficulties of abiding by the condom code as a longer-term risk-management strategy. Describing what a “revised” condom code might look like, he writes:

Whenever you have anal intercourse, you should use a condom to protect yourself and your partner. You need to know, however, that always using a condom takes great perseverance. Lots of men find that they do not always get themselves to use one and only you can decide whether you will. If you're not sure you will, you may want to build a rich sexual life that doesn't include anal intercourse. Remember: If you do not have anal sex, you will greatly decrease your chances of ever being infected with HIV.

Id. at 374–75 (footnote omitted). Chambers recognizes that “[m]any gay men would find this revised message repugnant since it raises doubts about anal sex and ‘problematizes’ it in a world in which straight people (and we ourselves) have problematized our sex lives for too long. They would say that we have fought too hard for the right to make love as we please to turn around suddenly and attack it as a problem.” *Id.* at 375 (footnotes omitted). It is no coincidence that at just this point, Chambers appeals to the classic understanding of what safer sex campaigns are: information-providing, hence autonomy enhancing, programs, not efforts in sexual regulation. Just so, given what he elsewhere says, it seems as though he is willing to countenance the possibility of urging gay men, if not requiring them openly, to abandon anal sex altogether and regulating toward those ends rather than risking sacrificing (too) many gay men's lives. These are among the textual reasons that may be cited to support the view that Chambers does not ultimately intend to be energizing an erotics of death. That his text nevertheless does so in the ways described here is something else again.

301 Chambers does at one point, for instance, indicate that he believes there is an upper limit to the number of gays dead from sex that he and the gay community would tolerate—but that number is very high: “Gay organizations would not hesitate to [advise men to stop having anal intercourse altogether] if condoms had no capacity to contain the virus and if nearly every act of anal intercourse between an infected and uninfected person led to a new infection. Even though condoms provide a high level of protection if properly used, gay

for the lives his condom code would not save—the lives it would thus sacrifice—is not designed to withstand this kind of pressure.

Nonetheless, the moral underpinnings of, and explanation for, the condom code are well suited to promoting an erotics of death—both in the context of safe and unsafe sex, if not to exactly the same degree. In this sense and to this extent, Chambers' condom code is of a piece with the ideology of sexual freedom. Precisely because it is not obviously a product of the ideology of sexual freedom—precisely because it seems to be so opposed to an erotics of death, so in favor of an erotics of life³⁰²—it may be able to actualize in unnoticed and unintended ways this ideology's holy ends. From the perspective of the ideology of sexual freedom, Chambers' condom code thus turns out to be not just its enemy, but also—in some important ways—its friend.

C. Richard Mohr, *Gays/Justice: A Study of Ethics, Society, and Law*

If Chambers' "Condom Code" offers an argument with a mixed relation to the ideology of sexual freedom, so, too, does Richard Mohr's book *Gays/Justice: A Study of Ethics, Society and Law*, though the mix itself is hardly the same. Mohr goes farther than Chambers ever does in the direction of pouring the ideology, including its erotics of death, straight.

Gays/Justice, published in 1988, presents an extended analysis of the social and legal status of gay men and lesbians,³⁰³ much of it in reaction to Justice Byron White's then-recent opinion in *Bowers v. Hardwick*,³⁰⁴ which refused to hold that gay sexuality enjoys constitutional privacy protections, and to the urgent social backdrop against which *Hardwick* itself was decided: the AIDS epidemic, then in darkly opulent bloom. Mohr engages these developments largely on separate tracks.³⁰⁵ On the one side, he generates a set of negative

organizations may need to adopt this unpalatable message in the future if, irrespective of educational efforts, a high proportion of gay men (a quarter or a third, for example) become infected through unprotected intercourse by the time they are thirty or forty." *Id.* at 374. Maybe—or maybe not.

302 Along similar lines are David L. Chambers, *For the Best of Friends and for Lovers of All Sorts, A Status Other than Marriage*, 76 NOTRE DAME L. REV. 1347 (2001); David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997); and David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996).

303 The locution "lesbians and gay men" is generally avoided here because Mohr's work bends so heavily in a gay male direction, as he himself recognizes. See MOHR, *supra* note 22, at 15–16 (acknowledging the leaning).

304 478 U.S. 186 (1986).

305 Largely, but not entirely. For moments of convergence, see, for instance, *infra* text accompanying notes 378–452 (discussing the negative rights claim Mohr ventures on behalf of a broad right to sexual autonomy in the context of a claim that also addresses the State's obligations to HIV-positive gay men and gay men with

rights claims that collectively locate *Hardwick*'s error in its misapprehension of the various meanings of the ideal of privacy on which it rests.³⁰⁶ Properly understood, Mohr maintains, "privacy," in its different dimensions, invariably repairs to, yielding, the same bottom line—a bottom line that *Hardwick* missed: Gay sexuality as such is private and entitled to moral and legal respect. On the other side, Mohr works up and describes a limited set of affirmative obligations that the State owes lesbians and gay men, including HIV-positive gay men and gay men with AIDS, to secure them the conditions for an autonomous life³⁰⁷—obligations to be discharged through the enactment of new forms of pro-gay and HIV/AIDS-related legislation.³⁰⁸ Connecting these tracks are Mohr's analytics, basically morally and politically liberal, throughout.³⁰⁹ While this gives the work what many liberal

AIDS). Mohr's references pervasively run to AIDS, not HIV. There is no index entry for HIV, for instance, found in the book, which elsewhere refers to "AIDS antibody testing," MOHR, *supra* note 22, at 258, 340, and "heterosexual transmission of AIDS," *id.* at 219. That Mohr's protocol on this is not followed in these pages is not meant, and should not be taken, as criticism.

306 See MOHR, *supra* note 22, at 49–133 (discussing privacy). Mohr clings to the idea that courts are the proper forum for negative rights claims, *see, e.g., id.* at 62 ("To the extent that sodomy laws are an assault on dignity and to the extent that dignity is not, as it is not, something which ought morally to depend on the whims of majorities, then the courts are not just an available forum to overturn sodomy laws, but are also the proper forum." (citing RONALD DWORKIN, *A MATTER OF PRINCIPLE* 33–71 (1985))), notwithstanding his deep pessimism that courts will deliver gays the justice we deserve, certainly in the short run. *See, e.g., id.* at 315 ("The nation's institutional means for establishing justice—the courts—have completely failed in their duty when it has come to the plight of gays. Indeed, they have now become a major part of the mechanisms of gay oppression."). "[W]in or lose," he writes, "gays should be pressing ahead in the courts." *Id.* at 323. Sometimes, he sees, victories can be claimed. *See id.* at 318 n.8 (discussing *Watkins v. U.S. Army*, 837 F.2d 1428 (9th Cir. 1988)).

307 As explained later, *see infra* note 378, Mohr seems to prefer the notion of "independence" to "autonomy," though, in passing, he himself seems to nod toward an equation between the concepts. *See* MOHR, *supra* note 22, at 82 n.75. In any event, the definition of "independence" Mohr provides, *see id.* at 92, 220, is consistent with some standard versions of "autonomy." "Autonomy" is used here to describe the idea only because the term will be more familiar to most legal readers.

308 *See* MOHR, *supra* note 22, at 137–243 (arguing for affirmative obligations of the liberal State to be discharged through responsive legislation). The specific civil rights legislation Mohr calls for includes anti-discrimination measures protecting lesbians and gay men in "housing, employment, and public accommodations," *id.* at 137; *see also id.* at 137–211, along with new, dedicated budget lines for research and funding for medical, including hospice, care, for HIV-positive gay men. *Id.* at 215–16. Interestingly, or strangely, depending on one's view, Mohr boasts that he is mounting no general argument for a right to health care. *See id.* at 239 ("I have argued for funding on specific moral grounds, ones which differentiate what should and should not be funded—stopping well short of universal open-ended government funding for research and care."); *see also id.* at 228–29 (describing other limitations on the argument for funding). So much the worse, one might say, for him—and for those who need it but would not receive it on this account.

309 For what are often taken as classic statements of the "liberal" position on homosexuality, *see* COMM. ON HOMOSEXUAL OFFENSES AND PROSTITUTION, *THE WOLFENDEN REPORT* (1957); H.L.A. Hart, *Prostitution and Homosexuality*, in *LAW, LIBERTY, AND MORALITY* 13 (1963). Speaking more politically, Mohr's views are

readers will find to be a familiar and reassuring ring, from the perspective of the ideology of sexual freedom, it sends up definite warning signs. The book's near-constant moralizing, not least of all its morality-based embrace of affirmative state obligations in relation to sex, are, from this perspective, to be strenuously opposed.

Against this backdrop, the ideology of sexual freedom takes special interest in one argument that Mohr ventures while explaining *Hardwick's* mistakes. It stands out from the others that surround it for the different and far friendlier path it breaks. Unlike the other claims, which ground sex's privacy claims on their substantive moral content, this argument apparently aims to garner sex impunity from moral and legal sanction based on the sheer experience of it.³¹⁰ In substance and effect, this phenomenological bid does not so much seem to collect and advance ideas tolerable to the ideology of freedom as it voices ideas found within it, ventriloquized.

Schematically, Mohr's sexual phenomenology hangs together as an erotic tale of sex, start to end: from "horniness" to "sexual arousal" to intercourse to its aftermath.³¹¹ Within it, sex is the very experience it presents: a "world-excluding"³¹² force. Like certain other experiences—the examples given are "reading a poem"³¹³ and "praying alone"³¹⁴—sex may happen in the world, but it is not for that reason properly of it. Far from it, sex "propel[s] away the ordinary world, the everyday workaday world of public places, public function, and public observation."³¹⁵ In doing so, it "creates its own sanctuary which is in turn necessary for its success."³¹⁶ Distinguishable and thus distinguished from the workaday world, by fiat deemed public, "the sexual realm" is by contrast declared "inherently

somewhere to the left of a purely libertarian stance but not as far to the left as a full-blooded welfare-state democrat. As he repeatedly points out in different ways, he does not think of himself as either a socialist or a communist. See, e.g., MOHR, *supra* note 22, at 102 (using "communist ideology" as a term of disparagement); *id.* at 308 (referring to "Commies," and their complaints about inadequate governmental action).

310 MOHR, *supra* note 22, at 101–06.

311 For "horniness," see *id.* at 103; for "sexual arousal," see *id.* at 101–04 (*passim*); for intercourse, see *id.* at 101–04 (*passim*). On sex's aftermath, more below. See *infra* text accompanying notes 345–354 (discussing sex as ecstasy in its various modes).

312 MOHR, *supra* note 22, at 100.

313 *Id.*

314 *Id.*

315 *Id.*

316 *Id.* at 103.

private.”³¹⁷ Though distinct from everyday reality, and largely (if not entirely) a world unto itself, the sexual universe turns out to be easily perturbed. The merest intruding glance³¹⁸ (much less anything more), and “[t]he whole process and nature of sex is interrupted and destroyed.”³¹⁹ To prevent that from happening, hence to fortify the sanctuary sex creates for itself against intrusion, “erotic reality” and “everyday reality”³²⁰ must be kept apart. When they are, sex and the world it produces are held unaccountable to anything else, including the ordinary world’s morals and laws.

Filling in the descriptive details, Mohr counts—to four—the “ways in which sex acts are world-excluding.”³²¹ He begins: “First, sexually aroused people experience the world in an altered way. Sexual arousal alters perception of reality in some of the same ways powerful drugs do.”³²² Through arousal and in sex, Mohr explains, the individual’s visual field is altered. “One’s gaze no longer roams or scans at large, but increasingly becomes a form of attention,” a process that “calls for and is enhanced by nightfall.”³²³ Along the way, the sense of being firmly grounded in space and in time recedes,³²⁴ sex being both nowhere or anywhere and taking place in an instant that can give onto eternity. As these dimensions of the world are warped, sensory perception increasingly shifts from vision to touch, with the result that, “[a]t peak arousal, . . . the horizon is but the extent of one’s flesh.”³²⁵

317 *Id.*

318 MOHR, *supra* note 22, at 103. As Mohr says: “The whole process and nature of sex is interrupted and destroyed if penetrated by the glance of an intruder—unless that glance itself becomes incorporated in the [sexual] process just described.” *Id.* Voyeurs everywhere can breathe relief. But worse than mere visual penetration is actual judgment of the sex. *Id.* at 104. It brings self-reflection back into the picture, which for reasons about to be described, recapping Mohr’s account, can amount to a sexual disaster. *See infra* text accompanying notes 338–340 (discussing the fourth dimension of sexual experience that Mohr describes).

319 MOHR, *supra* note 22, at 103.

320 Both expressions appear in Mohr. *Id.* at 101 (“[S]ocial relations alter importantly during the shift into erotic reality; people who were important in everyday reality recede from importance.”). A separation between these two “realities” fairly animates the entire phenomenological account.

321 *Id.*

322 *Id.* Mohr makes no argument for drug rights here. Later, he distinguishes drug use as different than sex on the grounds that “drug use is not for anyone a central personal value.” *Id.* at 229. This may or may not be true in this categorical form, but it practically misses the point.

323 *Id.* at 101.

324 *Id.*

325 MOHR, *supra* note 22, at 101.

“Second,” Mohr continues, sex is “world-excluding,” because “social relations alter importantly during the shift into erotic reality; people who were important in everyday reality recede from importance.”³²⁶ As social identities disintegrate, one becomes ever more “focused only upon those who potentially jibe with one’s tastes, the particularities of one’s erotic choices or desires.”³²⁷ Potential sexual partners are seen only in terms of their “appearance, mien, pose and act.”³²⁸ Sex itself is not only not a worldly endeavor, according to Mohr, it is not a continuation of our projects from the ordinary world, either.³²⁹ Sexual encounters, he insists, are not “marked by . . . social or economic roles.”³³⁰ Only

326 *Id.*

327 *Id.*

328 *Id.* at 102. There is practically, if not entirely, no trace of reciprocity up to this point. Mohr includes among these encounters promiscuous forms of public sex, which he believes are “intimate” in just these ways. *Accord* DENNIS ALTMAN, *THE HOMOSEXUALIZATION OF AMERICA, THE AMERICANIZATION OF THE HOMOSEXUAL* 79–80 (1982); *see also, e.g.,* WHITE, *FAREWELL SYMPHONY*, *supra* note 41, at 178. Leo Bersani has at Altman for suggesting “that gay baths created ‘a sort of Whitmanesque democracy, a desire to know and trust other men in a type of brotherhood far removed from the male bondage of rank, hierarchy, and competition that characterise much of the outside world,’” as among the “few lies [gays had been telling]—lies whose strategic value I fully understand, but which the AIDS crisis has rendered obsolescent.” Bersani, *supra* note 65, at 206 (quoting ALTMAN, *supra*).

329 Justice William O. Douglas had something like this to say about marriage in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty not commercial projects.”). Mohr deals with Douglas’s opinion in detail in MOHR, *supra* note 22, at 63–76.

330 MOHR, *supra* note 22, at 102. There are some qualifiers in what he writes: “[C]ommunist ideology aside, such [impersonal or anonymous] encounters are not marked by mere functioning in accord with social or economic roles.” *Id.* How much weight Mohr wants to place on the idea of “mere functioning” is unclear, as is how to figure it out from the text alone. The qualifiers do not seem to deserve much attention, because they seem to be a quick answer to the objection that Mohr is apparently responding to: that social roles do, indeed, play a meaningful part in sex, even in so-called “impersonal” or “anonymous” sex. So far from being left behind, they are regularly, if not often or always, integral to its erotic structure. For sources on the last, *see* Bersani, *supra* note 65, at 206 (explaining that “[r]ight-wing politics can, for example, emerge quite easily from a sentimentalizing of the armed forces or of blue-collar workers, a sentimentalizing which can itself prolong and sublimate a marked sexual preference for sailors and telephone linemen”); Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence*, 8 *SIGNS* 3 (1982) (noting the relation between gender and sex); Robin West, *Law’s Nobility*, 17 *YALE J.L. & FEMINISM* 385 (2005) (same); *but see, e.g.,* José Esteban Muñoz, *Ghosts of Public Sex: Utopian Longings, Queer Memories*, in *POLICING PUBLIC SEX: QUEER POLITICS AND THE FUTURE OF AIDS ACTIVISM*, *supra* note 63, at 355, 359 (“The great thing about anonymous sex is you don’t bring your private life or personal world. No politics or inhibiting concepts, no closed rules or fixed responses.”) (quoting JOHN GIORNO, *YOU GOT TO BURN TO SHINE: NEW AND SELECTED WRITINGS* 71 (1994)). It is not as though Mohr does not know how social roles can be integral to the erotics of sexuality. *See, e.g.,* MOHR, *supra* note 22, at 101–02, 105 & n.22.

“communist ideology” crassly supposes that erotic reality is conditioned by social reality like that.³³¹

“Third,” he goes on, “in the process of sexual arousal, one becomes increasingly incarnate, submerged in the flesh.”³³² Through sex, “the body ceases to be merely a coathanger for personality, but assumes an independent life of its own.”³³³ Ultimately, “the body submerges even the mind’s ability to carry out the requisite recognitions and one becomes just the body sensing.”³³⁴ More, “[w]hen this process [of becoming ‘increasingly incarnate, submerged in the flesh’] is mutual and paired with the shift in perception to touch, it achieves an unparalleled intimacy.”³³⁵ This is due to a spiraling sexual effect:

One perceives the other as flesh and desires the other to be flesh. Usually one becomes, in turn, flesh for another, in part because one’s own submersion into the flesh sparks or enhances desire in the other. The recognition of this effect on the other, in turn again, facilitates one’s own further submersion. This process of mutual reciprocal incarnations may be iterated at many levels, though eventually the body submerges even the mind’s ability to carry out the requisite recognitions and one becomes just the body sensing.³³⁶

Mutuality or no, spiral or no, none of which is formally required in the account, sex renders us flesh.³³⁷

And so, at last, comes the final world-excluding experience of sex that Mohr details. In doing so, he recovers a thread stitched into his earlier description of how sex changes our sensory apprehensions of the world. Sex, he had said, “withdraws one from the world of waking and talking, from reason, persuasion, and thought. Sex is essentially a world of silence; words, such as they are, are not reports, descriptions, or arguments, but murmurs

331 MOHR, *supra* note 22, at 102.

332 *Id.*

333 *Id.*

334 *Id.*

335 *Id.*

336 *Id.*

337 Or: “one becomes just the body sensing.” MOHR, *supra* note 22.

and invocations which emphasize silence and its awe.³³⁸ This is of a piece with the notion that sex can stymie, even eviscerate, the mind's capacity to "carry out" its ordinary recognitions, leaving us as "just the body sensing."³³⁹ These experiences, indicating larger truths about sex, become their own freestanding point:

[T]he everyday world of will and deeds fades away with sexual arousal. The will is not a chief causal factor in the fulfillment of sexual desire and indeed impedes sexual arousal. One can effectively use one's will to raise one's arm but cannot use one's will to raise, well, to effect the transition from sexual desire—horniness—to sexual arousal—the engorging and sexual sensitizing of the genitals. Indeed, quite the opposite is true: the willing of sexual arousal guarantees it will not occur. Sexual arousal must happen *to* one; it is a passion, not an action, project, or deed. It can occur only in situations in which one is not observing one's progress and judging how one is doing. . . . One has to be lost in the sex for it to work upon one.³⁴⁰

All told, this is Mohr's sexual phenomenology substance and sum, the predicate for his claim that, as a world-excluding force, sex is inherently private and so should be seen as such by morality and law, hence be freed.³⁴¹ Officially, the account simply describes, capturing sexual facts said to be true. But the erotics of the text—whether they remind us of experiences we ourselves have had, or make us aware of possibilities so far unachieved—simultaneously do double-duty as missionary's work. This sexual phenomenology proselytizes. It is for this reason that Mohr's depiction of sexual experience can be, and sometimes is, read as a seamless argument for sex's entitlement to privacy guarantees, notwithstanding, among its other flaws, the naturalistic fallacy that, on one level, it entails: the sheer experience of sex alone is no argument for its liberation, including from moral or legal sanction.³⁴² Once the phenomenology is reframed as a proof of the value of sex,

338 *Id.* at 101; see also WHITE, *FAREWELL SYMPHONY*, *supra* note 41, at 178 ("Now, since the innovation of the back room, all sex took place only very late and while still partially clothed and in public or semi-public places where no talk was required. In fact the least word broke the spell.").

339 MOHR, *supra* note 22, at 102.

340 *Id.* at 103.

341 *Id.*

342 Ian Kramer's review of Mohr's book provides a lively example. Describing Mohr's phenomenological argument, he writes: "In an extended passage[,] Mohr demonstrates, in a lyrical rhetorical trope that persuades us because it accords so perfectly with experience, that sex by its 'world-excluding' nature separates individuals from 'the everyday workaday world of public places, public function, and public observation[.]'" Ian Kramer,

however, the normative conclusion arguably carries. Sex's value provides the reason why the world that sex can dispel should leave it alone, treating it as inherently private. Mohr appears to commend this reading when he catalogues his descriptions of the sexual experience not as pure sensation lacking normative content but as "reasons."³⁴³ Ooh and aah—not hooray and boo—fuel the normative engine in this account.³⁴⁴

In case the seduction fails—and there are those who, for different reasons, remain impervious to its charms—Mohr finds clear evidence of the value of sex in the joys it can bring. In a passage that formally arrives after the phenomenological argument has ended, but which rounds out its themes, Mohr indicates that there are, in sex, minimally, the pleasures it immediately yields, which "only fanatics could deny" are their "own [value-laden] bottom."³⁴⁵ And somewhere on their other side, there is sex's potential to be nothing less than "one of life's boundary experiences[:]"³⁴⁶

For ordinary persons—not mystics or adolescent poets—orgasmic sex is the only access they have to ecstasy. This may take a number of forms: self-transcendence, a standing outside of self (*ex + histanai*); deliquescence and fusion; engulfing embrace; quiet peace; and self-negation (*la petite mort*), all of which have clear counterparts only in religious visions of the end of life and the ends of life.³⁴⁷

Pleasure may be intrinsically good, but sex can be truly great, producing experiences for

Book Note, 91 COLUM. L. REV. 1259, 1264 (1991) (reviewing Mohr) (internal references omitted).

343 MOHR, *supra* note 22, at 103 ("For all these reasons, the sexual realm is inherently private."). Also suggesting a similar reading is Mohr's earlier rejection of descriptive morality. *See id.* at 31 ("What is needed in order to use the notion of morality to praise or condemn behavior is a sense of morality that is *prescriptive* or *normative*[.]"). Then again, Mohr does not flesh out, certainly not as crisply as one might like, the relation between his phenomenological claim and moral claims of the sort he otherwise more regularly engages and himself makes.

344 *See generally* A.J. AYER, LANGUAGE, TRUTH AND LOGIC 102–14 (1952); Charles Stevenson, *The Emotive Meaning of Ethical Terms*, 46 MIND 14 (1937). Thanks to Elisa Hurley for help with the classic cites.

345 MOHR, *supra* note 22, at 113 ("If pleasure is its own bottom—and only fanatics could deny that—then sex as the most intense of pleasures is one of the central free-standing components of the good life.").

346 The full sentence is: "Sex used to seem so central, and yet seemingly frightening, that for centuries, only theologians and pornographers could discuss it: 'Sex must have at least the potential of being one of life's boundary experiences if it could be treated by only the highest and lowest literary genres.'" *Id.* at 110 (quoting JOHN L. MCKENZIE, THE ROMAN CATHOLIC CHURCH 74–80 (1969)).

347 *Id.* at 113.

the individual to which, outside sex, only religious visionaries, glimpsing the Divine, can possibly relate.

Once sex's immense value, found in—or through—the experience of it, is understood as the basis for its liberation and immunity, another dimension to Mohr's analogy between sexual and religious experience, initially easily missed, comes into sight. Sex may be like "solitary prayer" in casting the world away, but it is also, following Mohr, a way of being opened up and in relation to pleasure, and maybe ecstasy in any, or all, its forms: "self-transcendence," "deliquescence and fusion," "engulfing embrace," "quiet peace," and "self-negation." In order to achieve these states, sex—a power larger than we—must be allowed to cast its spell on us without worldly encumbrance. Having chosen us as its proper objects,³⁴⁸ it must be given the opportunity to drive the social world away, changing our senses, stripping us of our ordinary social roles and relations, bringing our bodies fully and wholly to life, again, while at the same time suspending our so-called higher faculties, leaving our reasoning, criticizing, judging, choosing, deciding selves, behind. All this so that we may be present, waiting, and open to the experience of sex, to what it may bring or where it might take us, shores known or unknown, with "clear counterparts only in religious visions of the end of life and the ends of life."³⁴⁹ To think about sex in these terms is not so much to think about it analogically in relation to religion—as religion-like—as it is to expose an identity between them: Sex is a religion.³⁵⁰ Like the music of "Wagner's last

348 There is a reason sex is the subject of so many sentences in Mohr's phenomenological account. In this frame, it comes before us, and holds us in its grip. This notion of sex and how it works does seem to be roughly consistent with Mohr's understanding of the coming out process, in which one discovers, but does not choose, one's sexual orientation. As Mohr comments, "the experience of coming out *to oneself* has for gays the basic structure of a discovery, not the structure of a choice." *Id.* at 40. The same is not so commonly said about the experience of coming out as a lesbian woman. For what is, see, for example, Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *SIGNS* 631 (1980), and Mary C. Dunlap, *Foundering on the Seas of Hopelessness*, 87 *MICH. L. REV.* 1366, 1375 n.24 (1989). These general points are critically engaged in Marc Spindelman, *Gay Men and Sex Equality*, 46 *TULSA L. REV.* 123 (2010).

349 MOHR, *supra* note 22, at 113.

350 David Richards comes close to the same conclusion, but in his view, it is sexual orientation, in particular, not sexuality, in general, that should be treated like a religion, and not because of the experience of it, but rather, because sexual orientation, like religion, entails a conscientious choice made in relation to a religious mark. See RICHARDS, *supra* note 31, at 109 ("[C]laims of gay and lesbian identity are a form of ethically based conscientious conviction entitled to equal respect with other forms of such conviction under the religion clauses of the First Amendment[.]"). Thus, for Richards, sexual orientation discrimination is religious discrimination that should be recognized as such. *Id.* Though the structure of sexual choice does not generally operate in Richards' account the way it does within Mohr's phenomenology, there is at least one moment in particular in his text when Richards' claim veers in a sensationalist direction. *Id.* at 95–96 ("First, on the assumption that gay and lesbian identity is about sex or sexual life, that fact would, if anything, bring it closer to the central concerns of human conscience in general and religions in particular. Religions organize the terms of sexual life

opera *Parsifal*,” sex “swells and dreams toward eternity and ecstasy: ‘Wonder of highest holies. The Savior is saved.’”³⁵¹ Sex is the spirit that touches, controls, remakes us and delivers us from ourselves, all—before returning us to the ordinary world. In this rendition, it even reduces us to babble, speaking in tongues.³⁵² Several years would have to pass before the idea stalking this account would be ushered out of the closet, but its looming presence is already distinctly sensed: In the religion sex is, “male homosexuality is, as it is in some cultures, treated as a priesthood.”³⁵³ Gay men are sex’s priests.³⁵⁴

Framing sex as religion, which, if nothing else, accurately captures how a number of gay men practically, if not also self-consciously, experience and relate to it,³⁵⁵ gives Mohr’s phenomenology a particular resonance in our political culture. Anyone—indeed, any State—capable of recognizing the value of religious experience, and exempting it

and its place in the mysteries of birth, love, and death under the aspect of eternity, supplying rituals that endow the cycle of living with a sense of enduring personal and ethical values before the terrors of loneliness, loss, decline, and death. Moreover, the experience of one’s sexuality is, from its inception, a mysterious, even awful force fraught with a sense of ultimate concern with the other, a longing for communion and transcendence in relationship with a beloved though alien other.”).

351 RICHARD D. MOHR, “*Knights, Young Men, Boys*”: *Masculine Worlds and Democratic Values*, in *GAY IDEAS: OUTING AND OTHER CONTROVERSIES* 135 (1992).

352 MOHR, *supra* note 22, at 101 (“[W]ords, such as they are, are not reports, descriptions, or arguments, but murmurs and invocations which emphasize silence and its awe.”). On the phenomenon, see Michael Warner, *Tongues Untied: Memoirs of a Pentecostal Boyhood*, in *CURIOUSER: ON THE QUEERNESS OF CHILDREN* 215, 217 (Steven Bruhm & Natasha Hurley eds., 2004).

353 MOHR, *supra* note 351, at 141. To be certain, Mohr is making this point in the context of the claim that male homosexuality, particularly in its egalitarianism, should be understood as a model for democracy. (As an aside, Mohr’s view of same-sex relations as basically egalitarian has been noted and challenged elsewhere. See, e.g., Candace Vogler, *Sex and Talk*, 24 *CRITICAL INQUIRY* 328, 356 n.47 (Winter 1998) (“This view is so odd, buttressed as it is by images and anecdotes that gives Mohr’s work the look and feel of native informant testimony, that one wonders how Mohr himself could have *missed* the relentless hierarchy other men seem to find inescapable in gay underground life and the iconography of ‘high’ and ‘low’ gay male subcultures.”)). Just so, the idea being drawn on here, that gay men, through and in their sexual relations, should be understood to be a social vanguard amounting to a priesthood, is fully portable. Moreover, Mohr’s language of “priesthood,” itself in the context of a sentence that literalizes the point, is telling.

354 Consider along these lines RECHY, *supra* note 41, at 31–32 (“[T]o the homosexuals here I want to say: ‘You have an untested insurrectionary power that can bring down their straight world. Use it—take the war openly into the streets. As long as they continue to kill us, fuck and suck on every corner! Question their hypocritical, murderous, uptight world.’ But I don’t say that. Why? Because promiscuity, like the priesthood, requires total commitment and sacrifice.”).

355 See *infra* note 362 (discussing ways in which some gay men report thinking about sex in decidedly spiritual terms).

from interference for that reason, ought to be able to do the same with respect to sex.³⁵⁶

356 Of course, “religion is a complex concept.” Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 762 (1984). While the notion that sex could be a religion will no doubt strike many as offensive and others as idle fancy, Mohr’s phenomenological description of sexual experience does lend itself to an argument that sex is a religion on various accounts. To flavor the point, some understandings of “religion” that sex could readily be plugged into, and satisfy, are found in, for example, *United States v. Seeger*, 380 U.S. 163, 165–66 (1965) (holding that “the test of belief . . . is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God”); *Welsh v. United States*, 398 U.S. 333, 339–40 (1970) (“‘intensely personal’ convictions which some might find ‘incomprehensible’ or ‘incorrect’ come within the meaning of ‘religious belief’ if they are ‘held with the strength of traditional religious convictions’”); Greenawalt, *supra*, at 805 (describing a “higher reality” approach, under which “the essential feature of religion is faith in something beyond the mundane observable world—faith that some higher or deeper reality exists than that which may be established by ordinary existence or scientific observation”); and LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 828 (1978) (venturing that anything that is “arguably religious” is religious for purposes of the Free Exercise Clause). Against this backdrop, one can neither be surprised by nor miss the mysticism surrounding sex in Justice Anthony Kennedy’s opinion for the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”), some of it an extension of his equally mystical views in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”) (joint opinion). Indeed, in his *Lawrence* dissent, Justice Antonin Scalia ribs—or perhaps more accurately, mocks—him for it. *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) (“[I]f the Court is referring . . . to the dictum of its famed sweet-mystery-of-life passage . . . [t]hat ‘casts some doubt’ upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all.”). For what may be a not wholly unrelated mystical account of marital sex, see GERMAIN GRISEZ, 2 THE WAY OF THE LORD JESUS: LIVING A CHRISTIAN LIFE 570 (1993) (arguing that “with respect to reproduction, each animal is incomplete, for a male or a female individual is only a potential part of the mated pair, which is the complete organism that is capable of reproducing sexually. . . . true also of men and women: as mates who engage in sexual intercourse suited to initiate new life, they complete each other and become an organic unit[;] in doing so, it is literally true that ‘they become one flesh’”) (quoted in BAMFORTH & RICHARDS, *supra* note 43, at 229); Robert George & Gerard Bradley, Brief Amicus Curiae of the Family Research Council and Focus on the Family in Support of the Respondent at 17, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (defining marriage as “a bodily, two-in-one flesh union of persons,” and explaining this “is why it is impossible for two men or two women to marry: it is impossible for them to enter into bodily communion”); John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 68 NOTRE DAME L. REV. 1049, 1066 (1994) (“The union of the reproductive organs of husband and wife really unites them biologically (and their biological reality is part of, not merely an instrument of, their *personal* reality); reproduction is one function and so, in respect of that function, the spouses are indeed one reality and their sexual union therefore can *actualize* and allow them to *experience* their *real common good*[.]”). The two-in-one-flesh view has again lately been criticized as factually wrong. See BAMFORTH & RICHARDS, *supra* note 43, at 230 (“When talking of the male and female coming together to form the complete organism that is capable of reproducing sexually, Grisez is thus treating two animals as organs or part of some other animal or organism. In doing so, Grisez gets his facts wrong. As Moore states, ‘while organs are part of animals or organisms, animals are not parts of animals or organisms.’”). For a not unrelated image, if not exactly a view, see Plato, *Symposium*, in LYSIS, SYMPOSIUM, GORGLAS 74, 137–41 (W.R.M. Lamb trans., 2001) (1925).

And do it. As a religion, and like other religions, sex stands apart from the world and deserves protections from it, remaining fundamentally unaccountable to anything but itself, especially the State.³⁵⁷ Mohr's phenomenological argument is made.

And not only with respect to sexual activity. Sex's institutionalized forms must be accorded safe harbor, as well. Beyond the implications some will immediately see for marriage and family life, in the *demimonde*, public sex venues—bathhouses, backroom bars, and gay cruising zones in public parks, among the examples Mohr flags,³⁵⁸ though an extended list would also include “alleys, piers, tearooms, adult books stores, gloryhole stops, truckstops, sex clubs, [and] porn theaters”³⁵⁹—are not to be vexed by state meddling either, certainly not through efforts to clear them out or shut them down.³⁶⁰ If sex is a

357 Exactly what would follow from this view would need to be worked out more comprehensively than Mohr ever does, or than will be ventured here. If taken seriously, it would reframe many of the conclusions that Mohr, and others since him, have taken for granted. Would the obligations the liberal State is thought to owe lesbians and gay men, if satisfied, give rise to Establishment Clause problems? How about efforts to recognize same-sex unions? Heterosexual marriages, as well? What would it do to reconfigure the teaching of sexuality in schools? Would it be the end of any public support for safer sex campaigns? How would seeing sexuality as a religion impact the legal analysis of clashes between pro-lesbian-and-gay forces and religionists opposed to homosexuality? See, e.g., *N. Coast Women's Care Med. Grp., Inc. v. Benitez*, 189 P.3d 959 (Cal. 2008). The questions go on.

358 See MOHR, *supra* note 22, at 102.

359 This list is Mohr's. *Id.* at 233.

360 As Mohr writes, sex “in orgy rooms at bathhouses and backrooms in bars” is private, too. *Id.* at 105. His own stated reason for making the declaration is that “the participants are all consenting to be there with each other for the possibility of sex polymorphic, [hence] they fulfill the proper criterion of the private in the realm of the sexual.” *Id.* at 105. Is consent what drives this conclusion? As he himself explains, “consent is not the mark of the private *überhaupt*. Not everything that is consensual is private.” *Id.* at 105. At least as plausible is what the logic of his phenomenology suggests: it is that these encounters are sexual that makes them world-excluding, hence inherently private. On this view, consent reinforces, but does not drive, the point. The relation of Mohr's phenomenology to this principle of consent is discussed in a slightly different way *infra* text accompanying notes 371–452. In any event, this is not the only argument Mohr offers for protecting the bathhouses from regulation. See also, e.g., MOHR, *supra* note 22, at 222–23. Later on, he suggests that shutting them down “denies [autonomy] as a value.” *Id.* at 223. “[T]he majority [does not] get[] to determine both what the good life is and to enforce it coercively.” *Id.* Even here, Mohr is thinking about bathhouses in near-religious terms. He reasons that, if the State may shut down bathhouses as “a small step to help those who are unable or unwilling to help themselves,” it could “justify compulsory religious conversion” in order to help “those who are unable or unwilling to see the light . . . to see it.” *Id.* (citation and internal quotation marks omitted). Locking up the baths is thus akin to forced religious conversion. The most that is allowed in this context, Mohr observes, may be “warning labels on baths as . . . on cigarettes, the use of which also threatens death.” *Id.* at 225. But that's far from certain. The obligation of governmental consistency seems, *id.* at 225 n.20, likely to doom even them.

religion, these venues are properly seen for what, for many, they were,³⁶¹ or are, and what all that practiced genuflection happening in them might have been taken to suggest all along: sites (however ruined) of intense devotion and religious worship.³⁶² To safeguard these sexual temples, including the sex that happens in them, by giving them sanctuary and repose,³⁶³ is not to confuse the sacred and the profane, but to get their measures, finally, level, and through the ideal of privacy, insulated from moral and legal surveillance and regulation.

Needless to say, from within the ideology of sexual freedom, thunderous applause and triumphal shouts abound. Mohr's sexual phenomenology lines up beautifully with a number of its major terms. Not all of them, to be sure. Somewhat disappointingly, for instance,³⁶⁴ Mohr seems to see sex's spiritual powers only to the extent they hew to

361 See, e.g., WARNER, *THE TROUBLE WITH NORMAL*, *supra* note 65, at 149–93 (complaining about the attacks on, and the waning of, gay male public sexual culture, and public sexual culture more generally). Mark Lilly fantastically captures this, drawing on the work of Jean Genet, describing “the Carolinas (the effeminate gay men of Barcelona), who form a procession to mourn the passing of an ancient but beloved pissoir (destroyed by rioters in 1933)”:

[They], in shawls, mantillas, silk dresses and fitted jackets, went to the site to place a bunch of red roses tied together with a crepe veil. . . . I saw them going by. I accompanied them for a distance. I knew that my place was in their midst, not because I was one of them, but because their shrill voices, their cries, their extravag[a]nt gestures seemed to me to have no other aim than to try to pierce the shell of the world's contempt. The Carolinas were great. They were the Daughters of Shame.

MARK LILLY, *GAY MEN'S LITERATURE IN THE TWENTIETH CENTURY* 91–92 (1993) (quoting JEAN GENET, *THE THIEF'S JOURNAL* 52–53 (1949)).

362 A delightfully campy version is in BROWNING, *supra* note 61, but in a different register, consider WHITE, *FAREWELL SYMPHONY*, *supra* note 41, at 237: “There I had to kneel again. . . . He ordered me to suck him as one might take Communion. Only now do I realize that the performance, far from exciting him, was designed as an offering to me.” Likewise, consider JAMES McCOURT, *QUEER STREET: THE RISE AND FALL OF AN AMERICAN CULTURE: EXCURSIONS IN THE MIND OF LIFE* 100 (2004): “TRAVEL TIP: The Santa Maria Atocha *Caballeros* shrine—located in the very underground pit where the charred remains of heretics, Jews and sodomites were thrown to the scavenging dogs following the *autos-da-fé* in the reign of Philip II. In this holy precinct male sex monks perform the sacred transformative rituals of cock worship and communion of both species, flesh, and hot spunk. Male sex monks? A pleonasm, I'd have thought.” See also *supra* note 61 (discussing Armistead Maupin's spiritualized view of bathhouse sex). But see, e.g., Warner, *supra* note 352, at 222 (“Only the most radical theories of sexual liberation (Marcuse's *Eros and Civilization*, for example) attribute as much moral importance to self-dissolution as fundamentalist religion does. (And nobody believes them anymore.)”).

363 See MOHR, *supra* note 22, at 104 (“Any moral theory that protects privacy as sanctuary and as repose from the world must presumptively protect sexual activity.”).

364 Another disappointment from the ideology of sexual freedom's perspective may be the way in which

liberalism's conventional sight lines: The value of sex, though significant, is measured ultimately by what it can do to us as individuals.³⁶⁵ These blinkers place beyond vision and thus conceptual reach the many other powers that, inside the ideology of sexual freedom, sex is storied to have,³⁶⁶ including not least of all its capacity to reconfigure the existing networks of power that lattice the social grid, making any sexual act, potentially, into a world-historic event.³⁶⁷ These limitations aside, what is affirmatively found in Mohr's account indicates a productive correspondence with—and a liberal drawing from—the ideology of sexual freedom: sex as a powerful force, valuable and to be valued simply for what it is, proven by what it does; sex as an irrational spirit that catches us in its grip, reconfiguring our sensory perceptions, reducing us to flesh, stunting our own rationality and capacity for reason; sex as a force that warms in the darkness of the night; sex as a world unto itself, distinct from and unaccountable to everyday reality. How far does the defense of sex this phenomenology entails, extend? Does it reach—and encompass—the ideology of sexual freedom's erotics of death?

Mohr's phenomenology seems, at times, to entail a substantive moral claim rather than amounting to a solid block against the moral regulation of sex. As he writes, for instance, "[a]ny moral theory that protects privacy as sanctuary and repose from the world must presumptively protect sexual activity." *Id.* This is not how to render the point scrupulously following the ideology of sexual freedom. But then, on a tight reading, the addition of the word "moral" here does absolutely no analytic work. Moreover, it is consistent with Mohr's phenomenological argument to read it as, if anything, stating reasons for morality and law to leave sex alone.

365 Not that sex or sexual relations cannot and should not be the basis for social, including legal, reform, or serve as models for large-scale social relations like democracy. *See supra* note 353.

366 This may help explain how Mohr can be, by turns, so puzzled and so horrified by some of Michel Foucault's remarks about the powers of sex, *see* MOHR, *supra* note 22, at 268–70 (discussing these), when his own views, including the view that sex can be worth dying for, *see infra* text accompany notes 368–452 (including discussion of Mohr's argument that it is rational, certainly for gay men, to treat sex as worth dying for), otherwise seem to veer in Foucault's directions. MOHR, *supra* note 22, at 269 (quoting Foucault suggesting his own view that sex is worth dying for). For Mohr at least (and at least in this work), and unlike Foucault, we, as individuals, are the ultimate objects and products sex works on. Even then, Mohr seems to think that we are only temporarily, not permanently, changed by sex, no matter how intense its pleasures or the form its ecstasies may take. In this sense, he appears to have something else in mind than Foucault does when thinking and talking about sex as one of life's "boundary experiences."

367 Eric Fassin catalogues different ways to theorize the "sexual event," including his own, in Eric Fassin, *Sexual Events: From Clarence Thomas to Monica Lewinsky*, 13 DIFFERENCES 127 (2002). Modern events are often taken to include the Clinton-Lewinsky Affair, the sexual harassment allegations lodged by Anita Hill against Clarence Thomas, but certainly, by any decent reckoning, must include Randy Shilts' Gaetan Dugas, *see supra* Part III.A, and the first act, source apparently unknown, of what Michel Foucault may have been the one to suggest is the first new sex act to come into being in something like generations, of fisting. DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 92 (1995) ("Perhaps Foucault himself was the source of [the] verdict" that "fist-fucking 'may be the only sexual practice invented in the twentieth century.'").

Formally speaking, the ideology of sexual freedom's erotics of death are nowhere on display within Mohr's account. It focuses exclusively on sex's positive effects. Even "self-negation (*la petite mort*)" is represented as an affirmative good, one of ecstasy's numbered forms.³⁶⁸ That the erotics of death do not appear uncloaked on this sexual stage does not, of course, mean that they are ungoverned by its rules, unprotected in its wings. Taking Mohr's mechanical rule of reason at face value—and measuring sex's entitlement to freedom from moral and legal regulation by whether it is a world-excluding force—suggests they are. For Mohr, it is in the nature of sexual experience to exclude the world. Are the erotics of death any different? By definition, as sexual experience, no. More affirmatively, by design and function, they precisely contemplate the world's exclusion: forever and completely. In this sense, the erotics of death might even be thought of as the apotheosis of sex's powers to exclude the world, hence be the missing paradigm of sex in Mohr's account.³⁶⁹ Either way, if sex's world-excluding-ness is the touchstone for its claim to freedom, the erotics of death name a game that should be able to be played without fear of worldly reprisal.³⁷⁰

This understanding of the analytics of Mohr's phenomenology comports with, and is reinforced by, the substantive view of the value of sex that Mohr expressly affirms. Once sex is prized, even worshipped, as like a religion—or more, as a religion—such that it can properly be seen as an end of life, perhaps the end of life, why should it not also—literally—be life's end? It would not be the first time.

Moreover, and more tellingly, the limiting principle Mohr eventually adds to his account, ostensibly to register the phenomenology's relevance for law, ultimately points in the very same direction: that this sexual phenomenology creates a safe harbor for an erotics of death. No sooner does Mohr finish making the case from sexual experience and declare that sex is thus inherently private than he proceeds to remark that he has only ever been

368 MOHR, *supra* note 22, at 113. For a more perspicacious view, see BATAILLE, *EROTISM*, *supra* note 40, at 170 ("Pleasure is so close to ruinous waste that we refer to the moment of climax a 'little death' (*la petite mort*).").

369 Along these lines, consider: "The corpse, the supreme monument to the [sexual] libertine's victory and mastery, is itself also the sign of the limits of his domain, of his ultimate impotence." GALLOP, *supra* note 100, at 42. More directly illustrative of how the erotics of death are world-excluding is the remark Gallop returns to Blanchot, which, in its way, brings to mind Mohr's initial description of how, with sexual arousal, both space and time recede: "Death suspends the relationship to place. . . . The corpse is not in its place. Where is it? It is not here and yet is not elsewhere; nowhere? but then nowhere is here. The corpse's presence establishes a link between here and nowhere." *Id.* at 41 (quoting Maurice Blanchot).

370 Cf. Foucault, *supra* note 107, at 178, 200 ("One can always produce the theoretical discourse that amounts to saying: in any case, sexuality can in no circumstances be the object of punishment."); Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1, 6–9, 28–47 (2004).

talking about a limited range of sexual experiences as inoculated against regulation.³⁷¹ “The inherently private nature of sex,” he writes, “has an important legal consequence: consent is the mark of the private in the realm of the sexual.”³⁷² From one angle, the ideal of consent operates exactly as Mohr apparently means it to: a limiting principle, an exclusionary force, which should reassure those feminists, among others, who might be concerned that his account sounds like a warrant for impunity for rape.³⁷³ Mohr does not dwell much on the details: no substantively engaged discussion, for instance, of whose consent counts, when, how, nor how exactly consent fits into his phenomenology, which is otherwise mainly focused on how sex functions to choose us, not on how we choose it.³⁷⁴ (We may try, but, he

371 Ian Kramer parallels the move in Mohr’s text when reviewing it. No sooner does he quote from Mohr, to the effect that “[a]ny moral theory that protects privacy as sanctuary and repose from the world must presumptively protect sexual activity” (p. 104)[.],” than he drops a footnote in which he adds: “Mohr recognizes, of course, that sex must be consensual to be considered private (pp. 104–06). Thus rape, incest, and child abuse cannot claim the privacy right with which consenting partners are induced.” Kramer, *supra* note 342, at 1265 & n.19. Then again, as Carol Nackenoff has noted, at least in the context of marital rape, “if a marriage contract represents that consent, this [Mohr’s idea that “consent is the mark of the private in the realm of the sexual”] is surely no answer.” Carol Nackenoff, *Book Review*, 1 J. HIST. OF SEXUALITY 535, 537 (1991) (reviewing Mohr). This, in part, because Mohr thinks he has provided an answer to “some fears that feminists have expressed against advancing privacy as an engine for social reform. They see the valuing of privacy as legitimizing marital rape, incest, and child abuse, and so as a chief tool and manifestation of patriarchy. But marital rape is not consensual and so is no more privacy-invoking than a bedroom murder.” MOHR, *supra* note 22, at 105.

372 MOHR, *supra* note 22, at 104. For many, and for Mohr himself, later on, the argument from consent, grounded in a principle of autonomy, is its own analytically independent claim. See *infra* text accompanying notes 378–403.

373 As Mohr puts it:

That consent is the mark of the private in the realm of the sexual should allay some fears that feminists have expressed against advancing privacy as an engine for social reform. They see the valuing of privacy as legitimizing marital rape, incest, and child abuse, and so as a chief tool and manifestation of patriarchy. But marital rape is not consensual and so is no more privacy-invoking than a bedroom murder.

Mohr, *supra* note 22, at 105.

374 Also unexplored is how, if Mohr’s claim about sex’s inherent privacy is respected, are we ever to find out that sex was not consented to? If sex is destroyed by the merest glance by an “intruder,” *id.* at 103, if observation alone “brings crashing in its train the everyday world of duration and distance, function and duty, will and action[.]” *id.*, then what is to be said of investigation, prosecution, and punishment? Don’t those possibilities themselves risk installing the State as a constant superintendent of sex in the ways that Mohr vehemently disapproves as violative of its nature and integrity? Don’t sexual regulation regimes, even those that are only addressed to sexual violence, amount to the kind of observation that “is bound to be construed by the observed as a harsh intrusive judgment”? *Id.* at 104. If not, why not?

suggests, it may not work.³⁷⁵) These points aside, the bigger picture Mohr intends remains unmistakable. He means to rely on the ideal of consent to expel nonconsensual sex from the sanctuary his phenomenology is calculated to create. Accordingly, and as he himself suggests when condemning both marital rape and “bedroom murder” as beyond privacy’s pale, because non-consensual, sexualized deaths that are unanchorable and unanchored to a valid exercise of consent are outside the ambit of his account.³⁷⁶ They violate autonomy, and ought for that reason to be legally regulated.³⁷⁷ From another angle, of course, the ideal of consent serves a different function. Sex’s world-excluding-ness itself may not state a condition the law is generally supposed to recognize. (What would be within the law’s reach if all it took for an activity to be protected as “inherently private” was that it “excludes the ordinary world”?) Consent, by contrast, does: Liberal *doxa* holds that when sex is consensual, the State not only has, without more, no cause to interfere with it, but affirmatively a cause not to. Inside Mohr’s phenomenology, the ideal of consent does a special kind of work. It refines, then reinforces, the conclusion to which the erotics of death’s world-excluding-ness already, independently points: So long as the erotics of death are consensual, there are now not one, but two reasons—they exclude the world and they are consensual—that they deserve to be freed.

As it happens, this is not the only set of safeguards practically erected around consensual sexual death found in Mohr’s work. In an argument that surfaces later in *Gays/Justice*, in a chapter addressing the liberal State’s obligations and the limits of its authority in relation to HIV/AIDS, Mohr, having left the phenomenological account far behind, works up an argument that issues a call for what amounts to a sexual right to die, a right to end life in sex’s name, at least where that life is one’s own.

Tracing a simple box step, Mohr avers that sex that is autonomously chosen has substantive moral standing that the State, through its laws, is obligated to respect.³⁷⁸ From this he deduces a bar on sexual regulation even when it is designed to curb—or stop—

375 Needless to say, consent is a malleable concept in the context of rape. Gary Peller was not the first to note how, in concrete cases, the idea of consent is subject to ideological manipulation, but he does make the case powerfully in Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1187–91 (1985). The same, of course, is true here, the question being, If Mohr’s sexual phenomenology is continuous with the ideology of sexual freedom, what kind of limit on its reach will the principle of consent he inserts into it be?

376 MOHR, *supra* note 22, at 105. Mohr seems to regard it as exclusively a form of first-party, self-harm. Even if it is a form of self-harm “that may tangibly harm others as well.” Sullivan & Field, *supra* note 6, at 177.

377 See *infra* text accompanying note 378.

378 Mohr frames this point in terms of the principle of “independence,” defined as “the ability to guide one’s life by one’s own lights to an extent compatible with a like ability on the part of others.” MOHR, *supra* note 22, at 220. For additional discussion of “independence” and its relation to “autonomy,” see *supra* note 307.

HIV-transmission and thus also the spread of AIDS. Acknowledging these measures are typically justified in harm reduction or harm elimination terms,³⁷⁹ Mohr files a dissent. He fully agrees that certain forms of harm—to wit: harm to others; classically: harm to third parties—are morally unprotected, themselves immoral, hence properly subject to legal regulation. Indeed, he explains, these regulations are fully consistent with, even “required by,”³⁸⁰ the State’s obligation to respect individual autonomy. Mohr’s opinion aims in a different direction. The reason the State may not regulate consensual sex to address the spread of HIV, in his estimation, is that this mode of transmission entails no third party harms. At most, Mohr maintains, the sex-based transmission of HIV is a form of first party, self-harm.³⁸¹ Animating this view is what has helpfully been described as an “intransitive” view of sex: “that it is a meeting of two subjects, and not an operation that one [who is the subject] does to another, [who is] the object.”³⁸² This view explains, because it drives, the opening substantive gambit (under the heading “harms to self”³⁸³): that “it is the general feature of self-exposure to contagion [in the transmission of HIV] that makes

379 See, e.g., Sullivan & Field, *supra* note 6, at 174 (“Even if sexual activity were itself clearly protected by the constitutional right of privacy, it would not necessarily be unconstitutional to order persons with AIDS or [HIV] carriers not to engage in sex or to quarantine them to prevent their sexual relations. The transmission of [HIV] obviously implicates serious and tangible harm, both to immediate victims and to the public at large.”). But see *id.* at 187–89 (underlining ways in which sexual privacy does provide powerful reasons not to criminalize the transmission of HIV).

380 MOHR, *supra* note 22, at 220 (“Preventing a person from harming another is required by the principle of [autonomy].”).

381 *Id.*

382 Kramer, *supra* note 342, at 1266 n.21. Kramer treats this as a “necessary implication” of Mohr’s view, found in another part of the book, that sex, even sex with another, is self-regarding conduct. Thus, he writes: “An interesting corollary of this argument is its necessary implication that consensual sex is intransitive—that it is a meeting of two subjects, and not an operation that one does to another, the object. Mohr thus implicitly rejects the phallocentric male-subject/female-object view of sex, in which men fuck women. For Mohr, people fuck, together.” *Id.* Although this is the view of sex that Mohr apparently has in mind in the passage that is presently being engaged, he nowhere says so expressly, much less does he trace it out and defend it. Nor, for that matter, does he consistently rely on it. His phenomenological account of sex, in which sex objectifies us, for instance, sits in some unresolved tension with it. See *supra* text accompanying notes 321–363 (discussing this view). For whatever it is worth, Mohr is not the only one to hold such a view of gay sex. Harry Hay’s “subject-SUBJECT” view of sexuality, see Will Roscoe, “*Calling One Another Into Being*,” in HAY, *supra* note 45, at 161, 162 (“Hay also introduces here the phrase ‘subject-to-subject’ (later subject-SUBJECT) to describe the kind of ‘responsible caring relationships that social equals can form, which he contrasts to heterosexual relationships, where the partners are unequal and perceive their counterparts as others’”); *id.* at 166 (Hay’s actual introduction of the subject), which is itself an attempt to repudiate what Kramer would call a “phallocentric” view of sex, works along similar lines.

383 MOHR, *supra* note 22, at 219.

... governmental coercive efforts to abate the disease particularly inappropriate.”³⁸⁴ And likewise the insistence that the question HIV/AIDS raises is whether “paternalistic state coercion [is warranted] to prevent those not-exposed from harming themselves, through banning or highly regulating the means of possible viral transmission,”³⁸⁵ especially when they are sexual. Naturally, once this is the question, the answer—Mohr’s answer—predictably ensues. Broadly-speaking: No. “[P]reventing someone from harming himself is incompatible with”³⁸⁶ respect for his autonomy. “[A] rather powerful justification is needed if the state is to be warranted in protecting a person from himself.”³⁸⁷ None is ever found.³⁸⁸

384 *Id.* at 219–20. Mohr does here speak of “direct governmental coercive efforts to abate the disease,” *id.* at 220, but these efforts are only “particularly inappropriate.” *Id.* As he goes on to clarify, he is generally opposed to indirect “governmental coercive efforts to abate the disease,” as well. *See, e.g., id.* at 220–21 (discussing the problematics of achieving “through the back door” what cannot be achieved through the front door, and then suggesting that the question of the legitimacy of indirect regulation will turn in important ways on the legitimacy of direct regulation, which itself will turn on whether the underlying choice at issue is entitled to respect as autonomous, or “independent,” or not). Indeed, the first concrete example he comes to—closing the bathhouses, *id.* at 222—might well be thought to be an example not of direct, but of indirect sexual regulation. At the same time, it is direct regulation of sexuality if one subscribes to the view Mohr espouses, that “given social reality, it is only in these institutions [the sex arcades that, “with the exception of a few community centers and churches,” define “gay turf”] and the sex acts they facilitate that gay men are able to affirm themselves as gay. And yet for the gay male, his sexual orientation is the chief factor of his existence. . . . Self-respect, such as it is, for gays in our culture is the product of a robust sex life.” *Id.* at 233. Regulating these venues is, in this light, a direct attack not only on gay sex, but also on self-identity and self-respect.

385 *Id.* at 222. To similar effect is a clarifying example, which surfaces in a footnote several pages on, *id.* at 227 n.23. Mohr rejects the comparison between “a person who knowingly exposes others to the AIDS virus” and a drunk driver or “someone shooting randomly in a theater.” *Id.* Mohr explains: that “the requirement of self-exposure for the transmission of the disease makes its mode of transmission relevantly dissimilar to either of these analogies.” *Id.* Those who are harmed, even killed, by the drunk driver or the guy who goes postal in a theater do not engage in acts of will that are “directed toward,” that “actively participate in,” or “contribute to, the course of events that harms them. One would not say that their actions *caused* them” to be run over or shot. *Id.* “Fault here lies entirely with the drunk driver or the sniper. The people they fell are correctly thought of as victims.” *Id.* at 227 n.23. By contrast, “the person who gets AIDS through sexual contact . . . actively participates in the very action that harms him and his deeds are properly said to be a contributory cause of the harms that come to him. He is not a victim.” *Id.*

386 *Id.* at 220.

387 *Id.*

388 Warnings on bathhouses, *id.* at 225, and some taxes for preventive measures like vaccine development, *id.* at 241, are about the extent of justified governmental paternalism Mohr seems willing to countenance. Not even the goal of achieving freedom to “have access to sex without fear of death,” *id.* at 240, important as that is, is enough. As he writes, “[t]he public good of an unencumbered sex life, however, fails this weighted ends-to-means test if the means are a dispersedly coerced sex life. For the intrusion and the good are on a par. . . . And so it appears that only equitably coercive means are available to achieve the end of reducing the pool of AIDS-exposures—taxation for preventive measures like vaccine development, but not coercive measures that affect

Though sex risks HIV-infection, and though that, in turn, “threatens death,”³⁸⁹ the right to sexual autonomy is undiminished. The State must let autonomous actors choose their own ends in and through sex. *Q.E.D.*

Unclear from this sketch is exactly what Mohr’s vision of sexual autonomy encompasses. It could be he is urging an autonomy right to make whatever sexual choices one wants, including the choice to risk HIV-infection, while imagining, if not also formally requiring, reasonable precautions will be taken, as through safer sex, to mitigate sex’s risks, anything else—or more—being deemed irrational.³⁹⁰ While this might have been Mohr’s stance, it is not the one he actually takes. He never expressly specifies the precise limits of his sexual autonomy right, but they can be gleaned from the structure of the underlying argument as it proceeds.

Momentarily, Mohr suggests sexual autonomy includes the right to risk a sexualized death through HIV/AIDS, but only because the dangers will not always materialize. “[N]ot every sexual encounter with a virus-exposed person exposes one to [HIV], and even exposure to it is nowhere near a guarantee of actually . . . [developing] AIDS, since only some portion of those exposed actually [do].”³⁹¹ Thus, he reasons, “in the absence of

some but not others, like closing bathhouses, or banning or regulating sex practices selectively, or mandating antibody tests[.]” *Id.* at 241. (Elsewhere, he seems to suggest that taxes may not amount to unjustified coercion. *Id.* at 228. Perhaps this is, after all, a question of justification.)

389 MOHR, *supra* note 22, at 225.

390 This might be one way to understand the argument discussed *supra* Part III.B.

391 MOHR, *supra* note 22, at 226. In context, Mohr is engaging the “slavery” limit on the exercise of autonomy, made famous by John Stuart Mill:

But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free; but is thenceforth in a position which has no longer the presumption in its favour, that would be afforded by his voluntarily remaining in it. The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom.

JOHN STUART MILL, *ON LIBERTY* 95 (David Spitz ed., 1975). As Mohr explains, it is a “legitimate argument for paternalistic coercion . . . that one should be protected from ceding away the very conditions that enable one to be an [autonomous] agent. Thus one cannot legitimately contract to become a slave or to sign away rights to the fair administration of the enforcement of contracts or more generally the equitable administration of justice.” MOHR, *supra* note 22, at 225. Just so, his argument ultimately rejects its application in the context of the right to sex autonomy.

inevitability, the assessment of risk should be left to the individual.”³⁹² But this inevitability proviso soon disappears. Mohr identifies the “pure case”³⁹³ of someone for whom suicide is “the culmination and chief organizing principle of his life,”³⁹⁴ only to breeze by it. Hard to imagine in real life, he says, dutifully adding a parenthesis setting the famous suicide of “[Yukio] Mishima aside.”³⁹⁵ Slowing down to engage less high-flying concerns, he spotlights the real choice regularly being faced—especially by gay men—in the age of HIV/AIDS. Sex, “one of the central values of human life,” “may have to be balanced with the value of continued [autonomy]—all the more so if [autonomy] is chiefly, like health, a generalized means to individuals’ ends rather than an end in itself.”³⁹⁶ Mohr is clearly unhappy about this choice, and believes that “[p]eople ought not to be in the position where they have to make tradeoffs between the components of a complete life.”³⁹⁷ But be

392 MOHR, *supra* note 22, at 226.

393 *Id.*

394 *Id.* Mohr does not tarry over the other “pure case” he discusses: someone for whom slavery is a proper end of life. He just cannot imagine anyone thinking the benefits worth the costs. But that, he says, is very different, he adds, “from ‘slavery’ in sex play where the thrill to the ‘slave’ lies in continued voluntary submission.” *Id.*

395 *Id.*

396 *Id.* at 226–27.

397 *Id.* at 228. *See also id.* at 240 (“Is there a public good involved simply in reducing the size of the pool of [HIV]-exposed people? I see one, the one I argued for—the ability to have access to sex without fear of death. But this good does not permit every form of state coercion.”). This view comes as part of a larger argument to the effect that:

The centrality of sex to individual lives, however, is a chief justification for state funding of preventive AIDS research. People ought not to be in the position where they have to make tradeoffs between the components of a complete life. Ending the conflict of central personal values will be especially attractive when the means to it place no nearly comparable burden on others. The case at hand requires tax dollars for both basic immunological research and applied viral research.

Id. at 228. Mohr is clear here that he is arguing for a limited State obligation in the medical research context. The State has no duty, consistent with this view, to address or try to prevent the medical needs of intravenous drug users as such, *id.* at 229. “[D]rug use,” he explains, “is not for anyone a central personal value.” *Id.* Along similar lines, he proposes that “the state [should not] be subsidizing preventive medicine for those who gratuitously put themselves at risk—that is, where the very experiencing of risk generates a large part of the risky activity’s attraction.” *Id.* He continues: “If gay men were in general, as mountain climbers are, mere seekers of beauty or sensuous pleasure because the pleasure has been enhanced by risk taking, then again AIDS funding would not be as well motivated as it is.” *Id.* Qualifier (“as well motivated as it is”) aside, Mohr seems to be suggesting that being an aesthete or a hedonist, with a kink for risk, is not a “central personal value.” This may cause some confusion. How could Mohr think that the decision gay men make to value sex over life in any of the ways they may is any different than these other sexual identity choices? Why should any of

that as it may, autonomy “is not the only value of life, or one prior to all other values.”³⁹⁸ Nevertheless, it does command, and in a voice that is entitled to respect, that “individuals, not the state . . . must make the difficult choice where values centrally affecting the self come in conflict.”³⁹⁹ By this point, the inevitability proviso long gone, Mohr has gained the full ground his argument implies: This is a right to make sexual choices for oneself guided by one’s own lights—even when those choices contemplate death.⁴⁰⁰ Minimally, it vindicates a right to risk a sexualized death, but more broadly, it also encompasses a right to choose sex that will inevitably result in death, though death itself is not what one actually wants.⁴⁰¹ In principle, the autonomy right likewise vindicates individual freedom in its “pure case”: the decision to depart life through a sexual suicide that is wanted because

them be entitled to any less respect than any of the others? Perhaps Mohr, consistent with the view that sexual orientation is not a matter of choice, *id.* at 14–15, 39–42, thinks that, as a sexual orientation, it runs deeper than other sexual identity choices do, hence is more a “centrally affecting” value than other sexual identity choices are. *Id.* at 227. If he is mistaken, and all are equally valuable and central to one’s identity, or equally valuable merely because chosen, his argument for research funding related to HIV/AIDS may collapse, seeming as it does to rely for its coherence on the distinction he draws between them. Or if it does not, it either has, as a matter of consistency, a broader or a narrower sweep than it does in his hands. The same does not appear to hold for his right to sexual autonomy. In principle, it can be reconciled with the right of dedicated aesthetes and hedonists, with or without side commitments to risk-taking, to make sexual choices consistent with their own values.

398 MOHR, *supra* note 22, at 227.

399 *Id.*

400 It could scarcely be otherwise in light of the way that Mohr incorporates a right to suicide, which he affirms at least under some circumstances, *id.* at 225 (noting that suicide is sometimes a “prudential choice”), into his right to sexual autonomy. Both rights, independently viewed, are neat reflections of individual autonomy. See, e.g., Marc Spindelman, *Some Initial Views on Sexuality and Gay Men with AIDS in Relation to Physician-Assisted Suicide*, 2 GEO. J. GENDER & L. 91, 94–95 (2001) (noting the autonomy underpinnings of both the right to physician-assisted suicide and the right to sexual autonomy urged on behalf of gay men, including gay men with AIDS). Though their constitutional status as rights of equal importance has not been affirmed, see *Washington v. Glucksberg*, 521 U.S. 702 (1997) (rejecting a right to physician-assisted suicide); *Lawrence v. Texas*, 539 U.S. 558 (2003) (affirming a right to sexual autonomy, including same-sex sexual autonomy); but see *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990) (recognizing a right to passive euthanasia), the moral case is widely thought to be fully made out. There is thus a certain economy to Mohr’s argument: If there is a right to take a sexual risk that, when it materializes, can lead to a condition that makes suicide a prudential choice, why should there not be a right to sexual suicide directly—if that is what one wants? Then again, it must be noted once more that Mohr underscores—and repeatedly—that he would like to see no need imposed by the circumstance of HIV/AIDS, to make the tradeoff between sex and life that it does or may require gay men to make. See *supra* note 397.

401 See *infra* text accompanying notes 434–436 (discussing the analogy Mohr draws between the right to sex and the decision of a Jehovah’s Witness to refuse a blood transfusion, which is respected, though death is an—if not the—expected result).

it embodies what one's life was for. Telling in this regard is that, having drawn attention to Mishima's suicide, which his text, carefully parsed, never disavows, Mohr does not stop to consider that it may have been precisely the perfect illustration of how one exercises the right to sexual autonomy he touts "not to live but to die one's life"⁴⁰²: *seppuku* as sexual suicide. Some think it was.⁴⁰³ Either way, obvious by this point is that this argument for sexual autonomy—a moral right to make value judgments for oneself, including about sex, and only derivatively about the right to take sexual risks—is in no way limited to, or by, safer sex.

But any doubt about the relation of Mohr's right to sexual autonomy to the project of safer sex that might continue to linger is decisively settled by what is said about it later in the same chapter.⁴⁰⁴ Mohr complains that government officials urging celibacy outside of "completely monogamous, long-term relationships"⁴⁰⁵ are not in touch with reality. "On the one hand, the recurring and intrusive nature of sexual desire guarantees that in general gay men, like others, will not be celibate. On the other, past long-term gay relations . . . are at least as rare as rubies."⁴⁰⁶ A more biting attack is unleashed on "safe[r] sex guidelines" themselves:

402 SARTRE, *supra* note 31, at 205.

403 See, e.g., NATHAN, *supra* note 88, at 95–100 (describing Mishima's self-confessed sexual investments in an erotics of death and, in particular, martyrdom, and their shared relation to his aesthetics, and then suggesting these confessions, which Mishima claimed were meant to reconcile himself with his past, were, in "truth," "a prophecy of the future"); *id.* at 258–59 ("One view of Mishima and Morita's deaths was that they had committed 'lovers' suicide.' It was maintained that Mishima had finally found the lover he had been awaiting all his life, and had contrived to die a violent warrior's death with him, as in 'Patriotism.' There is no evidence of this. But surely it was true for Mishima, whether or not he and Morita were physical lovers. At the very least, Mishima must have felt a strong sexual attraction to Morita or he would not have chosen him for his executioner."); HENRY SCOTT STOKES, *THE LIFE AND DEATH OF YUKIO MISHIMA* 264–71 (2000); see also, e.g., LILLY, *supra* note 361, at 131–36 (detailing Mishima's death-based eroticism, including his sexual investments in his own death); Michiko Kakutani, "Mishima": *Film Examines an Affair with Death*, N.Y. TIMES, Sept. 15, 1985, at H1, H1-12 (The film is not "an analytic case study advancing . . . the tidy explanation[.] . . . that he was the damaged product of an unhealthy childhood, in the grip of a homo-erotic obsession with death; that he was an aging, narcissistic artist, unable to cope with the specter of declining powers.").

404 The index entries for "safer sex" are light. MOHR, *supra* note 22, at 354 (flagging five entries on the topic of "safe sex").

405 He writes: "This advice seems remote from reality and quite oblivious to the cussedness of sex and culture." *Id.* at 232.

406 *Id.* Not to forget, as he also adds, that "necessity is a particularly poor forge for working the most delicate of human bonds with a view to future domestic continence (which is not to say that all shotgun marriages fail)." *Id.*

Though in midcrisis it is politically injudicious to say so, safe[r]-sex is poor sex—as likely to frustrate as satisfy. The much recommended use of condoms seems particularly blind. For those for whom sensation and not just will and fantasy is requisite for the transition from arousal to orgasm, condoms fail. Further[,] the vast majority of gay sex is oral sex. And for oral sex condoms are (well) distasteful—as unsatisfying as unappetizing. This leaves masturbation, which . . . produces the strongest orgasms of any sexual activity but which lacks the invasive yet ecstatic intimacy for which I suspect people have sex together in the first place, and which makes sex the natural symbol of union projected into the future.⁴⁰⁷

Even when autonomy is the organizing frame,⁴⁰⁸ the gravitational pull of sex's phenomenology is felt: What is condemned is condemned because it condemns the experience of sex.⁴⁰⁹ This does not lead Mohr (as it did Chambers⁴¹⁰) to try to repair sex or transform desire. Instead, he seeks to enhance the protections sex receives by right, with

407 *Id.* Scott O'Hara delivers the point with more verve this way: "Sex is not safe. Sex *cannot* be safe. Trying to make it safe destroys the essence of it." Scott O'Hara, *Talking with My Mouth Full*, in *POLICING PUBLIC SEX: QUEER POLITICS AND THE FUTURE OF AIDS ACTIVISM*, *supra* note 63, at 81, 85. Effectively situating the idea in the context of broader themes found in the ideology of sexual freedom, Frank Browning writes:

The pursuit and recovery of the sacred and the ecstatic in contemporary life is a journey separate from the path to equity, democracy, and justice. It promises only a quality of knowing unavailable to the Rousseauistic mind of social contracts. The impulse toward the ecstatic speaks of neither good nor evil, neither protection nor redemption. It speaks only to remind us that the permanent human condition is exposure, and it reveals that the new activist demand for sexual "safe space" is little more than a silly oxymoron. On the one hand, "safe space" denies the darkness and violence humans face in nature, and on the other it concocts a language of banal, "redemptive" sexual management that would suppress the inherently transgressive nature of desire. . . . We forget the simplest, plainest truth: To be alive is to be at risk. *Nowhere* can sex be altogether safe, because sex is, for most of us, our primary, residual, atavistic connection to the realm of animal existence.

BROWNING, *supra* note 61, at 104–05.

408 As it practically is in this chapter. See MOHR, *supra* note 22, at 216–43.

409 And that is to say nothing of the way in which the use of a condom threatens sex by reintroducing social roles, and meaning, into the act. The reason that most of the men who have sex with men but who do not self-identify as gay—and that, Mohr reports, is "most men who have gay sex"—"consciously do not have safe[r]-sex," is because "that, paired with the dominant culture's virtual identification of AIDS and 'queers,' force[s] them to a recognition that they themselves are after all 'queer.'" *Id.* at 233.

410 See *supra* Part III.B (discussing David Chambers' efforts to do just that: reform gay sexual desire).

a moral rule written as if safer sex were out of the picture. The condom code, so far from being figured as a moral obligation or a beacon of hope, is exposed as morality's enemy, more a violation of autonomy than a vindication of it. From the perspective of the ideology of sexual freedom, this attack on the condom code as unjustified sexual oppression is so deliciously on the mark, its moral bell-ringing might, for once, seen as irony, be nearly worth the price. Nearly, but then not quite.

Although unsafe sex, including “the invasive . . . intimacy”⁴¹¹ that drives most people who have sex to have it, is thus guaranteed by Mohr's sexual autonomy right, not everyone will favor sex over life, reflected in continued autonomy, when the values war. “[S]ome people indeed do not find sex very important and yet do not appear repressed.”⁴¹² In Mohr's estimation, these creatures appear “to be missing something, not to be morally lesser beings but somehow, like Gertrude Stein's Oakland, to have less there there.”⁴¹³ For them, “[i]t would be silly . . . to take high sexual risks.”⁴¹⁴ For others, a wholly different calculation is in order, particularly if they are among those gays⁴¹⁵ who have been busy “reappropriating for themselves that very characteristic”—sex—“by which the dominant culture transfixes them, . . . reinforce[ing] (reasonably enough) its very centrality to themselves.”⁴¹⁶ For these gays, “more than just pleasure and the fulfillment of need”⁴¹⁷ is wrapped up in sex. They understand that, “[w]ith some slight exceptions like the gay choral movement and (sure enough) AIDS support groups, sex is the only mode in which gays in current culture are allowed to identify themselves to themselves. Self-respect, such as it is, for gays in our

411 MOHR, *supra* note 22, at 232.

412 *Id.* at 227.

413 *Id.*

414 *Id.* Remarkably, Mohr adds that “little would be lost if the state nudged them” in the direction of not taking those risks. *Id.* Remarkably, because, at the very least, they should presumably, given Mohr's own argument, be given the respect and freedom to revise their own ends, free from governmental intrusion.

415 The general context for this chapter is an analysis of the State's relation to HIV/AIDS, which Mohr “treat[s] . . . as a gay disease,” *id.* at 7 (“Gays may be dismayed to find that I treat AIDS as a gay disease.”); *see also id.* at 7–8 (“I [treat AIDS as a gay disease] in the same way that it makes sense to speak of sickle cell anemia as a black disease. Not all blacks get it, not only blacks get it; but the overwhelming number of cases of it do involve blacks and this fact has determined how society has responded to the disease—*pari passu* gay men and AIDS.”). Thus, although his right to sexual autonomy, as an autonomy-based right, is not limited to gay men, he is obviously thinking of them when he argues for it.

416 *Id.* at 233.

417 MOHR, *supra* note 22, at 233.

culture is the product of a robust sex life.”⁴¹⁸ For these gay men, sex is the *sine qua non* of the value of life.⁴¹⁹ They may thus be expected (certainly, at times) to choose sex over life when the values collide. By their lights, abandoning sex could be seen as abandoning the very condition that makes life worth living, and so already to begin, while still breathing, the long night of being dead.

This background illuminates why some gay men may value sex over life itself, useful information, particularly in the age of HIV/AIDS.⁴²⁰ But it does not finally settle whether that choice is morally rational, hence entitled to moral respect. And Mohr, despite an emphatic declaration that a presumption of rationality “is a necessary condition for the very respect which is owed to” autonomous decision-making,⁴²¹ supplies some reasons for doubt. Concretely, he explains, gay men’s reappropriation of the value of sex as that which defines their lives is a reversal of their degraded reduction to sexual beings by anti-gay norms that dominate and define the social world. Immorally, gays have thus been refused their due recognition as autonomous equals, being seen and treated, as a long line of minorities have been, as sexual beasts.⁴²² As much of an “advance” as it may be to reject that dehumanization by claiming sex as the fundamental source of self-respect and identity, even pride, that process does nothing on its own to dissipate the moral taint at its foundations.⁴²³ If anything, it embraces it. Thus, the gay man’s choice to value sex over life

418 *Id.*

419 Not to claim or disavow any parallels, but only to note certain historical continuities, consider de Beauvoir, *supra* note 93, at 19: “Sade made of his eroticism the meaning and expression of his whole existence.”

420 See *supra* note 415. Although Mohr’s autonomy argument theoretically holds generally for those with the capacity for what he calls “independence,” he only explains why gay men might choose sex over life in a competition between the values. See *supra* notes 307, 378.

421 MOHR, *supra* note 22, at 224. He continues by observing that paternalistic interference “is warranted when a person is operating at risks which [he] is unable to assess due to diminished mental skills or lack of information. But education, not coercion, is the solution which is tailored to, and so appropriate for, such incapacities. Coercion in such cases is warranted only temporarily, to permit a check of whether a person indeed knows the risks she or he is taking.” *Id.*

422 A conspicuous example, of course, is the racist hypersexualization of African-American men. See *id.* at 25 (“With the decline of the stereotype of the black man as raping pillaging marauder (found in such works as *Birth of a Nation*, *Gone with the Wind*, and *Soul on Ice*), the stereotype of gay men as sex-crazed maniacs has become more aggravated. The stereotype of the sex-crazed threat seems one that society desperately needs to have somewhere in its sexual cosmology.”).

423 Homophobia’s moral irrationality explains why we need not, and Mohr properly does not, tarry over the ways in which the civil rights legislation he thinks the State is duty-bound to enact infringes on the homophobe’s choices, constraining them. That legislation may limit and disrespect the homophobe’s discriminatory preferences, but as immoral preferences, they are evidently entitled to no weight. Autonomy does not guarantee

itself may not be any more entitled to respect as morally rational, hence autonomous, than the irrational, hence immoral, reduction of gays to sexual animals to begin with was—or is. Both might be said equally irrational in moral terms, whatever sense to them there otherwise may be.

Mohr recognizes the contours of this point, and as he engages them, presses deeper into the problem. Though accurate, it is not enough to note that anti-gay cultural norms may in morally significant ways drive the decisions gay men make to risk or abandon life for sex. These same norms, Mohr points out, structure gay sexual desire itself. Anti-gay hatred, he notes, when internalized by gay men, “tend[s] to become fused”⁴²⁴ with sexual desire. The result is that “violence—even against oneself (as in the ‘rough trade’ phenomenon⁴²⁵)—can be an especially effective object of sexual arousal, [and] so [for that matter] can death—even one’s own.”⁴²⁶ These erotic desires for violence, including (but not limited to) self-harm and death, including (but not limited to) self-elimination, need not be conscious, he says, to those whose lives they shape and whose injuries and deaths they may consequently bring about.⁴²⁷ Those for whom desires are structured in these ways—and the question Mohr forces is, For whom are they not, at least in some way?—often “simply

a right to homophobia. See, e.g., *id.* at 147–48 (noting some limits on the rights of the “sacred ideologist” who opposes homosexuality). This view is in marked contrast with not only Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (“But if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. . . . Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess I have not yet written the opinion.”), but also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State.”).

424 MOHR, *supra* note 22, at 234.

425 An editorial note: “The term *trade* originally referred to the customer of a fairy prostitute, a meaning analogous to and derived from its usage in the slang of female prostitutes; by the 1910s, it referred to any ‘straight’ man who responded to a gay man’s advances. As one fairy put it in 1919, a man was trade if he ‘would stand to have ‘queer’ persons fool around [with] him in any way, shape or manner.’” GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE AND THE MAKING OF THE GAY WORLD 1890–1940* 69 (1994).

426 MOHR, *supra* note 22, at 234. Georges Bataille makes plain that this might be true anyway: “No-one today could deny that impulses connecting sexuality and the desire to hurt and to kill do exist.” BATAILLE, *EROTISM*, *supra* note 40, at 183.

427 MOHR, *supra* note 22, at 234 (“The desire need not be conscious to be effective. Few people with such desire ever achieve even the level of consciousness of the characters in Yves Navarre’s 1973 novel *Sweet Tooth*, who are somewhat aware that their sexual love is for death—their own—but who do not consciously seek it out; rather they simply drift into situations where the desire will be fulfilled.”).

drift into situations where the desire will be fulfilled.”⁴²⁸ Bleakly, Mohr adds, “AIDS is such a situation. Many gay men are drifting into it in part as the fulfillment of the dominant culture’s appraisal of them, [and] in part as a spinoff from the search for self-respect in a society that thwarts it.”⁴²⁹ Ergo, the question, which undesubjectifies the choice: When gay men do favor sex over life, is this a morally rational decision, hence autonomous and deserving of respect as such?

Though Mohr has paved the way for thinking it may not be, because ultimately conditioned by and continuous with anti-gay cultural norms, themselves irrational, hence immoral, he refuses to follow “these alarming facts”⁴³⁰ where they seem to lead. Unfortunately, no explanation why is offered. He simply announces that he does not believe “the irrationality claim [can] be made out”: “I do not think it can [be.]”⁴³¹ And then the concern is turned entirely around. “[T]he source of the alleged irrationality in these cases, when it is not a matter of poor education,” which can be fixed, is “the indirect but determinate result of social and governmental stigmatizing of gays.”⁴³² Mohr treats this as a reason to affirm—not impugn—the choice to value sex over life as rational. The explanation why, finally revealed, sounds in moral estoppel: Anti-gay forces responsible for driving gays to irrationality through their own, are barred from denying gays’ choices moral respect downstream because they are not the result of gays thinking straight.⁴³³

This may do. But it hardly dignifies the autonomous choice the way Mohr wants to. Better, perhaps, for Mohr to concede that these choices—no matter how irrational they might seem to others—merit respect, because the commitment to sex they reflect is religiously devotional. One need not be a person of faith in order to respect the decisions that someone else, who is, makes. Mohr moves in these directions, but his formulation of the point contents itself, again, with an analogy to religion. The decision to value sex as more important than life itself is like the decision of a Jehovah’s Witness who refuses a blood transfusion though it is needed to survive.⁴³⁴ That choice is regularly affirmed—

428 *Id.*

429 *Id.*

430 *Id.* at 235.

431 *Id.*

432 *Id.*

433 Along these lines, Mohr does “state[] starkly” that “the historical persecution of gays by society waives any claim that society has to be acting on gays’ behalf.” MOHR, *supra* note 22, at 235.

434 *See id.* at 227 (discussing this). Mohr does not invoke Jehovah’s Witnesses by name at this point in his text, but his example immediately brings them and their religious views to mind.

including by law—though everyone knows death will certainly result.⁴³⁵ That being so, he proposes, “[s]exual attitudes and acts in accord with them are at least as central to a person as religious beliefs, and so they too are not fit subjects of state coercion for the individual’s own good, even when that good is the continued ability to make choices.”⁴³⁶ And to live. If autonomy means anything, it is that one must be able to sacrifice oneself and one’s life for one’s deepest beliefs—no matter that to a nonbeliever, the decision will seem, and maybe otherwise even be, incomprehensible. All that matters is that the decision is consistent with one’s values. It helps that it is also considered and only involves oneself.

But in this case, does it? Is the sexual choice Mohr would safeguard as an autonomy right really only self-regarding—at most, a harm to oneself? Is sex perfectly intransitive the way this view imagines?⁴³⁷ Perhaps. But if one does not insist strictly on the self-reflexiveness of the right to sexual autonomy Mohr urges, it can easily be taken to imply the existence of another, related autonomy right. If autonomy is authorization to choose sex that values sex over life itself—whether this amounts to choosing a sexualized death outright, choosing sex that will inevitably result in death, or only risking that it will—it follows that it also authorizes one to enlist another’s help in doing the job.⁴³⁸ The warrant

435 *Id.* (“That such choice falls to the individual is generally recognized where religious commitment and health come in conflict.”). For some classics suggesting Mohr was generally right, *see, e.g.*, Pub. Health Trust of Dade Cnty. v. Wons, 541 So.2d 96 (Fla. 1989); *In re Estate of Brooks*, 205 N.E.2d 435 (Ill. 1965); *see also* 2 F. HARPER & F. JAMES, THE LAW OF TORTS 61 (Supp. 1968) (“Thus the Jehovah’s witness should have the legal right to refuse—on religious grounds which seem mistaken to most of us—the blood transfusion which is needed to save his life.”) (cited in Note, *Informed Consent and the Dying Patient*, 83 YALE L.J. 1632, 1648 (1974)). *But see In re President & Dirs. of Georgetown Coll., Inc.*, 331 F.2d 1000 (D.C. Cir. 1964) (ordering the transfusion); *John F. Kennedy Mem’l Hosp. v. Heston*, 279 A.2d 670 (N.J. 1971) (same).

436 MOHR, *supra* note 22, at 227.

437 Of course, if consensual sex is self-regarding the way Mohr ventures, gay men will be morally innocent of the spread of HIV, hence AIDS, to the degree that it results from consensual sex. Mohr works this view up into the predicate of an argument about what the liberal State owes individual gay men infected with HIV and those who have AIDS. *Id.* at 230 (“Though AIDS is a disease caught in a condition where one has put oneself at risk, nevertheless gay men in general ought in consequence of certain natural and cultural forces to be viewed as morally innocent in its contagion and spread.”). Mohr elaborates the point, *id.* at 230–35.

438 Among other things, this conventional view animates the classic “pro-choice” position in the “right to die” debates. *See, e.g.*, Tom L. Beauchamp, *The Justification of Physician-Assisted Deaths*, 29 IND. L. REV. 1173 (1996) (noting various ways in which individual autonomy, *inter alia*, can justify acts that are designed to end a human life in the “right to die” context). The idea seems to be that if the choice is autonomously made, it can be given as a warrant to someone else to do to that individual what he is entitled to do to himself. In light of this warrant, the actions of the third party stand in moral terms as self-regarding conduct would or does. The move is not, of course, immune from criticism, and it is not always precisely spelled out, but it is common enough and widely enough credited that no extended defense of it is required here. For a differently-inflected liberal position on the “right to die” question, *see* Marc Spindelman, *Death, Dying and Domination*, 106 MICH.

this choice issues, announcing what one may do to another that that other person wants to have done to himself, may be said to afford its holder an immunity—if not exactly a right—to deal a sexual death-blow, or less blatantly, to trade in a deadly sexual risk. His partner's underlying consent vitiates any notion that his death, sexually achieved as a result, is a harm.⁴³⁹ There can be no victims in this sex. This perspective scarcely tracks

L. REV. 1641 (2008).

439 This view is common in the right-to-die debates where death, intentionally caused by a third party, would—but for consent—be recognized as harm, and subject to legal punishment, as it is in some sexuality debates. See, e.g., Chris White, *The Spanner Trials and the Changing Law on Sadoomasochism in the UK*, 50 J. HOMOSEXUALITY 167 (2006). The S/M advocacy literature, for instance, is rife with references to consent as a limiting principle. See, e.g., Gayle Rubin, *The Leather Menace: Comments on Politics and S/M*, in COMING TO POWER 194 (3d ed. 1987). The discourses on the right to autonomy in sex, on the one hand, and the right to autonomy in death, on the other, spectacularly converged in the case of Armin Meiwes, also known as the “German Cannibal.” This case involved the sexualized murder of Bernd Jürgen Brandes. After drugging Brandes, Meiwes turned on a video camera and castrated him, the castration being Brandes’ stated wish. Ruth Elkins, *Beyond Hannibal*, INDEPENDENT ON SUNDAY (U.K.), Nov. 30, 2003, <http://www.highbeam.com/doc/1P2-1811594.html> (“Back at Meiwes’ home, the pair cuddled on the bed in the slaughter room, but the drugs [including “Night Nurse,” “a flu remedy which famously causes drowsiness,” and sleeping pills] still hadn’t made Brandes drowsy. Again, he became frustrated. ‘Just do it now,’ Meiwes recalled Brandes saying. ‘Cut the thing off.’ The ‘thing’ was Brandes’ penis.”). Meiwes fried Brandes’ penis, which the two men are reported to have eaten together, see Tony Paterson, *Cannibal says he was lonely and dreamt of ‘brother’ to disembowel*, INDEPENDENT (U.K.), Dec. 4, 2003, <http://www.religionnewsblog.com/5273/cannibal-says-he-was-lonely-and-dreamt-of-brother-to-disembowel> (“The two ate it with salt, pepper and garlic.”), Meiwes complaining it was “tough and unpalatable.” *Id.* Accelerating Brandes’ death by “stabb[ing] him,” Elkins, *supra*, Meiwes proceeded meticulously to “butcher” the corpse, *id.*, “put[ting] the pieces in the deep freeze,” *id.*, all the while listening to Judy Garland’s “Over the Rainbow.” See Christopher Hudson, *Having a Friend for Dinner*, COURIER MAIL (Australia), Dec. 13, 2004, at 34, available at 2003 WLNR 8076037 (“He filleted 30kg of flesh from Brandes’ body. These grisly cuts he wrapped in greaseproof paper and freezer bags labelled ‘rump’, ‘steak’, ‘fillet’, ‘ham’ and ‘bacon’, while he played a tape of Judy Garland singing Somewhere Over The Rainbow.”). According to the state prosecutor, one Marcus Koehler, “Meiwes frequently watched the video he had taken and masturbated.” Paterson, *supra*. Over the next period of months, he would eat parts of Brandes. See Elkins, *supra*. After his arrest, Meiwes “said . . . that he felt ‘hatred, fury and joy’ while killing Brandes. ‘It was almost like Communion—belief and the memory of the person are renewed,’ he said.” *Id.* In court, Meiwes defended himself on the grounds that this was a case of consensual euthanasia. See, e.g., Elkins, *supra* (noting that Meiwes’ lawyer argued for a ‘killing by demand verdict, as would be the outcome in a euthanasia case.’”). An initial trial resulted in a conviction for manslaughter and a sentence of eight years in prison. See *German Cannibal Loses Appeal in Murder Case*, REUTERS NEWS (Oct. 24, 2008), available at <http://www.reuters.com/article/2008/10/24/us-germany-cannibal-idUSTRE49N3MR20081024> (“A German court had initially convicted Meiwes of manslaughter and sentenced him to eight years in jail in 2004.”). The trial court rejected the prosecution’s attempts to secure a murder conviction and life sentence. Mark Candler, *German Court Convicts Internet Cannibal of Manslaughter*, N.Y. TIMES, Jan. 31, 2004, at A3 (“The three-judge panel rejected the prosecution’s pleas for a murder conviction and a life sentence.”). The conviction was ultimately overturned on appeal, and Meiwes was retried, convicted of murder and sentenced to life in prison in 2006. *German High Court Denies Cannibal’s Appeal*, DEUTSCHE WELLE (Oct. 24, 2008), available at <http://www.dw.de/dw/article/0,,3736614,00.html>. The German federal constitutional court refused to give him

the legal system's formal harm rules: Consent, as a general matter, remains no defense to homicide.⁴⁴⁰ But in its own way, it states the very same conclusion Mohr himself has reached, though by denying outright that third party harms exist in, or flow from, consensual sex. The conceptual difference does not traffic in moral semantics. It shows that the autonomy principle underlying Mohr's argument need not be taken as purely reflexive, involving only what one has a right to do to oneself through sex. It can be seen to have a mobile dimension, as well, speaking to what one is morally entitled to authorize another to do to oneself in sex, and without penalty. Perhaps more significantly, it expressly affirms that the impunity that Mohr's right to sexual autonomy tacitly extends to sexual partners who inflict what, but for his analysis, the law might regard as actionable third party harms, is not theirs by happenstance, or in silence, but as a moral guarantee.

And so it is that Mohr's sexual autonomy right yields its own version of the ideology of sexual freedom's erotics of death: a right to die for sex and also, practically, a right to kill with impunity in its name, when sex is deemed by an individual to be worth dying and killing for—or at least worth the risk. Two routes, then, within Mohr's analysis, lead to asylum for lethal sex: phenomenology and autonomy. What to make of them? From within the ideology of sexual freedom, examining this seeming abundance of riches reveals important differences between the approaches. Reversing the order, the right to sexual autonomy is far less amenable to the ideology's project than Mohr's sexual phenomenology is.

The right to sexual autonomy begins and ends as a moral right respecting the sovereignty of the individual to make decisions for himself, including decisions about sex. Having selected it from the universe of possible ends, the autonomous actor becomes the source—the sole source—of sex's value.⁴⁴¹ This dynamic locates sex squarely on the field of liberal

a more lenient sentence, *id.*, on the grounds (as one newspaper report described his argument) that “he could not be convicted of murder because his victim had agreed to be killed and eaten.” *Cannibal's Appeal of Life Sentence Rejected*, IRISH TIMES, Oct. 25, 2008, at 11.

440 Hence, as Kathleen Sullivan and Martha Field explain: “Under the law of both murder and manslaughter, consent of the victim is irrelevant to the crime—a homicide exists even if the victim has consented, or indeed requested, to be killed.” Sullivan & Field, *supra* note 6, at 165 (citing the Model Penal Code after noting it “explicitly makes it an offense purposely to help another to commit suicide,” MODEL PENAL CODE § 210.5(2) (1980)). Nevertheless, they do continue, that “the presence of ‘consent’ to acts that may transmit AIDS may well affect the degree of culpability that should attach—at least in the context of sexual transmission. A person who transmits AIDS after informing his sexual partner of everything he knows about his own condition and the contagious properties of AIDS seems far less blameworthy than someone who carefully hides from his sexual partner the fact that he is infected. Homicide law ignores this distinction.” *Id.*

441 Interesting in this regard is Michel Foucault's observation that:

In a philosophy like Sartre's[,] . . . it was essentially the subject which restored meaning to the world. This point was not questioned. It was the subject which attributed meanings. But

morality. As an outgrowth of autonomy, sex must always on some level be a rational and reasoned (if, at times, in practice, a somewhat unconscious) affair.⁴⁴² To be sure, good sex may prompt an autonomous actor to revise his schedule of ends, raising the price of sex's stock, as bad sex can lead to its price being driven down. But even in those cases in which sex is chosen, hence valued, for its violence or lethality, it is a staged undertaking: ends are rationally being advanced, sex being merely the means to their achievement. The right to sexual autonomy may thus liberate individual choice, hence affirm the freedom of the autonomous individual, but it does not—and is not meant to—liberate sex. To the contrary, sex is domesticated, fashioned into a tool to be responsibly used according to autonomy's rules, always within the limits autonomy sets. As bad, from the ideology of sexual freedom's perspective, public venues of sexual worship, if they receive protections at all, must do so for the very same reason as sex itself does: Their value, and thus the basis for protecting them, derives from autonomous choice. People choose this. To that extent at least, these sites are likewise subject to moral management, no longer zones in which moral rules can, finally, be dispatched. Within this frame, the most promiscuous sex in the darkened backroom of a bar is morally equivalent to what happens in the sacred precincts of the marital bedroom—so long as it is all consensual. The sexual domain is thus both underwritten and encumbered by moral respectability: Consensual sex is not simply entitled to state a claim for moral respect; it must be given it. This is hardly good news, as the ideology of sexual freedom sees it, recognizing that it still might be preferable to have no right to sex at all, especially in the real world, in which this might practically mean sex remains annexed by morality's more drearily oppressive, traditional forms. And, after all, the right to sexual freedom does at least give grudging protections to sex's darker side, proving, if nothing else, despite itself, how perfectly craven morally upstanding sex can be. Moralists, take note.

There is, fortunately, no need to settle; more villainous joys can openly be had in their own terms. Mohr's sexual phenomenology, certainly if its limiting principle of consent

here the question arose for me: can it be said that the subject is the only form of existence possible? Can't there be experiences in which the subject, in its constitutive relations, in its self-identity, isn't given any more? And thus wouldn't experiences be given in which the subject could dissociate itself, break its relationship with itself, lose its identity?

FOUCAULT, REMARKS ON MARX, *supra* note 41, at 49.

442 See, e.g., Charny, *supra* note 23, at 2058 (describing Richard Posner's and Thomas Philipson's shared view of sex as the product of rational choice in the context of HIV/AIDS in similar terms: "Sex in Hyde Park . . . is a tedious affair."); see also, e.g., BATAILLE, THE TEARS OF EROS, *supra* note 62, at 20 ("Utilitarian sexual activity is in conflict with eroticism in that the latter is the ultimate end of our life. But procreation, pursued in a calculated way, like the work of the scythe, risks being reduced in human terms to a lamentable mechanical activity.").

is momentarily set to one side, is as fertile a predicate and as welcoming a host as most any other for the ideology of sexual freedom's end-game: the total freedom of sexuality from external constraint. Mohr's account may be partial, seen from the ideology of sexual freedom's perspective, but from it, all alone, emerges the vital understanding that sex is its own source of value. When sex acts upon us, manipulating our senses, stripping us of our social identities, reducing us to flesh, and rendering our ability to think, to reason, to deliberate and judge, at a certain point wholly inert, where else could sex's value come from? Sex, as other gods are sometimes said to be, is its own uncaused cause, a power, with value, unto itself, not a stepchild of anything else, including autonomy, rational choice, reason, or morality in any of its other forms. Autonomous of autonomy, sex is not entirely unrelated to individual choice. Individuals remain free to choose it, and in doing so, as Mohr does, to affirm—not generate—its value. Or not: Individuals always remain free to turn away, to refuse to see sex as the force it is. For the willing, sex's grandeur—its world-excluding power—is there, ready, when the moment is right, to be experienced as irrationality, as passion, as corporeality, as animality, even as violence, and thus as pleasure, whether simple or transcendent, including the pleasures of extinction. Unlike the right to sexual autonomy, which figures the boundaries of the autonomous self as fully self-managed (even to the very end), the phenomenology of sex recognizes they need not be, and may be anything but. Indeed, the boundaries of the self must be on the line if sex is to be what Mohr tells us it can be: one of life's true "boundary experiences."⁴⁴³ To achieve this, whether on a psychic or a physical level, or more, both, the self must be and remain vulnerable—to surprise, to unplanned attack, subject to invasion, to being surpassed, overcome, violated, smashed, whether by whim or in a frenzy or for the sheer delight of disappearing a self or annihilating it, or, as can happen, by accident, as a certain state of sexual intensity, erupting into chaos, is reached.⁴⁴⁴ Consistent with the ideology of sexual freedom, if not also Mohr to the same degree, all this must be protected for sexuality to be free. As for sex's institutionalized forms, they are, once again, to receive the same immunities sex itself does and for the same reason, but here that is because, as sexual spaces, they are hallowed ground, sanctified because of the sexual practices that take place

443 MOHR, *supra* note 22, at 110 (quoting MURRAY S. DAVIS, SMUT: EROTIC REALITY/OBSCENE IDEOLOGY xx (1983)), 113 (suggesting that ecstasy "may take a number of forms: self-transcendence, a standing outside the self (*ex + histanai*); deliquescence and fusion; engulfing embrace; quiet peace; and self negation (*la petite mort*), all of which have clear counterparts only in religious visions of the end of life and the ends of life").

444 Some attempts to work toward a theory of this sexual scene have been ventured. For some discussion, see SCHEHR, *supra* note 2, at 169 (discussing Hervé Guibert's *Les Chiens*, in which "all notions of the oedipal subject have been banished in favor of a rhizomatic system of desires," and then asking, "How can the self be distinguished from the other, the dominator from the dominated, in such a system? How can we qualify acts as sadomasochistic, voyeuristic, or indeed hetero- or homosexual if the lines between subjects are indistinct?"); see also *id.* at 169–74 (discussing various ways of representing the scene); *infra* note 552.

in them. These venues mark our separation from the world, providing the platforms on which sexuality in its glories is to be revealed, worldly conventions, including morality and law, having not only no say, but also no voice, being safely out of sight.

In this light, part of the beauty of Mohr's phenomenology—though it itself does not embrace it, and indeed, in its own way seems to miss it—is how it surpasses and simultaneously exposes the limits, including the experiential limits, of framing sex as an exercise of autonomous choice. Reducing sex to an exercise of individual autonomy reconfigures it in ways that are insensitive or impervious to its transcendent powers, its phenomenological (and phenomenal) texture, including irrationality and boundary-lessness, not to forget its actual stance as an amoral force, beyond good and evil, and right and wrong. An individual right to sex is thus wholly inadequate to the real task at hand, as puny in relation to sex as an autonomy right to pray is to the true glory of a god. As well, on a certain view of how rights in their juridical forms function, they aim largely to fix and to ossify existing structural and interpersonal arrangements of social power, shielding them against the winds of change and the violence they can stir up.⁴⁴⁵ If this is correct, the right to sexual autonomy may, as a right, stand in the way of the transformative creativity, including the “new cultural forms”⁴⁴⁶ and the world-changing revolution, not to forget the destruction, that the ideology of sexual freedom believes sex capable, when unleashed, of bringing about.⁴⁴⁷ Thus, Michel Foucault, in a well-known remark: “That in the name of respect for individual rights someone is allowed to do as he wants, great! But if what we want to do is to create a new way of life, then the question of individual rights is not pertinent.”⁴⁴⁸ Worse, it may be an affirmative danger.

445 For a recent articulation of this view, see BROWN, *supra* note 19, at 96–134, which builds on both Marx and Foucault.

446 MICHEL FOUCAULT, *The Social Triumph of the Sexual Will*, in 1 ESSENTIAL WORKS OF MICHEL FOUCAULT 1954–1984; ETHICS: SUBJECTIVITY AND TRUTH, *supra* note 66, at 157.

447 Roberto Unger's “destabilization rights,” Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 600, 611–15 (1983), with their “claims to the disruption of established institutions . . . that have contributed to . . . [a] crystallized plan of social hierarchy and division,” *id.* at 600, show that it is not inherently in the so-called nature of rights “to entrench and reiterate existing relations of power,” Kenneth Baynes, *Rights as Critique and the Critique of Rights: Karl Marx, Wendy Brown, and the Social Function of Rights*, 28 POL. THEORY 451, 452 (Aug. 2000). But then, these rights are part of what Mark Tushnet has accurately described as a deeply “irrationalist project.” Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 515 (1986). Don Herzog shares some choice reactions to this general train in Unger's thought in Don Herzog, *Rummaging Through the Emperor's Wardrobe*, 86 MICH. L. REV. 1434, 1444–45 (1988).

448 FOUCAULT, *supra* note 446, at 158. David Kennedy offers a similar perspective in defense of what he describes as a “Libertine” view of sex, in Kennedy, *supra* note 75, at 279, 282–83 (questioning, among other things, the need to see sex in terms of consent and autonomy rights: “For the Libertine, sex doesn't have to be

This, of course, still leaves the principle of consent Mohr inserts into his sexual phenomenology to be addressed. Against this backdrop, it can now be seen for what it is: the odd idea out. Taken seriously, its moral gates completely opened, it would readily flood Mohr's sexual phenomenology with the morality of autonomy, territorializing the sexual domain in just the way the right to sexual autonomy does, or would. Mohr, who could not have entirely missed this possibility, deploys the ideal of consent in connection with his sexual phenomenology in a far more strategic and modest way: It serves as a principle that defines those world-excluding experiences of sex that should, in the final analysis, be left alone, especially by law. Were the principle of consent jettisoned from Mohr's phenomenology altogether, how much more faithful to sex's total liberation, defined as in the ideology of sexual freedom, it would be. This would not, as might be feared, necessarily entail the elimination of all choice in the sexual domain. Not at all. Not only would individuals still remain free to recognize the true value of sex, or not, but they would also remain free to make choices and take actions in relation to sex, or not, as they wished, as their desires dictated. It is just that rather than insisting that these choices be respected on pain of violation of morals or law, or both, they would be heeded or not, reacted to or not, with whatever consequences individuals themselves, through the exercise of their own power, could conjure up. No more special rules written for the weak, to give them power over others they do not otherwise possess.⁴⁴⁹ The state of nature articulates a set of conditions for choice, not its complete lack. Of course, were this the sexual world Mohr's sexual phenomenology dreams of, the erotic arts and the sexual truths they can expose might be able to flourish.⁴⁵⁰ With Foucault, again, in this sexual renaissance, sex's "truth [would] not [be] considered in relation to an absolute law of the permitted and the forbidden, nor by reference to a criterion of utility, [nor yet by autonomy or consent,] but first and foremost in relation to itself; it is experienced as pleasure, evaluated in terms of

equally chosen or equally desired by all the parties, may not even be chosen at all. You needn't require consent, needn't reimagine sexual partners as autonomous transactors to eliminate coercion."'). Hardly an aside, this point does set the groundwork for a deep critique of Michael Warner's advocacy on behalf of a right to sexual autonomy designed to vindicate sex's worldmaking capacities, found in WARNER, *THE TROUBLE WITH NORMAL*, *supra* note 65.

449 See *infra* note 552.

450 Cf. S.B. Drury, *Leo Strauss's Classic Natural Right Teaching*, 15 POL. THEORY 299, 304 (Aug. 1987) ("At least in theory, the doctrine of classic natural right finds its 'complete answer' in the rule of the wise. Wisdom being superior not only to unwisdom but to law, it would be unnatural to limit the rule of the wise either by law or by the consent of the unwise. . . . We are led to conclude that *the only natural right is the right of the wise to rule absolutely or in the absence of law.*"). But cf. Harry V. Jaffa, *Dear Professor Drury*, 15 POL. THEORY 316, 317 (Aug. 1987) ("Equally common is the saying that the heart of the political problem is the problem of reconciling the requirement of wisdom with the problem of consent. Indeed this is the very heart of statesmanship.").

intensity, its specific qualities, its duration, its reverberations in the body and the soul.”⁴⁵¹ None of this is to deny that sex has its dangers or its costs. The ideology of sexual freedom never does. It recognizes that sex can be violent, gruesome, mind-blowing, even devastating, psychologically and literally. We may wind up being “slain in [its] spirit”⁴⁵²—and in the flesh. It is because sex can do these things that its greatness must be confirmed, and why, if reason were ever needed, our whole lives are, as they should be, to be surrendered to its hands. To attempt to purge sex of these dangers, aside from being either laughably pointless or a mortal danger that must be strenuously resisted, is to renounce the truth of sex, along with its dark powers. One can endeavor to anchor sex down in the hopes of keeping its movements under control, rationalizing it, managing it, shrinking it down to the size of a tool, small enough perhaps for autonomous actors to use to advance their individual ends, which are themselves to loom large. As part of this project, the majesty of sex, and all that it can produce, would willingly be sacrificed. For what? Mohr’s own sexual phenomenology, laced as it is with a moral ideal of consent, which operates, in part, to cabin its reach, never arrives at this question. It stops far short of the full articulation of the larger position that, seen from within the ideology of sexual freedom, it unmistakably opens up. This is why Mohr’s phenomenology is, as he presents it, at most a sign of hope to the ideology of sexual freedom, not a promise delivered. Still, from smaller seeds have grown very great things.

D. Leo Bersani, *Is the Rectum a Grave?*

Leo Bersani’s essay *Is the Rectum a Grave?*⁴⁵³—published at the same time and in some of the same volumes as Crimp’s *How to Have Promiscuity in an Epidemic*—is one of the most interesting and challenging essays on sexuality and its relation to HIV/AIDS written in the high years of the epidemic. It covers an amazing amount of sexual and political and conceptual ground, rehearsing and engaging and challenging and discarding many of the standard ways in which some gay men and “pro-sex” lesbians had been theorizing sexuality in efforts to make it more acceptable to the heterosexual (and homosexual) mainstream. While others were busy trying to prettify sex, to redeem it, particularly in the age of AIDS, Bersani set out to chart a different course. Traveling deep into sex’s dark side, he sought to recover and name the “inestimable value”⁴⁵⁴ of the gay sex so many others inside the gay

451 I Foucault, *HISTORY OF SEXUALITY*, *supra* note 48, at 57.

452 The expression is borrowed from Warner, *supra* note 352, at 215 (describing “slain in the spirit” as “a Pentecostalist style of trance: you fall backward while other people catch you”), though it is used here in a more literal sense.

453 Bersani, *supra* note 65.

454 *Id.* at 215.

community were busy denying and running from, even as they were sideways uttering the claim, as they looked back in horror, that sex was a value of, and for, the good. Fascinated by what they were all trying to escape, Bersani wanted to stare sex and its relation to death square in the face. When he did, he could not but marvel and celebrate it for its gruesome powers, and in particular, its capacity to humiliate, to injure, to smash, to shatter, and to destroy the self. Complexly written, once its code is cracked, Bersani's analysis comes close—of the texts engaged here, the closest—to a full-bodied embrace of the ideology of sexual freedom's erotics of death. Resoundingly, on both descriptive and normative levels, the rectum is a grave.

Bersani opens with two kinds of aversion to sex,⁴⁵⁵ together widespread. The first, reflected in the “big secret”⁴⁵⁶ about sex he shares—“most people don't like it”⁴⁵⁷—is summarily treated. A malignant version of aversion to sex—his principal concern—comes in for closer examination. It has, after all, been given a renewed lease on life by the emergence of AIDS, a “spectacle of suffering and death” that “has unleashed and even appeared to legitimize the impulse to murder.”⁴⁵⁸ This impulse to murder is, as Bersani initially describes it, fully heterosexualized: It is a straight lust to murder gays. Concretely, it can be seen operating in homophobic governmental policies that, among other things, have limited life-saving scientific research and medical services, and also promoted the stigmatization of, and attacks on, homosexuality,⁴⁵⁹ all in effect numbering gays' days.

455 *Id.* at 198.

456 *Id.* at 197; *see also id.* at 197–98.

457 *Id.* at 197; *see also id.* at 197–98.

458 *Id.* at 198.

459 As he explains, materially, “[a]t the highest levels of officialdom, there have been the criminal delays in funding research and treatment, the obsession with testing instead of curing, the singularly unqualified members of Reagan's (belatedly constituted) AIDS commission, and the general tendency [in these same official circles] to think of AIDS as an epidemic of the future rather than a catastrophe of the present.” Bersani, *supra* note 65 at 198–99 (footnote omitted). And then there are the hospital policies that “have more to do with other patients' fears than a concern for the health of AIDS patients,” *id.* at 199 (quoting Simon Watney (quoting a New York City doctor)) (internal quotation marks omitted), “[d]octors . . . refus[ing] to [perform needed] operat[i]ons on people known to be infected with the HIV virus,” *id.*, and ongoing confusions and misrepresentations about how HIV was contracted that were being spread by the mainstream—read: straight—press. And let's not forget, outside the realm of officialdom and elite circles, the broad public support for the idea of sterilizing and giving “AIDS carriers” “treatment” “to curb their sexual appetite.” *Id.* And likewise the idea of the complete recriminalization of homosexuality. There were also serious proposals for quarantine camps, which Bersani mentions elsewhere, and William F. Buckley Jr.'s idea of forced branding of people with AIDS. “Everyone detected with AIDS should be tattooed in the upper forearm, to protect common needle users, and on the buttocks to prevent the victimization of other homosexuals.” Crimp, *supra* note 32, at 8 (quoting

If these policies achieved gay deaths or would have largely by inaction, the murderous, anti-gay impulses of heterosexuals were also visible in threats of more direct gay-killing that hung heavy in the air. All these years later, the story Bersani retells that must continue to give “the greatest morbid delight”⁴⁶⁰ is the one that “appeared in the London *Sun* under the headline ‘I’d Shoot My Son if He Had AIDS, Says Vicar!’ accompanied by a photograph of a man holding a rifle at a boy at pointblank range. The son, apparently more attuned to his father’s penchant for violence than the respectable reverend himself, candidly add[s], ‘Sometimes I think he would like to shoot me whether I had AIDS or not.’”⁴⁶¹ Gallows humor aside, Bersani is not venturing any very speculative claim. By his own compass, he is only surveying familiar ground. He thinks it obvious that political “power is in the hands of those [heterosexuals] who give every sign of being able to sympathize more with the murderous ‘moral’ fury of the good vicar than with the agony of a terminal KS patient.”⁴⁶²

But, as if to establish the irrefutability of the point, Bersani catalogues other examples, including a U.S. Department of Justice opinion that “employers could fire employees with AIDS if they had so much as the suspicion that the virus could be spread to other workers, regardless of medical evidence,”⁴⁶³ as well as proposals for national quarantine camps,⁴⁶⁴ which lead him to suggest that, if then-U.S. Attorney General Edwin Meese himself would not “hold a gun to the head of a man with AIDS, he might not find the murder of a gay man with AIDS (or without AIDS?) intolerable or unbearable.”⁴⁶⁵ The historical analogue is apparent: Bersani implies that being a gay man in Ronald Reagan’s America is like being a Jew in Adolph Hitler’s Germany. The rhetorical escalation is fevered, as Bersani is aware. But it does “not exaggerat[e] the hostility to homosexuality ‘legitimized’ by AIDS.”⁴⁶⁶ In any event, “being ‘sensible,’ we may soon find ourselves in situations where

William F. Buckley, columnist).

460 Bersani, *supra* note 65, at 199.

461 *Id.*

462 *Id.* at 201.

463 *Id.*; see Memorandum from Charles J. Cooper, Assistant Attorney Gen., Office of Legal Counsel, to Ronald Robertson, Gen. Counsel, Dep’t of Health & Human Servs., Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus 1 (June 20, 1980), reprinted in AIDS AND THE LAW 286, 308 (William H.L. Dornette ed., 1st ed. 1987).

464 Bersani, *supra* note 65, at 201. A comprehensive discussion of proposals for quarantine relating to HIV/AIDS is in Sullivan & Field, *supra* note 6, at 143–56.

465 Bersani, *supra* note 65, at 201.

466 *Id.* at 203.

exaggeration will be difficult, if not impossible.”⁴⁶⁷ Homophobia being as intense as it is, gays are “officially regarded, in our entirety, as a disposable constituency.”⁴⁶⁸ AIDS—far from underscoring homophobia’s social dangers or highlighting its moral monstrosity—has “made the oppression of gay men seem like a moral imperative.”⁴⁶⁹ What gays have for self-defense is “nothing but a moral argument”⁴⁷⁰ that is “not even recognized as a moral argument,”⁴⁷¹ a bleak picture marred by violence, hatred, and a will to kill gay men that is either actual or imminent, everywhere, its logical endpoint anti-gay genocide. Gays are “in our entirety, . . . a disposable constituency,”⁴⁷² living in a world in which heterosexuals have “a passionate yearning not to share the same planet with [us.]”⁴⁷³

Striking as it is on its own, this general survey of the American social scene in the era of HIV/AIDS is not provided as (or for) its own end. Much as anything else, it is presented as the raw social material from which individual desire—including sexual desire—is made. As readily apprehended as how these social forces inscribe themselves in and as heterosexual desire, itself captured and driven by a murderous anti-gay rage inflamed by AIDS, what that, in turn, means for gay men and their sexual desire, is, though equally important, somewhat less clear.

Bersani treads cautiously toward the answer he means to give, starting out with some social comparisons. “[A] gay man doesn’t run the risk of loving his oppressor *only* in the ways in which blacks or Jews might more or less secretly collaborate with their oppressors—that is, as a consequence of the oppression, of that subtle corruption by which a slave can come to idolize power, to agree that he should be enslaved because he is enslaved, that he should be denied power because he doesn’t have any.”⁴⁷⁴ That may be going on with gay men, too, but, Bersani continues, “blacks and Jews don’t *become* blacks and Jews as a result of that internalization of an oppressive mentality, whereas that internalization is in part constitutive of male homosexual desire, which, like all sexual desire, combines

467 *Id.*

468 *Id.* at 204 (quoting Simon Watney).

469 *Id.*

470 *Id.* at 205 (emphasis omitted).

471 Bersani, *supra* note 65, at 205.

472 *Id.* at 204 (quoting Simon Watney).

473 *Id.* at 201. In Bersani’s text, it is homosexuals who, given heterosexuals’ homophobia, might experience this “yearning,” but it remains fully consistent with what Bersani is saying to express the point this way.

474 *Id.* at 209.

and confuses impulses to appropriate and to identify with the object of desire.”⁴⁷⁵ Stated more affirmatively, homophobia, the “oppressive mentality” Bersani has in mind, “is in part constitutive of male homosexual desire,” making it, and so gay sex, and so gay men, be what they are. In saying this, Bersani is not offering the standard observation that homosexuals’ desire is marked by self-loathing. Far beyond that, his suggestion is that gay male desire has detectably been captured by a homophobic penchant for anti-gay violence that, undiluted, entails a heterosexualized “impulse to murder” gay men.⁴⁷⁶ Lining his vision of gay desire up with the ideology of sexual freedom on a descriptive level at least, homosexuality partakes of an erotics of violence, of injury, and death, an erotics that, as in the ideology of sexual freedom, originates in a homophobic representation of homosexuality’s threat—to sex and society itself.⁴⁷⁷

Gay male sexual desire being continuous with a homophobic erotics of death, gay men have a problem on their hands. Not only must gay men fight the forces of homophobia in the social world—fight the government’s indifference to our deaths, its secret or not-so-secret delight at our suffering—in order to preserve our lives. We must also fight these forces as they are installed within us⁴⁷⁸ as ideological male bodies that make us want, at the level of our own sexual desires, to give and take life—our own and others’—in, and as, sex. In Bersani’s words: “An authentic gay male political identity therefore implies a struggle not only against definitions of maleness and of homosexuality as they are reiterated and imposed in a heterosexist social discourse, but also against those very same definitions so seductively and so faithfully reflected by those . . . male bodies that we carry within us as permanently renewable sources of excitement.”⁴⁷⁹

What form should these political struggles, partly against ourselves, thus take? How are we “to explode [these] ideological bod[ies]”⁴⁸⁰ inside us? One tactic is denial: Pretend gay male sexuality is not what it is, in the hope that it might become what we want it to be.⁴⁸¹

475 *Id.*

476 *Id.* at 198.

477 Bersani, *supra* note 65, at 209.

478 *Id.*

479 *Id.* Richard Mohr makes a related point when he acknowledges that gay men are drawn to violence in sex, even death in it, over and over again, though most usually apparently as its “victims.” See *supra* text accompanying notes 424–432 (discussing this).

480 Bersani, *supra* note 65, at 209.

481 Crimp’s argument gives one, but only one, example. See *supra* discussion Part III.A. Bersani discusses others, including a few that will be mentioned momentarily.

Bersani rejects this approach, proposing instead that we follow “an arduous representational discipline”⁴⁸² that might enable us to destroy the ideologically-constructed heterosexual male bodies within us and what they make us do by—counterintuitively enough—throwing ourselves fully into our “nearly mad identification with [them],”⁴⁸³ “never ceas[ing] to feel the appeal of [their] being violated.”⁴⁸⁴ Male heterosexual identity, with its oppressions of gay men, and, of course, of women, has shown itself “easily”⁴⁸⁵ capable of “surviv[ing] social revolutions.”⁴⁸⁶ But, Bersani suspects, what male heterosexuality, and so its ideological byproducts, may not be able to withstand is its never-ending violation in sex. The problem here is that to embrace this project is to work to eliminate an integral feature of gay desire, hence the gay self. In an important sense, this pro-gay project is anti-gay to begin.

Almost predictably, Bersani switches tracks to get his gay readers back on board, writing almost as if he has not just intimated what he did. “To understand” the strategy being recommended, he continues, “it is *perhaps* necessary to accept *the pain* of embracing, *at least provisionally*, a homophobic representation of homosexuality.”⁴⁸⁷ All this sudden tentativeness is rich. What was—but a moment before—an “important (if politically unpleasant) truth[] about male homosexual desire,”⁴⁸⁸ has now been recast as merely “a homophobic representation of homosexuality,”⁴⁸⁹ which we might perhaps, for all the “pain” it may cause us even to try to do so, at least provisionally accept, for purposes of seeing a strategy to defeat it. The good news appears to be that the strategy Bersani is proposing does not require sexuality as we know it to be abandoned. Rather, what is urged is a more complete embrace of its erotic core: the sexual and social results that violence and destruction can, if somewhat mystically, produce.

Bersani proceeds to offer what a truly homophobic rendering of homosexuality looks like. He implies that he is not describing actual gay men, only how we are homophobically represented. In this phobic view, gay male sexuality is thoroughly promiscuous and

482 Bersani, *supra* note 65, at 209.

483 *Id.*

484 *Id.* (emphasis omitted).

485 *Id.*

486 *Id.*

487 *Id.* (emphasis added).

488 Bersani, *supra* note 65, at 209.

489 *Id.*

constantly anal; more importantly, it is driven by, hence is, an “insatiable”⁴⁹⁰ lust, an “unstoppable”⁴⁹¹ drive. Indeed, it is precisely the insatiability and unstopability of gay male anal desire that makes it so easy for the homophobic-inclined heterosexual to imagine, against the facts, that gay men would “pressure[] the Government into refraining from taking legitimate steps to help contain the spread of AIDS.”⁴⁹² Asks Bersani: How could anyone believe that “those belonging to the group hit most heavily by AIDS want nothing more intensely than to see it spread unchecked?”⁴⁹³ You cannot, he intimates, unless you were to believe that “those being killed are [themselves the] killers.”⁴⁹⁴ And not just one-off killers, either. The gay male thirst for the others’ blood, for killing, like their sex, because it is their sex, is what is “insatiable,” “unstoppable.” This homophobic fantasy, of course, as Bersani does not fail to note, is a perfect reversal of, and a justification for, the desire that is properly heterosexuals’ own: their desire to destroy the gays. It is a closet drama of epic, and cataclysmic, proportions.

Continuing along these homophobic lines, Bersani tells us that gay men’s death-lust, as a voracious force, is not really understood as a man’s desire at all. Certainly, it is not a manly way of expressing it. If anything, it is a womanly desire, which, like gay men’s may be, at least in the male imagination, is never-ending. Thus, Bersani notices that a precedent for gay men’s unquenchable sexual desire, including its lust for death, is found in (men’s imaginations of) women’s sexuality—a fact that Bersani sees as a powerful cue that the reason gay male anal sex is seen as such a threat is that it partakes of the act of sexual penetration. Physically, anatomically, that is what anal and vaginal sex share in common. And that fact alone, given the conventional social meanings of penetration, makes gay male sexuality something that can be expected to bring destruction and death in its wake. After all, “[t]o be penetrated is to abdicate power.”⁴⁹⁵ It is to lose one’s status as a man. When a man is fucked, he dies as a man. Man fucks man, man kills man. “The only ‘honorable’ sexual behavior ‘consists in being active, in dominating, in penetrating, and in thereby exercising one’s authority.’”⁴⁹⁶ This, of ancient Athens, according to Michel Foucault. And that is a civilization known commonly for its “acceptance (even glorification) . . . of

490 *Id.* at 210. In the original, an “insatiable desire.”

491 *Id.* In the original, it is “unstoppable sex.”

492 *Id.* Leave aside making HIV-transmission a crime.

493 *Id.* at 211.

494 Bersani, *supra* note 65, at 211.

495 *Id.* at 212 (emphasis omitted).

496 *Id.* (quoting Michel Foucault).

homosexuality.”⁴⁹⁷ It is a testament to the staying power of this version of honor—man is supposed to be sexually active, dominant, penetrative, to exercise his authority over others—that it remains as true as it does today.

If Bersani has his story right, it should not only be buggery that is associated with death because it involves penetration. If penetration involves death, vaginal sex should involve it, too. There is, after all, as Bersani suggests, “widespread confusion in heterosexual *and* homosexual men between fantasies of anal and vaginal sex.”⁴⁹⁸ Still, heterosexual penetration is not usually thought of as being about dying and death; its associations ordinarily run to regeneration, to life, and (above all) to the future. But Bersani searches for, and finds, the darker side of the story, in which vaginal penetration is figured as a harbinger of disease, decay, and demise.

Illustrative are the popular historical representations of female prostitutes of the nineteenth century “as contaminated vessels, conveyancing ‘female’ venereal diseases to ‘innocent’ men.”⁴⁹⁹ Pressing the point beyond disease, Bersani suggests that, through the act of being penetrated, the prostituted woman of the nineteenth century became she who delivered death through sex, a status that she shares in common with the contemporary gay man:

The realities of syphilis in the nineteenth century and of AIDS today ‘legitimate’ a fantasy of female sexuality as intrinsically diseased; and promiscuity in this fantasy, far from merely increasing the risk of infection, is the *sign of infection*. Women and gay men spread their legs with an unquenchable appetite for destruction.⁵⁰⁰

To be clear, that is the destruction of (straight) men.

497 *Id.* Foucault also knew that it also harbored “profound suspicion,” *id.*, about homosexuality, and in particular, those who lost their honor by being sexually penetrated.

498 *Id.* at 211.

499 *Id.* (quoting Simon Watney) (footnote omitted).

500 Bersani, *supra* note 65, at 211 (footnote omitted). But not, at least in the early parts of the last century, the male prostitute. See, e.g., Kerwin Kaye, *Male Prostitution in the Twentieth Century: Pseudohomosexuals, Hoodlum Homosexuals, and Exploited Teens*, 46 J. HOMOSEXUALITY 1, 9 & 55 n.14 (2003) (noting how male prostitution was seen, while flagging the irony of it, given “the close association of HIV and AIDS with gay men in the contemporary period”).

The historical analogy, including its strains,⁵⁰¹ aside, Bersani seeks to capture the associations between sexual penetration and death in the current era. Toward these ends, Bersani draws heavily on feminist writings about female sexuality under conditions of sex inequality. Here, too, to be fucked, which is what a woman is supposed to be for, is to lose one's very humanity, to cease being a human being, to become an object—a thing—for men's sexual use. Death in this sense, usually only social death, is ordinarily a precondition for, but in any event, is tightly bound up with, the practice, and sometimes, the very possibility, of heterosexual intercourse.⁵⁰² This is a central part of the reason that, according to Bersani, Andrea Dworkin urged women to abandon penetration,⁵⁰³ to stop—

501 They include Bersani's easy movement between heterosexuality and homosexuality, now and then, when these concepts were not invented until late in the nineteenth century: homosexuality, ostensibly, around 1868 or 1869, and heterosexuality (at least in English) in 1892. JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* 9–10 (1995) (In "1978, . . . I elaborated: . . . The term 'homosexual' was only invented in 1869 [the year has now been moved back to '68]. The first use of 'heterosexual' listed in the *Oxford English Dictionary Supplement* dates to 1901. [The most recent *Oxford English Dictionary Supplement* takes the date back to 1892, and 'heterosexual' has also been traced to 1868.]"); LADELLE MCWHORTER, *BODIES AND PLEASURES: FOUCAULT AND THE POLITICS OF SEXUAL NORMALIZATION* 37 (1999) ("The facts Katz marshals amply support his contention that heterosexuality was invented. First of all, he notes, the word *heterosexual* did not appear in English until 1892, and then it named not 'normal' sexual orientation but rather an allegedly pathological condition that many would now recognize as bisexuality."). Not surprisingly, Bersani elsewhere rejects this periodization. Tim Dean et al., *A Conversation with Leo Bersani*, 82 OCTOBER 3, 12 (1997) ("*Bersani*: . . . There has been an absurd and reductive misreading of the first volume of *The History of Sexuality* . . . that claims that 'the homosexual' didn't exist before the middle of the nineteenth century. I don't think Foucault believed that for a single moment.").

502 See, e.g., ANDREA DWORKIN, *INTERCOURSE* 11 (1987) ("Having actually killed, he sees the sex he took for granted as murderous in its diminution of human life—how it made women's humanity invisible, meaningless[.]"); see also generally *id.* at 169–94 (chapter entitled "Dirt/Death").

503 See Bersani, *supra* note 65, at 214. Bersani writes:

Dworkin has taken this position to its logical extreme: the rejection of intercourse itself. If, as she argues, "there is a relationship between intercourse per se and the low-status of women," and if intercourse itself "is immune to reform," then there must be no more penetration. Dworkin announces: "In a world of male power—penile power—fucking is the essential sexual experience of power and potency and possession; fucking by mortal men, regular guys."

Id. The citation Bersani adds includes three stacked page references to DWORKIN, *supra* note 502, at 124, 137, 79 (1987), where the quoted language is found. No direct quotation to Dworkin urging (in Bersani's words) "the rejection of intercourse itself" is in Bersani's text. To be clear, it is true that Dworkin does write: "Male dominant gender hierarchy, however, seems immune to reform by reasoned or visionary argument or by changes in sexual styles, either personal or social[.]" adding: "This may be because intercourse itself is immune to reform." *Id.* at 137. But this is no categorical statement of the position Bersani attributes to her, and the thrust of Dworkin's work, both in *Intercourse* and elsewhere, may be taken to suggest that she hopes and believes that there is nothing inherent in intercourse, as sex, that requires it to be structured as it is. For additional grist,

as an act of political protest about the unequal conditions under which they were forced to live—getting fucked by men. It would, Bersani suggests she thought, be the end of women’s social subordination, a precondition for a human life.⁵⁰⁴ Women’s “unquenchable appetite for destruction”⁵⁰⁵ has been reworked in these feminist efforts, Bersani thinks. It is not figured as the destruction of man, but of woman herself. Thus, Bersani approvingly quotes Catharine MacKinnon “speak[ing] of ‘the male supremacist definition of female sexuality as lust for self-annihilation.’”⁵⁰⁶ MacKinnon, he says, is descriptively right: To want to abdicate one’s power, to want to be fucked, is to desire to be an object for another, to want to be flattened into a thing, to cease being human, to be dead. For Bersani, it is not, of course, that the threat to men’s existence has disappeared. It is still there. It is, in fact, what drives this definition of female sexuality. Bersani prompts us to think that, if women did not learn—because male supremacy teaches them—to turn their “unquenchable appetite for destruction”⁵⁰⁷ inward, against themselves, then it would be men—always men—who would be wiped out. Forever, we are stuck with Adam’s downfall, produced by Eve’s insatiable need “to know.”

This is the point at which Bersani’s own affirmative project—his strategy for exploding the “ideological” body that homophobia has placed inside gay men, making gay desire mean what it does—begins to take concrete shape. What he borrows from feminism is a clear picture of the similarities, the parallels, and the relations, between gay male sexual desire and women’s sexual desire—how both are ultimately grounded in a projection of heterosexual men’s sexual desires. Gay men and women thus want for themselves what straight men want them to want. In this sense, gay men and women share an erotic

see, for example, *id.* at 122 (“There is never a real privacy of the body that can coexist with intercourse: with being entered. The vagina itself is muscled and the muscles have to be pushed apart. The thrusting is persistent invasion. She is opened up, split down the center. She is occupied—physically, internally, in her privacy.”); *id.* (“There is a deep recognition in culture and in experience that intercourse is both the normal use of a woman, her human potentiality affirmed by it, and a violative abuse, her privacy irredeemably compromised, her selfhood changed in a way that is irrevocable, unrecoverable. . . . Intercourse in reality is a use and an abuse simultaneously, experienced and described as such. . . .”); *id.* at 8 (“The radical social change demanded by Tolstoy in this story—the end of intercourse—is a measured repudiation of gynocide: in order not to kill women, he said, we must stop fucking them.”).

504 “If, as [Dworkin] argues, ‘there is a relationship between intercourse per se and the low-status of women,’ and if intercourse itself ‘is immune to reform,’ then there must be no more penetration,” Bersani takes her to reason. Bersani, *supra* note 65, at 214 (quoting DWORKIN, *supra* note 502, at 124, 137).

505 *Id.* at 211 (footnote omitted).

506 *Id.* at 213.

507 *Id.* at 212 (footnote omitted).

investment in a sexual regime defined by, and for, heterosexual men. Gay men and women take their pleasures from a straight-male-defined erotics of injury and death, which, in its more popular constructions, produced so as to keep gay male and female sexuality from being directed at straight men, call for them to sacrifice their own lives instead.

Needless to say, this is a very dark picture of sex. What it has to recommend it is its claimed status as truth. It does not seek, as other theories of sexuality being produced around the same time, to make sex appear to be, “in its essence, less disturbing, less socially abrasive, less violent, more respectful of ‘personhood’ than it has been in a male-dominanted, phallogentric culture.”⁵⁰⁸ It recognizes sex, in its essence, as being as disturbing, as socially abrasive, as violent, as disrespectful of “personhood”⁵⁰⁹ as it has been made to be in a male-dominated, phallogentric culture. This is why Bersani praises MacKinnon and Dworkin for having “at least had the courage to be explicit about the profound *moral revulsion* with sex that inspires the[ir] entire project.”⁵¹⁰

All the same, Bersani does not join in. “What bothers me about MacKinnon and Dworkin is not their analysis of sexuality, but rather the pastoralizing, redemptive intentions that support the analysis.”⁵¹¹ He said it: MacKinnon and Dworkin are ultimately “too sunny” about sex.⁵¹² They think sex’s destructiveness is unnecessary and can and should be changed. In Bersani’s view, however, they have not given us reasons why the sexuality they criticize “must be . . . abandoned.”⁵¹³ What they have given us instead, Bersani insists, turning deeply normative, are the very reasons it:

must be multiplied . . . , and, more profoundly, the reasons for defending, for cherishing the very sex they find so hateful. Their indictment of sex—their refusal to prettify it, to romanticize it, to maintain that fucking has

508 Bersani, *supra* note 65, at 215.

509 *Id.* at 215.

510 Bersani, *supra* note 65, at 215. MacKinnon anyway has long rejected the idea that her work is grounded in moral or per se revulsion. See, e.g., Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL’Y REV. 321 (1984). For a different relation of the project to morality, see Catharine A. MacKinnon, *Afterword*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 672 (Catharine A. MacKinnon & Reva Siegel eds., 2004).

511 Bersani, *supra* note 65, at 215.

512 Janet Halley, writing *sub nom* Ian Halley, *Queer Theory By Men*, 8 DUKE J. GENDER L. & POL’Y 7, 20 (2004) (“Wow—the rectum—it’s *dark* in there. So dark that Bersani launches a critique of Foucault and MacKinnon for being too sunny!”).

513 Bersani, *supra* note 65, at 215. Bersani is specifically talking about pornography, but, in context, what he says applies to sexuality, more generally.

anything to do with community or love—has had the immensely desirable effect of publicizing, of lucidly laying out for us, the inestimable value of sex as—at least in certain of its ineradicable aspects—anticommunal, antiegalitarian, antinurturing, antiloving.⁵¹⁴

Come again? This is its value? What is good about sex is that it is socially abrasive, violent, and disrespectful of personhood? Its “inestimable value” is found in how “anticommunal, antiegalitarian, antinurturing, and antiloving” it is?

In saying all this, Bersani is partly reacting to a certain need that gay men, in particular, have experienced, to defend our sexual practices by telling all sorts of what he calls “lies”⁵¹⁵ about them, rather than valuing them for exactly their violence, aggression, and brutality. Dennis Altman, for instance, lyrically suggested that the gay bathhouse was valuable, even praiseworthy, because it “created ‘a sort of Whitmanesque democracy, a desire to know and trust other men in a type of brotherhood far removed from the male bondage of rank, hierarchy, and competition that characterise much of the outside world.’”⁵¹⁶ Bersani dismisses this idea as “[un]helpful.”⁵¹⁷ Letting his own punches fly, he adds that “[a]nyone who has ever spent one night in a gay bathhouse knows that it is (or was) one of the most ruthlessly ranked, hierarchized, and competitive environments imaginable. Your looks, muscles, hair distribution, size of cock, and shape of ass determined exactly how happy you were going to be during those few hours, and rejection, generally accompanied by two or three words at most, could be swift and brutal, with none of the civilizing hypocrisies with which we get rid of undesirables in the outside world.”⁵¹⁸ Bersani dispenses with Altman’s defensiveness and the lies it produces. Unlike Altman, Bersani wants to maintain—insist, convince us—that ruthlessness, that hierarchy, that competitiveness, that the swiftness of its brutalities, are what gave the bathhouse its value. What unites them, of course, is how they structure and unleash power.

514 *Id.* at 215. Why “ineradicable,” Bersani never explains. Nor, for that matter, does he explain precisely what he means when he speaks of sexuality “in its essence.” *Id.* He does state he does not mean to be making any “essentialist” claims about sexuality. *Id.* at 216 (“To say this is not to propose an ‘essentialist’ view of sexuality.”). Whatever this means to him that makes it true, he clearly holds that, in some of its dimensions at least, particularly its hierarchical structure, sex is deeply fixed, and “ineradicably” so. This may take some of the normative pressure off the argument he makes.

515 *Id.* at 222.

516 *Id.* at 206 (quoting Dennis Altman).

517 *Id.*

518 *Id.*

Similar social formations, such as “the gay-macho style, the butch-fem lesbian couple, and gay and lesbian sadomasochism,”⁵¹⁹ criticized in some quarters for expressing “unqualified and uncontrollable complicities with a brutal and misogynous ideal of masculinity, or with the heterosexual couple permanently locked into a power structure of male sexual and social mastery over female sexual and social passivity, or, finally, with fascism,”⁵²⁰ had similarly been defended in some lesbian and gay circles as “subversive parodies of the very formations and behaviors they appear to ape.”⁵²¹ Bersani’s reply: Get real. They do not work sexually as parodies or subversions. “Parody is an erotic turn-off, and all gay men know this. Much campy talk is parodistic, and while that may be fun at a dinner party, if you’re out to make someone you turn off the camp.”⁵²² Even the “dark suspicion that you may not be getting the real article”⁵²³ can be enough to ruin an otherwise auspicious play date. Bersani asks: Why pretend we do not celebrate male machismo when we do? Why pretend gay male sexual desire—and sex—is not “brutal and misogynous”?⁵²⁴ Is not “locked into a power structure of male sexual and social mastery over female sexual and social passivity”?⁵²⁵ Is not fascistic?⁵²⁶ That that is what makes these forms of sex the turn-ons that they are?

The pleasures gay men experience do not stop with brutality toward, or brutality coming at us from, other men. Thus, Bersani suggests that “[t]he gay male parody of a certain femininity,”⁵²⁷ as in camp or drag, “is both a way of giving vent to the hostility toward women that probably afflicts every male (and which male heterosexuals have of course expressed in infinitely nastier and more effective ways) *and* could also paradoxically be thought of as helping to deconstruct that image for women themselves.”⁵²⁸ But gay men may

519 Bersani, *supra* note 65, at 206.

520 *Id.* at 206–07.

521 *Id.* at 207.

522 *Id.* at 208.

523 *Id.*

524 *Id.* at 206.

525 Bersani, *supra* note 65, at 206–07.

526 *See id.* at 207.

527 *Id.* at 208.

528 *Id.* Why is that? “A certain type of homosexual camp speaks the truth of that femininity as mindless, asexual, and hysterically bitchy, thereby provoking, it would seem to me, a violently antimimetic reaction in any female spectator.” *Id.* And here is where things start to get nastier: “The gay male bitch desublimates and desexualizes a type of femininity glamorized by movie stars, whom he thus lovingly assassinates with his style,

get a sexual charge out of woman hating, even as they engage performances of femininity. Who would have thought, before Bersani, that even the drag queen—underneath makeup, wig, dress, and heels—could basically be such a straight man?

Bersani, evidently, if not expressly, embracing some portion of the ideology of sexual freedom, is saying we are wrong to downplay the violence, the hierarchy, the homophobia, the sexism, the hatefulness, the rigid inspection accepting or rejecting bodies, the brutality, and the sadism of these sexual forms. We should celebrate them. As examples of what others have thought necessary to deny or disavow, they are mild expressions of the kinds of violence and cruelty and aggression Bersani wants to see more of. Compared to the real forms of sexual violence Bersani would unleash, they may be somewhat tame.

Still, they remind us of points of intersection between what gay men and women both experience as desire: the loss of status that comes along with getting—and being—fucked. It is in this light, with these connections in mind, that Bersani can describe what he sees as wrong with “[p]hallocentrism,”⁵²⁹ that doctrine of male supremacy and patriarchy. It is not, or not exactly, “primarily the denial of power to women (although it has obviously also led to that, everywhere and at all times), but above all the denial of the *value* of powerlessness in both *men and women*.”⁵³⁰ To Bersani, what is wrong with “phallogentrism” is that it denies what is on the other side of male sexual action.⁵³¹ This “value of powerlessness” that he so obviously appreciates is not “the value of gentleness, or nonaggressiveness, or even of passivity.”⁵³² What he has in mind is a certain kind of rough, aggressive, even active powerlessness. What phallogentrism misses, and what Bersani is calling for as a way to overcome it, is “a more radical disintegration and humiliation of the self.”⁵³³ There is, he suggests, “beyond the fantasies of bodily power and subordination,”⁵³⁴ “a transgressing of that very polarity which, as Georges Bataille has proposed, may be the profound sense of both certain mystical experiences and of human sexuality.”⁵³⁵ “[T]ransgress[ion]” as

even though the campy parodist may himself be quite stimulated by the hateful impulses inevitably included in his performance.” *Id.*

529 *Id.* at 217.

530 *Id.* (second emphasis added).

531 *See* Bersani, *supra* note 65, at 217.

532 *Id.*

533 *Id.*

534 *Id.*

535 *Id.*

a gateway to “certain mystical experiences and [to] human sexuality”⁵³⁶—sounds like Bersani is traveling deeper into the ideology of sexual freedom than before. He goes on:

In making this suggestion I’m also thinking of Freud’s somewhat reluctant speculation, especially in the *Three Essays on the Theory of Sexuality*, that sexual pleasure occurs whenever a certain threshold of intensity is reached, when the organization of the self is momentarily disturbed by sensations or affective processes somehow “beyond” those connected with psychic organization. Reluctant because, as I have argued elsewhere, this definition removes the sexual from the intersubjective, thereby depriving the teleological argument of the *Three Essays* of much of its weight. For on the one hand Freud outlines a normative sexual development that finds its natural goal in the post-Oedipal, genitally centered desire for someone of the opposite sex, while on the other hand he suggests not only the irrelevance of the object in sexuality but also, and even more radically, a shattering of the psychic structures themselves that are the precondition for the very establishment of a relation to others. In that curiously insistent, if intermittent, attempt to get at the “essence” of sexual pleasure—an attempt that punctuates and interrupts the more secure narrative outline of the history of desire in the *Three Essays*—Freud keeps returning to a line of speculation in which the opposition between pleasure and pain becomes irrelevant, in which the sexual emerges as the *jouissance* of exploded limits, as the ecstatic suffering into which the human organism momentarily plunges when it is “pressed” beyond a certain threshold of endurance. Sexuality, at least in the mode in which it is constituted, may be a tautology for masochism.⁵³⁷

Sexuality—whether gay or straight—destroys us. When it works, “the self is exuberantly discarded.”⁵³⁸ An extreme masochism may be phallogentric sadism’s end. From Freud on.

A thoroughly psychic process to Bersani, sex may provide a way to “explode” the “ideological body” that gay men and women evidently carry within us as a constant and renewable source of excitement. If we can smash that ideological body to smithereens, shatter it permanently, there will be no “self,” or no coherent self left; the ideological body

536 *Id.*

537 Bersani, *supra* note 65, at 217.

538 *Id.* at 218.

that plants within us our desire for an erotics of death will itself have been destroyed.⁵³⁹ Our desire for death—our investment in the erotics of death—may also disappear. If and when it does, we will have defeated heterosexual manhood as we know it. Anal sex is powerful—so powerful it may achieve what “social revolutions” have failed to do, and never could. Perhaps this explains certain fears about the homosexual’s rectum: the dark suspicion that it might turn out to be heterosexual men’s shared grave.

But it is not only that death that Bersani has in mind. The material effects of these sexual shatterings—on gay men—are where the connections between Bersani’s work and the ideology of sexual freedom become unmistakable. In Bersani’s embrace of the feminist understanding of sexuality, it is violent, cruel, about objectification, about death. For Bersani himself, sex should be, “in its essence,”⁵⁴⁰ “disturbing,”⁵⁴¹ “abrasive,”⁵⁴² “violent,”⁵⁴³ and otherwise disrespectful of personhood.⁵⁴⁴ What, concretely, is Bersani calling for when he says that sexuality “in a male-dominated, phallogentric culture”⁵⁴⁵ “must be multiplied and not abandoned,”⁵⁴⁶ must be, more profoundly, “defend[ed]”⁵⁴⁷ and “cherish[ed]”?⁵⁴⁸ This sex, as MacKinnon and Dworkin and Bersani have all recognized, operates as sexual and social violence, its paradigmatic form not intercourse, but more like rape—or worse. To be candid about this is to refuse, as they do, “to prettify” or “to romanticize” sex. It is to deny that it has been about community or love. Their indictment of sex whose ultimate logic goes beyond rape to snuff is about as “anticommunal,

539 Clearly, he offers that this self-shattering, if it is to take place, presupposes a “self,” which is “the basis on which sexuality is associated with power.” *Id.* By extension, if we can somehow manage to keep the shattering happening enough, if we can “multipl[y],” *id.* at 215, its occurrences, become permanently and irretrievably shattered, perhaps then we can keep sexuality from becoming so resolutely attached to power—perhaps then we might destroy the ideological body that causes gay desire to be what it is.

540 *Id.* at 215.

541 *Id.*

542 *Id.*

543 Bersani, *supra* note 65, at 215.

544 *Id.*

545 *Id.*

546 *Id.*

547 *Id.*

548 *Id.*

antiegaltarian, antinurturing, antiloving”⁵⁴⁹ as it comes. When it reaches its full potential, it extends beyond the powerful kinds of shatterings produced by its more ordinary but still perfectly violent forms, of rape, sexual harassment, and the rest, to become the ultimate form of shattering of life: literal death. To advocate for sex to the extent that it can shatter us, precisely to the extent it achieves these effects, precisely to the extent that our “self” is “exuberantly discarded,”⁵⁵⁰ is not, as some have supposed, merely to advocate for, and to seek to preserve, an erotics of death when it, whatever its form, is fully self-chosen.⁵⁵¹ To argue for sex because of its power to devastate us, to destroy us, to smash us to bits, is to support and promote a culture of, if not also the specific practices of, rape and sexualized murder.⁵⁵² It is no coincidence that victims of rape and sexual assault regularly report

549 See Bersani, *supra* note 65, at 215.

550 *Id.* at 218.

551 This leaves aside whether shattering, including death, can be “rushed” this way. See also *infra* notes 552, 567. For an important reading of Bersani that focuses on the role of consent in this process, see Adrienne D. Davis, *Bad Girls of Art and Law: Abjection, Power, and Sexuality Exceptionalism in (Kara Walker’s) Art and (Janet Halley’s) Law*, 23 YALE J.L. & FEMINISM 1 (2011); *id.* at 41 (“Yet, the subversive potential, indeed, the very logic of, Bersani’s abjection lies in the consent of the penetrated.”).

552 Bersani gives something important away in a passage in LEO BERSANI, *HOMOS* 128–29 (1995) (emphasis added), in which he provides a gloss on Andre Gide’s *The Immoralist*:

Michel’s pederasty is the model for intimacies devoid of intimacy. It proposes that we move irresponsibly among other bodies, somewhat indifferent to them, demanding nothing more than that they be as available to contact as we are, and that, no longer owned by others, they also renounce self-ownership and agree to that loss of boundaries which will allow them to be, with us, shifting points of rest in a universal and mobile communication of being. If homosexuality in this form is difficult to know, this is because it no longer defines a self. At once much less and much more than a sexual preference, it may also, as Marceline perceptively remarks, “eliminate the weak[.]” But the way we live already eliminates the weak, and the familiar piety she expresses serves to perpetuate their oppression. Nothing could be more different from the strength of Michel’s self-divestiture, from the risks he takes in loving the other as the same, in homo-ness. In that love (for want of a more precise word) he risks his own boundaries, risks knowing where he ends and the other begins. *This is lawless pederasty—not because it violates statutes that legislate our sexual behavior, but because it rejects personhood, a status that the law needs in order to discipline us and, it must be added, to protect us.* If Michel’s immoralism defies disciplinary intentions, it also gives up the protection. And this should help us to see what is at stake in Michel’s timid sexuality. He travels in order to spread his superficial view of human relations, preaching, by his anomalous presence among foreign bodies, a community in which the other, no longer respected or violated as a person, would merely be cruised as another opportunity, at once insignificant and precious, for narcissistic pleasures.

No “personhood,” no protection—and no legal redress for the injuries sex inflicts. See *supra* text accompanying

being shattered, destroyed, changed forever, and never the same. This is often a way of speaking about the end of one life and the start of another after a sexual injury has occurred. And, although the descriptions of sero-conversion are scarcely as widely available, the experience—certainly for some—must be much the same. One has to remake one's life as best one can as a person with a new identity. One may be as effectively shattered when one's limits are broken against one's will as when they're broken with a certain permission. It may very well be that the very intensities that Bersani, following Freud, sets up as the absolute apotheosis of sex—sex at its very, very best—are most acutely, intensely, fully, absolutely felt when one most insistently wishes to remain one's whole, complete, unified self.

Bersani is not too far away from registering much of this point—at least as it relates to the realities of HIV-transmission and death from AIDS—when he moves from what his strategy means on a psychic level to what it means in the social world. “[T]he rectum,” he writes, may be “the grave in which the masculine ideal (an ideal shared—differently—by men *and* women) of proud subjectivity is buried[.]”⁵⁵³ If it is, “then it should be celebrated for its very potential for death.”⁵⁵⁴ To which he immediately adds, recognizing what this means for gay men: “Tragically, AIDS has literalized that potential as the certainty of biological death[.]”⁵⁵⁵ No sooner does he register the material implications of what he has to say for gay men than he retreats to the symbolic realm. Because AIDS has literalized the sexual potential for death, it has “therefore reinforced the heterosexual association of anal sex with a self-annihilation originally and primarily identified with the fantasmatic mystery of an insatiable, unstoppable female sexuality.”⁵⁵⁶ What this means to Bersani, at least, is that “[i]t may, finally, be in the gay man's rectum that he demolishes his own perhaps otherwise uncontrollable identification with a murderous judgment against him.”⁵⁵⁷ But what, again, would it mean materially, literally for the gay man to “demolish[] his own perhaps otherwise uncontrollable identification with a murderous judgment against

note 449.

553 Bersani, *supra* note 65, at 222.

554 *Id.* Brett Levinson, too, has noticed that, for Bersani, AIDS “actually presents” “the death that was always present in every sexual encounter.” Brett Levinson, *Sex Without Sex, Queering the Market, the Collapse of the Political, the Death of Difference, and AIDS: Hailing Judith Butler*, 23 *DIACRITICS* 81, 94 (Autumn 1999) (“Given the ‘advent’ of this illness, the death that was always present in every encounter *actually* presents itself: not conceptually but as a tangible component of our everyday existence. AIDS destroys (the myths of) sex for us all.”).

555 Bersani, *supra* note 65, at 222.

556 *Id.*

557 *Id.*

him”?⁵⁵⁸ In the age of HIV/AIDS, that he can execute that murderous judgment against himself. With the aid of another, who, also partaking of the erotics of death, if perhaps differently, helps him sacrifice his body and his life. He need only engage in unsafe sex, willing, not shying away from,⁵⁵⁹ its known risks.⁵⁶⁰

For Bersani, AIDS is but a reminder—a painful, tragic reminder, of course, but a reminder nonetheless—of “certain”⁵⁶¹ “ineradicable”⁵⁶² truths about what sex “in its essence” is, truths which should be embraced and affirmed.⁵⁶³ Hence, in the age of AIDS, “[m]ale homosexuality advertises the risk of the sexual itself as the risk of self-dismissal, of *losing sight* of the self, and in so doing it proposes and dangerously represents *jouissance* as a mode of asceticism”⁵⁶⁴—“*jouissance* as a mode of asceticism,”⁵⁶⁵ that strange combination

558 *Id.*

559 *See infra* note 567.

560 Bersani’s essay has little to say on condom use or “safer sex” more generally. He uses the word “condom” twice, Bersani, *supra* note 65, at 202, 210, once somewhat disparagingly, *id.* at 202–03 (“... TV treats us to nauseating processions of yuppie women announcing to the world that they will no longer put out for their yuppie boyfriends unless these boyfriends agree to use a condom. Thus hundreds of thousands of gay men and IV drug users, who have reason to think that they may be infected with HIV, or who know that they are (and who therefore live in daily terror that one of the familiar symptoms will show up), or who are already suffering from an AIDS-related illness, or who are dying from one of these illnesses, are asked to sympathize with all those yuppettes agonizing over whether they’re going to risk losing a good fuck by taking the ‘unfeminine’ initiative of interrupting the invading male in order to insist that he practice safe sex.”). He also clearly has safer sex in mind when, deep into his essay, he writes that “[i]t might be pointed out that, unless you met your lover many, many years ago and neither you nor he has had sex with anyone else since then, monogamy is not that safe anyway. Unsafe sex a few times a week with someone carrying the HIV virus is undoubtedly like having unsafe sex with several HIV positive strangers over the same period of time.” *Id.* at 218 n.26. There are other very indirect allusions to safer sex that could be read in between the lines of Bersani’s text. *See, e.g., id.* at 199 (“Television and the press continue to confuse AIDS with the HIV virus, to speak of AIDS as if it were a venereal disease, and consequently to suggest that one catches it by being promiscuous.”); *id.* at 210 (“A London doctor does, in the course of the article, urge the use of condoms in such encounters, but ‘the main problem . . . is evidently “promiscuity”, with issues about the kinds of sex one has pushed firmly into the background’. But the kinds of sex involved, in quite a different sense, may in fact be crucial to the argument.”) (quoting Watney); *id.* at 220 (“Attention is turned away from the kinds of sex people practice to a moralistic discourse about promiscuity.”). But nothing close to advocacy of safer sex as a sexual project.

561 *Id.* at 215.

562 *Id.*

563 *Id.*; *see supra* note 514.

564 Bersani, *supra* note 65, at 222.

565 *Id.*

of pleasure and destruction,⁵⁶⁶ being a way to make something of ourselves. HIV/AIDS, which had only been seen in terms of what it takes from us, what it robs us of, turns out to offer us something in return that nobody—until Bersani—had seen quite like this and publicly affirmed: a way out, not just of ourselves, or our lives, but of the desires that, homophobically defined, would have us kill ourselves and one another. It may offer a permanent escape from the oppression that defines our desires and so makes us who we are. If it is, contracting HIV, like developing AIDS, should not be thought of—or not exclusively—as our doom, demise, or downfall, but proof of the power of sex, a Holocaust that entails our salvation. We may not survive it, but then neither may the ideological forms of male heterosexuality that wish us dead.

What earlier might have appeared to be merely a descriptive affinity for the ideology of sexual freedom's understanding of what sexuality is, including its erotics of death, is fully normative by the end of Bersani's account.⁵⁶⁷ As he offers it, it is largely an affirmative, if psychologized, argument for the erotics of death: a call for death, both suicide and homicide, on a psychic level. But it is also, as he realizes and never disavows, an argument that has literal dimensions in the age of AIDS.⁵⁶⁸ The "*jouissance* of exploded limits"⁵⁶⁹ at

566 For an analysis of at least Jacques Lacan's use of the term, see Dean, *Psychoanalysis of AIDS*, *supra* note 37, at 109–10.

567 As it is in some of his newer work, LEO BERSANI & ADAM PHILLIPS, *INTIMACIES* (2008), though he does take some pains to try to limit the point to sexual transactions that are consensual. *See, e.g., id.* at 48 ("It would have been nice if the right of all citizens to have consensual sex had been enshrined in the Bill of Rights (especially nice given the attacks on this right), but this is not the same thing as sacralizing sex as a cultural treasure."). There is some reason for doubt. *See supra* note 552 (raising some questions about the limits of this limitation); *see also* BERSANI & PHILLIPS, *supra*, at 56–57; Leo Bersani, *Shame on You*, in *AFTER SEX?: ON WRITING SINCE QUEER THEORY* 91, 105–06 (Janet Halley & Andrew Parker eds., 2011) ("A sign of my own troubled response to the practice is that I also find bug-chasing and gift-giving sexually repellent and staggeringly irresponsible behavior. Of course, even the irresponsibility can appear to be a minor sin in the larger social context of the murderous irresponsibility that so continually marks U.S. domestic and foreign policies. Many barebackers (not the self-confessed bug-chasers) prefer not to know the HIV status of their partners, but no one is advocating nonconsensual unsafe sex. This is not to deny the seriousness of spreading the infection, with or without mutual consent, but even the most ardent gift-givers seem unmotivated by the thrill of exercising murderous power."); Ben Naparstek, *Myopic View of Deadly Sexual Play*, *AUSTRALIAN*, July 19, 2008, <http://www.theaustralian.news.com.au/story/0,,24024059-5003900,00.html> ("Bersani and Phillips have written a barebacking manifesto, not that they'd ever admit to it. Instead, we're told that bareback sex is 'ethically and politically ambiguous' and something 'we should not relish dismissing.' The authors argue that 'no one should in any way promote nonconsensual barebacking,' but their focus is voluntary barebacking and consent isn't the issue.").

568 The disavowal has arrived in other work. *See supra* note 567.

569 Bersani, *supra* note 65, at 217. Though Bersani seems to trace this disintegration of the self back to Freud, it also has resonances in Nietzsche's work. *See, e.g.,* VATTIMO, *supra* note 68, at 98 ("Even though the

the heart of sexuality is a dance with death on the symbolic and the material planes. Sex is figured within Bersani's analysis in much the same way it is within the ideology of sexual freedom. It is a source of power that, of course, produces bodily pleasures. More, it offers a "mode of asceticism,"⁵⁷⁰ a way of working on, through smashing, to change, our selves. These changes may in turn have far-reaching social consequences, producing major alterations in the existing networks of social power. Sex's powers, if acknowledged for what they are and fully embraced for that reason, may not only make us into something new, but in doing so, specifically, by destroying those ideological male bodies within us, key to the operation of homophobia and sexism, may also bring heterosexism and male supremacy to an end. Bersani flags this possibility as only that: a possibility. This leaves open the prospect that all we will have is an erotics of death that destroys us on whatever level it does, changing us, but not—or not really—the social world, except perhaps by emptying it out. Bersani thinks there is only one way to discover what sex will do. For those whose lives are literally ended along the way, the comfort is that the sex that spelled the beginning of the end, was sex in its ideal form. The rectum, as itself and as a more general sign for intercourse, is and should be a grave.

CONCLUSION

These texts give us various ways in which gay men affirmed and advanced the ideology of sexual freedom during the high years of the HIV/AIDS epidemic, and—perhaps with the exception of Crimp (to be conservative about it)—affirmed and advanced its erotics of death. Chambers sees sex at least at times as a socially abrasive force, but does not for that reason embrace it the way that Mohr and Bersani do. Crimp and Chambers share a view of sex as good, but Chambers does not think it is such a powerful force for good that it can never be held responsible for transmitting HIV. Crimp and Mohr and Bersani all recognize sex's power, but divide on whether it should be seen as a force of good or as beyond that, and also on what it may do. And although Chambers, Mohr, and Bersani all openly affirm an erotics of death, they do so in differing ways and to greatly varying degrees.

From Crimp, we receive certain ideas about the relationship between and among sex, power, and knowledge. Knowledge that is not only about how to "have promiscuity in

noontide appears to Nietzsche-Zarathustra as the perfect hour, the moment of total rest and perfect stasis, it contains the problem of having to make a decision, which must necessarily lead to movement, which in turn will disturb the noontide perfection. It means having to set off towards a downfall; perhaps not towards death (as Löwith suggests in his wonderful commentary on this text) but rather towards the unavoidable disintegration of the subject, which is the consequence of the idea of Eternal Recurrence, if thought through radically enough.") (footnote omitted).

570 Bersani, *supra* note 65, at 222.

an epidemic”—knowledge about how, through sex, we can overcome and cheat death itself—but also knowledge that reality, especially the reality of sex, is only what we make of it. We thus need never acknowledge any of the ways sex doesn’t just not beat death, but affirmatively causes it. From Chambers, we learn that sex as a value justifies, in a sort of cost-benefit analysis, a few deaths in the name of community solidarity defined in sexual terms. Sex tinged or laced, though perhaps not richly laden, with the risk of death is what sex—including “safer sex”—is, normatively speaking. From Mohr, we get that the experiences and sensations of sex justify sex itself—up to a point (the point of consent), and that so long as sex is consensual, there are virtually no limits to its demand for freedom, if not also moral respect, even when it entails (the risk of) a sexually-caused death. From Bersani, we receive the idea that sex, when it is at its best (which we should constantly want it to be) is a destructive force that will be the death of us psychically, symbolically, and “tragically,” in the age of AIDS, sometimes, literally. As proof of sex’s powers, it may also be the death of heterosexism—homophobia and sexism both—in the bargain.

None of these texts embraces the ideology of sexual freedom in its entirety. Crimp refuses to see its “dark” side as its “dark” side. Chambers embraces a moral form of sexual regulation. Mohr misses the larger stakes of sexual freedom by considerably individualizing and—at times—deeply moralizing sex. Clinging to a certain liberalism, he only sees what sex means for us as individuals and refuses to liberate it beyond consent. And Bersani frames his outrage at how gay men have been treated in the age of AIDS in expressly moral terms and misses the opportunities to situate his argument for an erotics of death squarely and solidly in the material realm.⁵⁷¹ Still, these texts collectively show various ways in which the ideology of sexual freedom, including its eroticization of death, was an operative force during the high years of HIV/AIDS, sustained throughout the period by these and other works, as well as by the sexual practices to which they were related—all of which were themselves, if not uniformly, ideologically organized, shaped, and driven. The ideology of sexual freedom supplied those years with a cohesive conceptual framework that overall pushed these seemingly discrete, sometimes seemingly opposed, political projects in a single, shared direction: the protection and preservation of the supreme value of sex, which, as a foundational faith, is more important than life itself.

If the ideology of sexual freedom has been an actual force in the world, preserved as much in a range of texts as in the sexual practices and projects to which they point and perhaps energize, what does it *do*, in particular, to political and legal efforts designed to address sexual injury and abuse in order to end them? In the situation of the sex-based transmission of HIV, along with the suffering it brings in its wake, the ideology

571 See, e.g., HALLEY, *SPLIT DECISIONS*, *supra* note 57, at 161–63 (noting a moralizing tendency in Bersani’s essay and criticizing it for that reason).

of sexual freedom heralds sex deployed as violence—power over (and inflicted upon) others, including cruelly, painfully, and brutally. It does not shy away from, and even at times embraces, sex's capacity to injure and cause sex-based suffering, even unto death. This is, in fact, not a limitation of sex, but the true measure of its value, which must be recognized and worshipped and engaged as such, if all sex's secrets, the truths it possesses, are to be discovered, its magnificence both as a world-destroying and world-creating force, actualized. In this light, the sex-based transmission of HIV, with its accompanying suffering and death from AIDS, is a glorious and shattering, if sometimes also tragic, manifestation of what sex can do.⁵⁷² It shows why we worship it. HIV-infection and its aftermath confirm what was believed about sex all along: Relative to its monumental power, our little lives are very small.

The ideology of sexual freedom's dematerialization of the sex-based transmission of HIV as an injury is but one instantiation of its larger perspective on sexual violence and harm. But it may be understood as a—or the—master lens through which all claims of sexual injury—whether same-sexed or cross-sexed—are filtered, then judged. Once the sexual transmission of HIV, including what follows from it, is a non-event, an uncaused

572 Perhaps this sheds some new light on a certain passage from Gary Indiana's *Horse Crazy*, textually quoted at some length by David Charny in his still-breathtaking review of PHILIPSON & POSNER, *supra* note 23:

It wouldn't be strange to get it and then to decide as Perkins did that this one particular person gave it to you, one out of ten or fifty or a hundred, maybe because that person made you feel something special, had done wonderful things in bed or gotten you to trust him physically and mentally as no one else ever had. Mike for example had miraculous talents because his sexual demands were flagrant and overpowering, he was socially rather genteel but I remember in the bathroom at Nightbirds and later too he talked dirty and tough, Kneel down, bitch, suck that dick, he actually said things like, Yeah, you want that big dick, sure, you wanna get fucked with that big prick, and of course the pissing, which had introduced itself as a specially filthy surprise, but the way he insisted on it made it seem like an ordinary thing people really ought to do. Mike was an incredibly complete fuck, he exhausted your imagination and wiped out your memory of other fucks, when Perkins remembered making love perhaps he only thought of Mike and things Mike did to him. You would naturally connect your most vivid memory of pleasure to infection and death because the others weren't remotely worth getting sick from, just pale skimpy traces of sex crossed with thin trickles of "bodily fluids," if the two things had to be linked, better for a cherished memory of sex to connect with transmission of the microbe.

In any case, if you had sex now it was a matter of deciding, even if you took elaborate precautions, whether the degree of risk involved (and who could calculate that?) was "worth it," whether your need for that kind of experience with another person outweighed, in a sense, your desire for survival.

Charny, *supra* note 23, at 2061–62 (quoting GARY INDIANA, *HORSE CRAZY* 40–41 (1989)).

non-wrong, little else will amount to an injurious event. When sex that devastates, smashes, kills us, is sex at its best, what is there to say about other forms of sexual injury, including sexual harassment and rape?⁵⁷³ In this context, to complain that one has been sexually violated and to expect recognition of one's harms, political organization on one's behalf, and redress of one's grievances sounds delusional. Within the ideology of sexual freedom, individual complaints of sexual violation have a suspect aura of petty, resentful opinion—opinion with which others, including those who inflict the injuries being complained of, may or should “disagree.”⁵⁷⁴ The injuries are like what happens to a child who tumbles on a playground: more scared than hurt.⁵⁷⁵ Address that seriously, and, under the ideology of sexual freedom, suffering is created, manufactured, and inflicted not only on the ostensible sexual victim (though there may be that), but also on the so-called perpetrator. Redress of ostensible sexual injury—not sexual injury itself—is the true source of suffering. Sex-unto-death being the highest possible ecstasy, sexual injury is oxymoronic. The ideology of sexual freedom, with its supreme valuation of sex, is thus at war with projects on behalf of sexuality's real victims: those who sustain its violence, injury, and harm.

The war between these two perspectives—the ideology of sexual freedom and the politics against sexual abuse—is one that is waged upon multiple battlefields, the most prominent of which, lately at least, has been the law. This conflict has been visible to legal actors at least since the United States Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*,⁵⁷⁶ recognizing a cause of action for same-sex sexual harassment under federal sex discrimination law, if not before, though the stage for the skirmish around *Oncale* was set over a decade earlier. As the AIDS crisis among gay men achieved a certain peak in the mid-1980s, anti-sexual-abuse politics were achieving significant gains in law through the recognition of a cause of action for sexual harassment. The central cases recognizing this federal harm, including the United States Supreme Court's decision in *Meritor Savings Bank v. Vinson*,⁵⁷⁷ handed down within days of *Bowers v. Hardwick*,⁵⁷⁸

573 Following this, there would be real resistance to condemning rape as a fate that is as bad as, if not worse than, death. One recent argument in exactly these directions comes in Janet Halley, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 3 MELB. J. INT'L L. 78, 113 (2008) (“[W]e might bring some scepticism to feminist representations that carry forward the ‘worse than death’ figuration of rape.”).

574 See *infra* text accompanying note 594.

575 See *supra* note 106.

576 523 U.S. 75 (1998).

577 477 U.S. 57 (1986) (handed down on June 19, 1986).

578 478 U.S. 186 (1986) (handed down on June 30, 1986).

involved male-on-female sexual harassment. Although the creation of a cause of action for cross-sex sexual harassment was at odds with the ideology's generalized opposition to treating sex-based injuries as compensable wrongs, especially by law, its defenders mounted no offensive against *Meritor* when it appeared.⁵⁷⁹ Back in 1986, they were busy with more immediate concerns: *Hardwick* and HIV/AIDS. Crucially, moreover, *Meritor* did not facially involve same-sex, especially male-on-male, sexual harassment, and so did not tread on hallowed ground.

By the late 1990's when *Oncale* came before the Supreme Court, the ground had shifted in two important ways that, in turn, changed the tactical dynamics of the conflict between the ideology of sexual freedom and the politics against sexual abuse. The AIDS crisis had entered a new, less-immediately-deadly phase with the introduction of drug "cocktails."⁵⁸⁰ And sexual harassment rules, as *Oncale* soon attested, had started to point directly at same-sex—including male-on-male—sexual harassment. Holy terrain was now unmistakably coming under attack. Though *Oncale* involved a straight man asserting the right to claim sexual harassment to name what had been done to him sexually by other men as an injury the law should address,⁵⁸¹ a legal rule recognizing same-sex sexual injuries in the case could well pave the way—it was recognized—for gay men's sexual injuries at the hands of other men to be legally cognizable, too. If gay men could be seen to sexually injure one another in the workplace in ways they were legally accountable for, what could be next? What would this legal liability mean for gay sexual life?

Widely missed at the time *Oncale* was being decided, though readily apparent in hindsight, was the alternative the Supreme Court effectively faced in the case. Gay men, through their collective refusal to turn to the legal system's harm rules, had in effect made same-sex sexual transmission of HIV, along with its aftermath, into a legal non-harm.⁵⁸²

579 Just so, in 1988, Richard Mohr was prepared to describe at least some "sexual harassment codes" as "phony neutral rules," MOHR, *supra* note 22, at 143 n.13, ultimately noting their negative effects for sex and their "disparate impact against gays." *Id.* at 326–27 (describing sexual harassment rules as both anti-sex and anti-gay: "[S]exual harassment rules are now being touted even by conservative institutions. The reason is not hard to see. Such institutions are not interested in protecting women from coercion but in suppressing sexuality and discourse about sex and in providing for themselves a pretext for getting rid of people they consider troublemakers. . . . Shallow feminism, paired with legal formalism, is for gays a loaded gun left unattended.").

580 Indeed, some time before oral arguments at the Supreme Court in *Oncale*, Andrew Sullivan announced in the pages of the *New York Times Magazine* that the AIDS "plague," at least for those who could afford the new medications, was effectively at an end. Sullivan, *supra* note 15, at 52.

581 *Oncale*, 523 U.S. at 77.

582 N.B. This is not at this point a claim about the law-on-the-books. One can assume that the law-on-the-books could handle sex-based HIV-transmission among gay men as a legal harm. The claim here is that gay

Should same-sex harassment be treated this way formally as a matter of law? Or would that approach be rejected in favor of treating same-sex sexual harassment as the legal system had been treating cross-sex sexual harassment: as a legally cognizable and compensable sexual injury? When the *Oncale* Court assimilated same-sex harassment to its cross-sex counterpart—refusing to see same-sex sexual harassment as a legal non-event, as the Fifth Circuit’s decision in the case had⁵⁸³—the ideology of sexual freedom was delivered a body blow. Men can be sexually hurt and the law will not be blind to it. But it did not take long before views in important ways consistent with the ideology struck back, urging, if not for the reasons the Fifth Circuit itself gave, that its conclusion—same-sex sexual harassment should not be legally actionable—was basically correct.

The challenge to *Oncale* and, more fundamentally, to its underlying anti-sexual-abuse politics, came in the form of an essay written by Janet Halley, which noted the “deep tension” between the politics of sexual freedom, including Halley’s own “queer theory” version of it, and the politics and law designed to liberate sex from its injuries.⁵⁸⁴ They “seem[ed] to be on a collision course”⁵⁸⁵ with one another, she said. Briefly described, Halley’s argument against *Oncale* and its political and theoretical underpinnings is a carefully calibrated effort to take what she calls “queer theory’s” “skepticism” toward claims of same-sex sexual injury, which she believes emerged from the queer “understanding of the historical fate of same-sex love” and “of the complexities and ambivalences of eroticism,” and spread it across the sexual board.⁵⁸⁶ That skepticism, the essay asserts, “undermine[s] our reasons for believing women who assert that they are sexually injured by men. If same-sex sexual injury can be phantasmatic, based as much on desire as its opposite, why not also its cross-sex counterpart?”⁵⁸⁷ This skepticism leads to a seemingly moderate call for “a new

men, collectively, and consistent with the ideology of sexual freedom, have in many ways practically nullified the law-on-the-books, making what may by law, at least in theory, be a legal harm, be, as a matter of practical legal, hence social, fact, a legal non-harm. Cf. Zita Lazzarini, Sarah Bray & Scott Burris, *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 20 J.L. MED. & ETHICS 239, 250 (2002) (“Possibly even more than the average American, gay men are dubious about government regulation of sexual behavior. Mistrust of ‘the system’ may be widespread They simply may not believe that government rules about how to behave in matter of sex . . . are due any obedience.”).

583 *Oncale v. Sundowner Offshore Serv.*, 83 F.3d 118 (5th Cir. 1996) (relying on *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451–52 (5th Cir. 1994), for the conclusion that male-male, same-sex sexual harassment was not actionable under Title VII).

584 Halley, *supra* note 55, at 196.

585 *Id.*

586 *Id.* at 196–97.

587 *Id.* at 197.

understanding of the tradeoffs we make when we seek to punish and deter the sex- and sexuality-based injuries which—[she] readily admit[s]—men sometimes do inflict on women.”⁵⁸⁸

Clearly visible throughout this essay is the idea that powerfully shapes and drives the entire analysis: “[S]ame-sex sexual injury can be phantasmatic.”⁵⁸⁹ This might be a nicely nuanced recognition of the obvious if it were ever recognized that same-sex injury could be—and often is—real.⁵⁹⁰ But within this account, the injuries of unwanted and non-consensual same-sex sex are only ever “phantasmatic,”⁵⁹¹ as much desired as not. They are never recognized as concretely damaging or socially real injuries, social facts that must be addressed and ended, including by law. Claims of same-sex sexual injury, especially those leveled against gay men, are presumed not only unreal but “*in bad faith*.”⁵⁹² Though Halley maintains that claims of sexual injury are thus to be viewed “skeptical[ly],”⁵⁹³ closer to accurate, given what else she says, is that they are actively to be disbelieved. The essay does not so much promote “skepticism” toward all claims of sexual injury as it advances a view, theoretically developed in ways that often widely obscure it, that is consistent with the ideology of sexual freedom’s notion that sexual injury deserves impunity. Mildly, she observes, “[s]ome women disagree with other women who claim sexual injury.”⁵⁹⁴ More strongly, she maintains that some “might even say that we insult women by attributing to them such milquetoast psyches that they can be imagined incapable of fomenting powerful

588 *Id.* at 198.

589 *Id.* at 197.

590 Halley admits that men do “sometimes” inflict “sex- and sexuality-based injuries” on women, Halley, *supra* note 55, at 198, but there is no similar express affirmation for the injuries gay men inflict on other gay men.

591 Perhaps the only form of male-on-male sexual injury seen in Halley’s analysis as “real” is that which takes form as gay panic, paradigmatically including a homophobic attack. Why these attacks, chiefly perpetrated by those gripped by a desire to deny their own sexual desires against those who are or would be sexual, are real in ways that sexual injuries forced on those who do not want to be sexual by those who do, are not, is never explained. This problem in Halley’s work is engaged in Marc Spindelman, *Discriminating Pleasures*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, *supra* note 510, at 201. This is not to forget the ways in which sexuality’s denial, including desire’s denial, particularly by the State, can be seen as a form of sexuality-based injury, even male-male sexual harm.

592 Halley, *supra* note 55, at 195.

593 *Id.*

594 Halley, *supra* note 512, at 50 (describing queer theory as a project that “ends up affirming sex ‘dark side and all’”).

phantasmatic cathexes and desires,”⁵⁹⁵ and so can be injured by sex. The knock-out punch comes this way: “And so we have [a] queer . . . project[] of asking whether, when a woman claims that a male coworker or supervisor or teacher injures her by desiring her sexually, we should believe her, or think that her claim of injury is reasonable.”⁵⁹⁶ It may “readily [be] admitted” that men do “sometimes” “inflict” “sex- and sexuality-based injuries” on women.⁵⁹⁷ But we are never told how we are supposed to know when men injure women through sex, or when women have not simply imagined or invented their own violations. We are likewise never told when it is not an insult to believe women by taking their claims of sexual harm seriously. Even in those instances in which male-on-female sexual injury might fall within Halley’s stipulation that this does “sometimes”⁵⁹⁸ happen, we are never told how to tell when one of those times is at hand. It seems worth recalling here that, even the ideology of sexual freedom knows that sexual injuries exist “sometimes,” but that within it, they are evidence of sex’s greatness, not injuries that should be seen and understood as wrongs calling out for action in politics or under law. In this respect, closely aligned with the ideology of sexual freedom, Halley’s essay advocates giving all women what gay men presumably already have: a “full-face encounter with . . . the pleasure and the danger of sexuality,”⁵⁹⁹ or, as she would put it a few years later, writing in the name of “Ian Halley,” a gay man, a full-face encounter with “sex ‘dark side and all.’”⁶⁰⁰ Halley does not—and does not profess—to speak in the name of the ideology of sexual freedom as such. But this work does do its bidding to a noticeable extent. Schematically and programmatically, it takes what began as the ideology of sexual freedom’s lens on HIV-transmission and expands it across the sexual world. On principle, it should go all the way.⁶⁰¹ Or explain why it does not.

The conflict between the ideology of sexual freedom and the politics against sexual abuse, far from being settled in the context of sexual harassment law, has moved on. The queer project that Halley, among others, has been advancing has become even more aggressive since the attack on *Oncale*, openly stalking other legal successes designed to

595 Halley, *supra* note 55, at 197.

596 *Id.*

597 See *supra* note 588 and accompanying text.

598 Halley, *supra* note 55, at 198.

599 *Id.* at 195.

600 Halley, *supra* note 512, at 50.

601 It is useful in this sense—for queer theory, anyway—that it tends to be “highly liable to contradiction in all its affirmative projects.” *Id.* at 51. Moreover, “in general and overall, queer theoretic work seeks and values paradox, contradiction, catachresis, crisis.” *Id.*

eliminate sexual abuse. Legal rules prohibiting (and in certain ways, regulating) domestic violence,⁶⁰² tort rules (including legal immunity rules) compensating for sexual injury,⁶⁰³ criminal law rules designed to protect victims of sexual abuse,⁶⁰⁴ and anti-sexual violence laws passed and enforced in various foreign countries⁶⁰⁵ have all been assailed in the name of protecting and liberating this ideology's "sex." More recently, so have some notable successes for victims and survivors of sexual harm undertaken on the international law stage, including the recognition that rape can be an act of genocide.⁶⁰⁶ What could substantively and politically be driving queer opposition to this international legal recognition of the ways in which rape and other forms of sexual assault—chiefly, but not exclusively, by men of women⁶⁰⁷—have been a systematic feature of the conflicts men have waged against other

602 Janet Halley, *Taking a Break from Feminism*, 12 COLUM. J. GENDER & L. 604, 611–17 (2003) (discussing *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993)).

603 *Id.*

604 Janet Halley, *Subversive Legal Moments?*, 12 TEX. J. WOMEN & L. 224, 229–34 (2003) (discussing *State v. Wanrow*, 538 P.2d 849 (Wash. App. 1975), *aff'd*, 559 P.2d 548 (Wash. 1977)). Some of these attacks were prefigured in Halley, *supra* note 55 (discussing procedural and substantive rules written to help level the playing field between those claiming sexual injury and those defending against charges of it).

605 Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking. Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 340, 345–47 (2006) (noting migration of domestic U.S. law into Israeli law, and also talking about the “oft-professed aim” of “governance feminists” “to download their international law reforms into domestic legal regimes”); *see also* STYCHIN, *supra* note 44, at 126–39 (1995). *Cf.* Carl F. Strych, *Unmanly Diversions: The Construction of the Homosexual Body (Politic) in English Law*, 32 OSGOOD HALL L.J. 503 (1994).

606 Halley tracks the movement from domestic to international law—both of the anti-sexual-violence work, and the critique, in Halley et al., *supra* note 605, at 340–42 (noting some of the ways that anti-sexual violence work, starting with sexual harassment rules, has gone international). More recent work appears as Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1 (2008) [hereinafter Halley, *Rape at Rome*]; Halley, *supra* note 573; *see also* Caroline Russell O'Shea, *Janet Halley, Royall Professor of Law at Harvard, Lectures at Hamilton*, HAMILTON COLLEGE (Mar. 2, 2007), available at <http://www.hamilton.edu/news/story/janet-halley-royall-professor-of-law-at-harvard-lectures-at-hamilton>. For a brief description and online video of some of the efforts aimed in these directions, see Radcliffe Institute for Advanced Study, *Janet Halley: Rape and International Humanitarian Law*, HARVARD@HOME, http://athome.harvard.edu/programs/iwz/iwz_video/iwz3_3.html (last visited Apr. 9, 2013).

607 For a discussion of one well-known same-sex case, see Halley, *Rape at Rome*, *supra* note 606, at 86 (discussing “one incident described in the *Tadic* case [before the International Criminal Tribunal for the former Yugoslavia], [in which] a man was tortured when another prisoner was forced to bite off his testicle,” and suggesting that “this description of the assault at [the] Omarska [prison camp can be analyzed] as a literary event—that is, as embodying a range of choices about how to represent an event, how to pictorialize it”). *See also generally* Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 EUR. J. INT'L L. 253

men? Why must queers expunge recognition of the realities of sexual enslavement as a legal crime in order to be free themselves? Once again, these analyses are characteristically subtle, elaborate, calculating, masterful performances in tying intellectual knots. Their shared theme is a relation to a simple but powerful and potentially devastating faith: Sexual violence and the injuries sex produces—(virtually) no matter the form they take—should be welcomed, embraced, cherished, and proliferated, rather than regulated out of existence. Genocide and war presumably are made-in-heaven opportunities for the expression of sexual agency. Sex—not those it injures, devastates, enslaves, and kills—is to be freed. When rape that is doing the work of genocide is in effect being denied accountability, it is long past the time when the ideology of sexual freedom’s erotics of death can be inferred beneath these lines as well.

Thus, the ideology of sexual freedom clashes with the politics against sexual abuse over the legal projects to which they have helped give rise. Whether victims of sexual injury, same-sex and cross-sex, have legal tools available to them to redress what has happened to them is a matter of pressing concern on both sides. Although the ideology of sexual freedom has not yet succeeded in stripping victims of sexual harm of the legal rights that the politics against sexual abuse has managed to secure for them,⁶⁰⁸ it can hardly be counted as impotent. Far from it, the ideology of sexual freedom has had, and continues to have, a profound influence on how all legal rules on sexual injury operate inside the gay male community, perhaps for gay male victims of sexual injury most of all.⁶⁰⁹ As a formal matter, legal rules may prohibit various forms of same-sex sexual violence. They may likewise recognize various forms of same-sex sexual harm as actionable. But practically, the ideology of sexual freedom has in many respects been a “tougher and truer”⁶¹⁰ measure of what the law of sexual abuse for gay men is.

This being the case, it is no wonder that the formal legal rules have so consistently gone unused. Not only are there remarkably few suits involving claims of sex-based transmission of HIV as an injury gay men inflict upon one another, but also few suits involving allegations

(2007).

608 The qualification means to exclude, for instance, the elimination of sodomy laws, which have sometimes historically been used to benefit victims of sexual injury. The ideology of sexual freedom has played a role in the anti-sodomy-law campaign. *See infra* text accompanying notes 619–623.

609 Though not without exceptions. The cases of Jeffrey Dahmer, domestically, and Armin Meiwes, the German cannibal, overseas, *see supra* note 439 (with some details), come quickly to mind. So, too, does the case of Andrew Cunanan, the man who killed Gianni Versace.

610 *Poe v. Ullman*, 367 U.S. 497, 502 (1961) (Frankfurter, J., plurality opinion).

of gay-on-gay rape.⁶¹¹ This general pattern extends to cases of same-sex and gay sexual harassment, as well—even after *Oncale*.⁶¹²

And it is not only that the ideology of sexual freedom shapes gay men's willingness to press legal charges or instigate formal legal causes of action. More, it keeps many gay men who are sexually violated from speaking out about their sexual injuries at the hands of other gay men, often correctly anticipating the reactions if they do: nothing happened; if it did, it was no big deal; and if it was, you must have wanted it,⁶¹³ quit crying; be

611 And even fewer involving both. For one such case, in which the possibility of HIV-transmission seems to have had no formal legal significance, and which eventually resulted in the sex being completely exonerated as a matter of law, see Anthony Glassman, *Man Gets Ten Years for Kidnapping Akron Student*, GAY PEOPLE'S CHRON., Mar. 19, 2004, at 3 (reporting on conviction of Patrick C. Geiger for the abduction, kidnapping, and felony assault—but not the rape—of a University of Akron student, and observing that one juror explained the non-conviction for rape was that “the sex was consensual but became violent”); Eric Resnick, *Man Says Akron Police Move Too Slowly on Male Rape*, GAY PEOPLE'S CHRON. (Sept. 5, 2003), <http://www.gaypeopleschronicle.com/stories03/03sep5.htm> (detailing the documented physical violence that punctuated the alleged rape of a thirty-four-year old University of Akron student); see also Eric Resnick, *Police Arrest Suspect in Rape of Akron Student*, GAY PEOPLE'S CHRON., Oct. 10, 2003, at 3. Other reports on the case include Carl Chancellor, *Kidnapper Guilty in Assault of Man*, AKRON BEACON J., Mar. 13, 2004, at B1 (describing the victim in the case as having “escaped” “half-naked” “from Geiger’s apartment” and the assistance provided by “another tenant in the building, who called the police”); Ed Meyer, *HIV-Positive Rape Suspect in Custody*, AKRON BEACON J., Feb. 25, 2004, at A1; Ed Meyer, *Man Wrongly Released Back in Police Custody*, AKRON BEACON J., Feb. 24, 2004, available at 2004 WL 56254342; Phil Texler & Ed Meyer, *HIV Rape Suspect Set Free by Error*, AKRON BEACON J., Feb. 24, 2004, at A1; *Law and Order*, PLAIN DEALER (Cleve.), Mar. 13, 2004, at B3 (“The victim said there was no one else at the apartment and Geiger, who is HIV-positive, forced him to have sex, then beat and choked him. Geiger said the sex was consensual and the victim knew that Geiger carried the virus that causes AIDS. The jury acquitted Geiger of rape.”). For additional discussion, see Marc Spindelman, *Thinking Male Sexual Victimization Under Law* (Mar. 12, 2013) (unpublished manuscript) (on file with author).

612 Recognizing the challenges that standard legal database searches present, reported cases involving gay men suing other gay men for sexual harassment are, so far, most notable for their absence. *But see, e.g.*, *Lorenzen v. Vt. Rest.*, No. B219625, 2011 WL 1534548 (Cal. Ct. App. Apr. 25, 2011); *cf.* Bill Heatherman, *Gay Waiters Claim Gay Restaurant Owners Sexually Harassed Them*, CITY NEWS SERV., INC., available at http://www.finksteinberg.com/index.php?option=com_content&view=article&id=114:gay-waiters-claim-gay-restaurant-owners-sexually-harassed-them&catid=6:related-projects&Itemid=100078 (last visited Apr. 9, 2013). Some cases involving lesbian women have appeared. *See, e.g.*, *Russell v. Univ. of Tex.*, 234 F. App'x 195 (5th Cir. 2007); *Baugham v. Battered Women, Inc.*, 211 F. App'x 432 (6th Cir. 2006); *Johnson v. Cmty. Nursing Servs.*, 985 F. Supp. 1321 (D. Utah, 1997); *Muzzy v. Cahillane Motors, Inc.* 749 N.E.2d 691, 693–94 (Mass. 2001).

613 The first sequence comes from Robin West, who suggests it reflects how claims of victims of domestic sexual injury are often answered. West, *supra* note 330, at 411 (“Simply: it couldn’t have happened; if it did, she asked for it; and, if she didn’t ask for it, it’s just not a big deal anyway.”). *Cf.* Hadar Aviram & Annick Persinger, *Perceiving and Reporting Domestic Violence Incidents in Unconventional Settings: A Vignette Survey Study*, 23 HASTINGS WOMEN’S L.J. 159 (2012).

quiet; be a man; *worse* things have happened; was he cute?; was it hot?; did you come? In those rare instances when the ideology of sexual freedom does not manage to silence sexuality's victims, there is another tactic ready at hand: ignore the claims of injury when they are publicly ventured.⁶¹⁴ How many now recall that Golan Cipel, former-New Jersey Governor James McGreevey's alleged "lover," alleged that he was the straight victim of the

614 Gay men do not appear to be regularly reporting these crimes even to the few gay organizations that have sexual violence within their portfolios. The National Coalition of Anti-Violence Programs (NCAVP), the umbrella organization for a number of these groups, reported a sum total of 107 incidents of sexual assault and rape reported to its member organizations across the country in 2005. National Coalition of Anti-Violence Programs, *Anti-Lesbian, Gay, Bisexual and Transgender Violence in 2005*, 26 (release ed. 2006), [http://www.ncavp.org/common/document_files/Reports/2005%20National%20HV%20Report%20\(Release%20Draft\).pdf](http://www.ncavp.org/common/document_files/Reports/2005%20National%20HV%20Report%20(Release%20Draft).pdf) [hereinafter NCAVP 2005]. In 2004, the year after *Lawrence* was decided, that number was 112. National Coalition of Anti-Violence Programs, *Anti-Lesbian, Gay, Bisexual and Transgender Violence in 2004*, 26 fig.4 (release ed. 2005), http://www.ncavp.org/common/document_files/Reports/2004NationalHV%20Report.pdf [hereinafter NCAVP 2004]. In NCAVP's report published in 2012, the total number of incidents of sexual assault and rape reported in 2011 was 107. E-mail from Shelby Chestnut, Data Collection, Analysis, and Writing for New York City Anti-Violence Project (Dec. 21, 2012, 05:37 EST) (on file with author) [hereinafter E-mail from Shelby Chestnut]. A conservative estimate of the total number of incidents of sexual assault and rape reported between 2004–2011 is 784. See E-mail from Shelby Chestnut, *supra* (107 reports in 2011); *id.* (reporting that the total number of reported incidents of sexual assault and rape in 2010 was 89); *Hate Violence Against the Lesbian, Gay, Bisexual, Transgender, and Queer Communities in the United States in 2009*, 21 fig. (release ed. 2010), http://www.avp.org/storage/documents/Reports/2009_NCAVP_HV_Report.pdf (74 reports in 2009); National Coalition of Anti-Violence Programs, *Hate Violence Against Lesbian, Gay, Bisexual, and Transgender People in the United States in 2008*, 10 (release ed. 2009), http://www.ncavp.org/common/document_files/Reports/2008%20HV%20Report%20smaller%20file.pdf (138 reports in 2008); *id.* (94 reports in 2007); National Coalition of Anti-Violence Programs, *Anti-Lesbian, Gay, Bisexual and Transgender Violence in 2006*, 6 fig.4 (release ed. 2007), http://www.ncavp.org/common/document_files/Reports/2006NtnlHVReportReleaseEdition.pdf (63 reports in 2006); NCAVP 2005, *supra*, at 26 (107 reports in 2005); NCAVP 2004, *supra*, at 26 fig.4 (reporting that 112 reports were made in 2004; NCAVP 2005, *supra*, at 26, notes, by contrast, that 138 reports were made in 2004; for purposes of calculating the 784 reported cases between 2004–2011, the more conservative number 112 was used). For some relevant empirical data on the prevalence of sexual assault and rape, see Emily F. Rothman, Deineria Exner & Allyson L. Baughman, *The Prevalence of Sexual Assault Against People Who Identify as Gay, Lesbian, or Bisexual in the United States: A Systematic Review*, 12 TRAUMA VIOLENCE ABUSE 55, 57–59 (2011) (meta analysis concluding that “prevalence estimates of [lifetime sexual assault victimization] reported are approximately 15.6–85.0% for lesbian and bisexual (LB) women and 11.8–54.0% for gay and bisexual (GB) men” compared to an “approximately 11–17% of women and 2–3% of men in the United States experience sexual assault during their lifetimes” (citing Kathleen C. Basile; Jieru Chen; Michele C. Black; Linda E. Saltzman, *Prevalence and Characteristics of Sexual Violence Victimization*, 22 VIOLENCE & VICTIMS 437, 437 (2007), and PATRICIA TIADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, NO. NCJ 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iii–v (2000))). Currently, there are no reliable data available tracking actual prosecutions and convictions for same-sex rapes of gay men. See Kristine M. Chapleau et al., *Male Rape Myths: The Role of Gender, Violence, and Sexism*, 23 J. INTERPERSONAL VIOLENCE 600, 600–01 (2008).

Governor's sexual harassment.⁶¹⁵ "This was his spin," Cipel maintained, "trying to blame the closet so he did not have to take responsibility for his sexual harassment."⁶¹⁶ If—a big "if," because there are so many unknowns in the case—Cipel's allegations are true, he was right: It worked. The leadership of the gay community, which rallied to McGreevey's side when he publicly came out, often seemed not even to hear Cipel's claims that he had been sexually *injured*. Hardly anyone else seemed to, either.⁶¹⁷

This perspective on how the ideology of sexual freedom supplies the real law of gay sexual life reframes, among other things, some of the conventional ways formal legal rules are understood. To take but one well-known example, consider the U.S. Supreme Court's decision in *Lawrence v. Texas*,⁶¹⁸ widely heralded as a straightforward victory for gay rights. Situated against the backdrop of the ideology of sexual freedom, which is the backdrop against which gay men in important ways live the rule of the case, *Lawrence* does a good deal more than simply validate same-sex sexual intimacies as a constitutional matter. When the formal law *Lawrence* announced—that the Constitution protects a right to consensual same-sex intimacies—is read against the real law of the gay sexual world, its *de jure* right to sex with consent is seen to entail a *de facto* right to rape. Disturbingly,

615 See, e.g., Dyana Bagby, *Cipel Urges Gays Not to Embrace McGreevey as Hero*, S. VOICE, Dec. 15, 2006, <http://web.archive.org/web/20061229024010/http://www.sovo.com/2006/12-15/news/national/index.cfm> (accessed by searching for Southern Voice in the Internet Archive index). Cipel alleged that "McGreevey sexually assaulted him, including pushing him down on his bed as well as masturbating in front of him while his baby daughter was in the room with them." *Id.*

616 *Id.*

617 Not to say no one, including inside the gay male community, did. Michelangelo Signorile observes, for instance, that "McGreevey's aides have told the press that Cipel . . . was trying to extort millions of dollars from him, claiming he'd file a lawsuit against McGreevey unless McGreevey paid up. Cipel's now saying he's straight, that the relationship was not consensual and that he was sexually abused." MICHELANGELO SIGNORILE, HITTING HARD: MICHELANGELO SIGNORILE ON GEORGE W. BUSH, MARY CHENEY, GAY MARRIAGE, TOM CRUISE, THE CHRISTIAN RIGHT AND SEXUAL HYPOCRISY IN AMERICA 267 (2005). To which Signorile then quickly adds: "He seems like a two-bit hustler, but I can't help but also think of the many men I interviewed in 1990 for my first book . . . who worked for powerful closet cases in Washington. They were young, ambitious and closeted themselves, and found themselves working as aides for elected officials who exploited their own confusion and self-hatred." *Id.* And a little later on: "But I don't know about Cipel. He seems like too much of a smooth operator—living in a posh place on the Upper West Side, cavorting with and working for a known blackmailer . . . , and, from what I'm told, being very out and about in all the gayest places in Chelsea. As new information comes out every day, McGreevey and Cipel both look sleazy—it seems like they indeed make the perfect couple." *Id.*; see also, e.g., MICHAEL MUSTO, LA DOLCE MUSTO: WRITINGS BY THE WORLD'S MOST OUTRAGEOUS COLUMNIST 217–18 (2007) ("Adding fuel to the flaming-queen flames, the guy, Golan Cipel, then swore he was the victim of predatory advances and horny vindictiveness, and by the way he isn't gay, no matter how close he lives to Don't Tell Mama!").

618 539 U.S. 558 (2003).

Lawrence itself points in these directions when it observes, of itself, that it is not a case that “involve[s] persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.”⁶¹⁹ But Paul Smith, the lawyer for John Geddes Lawrence and Tyrone Garner, made similar gestures, and more unambiguously, during oral arguments in the case when responding to a question that Justice Antonin Scalia posed about the implications of the pro-gay argument being advanced in *Lawrence* for the law of rape. Smith’s position being that homosexuality is just like heterosexuality and so should be treated the same as it is under law, Justice Scalia asked:

[SCALIA]: What about rape laws? There are—there are rape laws that—that only apply to—to male/female rape. . . . You think that they’re unconstitutional?

MR. SMITH: I didn’t suggest that they’re unconstitutional.

. . .

[SCALIA]: I don’t understand that. Suppose the State has a rape law that—that, you know, that really requires the penetration of the female sex organ by—which is the classic common-law definition of rape, and it has no—no law of—about homosexual rape. You think that that law would be unconstitutional?

MR. SMITH: I think it would have to be justified by the State. They may well come in with evidence that this is not a problem that needs to be addressed or that the victims are more able to protect themselves[.] . . .⁶²⁰

Though Smith’s oral arguments and his briefs to the Court were filled with platitudes about, including multiple references to, sexual consent,⁶²¹ the right he was arguing for in

619 *Id.* at 578. *Lawrence* is analyzed extensively along these lines in Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615 (2004). Additional analysis of the case is in Marc Spindelman, *Tyrone Garner’s Lawrence v. Texas*, 111 MICH. L. REV. 1111 (2013).

620 Transcript of Oral Argument at 15–16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102). This exchange is also discussed in some detail in Spindelman, *supra* note 619, at 1643–48.

621 Smith repeatedly mentioned, if he did not closely analyze, sexual consent both during oral argument before the Supreme Court, Transcript of Oral Argument at 3–5, 7, 14, 22, 24, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), and in his written submissions to the Court in the case. Brief of Petitioners at 11, 13–14, 22 & n.16, 27–28, 45, 50, *Lawrence v. Texas*, 539 U.S. (2003) (No. 02-102) (discussing consent); *see also* Spindelman, *supra* note 619, at 1640 n.121 (collecting multiple references to the ideal of consent found in a number of the pro-gay rights briefs submitted to the Supreme Court in *Lawrence*). The notion of sexual

Lawrence was, through this exchange, exposed as a right to same-sex sex *simpliciter*, not a right to same-sex sexual intimacies limited by a right not to be sexually violated that was itself to be vindicated by the State. Raised, but uncommented on by Smith or anyone else, was the question Smith's answer raised: What *is* the right to same-sex sex if the State need not prohibit so-called "homosexual"—really: same-sex—rape? What does legal consent to same-sex sex *mean* if the State need not outlaw it when it is unconsented to? Does legal consent have any real content at all if same-sex rape can be perpetrated with legal impunity? When, legally, there is no "no," what does saying "yes" say? Positively, it frees sex from law. But what kind of sex, and whose, and at whose expense? Whether he realized it or not, or meant to or not, Smith effectively fed the Court the ideology of sexual freedom's line. And the Court took it in and reproduced it as its own idea: Because they were gay, *Lawrence* and *Garner* were "not persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."⁶²² No wonder that, according to the politics against sexual abuse, *Lawrence* is not simply, as it is often seen, a great victory, but at best a mixed bag. To the extent that it wrote the ideology of sexual freedom into our country's basic law, it is an outright danger that promised to unleash sexual violence and injury in the name of recognizing lesbians and gay men as heterosexuals' equals. Substantively, this is a queer vision of equality, heterosexual sexual equality as well.

In this light, *Lawrence* is a reminder that, notwithstanding *Oncale*, the legal system still has its own investments in not recognizing the realities of same-sex sexual violation. Gay male victims of sexual harm, like all male victims of it, are, evidently, even now, still capable of being seen by legal actors just as Smith represented them: as perpetrating their own injuries, perhaps even desiring or being actualized by their abuse. From the perspective of the politics against sexual injury, these investments must be illuminated and eliminated if the legal tools now supposed to be formally available to male victims of same-sex sexual injury are to be substantively available to them on fair terms. That work—of ensuring that the legal system is really open for the business victims and survivors of same-sex sexual injury might bring—has begun. But in order for it to succeed—for gay men safely to present their injuries to the legal system for adjudication without further threat to themselves—the hegemony of the ideology of sexual freedom and its rule as a law of gay sexuality must also finally be broken. Only when it is, will the promise *Oncale*

"coercion" in many of these briefs often meant coercion by the State in the form of sodomy laws, not coercion by other private actors, as in rape.

622 *Lawrence*, 539 U.S. at 578. A similar point can be made about *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003): a *de jure* right to marriage that includes same-sex marriage, yes, but also a *de facto* right to marital rape. For an argument along these lines, see Spindelman, *supra* note 112.

held—the elimination of sexual harm, including same-sex sexual harm, both in law and social life—ever be realized.

The hard work in this community-based effort of reforming gay sexuality's own law has to begin with those gay men who have been most directly harmed by same-sex sex. They must speak out more loudly than they ever have, coming out of the closet of abuse the ideology of sexual freedom has constructed and put them in.⁶²³ They are the ones who have the power—and the lived, practical knowledge—to expose what the ideology of sexual freedom has been doing in the gay male community to hurt and to silence them. In reclaiming what was done to them as harm that must be recognized and addressed, politically and legally, not the inevitable price of sex that must be excused, they may—for the first time—join a larger movement of women and men, straight and gay, who have the ideology of sexual freedom in their sights, and real sexual freedom—including freedom from sexual abuse—on their minds.

The choice ahead for gay men generally, including those who have so far luckily escaped same-sex sexual injury at the hands of other men, is stark. We can choose to delight in the pain and suffering and cruelty sex inflicts. We can embrace an ideology that entails a sexuality that allows us either to be the subjects or the objects of sexual violence, and that wants us to be willing to sacrifice our own or others' lives—maybe both—to affirm the “true” value of sex. We can make sex into something bigger than we are. We can take the closet of abuse that has been foisted on us and claim it as the whole sexual world, so that what we do to one another and what has been done to us in there is all there is for anyone. We can share the ideology of sexual freedom's sexual gospel, claiming it as something sublime everyone should experience whether they realize it or not.

Or we can aim for something truly new: a way of affirming life that does not simply track by inversion the moralistic platitudes that have kept us in the shadows. We can aim for a new kind of sexuality that lays waste to the sex that lays waste to us. For this choice to succeed, we must be very alive and very awake and very, very clear about what sex is as it has been given to us. It is, as the ideology of sexual freedom holds, a great power. How will we use it? What will we do with it? What will we make of, and with, it? How, if at all, will we choose to use the law to promote these ends? On our answers depends the future of who we are. And what sex can be in the life that we make.

623 Cf. CATARINE A. MACKINNON, *SEX EQUALITY* 1012 n.10 (2d ed. 2007) (“Heterosexuality has a closet. It keeps sexual abuse in there[.]”).

APPENDIX

This Appendix is a compilation of a variety of mainly domestic United States sources that involve actual or possible, if sometimes negligible or purely hypothetical, or even nonexistent, risk of exposure to or transmission of HIV, chiefly in cases involving male-male sex. The materials here do not purport to be exhaustive. Beyond substantiating a point made in the text, they are reproduced here to serve as an aid for research. Information about some very helpful resources collecting similar information, sometimes on an ongoing basis, is found *infra* on pages 250–52.

Male-male cases, some of which (may) include only gay men, include:

- *Commonwealth v. Garvin*, 50 A.3d 694, 695 (Pa. Super. Ct. 2012) (affirming conviction of David Garvin for, *inter alia*, felony prostitution by “person who . . . knew that he or she was . . . [HIV] positive,” after Garvin attempted to solicit undercover Office Joseph Ferrero (quoting 18 Pa. C.S.A. § 5902(a)(1))).
- *People v. Dorn*, No. 297784, 2011 WL 4862440, at *4 (Mich. Ct. App. Oct. 13, 2011) (dismissing Dorn’s ineffective assistance of counsel claim, which claimed it was an error for his attorney to fail to construct a defense around his HIV-status).
- *Rhoades v. State*, No. PCCV112123, at *3, 10 (Iowa Dist. Ct. Dec. 23, 2011) (denying Rhoades’ application for post-conviction relief brought on grounds of ineffective assistance of counsel; affirming original sentence of up to 25 years in state prison, which was suspended and Rhoades placed on probation for five years and a five-year no contact order) (on file with author).
 - Mary Stegmeir, *HIV Case Brings 25-Year Sentence*, WCFCOURIER.COM, May 3, 2009, http://wfcourier.com/news/local/article_21dda1df-94c9-5916-8212-90cd54c7966d.html (noting that Nick Clayton Rhoades received a 25-year sentence, “a five-year no-contact order with the victim,” must “register as a sex offender and undergo a sex offender treatment program, will have lifetime parole and was ordered to pay court costs and restitution” for having “fail[ed] to disclose his HIV status prior to having sex with a Cedar Falls man”).
 - *Nick Rhoades Appeals Criminal Charge*, KSDK.COM, Nov. 30, 2012, <http://www.ksdk.com/news/article/349910/9/HIV-positive-man-appeals-criminal-charge> (discussing case of Nick Rhoades as a case of a “young

man in Iowa [who] knew his HIV status, but didn't reveal he was HIV positive to his sexual partner," and that "[a]fter a one-time encounter, Nick Rhoades found himself charged with criminal transmission of HIV because of his silence"; "'I actually was not guilty of what I pleaded guilty to . . . ,' said Rhoades.'").

- *State v. Kinder*, No. 94722, 2011 WL 826284, at *1 (Ohio Ct. App. Mar. 10, 2011) (affirming Kinder's convictions arising "from Kinder having consensual sexual relations with three men without informing them that he was HIV positive").
- *State v. Gamble*, 945 N.E.2d 1135, 1139 (Ohio Ct. App. 2010) (affirming conviction for engaging in sexual conduct, here: engaging in sexual conduct with "knowledge that [defendant] had been diagnosed as HIV-positive").
- *Clayton v. Curtin*, No. 05-71943, 2010 WL 5439729, at *2 (E.D. Mich. Dec. 28, 2010) (habeas petition involving conviction for male-male "sexual penetration by an HIV-infected person with an uninformed partner").
 - *People v. Clayton*, No. 230328, 2002 WL 31058331 (Mich. Ct. App. Sept. 13, 2002) (underlying criminal case).
- *State v. Eversole*, 912 N.E.2d 643, 645 (Ohio Ct. App. 2009) (affirming Eversole violated terms of judicial release because he, as "a carrier of HIV/AIDS," engaged "in sexual conduct with [Hutchins, a man], . . . without prior approval of the court as to such said individual" (internal quotation marks omitted); facts also point to cross-sex relations in the background of the case).
 - *State v. Eversole*, 912 N.E.2d 643, 648–49 (Ohio Ct. App. 2009) (Donovan, J., dissenting) (in the context of judicial supervision standards, suggesting that sexual conduct between consenting adults might be protected even if it entails the risk of exposure to or transmission of HIV).
- *State v. Musser*, 721 N.W.2d 734, 741–45 (Iowa 2006) (upholding state statute requiring HIV-positive persons to disclose status to sexual partners as constitutionally valid under First Amendment notwithstanding that it compels speech and is not content neutral, because it "promotes a compelling state interest, and [is] narrowly tailored . . . to promote this compelling interest"; in particular, the court noted that "[t]he statute does not absolutely prohibit an infected person from having sexual relations with another" and "does not compel public disclosure of an infected person's HIV status.'").

- *Commonwealth v. Cordoba*, 902 A.2d 1280, 1289 (Pa. Super. Ct. 2006) (in a case involving what is described by the trial court as consensual male-male sex, evidently without actual transmission, court explains that sex without informing partner of HIV status is placing person “in danger of serious bodily injury because this conduct may have placed [the HIV-negative person] in danger of contracting HIV” and the trial court should have taken “judicial notice of this fact” and not have required “the Commonwealth to establish the likelihood of transmission of HIV”).
- *Mathonican v. State*, 194 S.W.3d 59, 61 (Tex. App. 2006) (in case involving multiple sexual assaults against a male victim by Mathonican, additional finding that “during the commission of the offenses, Mathonican used or exhibited a deadly weapon, that is, his HIV-positive seminal fluid,” new trial ordered, though “deadly weapon finding” could be sought again in new trial since “the evidence was legally sufficient to support that finding”).
- *United States v. Womack*, 29 M.J. 88, 88–89 (C.M.A. 1989) (affirming the conviction of male defendant for “disobeying a ‘safe sex’ order” issued after he was “diagnosed as being infected with” HIV against a challenge to the order’s constitutionality).
- *United States v. Morris*, 25 M.J. 579, 579 (A.C.M.R. 1987) (“find[ing] that the military judge erred in suppressing the [HIV] test results” since defendant Morris was “charged with offenses alleging, *inter alia*, that, while knowing that he was infected with HIV and that it (HIV) can be sexually transmitted, he engaged in sexual intercourse and sodomy with [gender unspecified] others”).
 - *Soldier Who Knew He Carried AIDS Virus Faces Assault Charges*, N.Y. TIMES, Apr. 4, 1987, at 31 (discussing charges against Pfc. Adrian G. Morris, Jr. for “aggravated assault for reportedly having sexual relations with two other soldiers when he knew he carried the AIDS virus”; according to an attorney for Morris, the Army’s “theory is the AIDS virus is the weapon used in the assault”; one soldier Morris was accused of having sexual relations with was a man, the other, a woman; “neither . . . had tested positive for the AIDS virus but . . . the female soldier was impregnated”; the article separately discusses the case of “a homeless man who pleaded guilty to manslaughter sa[ying] he had killed a male lover who said he had AIDS after they had a sexual encounter”).
- Scott Roberts, *Montana: Man Charged with Infecting Partner with HIV Also*

Accused of Killing 55 Dogs, PINKNEWS.CO.UK, Dec. 6, 2012, <http://www.pinknews.co.uk/2012/12/06/montana-man-charged-with-infecting-partner-with-hiv-also-accused-of-killing-55-dogs/> (discussing charges against Peter Northcutt for, *inter alia*, “fail[ing] to disclose his medical condition to a man with whom he had a three-year sexual relationship”; “[t]he man, referred to as T.V. in court records, later contracted HIV from the defendant, who has been HIV positive since 1997”; Northcutt denied the felony endangerment charge).

- Jaime E. Galvan, *Suspect to Date Rape Victim: I Just Gave You HIV*, KHOU.COM, Nov. 30, 2012, <http://www.khou.com/news/crime/Police-Man-infects-victim-with-HIV-during-sexual-assault-181559551.html> (discussing arrest of Jason B. Jackson “on a charge that he sexually assaulted a man he met in northeast Houston over the summer”; “[a]fter the assault, Jackson told the victim that he was HIV positive and that he had just infected him with the virus, the affidavit states”; “[i]t’s not clear if Jackson is actually HIV positive”).
- Gene Hartley, *HIV-Positive Man Is Accused of Not Telling Sex Partner About Risk*, KSPR, Nov. 8, 2012, http://articles.kspr.com/2012-11-08/hiv-positive-man_34999515 (Tyler Clark, “charged . . . with recklessly risking HIV infection of another person,” said to face “a prison sentence of five to [fifteen] years if he’s convicted”; “[t]he probable cause statement used as the basis of the charge says the other man told police that he and Clark had sexual relations last May 11[;] [n]early three weeks later, Clark sent that man a text message in which he apologized for not telling him that he is HIV-positive.”).
- *United States Soldiers File Sexual Abuse Lawsuit in Federal Court*, VALLEJO TIMES HERALD (Cal.), Sept. 29, 2012 (mentioning, *inter alia*, two cases, including one brought by Kole Welsh, in which “male soldiers allege that a superior officer invited them to his home, raped them and infected them with HIV”).
- *HIV-Infected Man Lied to Sex Partner*, WOODTV.COM, Aug. 17, 2012, http://www.woodtv.com/dpp/news/local/kent_county/hiv-infected-man-lied-to-sex-partner, cited in HIV LAW & POLICY CENTER & POSITIVE JUSTICE PROJECT, PROSECUTIONS AND ARRESTS FOR HIV EXPOSURE IN THE UNITED STATES, 2008-2012, available at <http://www.hivlawandpolicy.org/resources/download/456> (last visited Apr. 15, 2013) (noting charges against Jeremy Merithew for “sexual penetration with [an] uninformed [male] partner” when he was HIV-positive).
- Jeff Reinitz, *HIV Law Is Too Severe Given Risks, Critics Say*, WATERLOO-CEDAR FALLS COURIER (Iowa), Feb. 5, 2012, available at 2012 WLNR 2559220 (discussing

Rhoades v. Plendl and Donald Bogardus cases; Bogardus “is accused of having unprotected sex with another man three times in Black Hawk County between August and October 2009 without disclosing his HIV status”).

- Jeff Reinitz, *Waterloo Man Arrested for Transmission of HIV*, WATERLOO-CEDAR FALLS COURIER (Iowa), Dec. 16, 2009, available at 2009 WLNR 25332061 (discussing arrest of Donald Eugene Bogardus “for allegedly having unprotected sex without telling his [male] partner that he was infected with HIV”).
- M. Alex Johnson, *Michigan Man May Have Intentionally Infected Hundreds with HIV*, NBCNEWS.COM, Dec. 30, 2011, http://usnews.nbcnews.com/_news/2011/12/30/9833291-michigan-man-may-have-intentionally-infected-hundreds-with-hiv, cited in HIV LAW & POLICY CENTER & POSITIVE JUSTICE PROJECT, PROSECUTIONS AND ARRESTS FOR HIV EXPOSURE IN THE UNITED STATES, 2008-2012, available at <http://www.hivlawandpolicy.org/resources/download/456> (last visited Apr. 15, 2013) (reporting that David Dean Smith admitted to “intentionally ha[ving] unprotected sex with as many people as he could over the last three years”; “[a]ccording to documents on file with the Grand Rapids 61st District Court, Smith claimed to have had sex with ‘thousands’ of partners, intending to kill them by infecting them with HIV”; reporting that Smith had sex with men as well as women).
- Abby Simons, *Probation Set in HIV Case: Daniel James Rick May Avoid Prison Time for Exposing a Sexual Partner to Virus that Causes AIDS*, STAR TRIB. (Minneapolis, Minn.), Nov. 29, 2011, at 1B, available at 2011 WLNR 24717748 (discussing several separate cases against Daniel James Rick, including one that resulted in “a conviction for third-degree criminal sexual conduct for having sex with a 15-year-old [male] . . . when he was 28”; in another case, sex was condomless and “[a]ccording to prosecutors, Rick did not disclose that he had tested positive for the AIDS virus, but jurors believed Rick’s contention that he did share that information with the man[;] Rick was convicted of attempted first-degree assault because there was no proof the victim contracted the virus from Rick”; other cases involved charges that Rick “rap[ed] a drunken man after a night out in downtown Minneapolis, transferring the virus to him”; “publicity from that case led two men to come forward the next month who accused Rick of not disclosing he had the virus when he had sex with the partners he met over a website[;] [o]ne of the men contracted the virus, while the other did not.”).

- *State v. Rick*, 821 N.W.2d 610, 611, 615 (Minn. Ct. App. 2012) (in case involving Daniel James Rick, identified as HIV-positive, who had sex with D.B. who “[s]hortly thereafter . . . tested positive for HIV,” court relies on “a rule of strict construction” (or lenity) to reverse Rick’s conviction under “knowing-transfer[-of-communicable-disease]” statute, because the statute “is subject to more than one reasonable interpretation[,]” hence is “ambiguous”).
- Vince Tuss & Josephine Marcotty, *Assault Charged in HIV Case: Daniel James Rick Didn’t Tell Men He Had the Virus Before Having Sex with Them, Prosecutors Say*, STAR TRIB. (Minneapolis, MN), Mar. 25, 2010, at 1B, available at 2010 WLNR 6262509 (noting charges against Daniel James Rick for “assaulting two men by failing to tell them he was HIV-positive before having consensual sex with them”; “[o]ne of those men tested positive for the virus a month later, . . . prosecutors say”; noting other charge against Rick).
- Abby Simons & Vince Tuss, *HIV Criminal Case May Include Teen: Then 15-Year-Old’s HIV Status Is Not Known*, STAR TRIB., Mar. 27, 2010, available at 2010 WLNR 25943546 (noting that Daniel James Rick, in addition to other charges against him for “assaulting two men by not telling them he was HIV-positive before having consensual sex with them[,] also faces charges of having sex with a teenager in Big Lake”; “[i]t is unclear whether the 15-year-old contracted the virus”; Rick’s attorney “said Rick has an alibi for the night”).
- *Law & Order: Public Safety: Man Accused in HIV Case*, ST. LOUIS POST-DISPATCH (Mo.), Oct. 20, 2011, at A5, available at 2011 WLNR 21528574 (discussing charges against Bobby Smith for “knowingly infecting another person with HIV, a felony”; “[a]ccording to court documents, a man told police that in 2008–09 he engaged in a sexual relationship with Smith . . . who denied being HIV positive[;] [t]he man later learned that he had contracted HIV.”).
- Patrick Orr, *Boise Man Who Didn’t Tell Multiple Sex Partners He Had HIV Sent to Prison for up to 15 Years*, IDAHO STATESMAN (Boise), Mar. 25, 2011, available at 2011 WLNR 5868496 (discussing case against Michael V. Everhart “for purposefully having unprotected sex with as many as 20 other men without telling them he had HIV”; “Ada County Sheriff’s investigators say Everhart told them . . . he had unprotected sex with as many as 20 men and one woman he met online . . . but

didn't tell those people he had HIV"; "[t]here has been no court testimony which indicates if any of Everhart's victims contracted" HIV).

- Patrick Orr, *Sentencing for Boise Man Accused of Purposefully Spreading HIV Delayed So He Can Get Mental Health Evaluation*, IDAHO STATESMAN (Boise), Feb. 4, 2011, available at 2011 WLNR 2271715 (noting that Everhart pleaded guilty to a charge of "knowingly attempting to transfer bodily fluids infected with . . . [HIV]").
- *Area Man Charged with HIV Crimes*, IDAHO PRESS-TRIB., Sept. 15, 2010, http://www.idahopress.com/news/article_2271b802-c092-11df-b0a7-001cc4c002e0.html (discussing reports by Michael V. Everhart to "investigators [that] he has had sex with one woman and as many as 20 different men he met online since learning he was HIV-positive The suspect told detectives he did not warn any of his sexual partners that he has the virus and did not practice safe sex[.]").
- *Two Reno Men Plead Guilty to Not Telling Sex Partner They Had HIV*, RENO GAZETTE-J. (Reno, Nev.), Dec. 3, 2010, available at 2010 WLNR 24016462 (discussing guilty pleas of Michael L. McGarrigle and Michael A. Wiltse to "conspiracy to transmit HIV" to a "mutual sex partner," who was male; "[a]uthorities said the victim was unaware of the men's HIV status until he saw that their online profiles mentioned it").
- Meghann M. Cuniff, *HIV-Positive Man Sentenced for Assault*, SPOKESMAN-REV. (Spokane, Wash.), Oct. 12, 2010, at 7A, available at 2010 WLNR 20650881 (discussing guilty plea of Zuriel E. Roush to charge of "attempted first-degree assault with sexual motivation" after lying "to his sex partner about" his HIV-status; "[t]he victim, a married man with children, did not contract the virus from his encounter").
 - Jim Camden, *HIV-Assault Suspect Undergoes Evaluations*, SPOKESMAN-REV. (Spokane, Wash.), July 16, 2009, at 5A, available at 2009 WLNR 13673764 (noting Roush's case was delayed for mental evaluations; "a second charge of first-degree assault . . . came after family members of an ex-boyfriend recognized Roush from news reports of his arrest in May").
 - Meghann M. Cuniff, *HIV-Positive Man Faces New Charge*, SPOKESMAN-REV. (Spokane, Wash.), July 14, 2009, available at 2009 WLNR 13673721 (suggesting that Roush is gay, additional charge regarding

former boyfriend; Roush “told police he had sex with 120 people since he was diagnosed with HIV and said two-thirds of the encounters were unprotected, according to court documents”).

- Meghann M. Cuniff, *Man with HIV Facing Charge: Sex Partner Tells Police He Wasn't Warned of Risk*, SPOKESMAN-REV. (Spokane, Wash.), May 22, 2009, available at 2009 WLNR 10030711 (noting that “[i]n interviews with local news stations at the jail, Zuriel said he felt bad about potentially giving HIV to unsuspecting partners”; his father describes him as “a ‘timid and meek’ but good person who works at a Jack in the Box in Spokane Valley and has been HIV-positive for about a year”; also that one victim “told police he contracted HIV from Roush, but that has not been confirmed, [Lt. Dave] McGovern said.”).
- Q13 FOX NEWS ONLINE, *HIV-Positive Male Escort Accused of Knowingly Having Unprotected Sex with Clients He Met Online*, CHI. TRIB., June 4, 2010, <http://www.chicagotribune.com/kcpq-060310-male-escort-hiv,0,443722.story> (discussing charges against Oliberio Moreno for “knowingly exposing other men to HIV” while working “as a prostitute”; “Moreno told detectives the reasons he didn’t reveal his HIV status to clients [were] because he was embarrassed and wanted to make money”).
- *Oklahoma City Man Arrested on Suspicion of “Transmitting AIDS,”* NEWSOK.COM, Aug. 28, 2009, http://newsok.com/man-arrested-on-suspicion-of-transmitting-aids/article/3396100?custom_click=rss (reporting on the arrest of Michael Austin “on a complaint of knowingly engaging in conduct reasonably likely to transfer HIV,” based on a report “from a man . . . who said a man he had been with the night before had stolen his credit cards and Social Security card and possibly transferred data from his laptop computer”).
- Matthew Pleasant, *Houma Man Accused of Attempted HIV Exposure*, DAILYCOMET.COM, June 21, 2009, www.dailycomet.com/article/20090621/ARTICLES/906209915/1026?Title=Houma-man-accused-of-attempted-HIV-exposure (noting the failure of Todd Joseph Duplantis “to tell an undercover officer he was HIV positive during a prostitution bust”).
- Patti Dozier, *HIV-Positive Man Charged, Denied Bond*, THOMASVILLE TIMES-ENTERPRISE (Ga.), Feb. 18, 2009, available at 2009 WLNR 3163541 (discussing charges against Phillip Randall Hufstetler for consensual sex with a 20-year-old male who maintained that, although the sex was consensual, “he (Hufstetler) didn’t

tell him he was HIV[-positive]”).

- Seth Rosenfeld, *Clerics Knew of Sex Abuse, Suit Says*, S.F. CHRON., Sept. 22, 2008, available at 2008 WLNR 17987582 (discussing lawsuit stemming from Rev. Michael Rymer’s “alleged[] seduc[tion] [of a male parishioner] without revealing that he had been exposed to HIV”; Rymer “said he struggled with the conflict between being ‘a practicing homosexual and being part of a church that basically was condemning of who and what I was engaging in”; “[f]or his part, the man believed Rymer was trying to convince him he was gay”; the judge “approve[d] a confidential settlement of the man’s lawsuit at a closed hearing”).
- *Court Takes Action to Curb HIV Danger: N.C. Man Must Take Precautions or He Will Be Sent to Jail*, RALEIGH NEWS & OBSERVER (N.C.), Aug. 24, 2008, available at 2008 WLNR 15967537 (discussing Joshua Weaver’s failure to “heed the county’s orders to alert sexual partners that he has HIV or protect them by wearing a condom during sex” and his plea agreement ordering him “to practice safe sex and alert potential partners that he is infected”; describes “Weaver and his boyfriend slipp[ing] out a side door without comment”).
 - *Club DJ on House Arrest for Violating Probation*, WRAL.COM, Oct. 21, 2008, www.wral.com/news/news_brief/story/3781930/ (noting that Joshua Waldon Weaver was “sentenced to six months of house arrest for violating his probation” when he had condomless sex and failed to “notify sexual partners that he has HIV”; “[h]e must also wear an electronic bracelet and undergo a mental health assessment”).
- *Man Charged with Unprotected Sex*, BENDWEEKLY.COM, Feb. 13, 2008, www.bendweekly.com/Nationwide-News/13383.html (noting charges against Michael Bergman for “having unprotected sex with a woman,” though “[i]nvestigators say Bergman may have had sex with five people, both men and women, since learning he was HIV positive”).
- Josh Mitchell, *Academy Ex-Chaplain Sentenced to 2 Years: Catholic Priest Who Is HIV-Positive Guilty in Sex Scandal*, BALT. SUN, Dec. 7, 2007, at 1B, available at 2007 WLNR 24181757 (describing the conviction of Catholic Navy chaplain Lt. Cmdr. John Thomas Matthew Lee, who “pleaded guilty to 11 charges, including aggravated assault, fraternization, forcible sodomy, conduct unbecoming an officer and wrongful use of his government computer”; charges involved, among other things, included “sex with an Air Force officer without disclosing he was HIV-positive”; mentions Lee lived with a man, but no mention of other servicemen’s

orientation; noting that “Marine spokesman Maj. Tim Keefe said . . . that nobody is know to have contracted HIV from Lee”).

- Ernesto Londoño, Josh White, Michelle Boorstein & Meg Smith, *Navy Chaplain Pleads Guilty*, WASH. POST, Dec. 7, 2007, www.washingtonpost.com/wp-dyn/content/article/2007/12/06/AR2007120601069_pf.html (providing background on servicemen and Lee).
- F. Daniel Kent, *Handwritten HIV Transmission Lawsuit Names Monell's Owner King*, OUT & ABOUT, Feb. 1, 2005, <http://outandaboutnewspaper.com/article.php?id=1120> (noting that “Michael King and his restaurant chain Monell’s have both been named in a \$1 million lawsuit over negligent HIV transmission, filed . . . by Tommy Fowler,” “a former Monell’s employee,” who claimed he “was wrongfully terminated by King after Fowler refused to have unprotected sex with one of King’s friends”; the suit claimed “that King willingly and knowingly infected Fowler with HIV while the two engaged in unprotected sexual activity numerous times between March and December of 2003, after King assured Fowler that he was negative”; the suit “also states that King insisted that Fowler engage in unprotected sex with many of his friends on numerous occasions” and that “many of these liaisons happened in the second floor office of Monell’s main restaurant”).
- *Man Sentenced in AIDS Case*, RAPID CITY J. (S.D.), Mar. 26, 2003, www.rapidcityjournal.com/new/local/article_ac5a2a9c-ffbf-5966-b8b3-b9afa238d899.html (discussing sentence of William K. Jenigen “for intentionally exposing another person to the AIDS virus”; and noting that “Jenigen’s HIV-positive roommate, Jay L. Woods[,] . . . faces the same allegations from their arrest last spring”).
 - Scott Waltman, *South Dakota: New Plea Given in HIV Case*, THE BODY, Feb. 12, 2003, www.thebody.com/content/art29238.html (indicating that Jenigen and Woods were both “roommate[s] and partner[s]”).
- *Unsafe Sex Among HIV-Positive Men Increasing*, BRAINERD DISPATCH, Aug. 13, 2001, www.brainerddispatch.com/stories/081301/sne_0813010034.shtml (discussing claims by “at least three Iowa men” who “told police they believed Aaron Dahlberg when he told them he was HIV-negative before having unprotected sex with them,” though he was HIV-positive; quoting Dahlberg: “I would not wish HIV upon anyone” and “[w]hat I’m being accused of is so heinous that it makes me sick to my stomach”).

- Todd Dvorak, *Iowa: Man Accused of Passing HIV Pleads to Lesser Count*, Jan. 22, 2003, www.thebody.com/content/art28938.html (noting that attorneys for Dahlberg, “who was accused of knowingly transmitting HIV during unprotected sex with an Iowa City, Iowa, man, said . . . that Dahlberg has entered a plea to a lesser crime”: “one count of willful injury”; a lawyer for Dahlberg “said the resolution stemmed in part from doubts both sides had heading into the trial, and concerns for Dahlberg and the victim”; Johnson County Assistant Attorney “said she would not have approved of the plea agreement without the consent of the victim,” but “declined to say whether the victim has tested positive for HIV”).

Male-to-male cases that seem clearly to involve only gay men include:

- *In re Louie*, 213 B.R. 754 (Bankr. N.D. Cal. 1997) (in the context of bankruptcy nondischargeability claim, court dismisses claims by Mychael Robinson for emotional distress caused by fear of contracting AIDS, and for sexual assault associated with exposure to HIV during unprotected sex with Alan Louie, his ex-partner, while allowing claims for fraud and sexual battery “even though partner presently tested negative for HIV”).
- *Zaremba v. Cliburn*, 949 S.W.2d 822, 827 (Tex. App. 1997) (in case arising from the end of relationship between Thomas Zaremba and Harvey Cliburn, Jr., Zaremba alleged intentional infliction of “emotional distress ‘as a result of [Cliburn]’s exposing [him] to the HIV virus without any warning” (alterations in original); claim properly dismissed for failure to state a claim).
- *Allstate Ins. Co. v. Myers*, 951 F. Supp. 1014, 1016 (M.D. Fla. 1996) (resolving counterclaim by defendant McGinnis against the estate of his former partner Ahern D. Welsh “alleging that Welsh knew he had HIV yet failed to disclose that information to McGinnis,” who, “as a proximate result of his unprotected sexual relations” with Welsh “was infected with HIV”).
- *Plaza v. Estate of Wisser (In re Plaza)*, 626 N.Y.S.2d 446, 449 (N.Y. App. Div. 1995) (suit by Jose Manuel Plaza to recover against estate of Scott Allen Wisser, Plaza’s “now-deceased companion[,] for decedent’s allegedly negligent, deliberate and fraudulent conduct in causing . . . [HIV] to be transmitted to plaintiff”).
- *J.B. v. Bohonovsky*, 835 F. Supp. 796, 797 (D. N.J. 1993) (dismissing claims by plaintiff for “emotional distress caused by the fear of contracting AIDS and

knowledge of the duplicity of his longtime [male] lover”).

- *Martinez v. Brazen*, No. 91 Civ. 7769, 1992 WL 93245, at *1 (S.D.N.Y. Apr. 22, 1992) (granting motions by plaintiff and defendant in a case involving claims by man who “maintained a homosexual relationship with Defendant from the summer of 1984 through April 1991” for “compensatory and punitive damages based upon Plaintiff’s allegation that Defendant engaged in homosexual relations with Plaintiff while Defendant was aware he was infected with” HIV, and “that as a result of misrepresentations made by Defendant, Plaintiff contracted HIV”).
- *Baranowski v. Torre*, No. CV90-0236178, 1991 WL 240460, at *1 (Conn. Super. Ct. Nov. 7, 1991) (granting a prejudgment attachment of real estate in case involving claims by man who “had a homosexual relationship [with the defendant] from January 1987 to March 1990” for “false misrepresentation, negligent and intentional infliction of emotional distress” owing to the defendant’s failure to disclose that his former lover was HIV-positive and died from “cardiopulmonary arrest as the immediate cause, with AIDS pneumonia as a significant condition”).
- *Flynn v. Doe*, 553 N.Y.S.2d 288, 288 (N.Y. Sup. Ct. 1990) (application of HIV status disclosure statute in case brought by Flynn, claiming “fraud and misrepresentation in the concealment by the deceased defendant of his AIDS illness from plaintiff who engaged in unprotected sexual relations with the decedent”).
- *Hosford v. Estate of Campbell*, 708 F. Supp. 7, 8–9 (D.D.C. 1989) (dismissing claims by John Henry Hosford against Vincent A. Campbell’s estate for “negligence, assault and battery, fraud and intentional infliction of emotional distress” based on allegation that Campbell, with whom Hosford had “a sexual relationship,” “lied about his sexual history and exposed [Hosford] to the Acquired Immune Deficiency (‘AIDS’) virus”; dismissal based on D.C.’s “Dead Man Statute,” and “[t]he only evidence of the decedent’s alleged misrepresentations to plaintiff regarding his sexual history is plaintiff’s own self-serving declarations.”).
- Adam Linhardt, *Judge: Drop HIV charge: Gay Nondisclosure Not Defined As Crime*, KEY WEST CITIZEN (Fla.), Nov. 19, 2011, at 1A, available at 2011 WLNR 23995582 (discussing charges against Gary DeBaun for failure to disclose his HIV status to Charles Marlin before having sexual intercourse “and [also] of crafting lab test results by forging a doctor’s notation saying he suffered from lupus, not HIV”).

- Adam Linhardt, *Police: Man Hid HIV*, KEY WEST CITIZEN (Fla.), Nov. 2, 2011, at 1A, available at 2011 WLNR 27023626 (describing Marlin as DeBaun's "live-in boyfriend"; "DeBaun initially denied Marlin's claims, telling police he had been honest from the beginning and saying the apology was about something else, but later admitted he had not been truthful, court records say"; "[w]hether Marlin got the virus is not in the Aug. 2 public record, which states that he 'has since gotten tested for HIV and is still getting tested'").
- Meg Laughlin, *Secrets, Lies and AIDS Trading*, ST. PETERSBURG TIMES (Fla.), May 22, 2011 at 1A, available at 2011 WLNR 10258230 (opening with story of "19-year-old D.W. Swain [who] came down with a severe cough and high fever he couldn't shake. It didn't occur to him, he said, that he could be HIV positive because his sex life had been limited to a man who swore his love and that he was HIV negative. But when Swain heard from friends that his former boyfriend was 'spreading the ninja'—infecting people—he got tested. The test came back positive, and Swain discovered he already had full-blown AIDS.").
- Matt Comer, *Wake County Man Charged with HIV Violation*, QNOTES, Nov. 7, 2011, <http://goqnotes.com/13153/wake-county-man-charged-with-hiv-violation/> (discussing public health violation charges against John Conway Hart filed "after his partner informed police the man had failed to disclose his HIV status during their two-month-long relationship).
- Jamal Thalji, *Man Accused Of Concealing HIV From Beau*, ST. PETERSBURG TIMES (Tampa Bay), Aug. 6, 2011, at 4B, available at 2011 WLNR 15695404 (discussing case against Shan Ortiz, "charged . . . with having sexual intercourse without disclosing [to his former boyfriend] that he ha[d] HIV"; quoting Ortiz's ex-boyfriend, who "has been repeatedly tested" with negative results: "I knew what he did was wrong. I thought to myself: 'Do I let this go and do I let him do this to other people? Or do I stand up and be that person who could potentially save a life? Or multiple lives?'" (internal quotation marks omitted).
 - *Law & Order: Treasure Island Man Arrested in HIV Case*, TAMPA TRIB., at 11, available at 2011 WLNR 15734978 (bail for Ortiz set at \$100,000).
- Katie Thomas, *Equestrian Is Facing H.I.V.-Related Felony Charge*, N.Y. TIMES, Apr. 12, 2010, at A12, available at 2010 WLNR 7526925 (noting charges against Darren Chiacchia "under state law that makes it [a] felony for people with HIV to have sexual intercourse without informing partners" after a "former sexual partner

accused him of exposing him to [the] HIV virus”; and noting that Chiacchia pleaded not guilty, as well as certain other evidence, including former sexual partner’s HIV-negative status, in Chiacchia’s favor).

- MATTHEW WEAIT, *INTIMACY AND RESPONSIBILITY: THE CRIMINALISATION OF HIV TRANSMISSION* 32–33 (2007) (discussing Mark James, “the first gay man to be convicted for recklessly transmitting HIV to a partner,” whose sentence was “in line with that given in cases involving reckless heterosexual transmission, suggesting that the courts will not treat ‘gay cases’ any differently”; further discussing Matthew Collins, “the second gay man to be charged with reckless transmission, [who] was also the first person in the UK to be acquitted at trial”; “[a] crucial determinant of his acquittal, which was directed by the judge, was the evidence of an expert virologist,” who “indicated that on the basis of the evidence before her it was not possible to say [whether Collins was the source of the petitioner’s infection].”).
- *Man Sues Estate; He Claims Ex-Lover Transmitted AIDS*, ST. LOUIS POST-DISPATCH, Aug. 24, 1990, at 4B (discussing suit by Wayne McDaniel against the estate of Warren Duhme, “claim[ing] he was infected with the AIDS virus by Duhme” under theories of “breach of contract, negligence, and fraud”).
- Edward J. Boyer & Kenneth J. Garcia, *Jurors Award \$14.5 Million to Rock Hudson’s Lover*, L.A. TIMES, Feb. 16, 1989, at OC1 (case brought by Rock Hudson’s lover, Marc Christian, against Hudson’s estate; “personal injury lawyers said the Hudson case is unique and could set a precedent because Christian has continued to test negative for [HIV].”).
 - *Christian v. Sheft*, No. C 574153 (Cal. Super. Ct. Feb. 17, 1989) (granting “motion for new trial . . . on the ground that the compensatory damages award is excessive,” subject to plaintiff consenting to reduction to \$5,000,000).

Male-to-male cases involving young men and boys include:

- *Boyer v. Belleque*, Civil No. 06-35-PK, 2010 WL 2326585 (D. Or. June 8, 2010), *aff’d*, 659 F.3d 957 (9th Cir. 2011) (in habeas proceedings, relief not warranted, because evidence was sufficient to affirm Andre Lee Boyer’s conviction for attempted aggravated murder by exposing victims to risk of contracting HIV).
 - *Boyer v. Belleque*, 659 F.3d 957, 960 (9th Cir. 2011) (noting Boyer’s underlying conviction was for, among other things, “two counts of

attempted aggravated murder, based on the theory that, in the course of and in furtherance of the crimes of sexual abuse and sodomy, he attempted to cause the death of two individuals by performing anal sodomy on the said [individuals], knowing that he . . . was infected with [AIDS]" (internal quotations omitted) (alterations in original)).

- *Hucks v. State*, 348 S.W.3d 359, 361 (Tex. App. 2011) (affirming conviction for "sexual assault of a [fourteen-year-old] child"; rejecting defendant's argument that admitting evidence regarding appellant's being HIV positive "to show why [the victim] confided in his mother that he had sexual contact with [the defendant]" was reversible error).
- *Lopez v. State*, 288 S.W.3d 148, 154 (Tex. App. 2009) (reviewing "the intentional and knowing use or exhibition of a deadly weapon in the course of the assaults—namely, Lopez's [HIV-positive] bodily fluids, which in the manner of their use were capable of causing death and serious bodily injury"—as an aggravating factor in the course of assault of a sixteen-year-old boy (footnote omitted)).
- *State v. Smith*, No. M2007-00932-CCA-R10-CO, 2008 WL 544603, at *1 (Tenn. Crim. App. Feb. 21, 2008) (appeal in a case involving Tommy DeWayne Smith, who "was charged with the crimes of statutory rape, criminal exposure to HIV, and sexual exploitation of a minor," a seventeen-year-old boy).
- *State v. Stevens*, 719 N.W.2d 547, 548 (Iowa 2006) (appeal of conviction of Jimmy Dean Stevens for "criminal transmission of HIV" involving sex between the defendant and a fifteen-year-old boy; by time of trial, victim "had been tested twice for the HIV," but "[b]oth results were negative").
- *People v. Dempsey*, 610 N.E.2d 208, 209–10 (Ill. App. Ct. 1993) (affirming the convictions of Randall Lee Dempsey for "aggravated criminal sexual assault and criminal transmission of HIV" in a case involving sex Dempsey had with a minor boy, nine years old at the time of trial).
 - *Relative with AIDS Forced Him to Have Sex, Boy Testifies*, PALM BEACH POST (Florida), Oct. 13, 1990, at 14A (discussing charges against Dempsey for "criminal transmission of the HIV virus and aggravated criminal sexual assault" involving an "8-year-old [male] relative").
- *United States v. Johnson*, 27 M.J. 798, 801–02 (1988) (in a case involving a defendant who "conceded that he was a homosexual," court discusses whether

knowing exposure of seventeen-year-old male to HIV, which the court dubs “assault by AIDS virus,” constitutes “aggravated assault with a means likely to produce death or grievous bodily harm” within the meaning of the offense under Uniform Code of Military Justice).

- *Cooper v. State*, 539 So.2d 508, 511 (Fla. Dist. Ct. App. 1989) (sentencing departure warranted on the grounds that, “[b]ecause of his life-style, Cooper knew or should have known that he had been exposed to the AIDS virus and that by sexual battery upon his victim there was a strong likelihood that the victim would be exposed to AIDS”).
- Kyle Feldscher, *Man Charged with Sexually Assaulting 4th Teen; Lawyer Says He’s “Target of Accusations,”* ANNARBOR.COM, Dec. 7, 2012, <http://www.annarbor.com/news/ypsilanti/leonardo-christian-charged-with-sexually-assaulting-fourth-teenage-boy/> (discussing charges against Leonardo Devinci Christian, “who is HIV positive,” for sexually assaulting a teenage boy, including “sexual penetration by a person with AIDS/HIV on an uninformed partner”; prior charges involve allegations of sexual assault against three other teenage boys).
 - *HIV Positive Man Charged in Sex Assault of Teen Boy*, CBS DETROIT, Aug. 31, 2012, <http://detroit.cbslocal.com/2012/08/31/hiv-positive-man-charged-in-sex-assault-of-teen-boy/> (discussing case against Christian; “police interviews with the [fourteen-year-old boy Christian was charged with sexually assaulting, someone he “met through an annual Christmas dinner he sponsored”] revealed numerous assaults at Christian’s home”; “[p]olice don’t know whether the boy is infected”).
- *Man Sentenced for Attack on Boy in Portland Restaurant*, LEWISTON MORNING TRIB. (Idaho), Oct. 11, 2012 (describing Adam Lee Brown’s guilty plea to “kidnapping, attempted aggravated murder, assault, sexual abuse, strangulation and sodomy” in a case involving a ten-year-old boy; sentenced to 33 years in prison; Brown’s HIV-positive status is mentioned, though unclear from report how it affected the outcome of the case; “[i]n 1993, Brown was sentenced to 16 years in prison after being accused of trying to infect as many as nine children in the logging town of Roseburg with HIV[;] [n]o children are known to have been infected”).
 - *Sex Offender Who Tried to Infect Kids with HIV Accused in Attack on Oregon Boy*, FOXNEWS.COM, July 3, 2012, <http://www.foxnews.com/us/2012/07/03/sex-offender-accused-attacking-boy-in-portland/> (additional background on Brown).

- David Harris, *HIV-Positive Flint Man Used Websites To Find Sex Partners, Never Told Them About Condition, Authorities Allege*, MLIVE.COM, Sept. 11, 2012, http://www.mlive.com/news/flint/index.ssf/2012/09/hiv_positive_man_used_websites.html (discussing case against Johnnie D. Peters, “charged with two counts of sexual penetration with uninformed partner”; “both of the men were in their teens, but over the age of consent”; “Genesee County Sheriff Robert Pickell said . . . that . . . Peters used three aliases on Facebook and would troll homosexual websites to find sexual partners. Peters knew he was infected but never told partners about it, they charge. Peters was informed after a prison test in 1995 that he was infected with HIV.”; “‘We learned from the investigation that he didn’t want to be denied sex. He didn’t want to be looked at differently.’ Pickell said investigators believe he could have had unprotected sex with as many as 50 individuals.”).
- *Man Charged with HIV Transmission*, UNITED PRESS INT’L, Sept. 10, 2012, http://www.upi.com/Top_News/US/2012/09/10/Man-charged-with-HIV-transmission/UPI-44111347310146/ (discussing charges against Steve Douglas Podles “accused of having sex with a 13-year-old boy, . . . also . . . charged with knowingly transmitting the HIV virus”; noting that “[p]ublic health advocates call the charge [of transmitting the HIV virus] arcane and ineffective, discouraging HIV testing and perpetuating a stigma against people with the disease”).
 - Jessica Anderson, *Edgemere Man Faces Rarely Used HIV Transmission Charges*, BALT. SUN, Sept. 9, 2012, <http://www.baltimoresun.com/news/maryland/crime/bs-md-co-hiv-criminal-transmission-20120909,0,7534341.story?page=1>, cited in HIV LAW & POLICY CENTER & POSITIVE JUSTICE PROJECT, PROSECUTIONS AND ARRESTS FOR HIV EXPOSURE IN THE UNITED STATES, 2008-2012, available at <http://www.hivlawandpolicy.org/resources/download/456> (last visited Apr. 15, 2013) (discussing case of Steven Douglas Podles).
- Carli Teproff & Steve Rothaus, *Man, 30, Charged with Attempted Murder After Boy, 15, Contracts HIV After Sex*, MIAMI HERALD, Sept. 7, 2012, <http://www.miamiherald.com/2012/09/07/2989939/man-30-charged-with-attempted.html> (discussing case against Keith “Keyoko” Sumlin, “charged with attempted second-degree murder and criminal transmission of the AIDS virus, along with five other charges involving sex with a 15-year-old boy”).
- Christi Lowe, *Bragg Soldier Charged with Infecting Teen with HIV*, WRAL.COM, July 17, 2012, <http://www.wral.com/news/local/story/1599161/> (discussing

charges against Pfc. Johnny Lamar Dalton, “who is married and has children,” for “knowingly infecting a [seventeen-year-old] . . . boy with . . . HIV”).

- *GI Accused of Spreading HIV*, CHICAGO TRIB., July 18, 2007, available at 2007 WLNR 13751463 (noting that Dalton was charged with “assault with a deadly weapon, accusing him of having unprotected sex with a partner he didn’t tell about the [HIV] infection”).
- Bryan Mims, *Soldier Pleads Guilty to Passing HIV Infection*, WRAL.COM, Nov. 1, 2007, www.wral.com/news/local/story/1992178 (confirming that the then-seventeen-year-old boy “was HIV-positive”).
- *KC Man Charged with Molestation Has HIV*, ASSOCIATED PRESS, Feb. 4, 2012, <http://www.connectmidmissouri.com/news/story.aspx?id=715816> (discussing charges against Daniel M. Roberson for “sodomy and attempted sodomy involving two boys”; separately, Roberson was indicted “on allegations that he molested a third boy and recklessly exposed one of the first two boys to” HIV).
- May-Lin Biggs, *TX Man Charged with Exposing Runaway Teen to HIV*, ABC24, Dec. 20, 2011, <http://www.abc24.com/news/local/story/TX-Man-Charged-with-Exposing-Runaway-Teen-to-HIV/1jVr215E20C0GzqDEG7BFQ.csp>, cited in HIV LAW & POLICY CENTER & POSITIVE JUSTICE PROJECT, PROSECUTIONS AND ARRESTS FOR HIV EXPOSURE IN THE UNITED STATES, 2008-2012, available at <http://www.hivlawandpolicy.org/resources/download/456> (last visited Apr. 15, 2013) (describing charges against Steven Geer for, *inter alia*, “felony exposure to HIV” involving a sixteen-year-old boy).
- Todd Ruger, *Vague Terms Hamper HIV Law*, SARASOTA HERALD TRIB., July 16, 2011, at A1, available at 2011 WLNR 14261286 (noting the cross-sex application of Florida HIV-transmission law, “[s]o, after Sarasota County authorities arrested [Jerome Walker,] an HIV-positive man . . . on charges he had anal and oral sex with a 14-year-old boy, the sexual battery charge may stick, but the HIV charge [that the boy contracted HIV as a result of sex with Walker] will not.”)
- Kelli Wynn & Steve Bennish, *Boy, 15, Infected by Man with HIV: It’s Latest in Trend of Recent Cases Involving People with the Virus Arrested on Sex Charges*, DAYTON DAILY NEWS, June 16, 2011, at B1, available at 2011 WLNR 12073339 (noting that “[p]olice believe a 15-year-old boy contracted HIV from a man who knew he had the virus,” Jerome Walker, who “faces two counts of felonious assault, according to the police”).

- Brian Stanley, *Man Convicted on AIDS Case Arrested on Sex Charge*, JOLIET HERALD NEWS, Apr. 20, 2011, <http://heraldnews.suntimes.com/news/4941274-418/man-convicted-on-aids-case-arrested-on-sex-charge.html> (noting that Joseph A. Stevens “pleaded guilty to transmitting HIV in October 2009” in a case involving a then sixteen-year-old boy; Stevens ““said he did not tell the juvenile about his condition””).
- Edecio Martinez, *Band Teacher with HIV Allegedly Had Sex with 15-Year-Old Student*, CBSNEWS, Apr. 14, 2011, http://www.cbsnews.com/8301-504083_162-20053944-504083.html, cited in HIV LAW & POLICY CENTER & POSITIVE JUSTICE PROJECT, PROSECUTIONS AND ARRESTS FOR HIV EXPOSURE IN THE UNITED STATES, 2008-2012, available at <http://www.hivlawandpolicy.org/resources/download/456> (last visited Apr. 15, 2013) (reporting arrest of Travis McCauley on charges of “contributing to the delinquency of a minor, aggravated child molestation and reckless conduct by an HIV-infected person”).
- Rene Stutzman, *No-Contest Plea Deal Sends Man to Prison for 10 Years*, ORLANDO SENTINEL, Apr. 9, 2011, at B2, available at 2011 WLNR 6931077 (detailing charges against Joseph Woller for sex with a thirteen-year-old boy, including “being HIV-positive but failing to inform a partner”).
 - Rene Stutzman, *\$150K Bail for Suspect Charged with Using Web To Seduce Boy*, ORLANDO SENTINEL, Mar. 15, 2011, at B3, available at 2011 WLNR 5099226 (noting that “[i]t’s not clear whether the boy was infected”; “Woller used a condom, according to his arrest report and Casselberry Sgt. William Nas”; bail set at \$150,000).
- *Police: Man with HIV Molests 8-Year-Old Boy*, THE INDYCHANNEL, Mar. 12, 2011, <http://www.theindychannel.com/news/police-man-with-hiv-molests-8-year-old-boy>, cited in HIV LAW & POLICY CENTER & POSITIVE JUSTICE PROJECT, PROSECUTIONS AND ARRESTS FOR HIV EXPOSURE IN THE UNITED STATES, 2008-2012, available at <http://www.hivlawandpolicy.org/resources/download/456> (last visited Apr. 15, 2013) (noting multiple charges against Carl Delong for child molestation “and an additional charge [against him for] . . . fail[ing] to warn the [eight-year-old] boy he was HIV positive”).
- *Man Faces Sex Charges*, JACKSON SUN (Jackson, TN), Mar. 3, 2011, at B1, available at 2011 WLNR 4143493 (discussing charges against Christopher Griffin who “faces three counts of aggravated statutory rape and one count of criminal exposure to HIV after he was accused of meeting a 14-year-old boy for sex”; notes

“actual transmission of HIV does not have to occur for a person to commit the offense of criminal exposure of another to HIV, according to state law”).

- *Boy Exposed to HIV in Three Sex Attacks*, BUFF. NEWS, July 24, 2010, at D3, available at 2010 WLNR 14782897 (discussing charges against Maurice Johnson “for allegedly raping a teenager on three occasions, exposing the boy to HIV”; “[h]e engaged in oral and anal sex without telling the boy he was HIV positive, according to the reports”; boy’s age not disclosed).
- Carl MacGowan, *Admits to Unsafe Sex*, NEWSDAY, June 8, 2010, at A20, available at 2010 WLNR 11635009 (discussing guilty plea of Robert Musmacker “to a 25-count indictment, including charges of first-degree reckless endangerment, third-degree criminal sexual act and endangering the welfare of a child” relating to “unprotected sex with nine young men and boys, some as young as 16”; “[h]e said he did not tell his victims that he had known since October 2005 that he was HIV positive, and he said he did not use condoms or ask his victims to use condoms”; Assistant District Attorney Laurie Moroff “said in court none of the victims had contracted AIDS”).
 - Kaitlyn Piccoli, *HIV-Positive Sex Offender Gets 14 Years for Sex with Boys*, LONG ISLAND PRESS, July 21, 2010, www.longislandpress.com/2010/07/21/oceanside-sex-offender-with-hiv-sentenced-to-14-years/ (noting sentence for Musmacker: fourteen years prison sentence and fifteen years of post-release supervision for having “unprotected sex with nine boys and men aged 16 to 20-years-old”).
- *Man Indicted for Not Telling Partner of HIV*, CINCINNATI ENQUIRER, Apr. 23, 2010, available at 2010 WLNR 8434848 (reporting that Maurice Golsby was “indicted . . . for not telling a [seventeen-year-old] teen he had sex with at the Downtown library that he was HIV positive”).
- John Cuoco, *Charges Filed After HIV Used As Deadly Weapon*, NEWS CHANNEL 25, Nov. 3, 2009, available at <http://www.kxxv.com/Global/story.asp?S=11436836>, cited in HIV LAW & POLICY CENTER & POSITIVE JUSTICE PROJECT, PROSECUTIONS AND ARRESTS FOR HIV EXPOSURE IN THE UNITED STATES, 2008-2012, available at <http://www.hivlawandpolicy.org/resources/download/456> (last visited Apr. 15, 2013) (reporting charges against Christopher Everett for “aggravated sexual assault with deadly weapon” after “unprotected sex with a 16-year-old boy”).

- *Lakeland Man Accused of Sex with Church Teen*, TAMPA TRIB., Aug. 12, 2009, at 7, available at 2009 WLNR 16148664 (noting Jere Michael Temple charged with sexual battery of “a teen he mentored at . . . church”; Temple “faces six counts of sexual battery . . . [and] [h]e also is charged with engaging in sexual intercourse without disclosing infection of HIV”; bail set at \$1.25 million).
- Jon Ruhlen, *Acquittal for Man in HIV Case*, HUTCHINSON NEWS (Hutchinson, Kansas), Feb. 11, 2009, www.hutchnews.com/localregional/acquittal (reporting that Harlin E. Bailey, Jr. was “found innocent . . . of knowingly trying to infect an 18-year-old with HIV”; the teen was “learning-disabled”; mention of Bailey’s parole in a case involving a conviction “for criminal sodomy of a child older than 14” though “[t]he victim in that case was an 11-year-old boy”; “the charge was amended as part of a plea bargain”).
- Terry Vau Dell, *HIV-Positive Man Given More than 20 Years in Molestation Conviction*, CHICOER.COM, Mar. 27, 2008, http://www.chicoer.com/news/ci_8712340 (reporting “judge . . . sentenc[ing] . . . [Edward Hosmun] diagnosed as HIV-positive to more than 20 years in prison,” for “charges of engaging in sex with an ‘incompetent’ minor, two counts of committing a lewd act with a child and a separate felony charge of inducing the two boys to engage in a lewd act with each other”; one boy was “a 17-year-old [and] developmentally disabled” who “so far . . . has not contracted [HIV],” and another boy, thirteen; “[a]s part of a plea bargain earlier this year, a special enhancement was dismissed, alleging that Hosmun was aware he carried the AIDS’ virus when he committed the molestations”).
- Jennifer Emily, *131 Likely Exposed to HIV: Man Who Taped Sex with Boys Knew He Had Virus, Prosecutors Say*, DALLAS MORNING NEWS, May 4, 2007, at 1A, available at 2007 WLNR 8494626 (noting that “Dallas prosecutors say a man [Willie Atkins] convicted of attempting to entice a 15-year-old boy for sex knowingly exposed at least 131 young men to HIV over the years as he recorded them with a camera hidden in a world map on the wall of his bedroom”).
 - Jennifer Emily, *Prosecutors: Man Knowingly Exposed 131 to HIV*, DALLAS MORNING NEWS, May 4, 2007, available at 2007 WLNR 8441271 (discussing details of the videotapes Atkins kept).
- Mark Vane, *Pederast with AIDS Virus Sentenced to 98-295 Years*, WASHINGTON TIMES, Nov. 15, 1990, at B3 (discussing the conviction of Michael Feaster, “who earlier had charges of assault with a dangerous weapon—the virus which causes acquired immune deficiency syndrome—dismissed,” for “molesting [six] young

boys,” ages ranging from nine to fifteen; “[a]ccording to the indictment, Feaster allegedly sodomized a 13-year-old boy three times in November and December 1988 and February 1989 after he tested positive for the AIDS virus”).

- *Police Investigate Man Charged with Sodomy*, ST. LOUIS POST-DISPATCH, Aug. 14, 1990, at 10A (discussing the charges against “convicted sex offender” Ronald Troupe for “abducting and sodomizing a 12-year-old boy . . . [and who] is under investigation for sexually molesting three other children, . . . a girl, 3, and two boys, 4 and 6”; “[a]uthorities said . . . that they were unsure whether Troupe had AIDS but that they were taking no chances and that his blood was being tested”; earlier conviction was for “sodomizing a boy, 12”).
- *Crime Column: Police/Courts*, ST. LOUIS POST-DISPATCH, Aug. 17, 1990 (reporting that “[a] blood test for AIDS proved negative but, because the virus could be dormant at the time of testing, authorities are not positive that Troupe is not infected. Future blood tests will be needed to monitor the situation.”).

Other resources (not otherwise in specified categories), including foreign analogues, include:

Cases:

- *People v. Henry*, No. B211154, 2009 WL 3467498, at *1–2 (Cal. Ct. App. Oct. 29, 2009) (prostitution conviction for Kenneth Carl Henry, who was HIV-positive).
- *United States v. Blas*, 360 F.3d 1268, 1273–74 (11th Cir. 2004) (holding that upward departure under the sentencing guidelines is justified when defendant knowingly subjects a minor to HIV through sexual contact).
 - *United States v. Burnett*, 545 F. Supp. 2d 1207 (N.D. Ala. 2008) (additional evidence that federal courts are approving upward departure of sentencing guidelines because of HIV status) (male-male, no sex, hence no transmission).
- *Davis v. State*, 396 S.E.2d 301, 301 (Ga. Ct. App. 1990) (affirming conviction for, *inter alia*, “reckless conduct by an HIV infected person, attempted aggravated sodomy and attempted reckless conduct by an HIV infected person”; admitted evidence (not specified) “normally associated with homosexual activity”).

- *State v. Thomas*, 983 P.2d 245, 246 (Idaho Ct. App. 1999) (affirming defendant's conviction for "transferring body fluid which may contain . . . HIV" to C.G. "a preoperative transsexual," who "had assumed a female identity for most of his adult life and dressed as a woman at all times, including the evening that he met Thomas").

Female-to-female:

- *L.A.P. v. State*, 62 So. 3d 693, 693 (Fla. Dist. Ct. App. 2011) (dismissing conviction against L.A.P. for having "sexual intercourse with another person without informing the other person of her status as HIV positive" when she had knowledge of her HIV status, on the grounds that sexual intercourse does not encompass female-female "oral sex and digital penetration of the vagina").

News articles discussing HIV transmission:

- Meg Laughlin, *Secrets, Lies and AIDS Trading*, ST. PETERSBURG TIMES (Tampa Bay), May 22, 2011, at 1A, available at 2011 WLNR 10258230 (discussing case of D.W. Swain who contracted HIV from "a man who swore his love and that he was HIV negative" in the context of a larger discussion of bug-chasing and gift-giving; and describing the man from whom Swain contracted HIV as a "notorious gift giver").
- Michael Stone, *Atlanta Pastor Arrested After Infecting Parishioners with HIV*, EXAMINER.COM, Aug. 30, 2012, <http://www.examiner.com/article/atlanta-pastor-arrested-after-infecting-parishioners-with-hiv> (discussing allegations against pastor Craig Lamar Davis, that he had "multiple affairs with men and women both in and outside of his congregation and not telling them that he has HIV"; "[a]ccording to one report, Davis denies that he had sexual relations with men, but welcomes the publicity associated with the allegations, which Davis believes is a good thing and a platform that he will use to start his own ministry" (internal citation omitted)).

Surveys of and resources on U.S. and international HIV prosecution (not sex or sexual orientation specific):

- HIV JUSTICE NETWORK, CASES, available at <http://www.hivjustice.net/site/cases/> (last visited Apr. 15, 2013) (reporting "international developments regarding

laws and prosecutions that criminalise HIV non-disclosure, potential or perceived exposure and transmission,” with the purpose of fostering better understanding “of laws, policies and practices that inappropriately regulate and punish people living with HIV.”).

- HIV LAW & POLICY CTR. & POSITIVE JUSTICE PROJECT, PROSECUTIONS AND ARRESTS FOR HIV EXPOSURE IN THE UNITED STATES, 2008-2012 (2012), *available at* <http://www.hivlawandpolicy.org/resources/download/456>.
- Roger Pebody, *Three Tactics to Stem the Tide of Criminal Prosecutions*, July 29, 2010, AIDSmap, *available at* <http://www.aidsmap.com/page/1498385> (referring to report by Robert James on policies in the Netherlands, England, and Switzerland that help to “reduce unwarranted prosecutions of HIV exposure and transmission”; also discusses report by Edwin J. Bernard on U.S. situation).
- MICHAEL KIRBY & EDWIN J. BERNARD, HIV & THE CRIMINAL LAW (2010), *available at* <http://www.aidsmap.com/page/1410517/> (presenting an international picture of HIV criminalization; summary regarding U.S. estimates 442 HIV-positive persons prosecuted and 251 convictions as of 2010; estimates 84 prosecutions “were for sexual HIV exposure or transmission through unprotected sex without disclosure”).
- Edwin J. Bernard, *Kafkaesque: A Critical Analysis of US HIV Non-Disclosure, Exposure and Transmission Cases, 2007-2009*, XVIII International AIDS Conference at Vienna (2010), *available at* <http://pag.aids2010.org/PDF/6010.pdf> (summary of findings from surveying “US-related blog entries between Oct. 2007 and Nov. 2009”; of 82 individuals with HIV “arrested and/or prosecuted,” 40 cases “involved unprotected sex without disclosure and no alleged HIV transmission” and 7 cases “involved unprotected sex without disclosure, where transmission was alleged”; estimating that “[s]ince 1987 at least 450 people living with HIV in the United States (US) have been prosecuted for sexual or non-sexual HIV exposure or transmission, more than in any other country in the world”).
- GNP+, THE GLOBAL CRIMINALISATION SCAN REPORT 2010, at 18 (2010), *available at* www.gnpplus.net/images/stories/Rights_and_stigma/2010_Global_Criminalisation_Scan.pdf (noting that, in U.S., at the time of publication, “more than 400 people have been prosecuted for HIV exposure or transmission” and “[a]t least 300 of these have resulted in convictions”).
- Zita Lazzarini, Sarah Bray & Scott Burris, *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J.L. MED. & ETHICS 239, 244–45 (2002) (identifying

“316 unique prosecutions of persons for exposure or transmission of HIV for 1986-2001”; 211 regarded sexual exposure).

Attitude survey:

- Keith J. Horvath, Richard Weinmeyer & Simon Rosser, *Should It Be Illegal for HIV-Positive Persons To Have Unprotected Sex Without Disclosure? An Examination of Attitudes Among US Men Who Have Sex with Men and the Impact of State Law*, 22 AIDS CARE 1221, 1224 (2010), available at www.hivlawandpolicy.org/resources/download/604 (reporting that “[s]ixty-five percent of respondents believed that it should . . . be illegal for an HIV-positive person who knows his or her status to have unprotected sex without telling the other person of their HIV-status, 23% believed that it should not be illegal, and 12% did not know”).

Additional foreign analogues:

- *HIV Positive Man Had Unsafe Sex at Gay Romp: Court*, THE AGE (Austl.), June 23, 2008, <http://www.theage.com.au/national/hiv-positive-man-had-unsafe-sex-at-gay-romp-court-20080623-2vim.html?page=-1> (Michael Neal charged with (but pleaded not guilty to) “infecting two people with HIV and attempting to infect 14 others”; sex of all of the sex partners unclear, but article appears to suggest they were all men).
- Charles Lavery, *My Lover Didn't Tell Me He Had HIV*, SUNDAYMAIL.CO.UK, Mar. 30, 2008, <http://web.archive.org/web/20080505035030/http://www.sundaymail.co.uk/lifestyle/real-life-stories/2008/03/30/my-lover-didn-t-tell-me-he-had-hiv-78057-20366849/> (Gary Hamilton “admits he did not tell his unsuspecting victim he had been diagnosed as HIV positive” and “could face five years in jail”).