

**PUBLIC HEALTH VERSUS PRIVATE FREEDOMS:  
The Regulation of Commercial Sex Establishments**

by  
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## I. INTRODUCTION

What counts more? The need to reduce H.I.V. transmission to the lowest possible level or the need for a community to express itself sexually in the fullest possible way?

*Dr. Ron Stall, associate professor and epidemiologist at the University of California at San Francisco.*

Government and society must address serious issues pertaining to HIV prevention and protecting civil liberties. The government must attempt to limit public access to unsafe sexual behavior in order to lower the HIV transmission rate. Problems arise however, when the government legislates desire. These problems do not have easy solutions, and the state and communities continually ask themselves what power should the state have in limiting public unsafe sex.

Gay communities provide an excellent illustration of the tension between the government's interest in preserving health (reducing HIV transmission) and the individual's interest in protecting his civil liberties (unrestricted sexual freedom). This tension surrounds commercial sex establishments—places where individuals pay an entrance fee and meet other people in order to have sex. They are different than bars or discotheques because patrons of commercial sex establishments have sex on the premises. Commercial sex establishments include sex clubs and bathhouses. Municipal governments and gay communities across the United States, but specifically in San Francisco, are asking whether the state should regulate condomless anal sex<sup>1</sup> in gay male commercial sex establishments<sup>2</sup> by monitoring their patrons.

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<sup>1</sup> Condomless anal sex carries the greatest risk of HIV viral transmission. Bay Area Physicians for Human Rights. AIDS Risk Reduction Guidelines For Healthier Sex. Pamphlet.

<sup>2</sup> A commercial sex establishment is a place where a person pays an entrance fee, where he can meet other people that want to have sex. It is different than a bar or discotheque in that patrons of commercial sex establishments have sex on the premises. Commercial sex establishments include sex clubs and bathhouses.

Because commercial sex establishments are neither wholly public, nor fully private, it is difficult to ascertain how, if at all, governments should regulate them. How do we conceive of government regulation in a messy public-private continuum? Because of the danger of HIV transmission, and the high number of sexual contacts that occur in commercial sexual establishments, local government not only has the power, but the responsibility to regulate commercial sex establishments in order to decrease high-risk sexual behavior. Any regulation that the state enacts must be the least intrusive method, so as to have a minimal effect on the civil liberties of gay men—a group whose civil liberties have historically been ignored.

The first section outlines the current municipal ban on private sex and monitoring requirement placed on San Francisco commercial sex venues. The first section delineates the splits found gay communities concerning the appropriateness of this type of legislation. One side advocates sexual freedom without restriction, while the other wants less emphasis placed on the sexual culture, and decreased promiscuity.

The second section begins the constitutional analysis of the state's role in regulating public health, and asks, from both legal and public health perspectives, whether the state should close gay commercial sex establishments in order to control HIV transmission. First, this section examines public health jurisprudence and argues that state officers have a compelling state interest to lower the rate of HIV transmission. This section examines the public health usefulness of these gay establishments, and also discusses some state governments' arguments for closing them. I criticize the Supreme Court's ruling in *Bowers v. Hardwick*, and argue that not only does the right to engage in private adult consensual sex in the home exist, but that individuals have a right to personal autonomy that exists regardless of their location. Finally, this section reviews court rulings on commercial sex establishment

closings, and argues that courts should constitutionally review any sex establishment regulations under a strict scrutiny analysis.

The final section proposes some state commercial sex establishment regulations in order to lower HIV transmission rates in bathhouses. These regulations are intended to solve the problem of HIV transmission in bathhouses in a manner that is least intrusive to patrons. These regulations include self-monitoring by the sex club owners, and changes in architecture that limit the amount of private space in the commercial establishment.

Additionally, this section looks at the construction of social space and attempts to locate commercial sex establishments' position on the public-private continuum. This section observes that while individuals have the right to personal autonomy, this right is not absolute. By placing commercial sex establishments in the middle of the public-private space continuum, this section argues that states have more of a compelling interest to control unsafe sex establishment activities, than unsafe activities in the home.

## II. GAY CULTURE AND SEXUALLY REPRESSIVE LEGISLATION

### A. The Lack of Privacy In San Francisco Commercial Sex Establishments.

San Francisco is currently undergoing a fight over the regulation of commercial sex establishments in the face of the AIDS epidemic. AIDS is an epidemic of serious concern to the citizens of San Francisco. There have been 26,000 reported AIDS cases in San Francisco and 17,800 deaths.<sup>3</sup> In 1997, San Francisco drafted a public health policy that would have effectively banned sex behind closed doors in commercial sex establishments.<sup>4</sup>

The municipal draft statute reads:

#### SEC. 27.14. ROOMS AND BOOTHS: VISIBILITY AND LOCKING.

- (a) The operator of a commercial sex club shall construct and maintain every room and booth to which patrons have access in such a way that the entire interior portion is visible from the exterior of the room or booth. If the operator installs doors, the doors must be half-size or designed with "cut outs" or other features that allow any activity occurring in any part of the room or booth to be visible to staff monitors from outside the door.
- (b) No room or booth to which patrons have access shall have a door capable of being locked.
- (c) The requirements of this Section do not apply to bathrooms if the establishment prohibits sexual activity in the bathrooms. If the establishment does not prohibit sexual activity in the bathrooms, the provisions of subsections (a) and (b) of this Section apply to the bathrooms.

The policy requires monitors to observe the patrons' sexual practices.<sup>5</sup> The policy allows monitors to determine whether patrons are practicing safer sex.

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<sup>3</sup> Evelyn Nieves, *San Francisco Is Urged to Allow Secluded Sex in Bathhouses*, N.Y. TIMES, May 29, 1999, at A9.

<sup>4</sup> SAN FRANCISCO, CAL., HEALTH CODE ch. V, art. 27 §27.14 (1997).

<sup>5</sup> Article 27, Section 27.12(a)(6) of the San Francisco Health Code requires the operators of commercial sex establishments to "[m]onitor the activities of patrons in order to prevent and stop those activities, including

Currently, there is a movement that wants to repeal this policy. This movement led by a group of gay men wants to reopen bathhouses where men can meet and have sex in private rooms.<sup>6</sup> These men say that bathhouses could provide a safe-sex alternative for those who do not want to perform in front of an audience in a sex club.<sup>7</sup>

While the argument over closed-door versus open-door sex in commercial sex establishments is specific to San Francisco, the debate about the government's role in the regulation of these establishments is not. In gay communities across the United States, this issue is part of a larger debate concerning sexual liberation and gay male public health. Many gay men would see any regulation (or closure) of a gay commercial sex establishment as an irrational and sexually negative response—some would call it a sex panic. It is crucial to examine sex panics (and individuals' responses to them) in order to fully understand the liberty interests at issue.

#### B. Sex panic defined.

In 1984, historian Allan Bérubé was the first to write a prognostication that sexual panics would form as a reaction to a growing AIDS epidemic.<sup>8</sup> A sexual panic is a conservative backlash—a wave of societal prudishness—against the sexual practices of some social group.<sup>9</sup> There are some that believe a sexual panic exists that is targeting gay men as

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sexual activities, which the Director has prohibited and to maintain compliance with the requirements of this Article.”

<sup>6</sup> Evelyn Nieves, *supra* note 3.

<sup>7</sup> *Id.*

<sup>8</sup> Allan Bérubé, *Prophesy*, 1984 in *Harv. Gay & Les. Review*. Page 10.

<sup>9</sup> See Sheryl Gay Stolberg, *Identity Crisis—Gay Culture Weighs Sense and Sensibility*. N.Y. TIMES, Nov. 23, 1997 at D1.

monsters. They believe that the government and the religious right have manufactured a sex panic in the form of police crackdowns on sex in public restrooms, and closing gay bars and commercial sexual establishments. At the 1997 National Sex Panic Summit, Bérubé said that sex panics are moral purity crusades that draw on the fear of sexual monsters to target a group of despised sexual outsiders.<sup>10</sup> Bérubé stated that “sex panics usual take place during politically conservative times, election years, world’s fairs, epidemics, anti-crime drives, and religious revivalism. They are often a response to the successful political activism of targeted groups.”<sup>11</sup>

Sex panics are usually started by moral right thinking people who are usually journalists or politicians. Bérubé claimed that these leaders expose a frightening problem to society-at-large, i.e. an epidemic. Sex panics almost always require a sexual monster<sup>12</sup> to mobilize the public to take action. Journalists convey images of these people in attempt to shock the public. Newspapers write editorials about these people, that portray them “as so dangerous that drastic measures, which always includes government intervention, must be taken to protect a frightened public from this new threat.”<sup>13</sup>

Bérubé believed that sex panics socially impact institutions as well as individuals. He believes that sex panics are an engine used to create repressive legislation.

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<sup>10</sup> Audio recording of Allan Bérubé: History of Sex Panics I, National Sex Panic Summit (Nov. 13-15 , 1997) (<<http://hivinsite.ucsf.edu/ram/sps/berube.ram>>). Note that all references to Bérubé refer to this citation of his panel presentation.

<sup>11</sup> *See id.*

<sup>12</sup> Bérubé says that the historical landscape is filled with images of sexual monsters. Such sexual monsters include Typhoid Mary who aggressively infects innocent individuals with diseases; the image of the hypersexed black man who rapes white women and girls; the image of the stranger child molester; the perverted lesbian mother who has felonious sex in front of her children; the image of the pregnant welfare queen wasting tax payer money having lots of children she cannot support; and the sex crazed gay man who is addicted to promiscuous sex and orgies in public spaces. *Id.*

<sup>13</sup> *Id.*

Sex panics create crises in which governments ritually solve a social problem by passing laws against symbolic sexual scapegoats without ever addressing any underlying causes. Sex panics are the means by which repressive laws get passed. Once enacted, these new laws are nearly impossible to get off the books. Police use them to justify sexual crackdowns in which they conduct purges and interrogations, round up and arrest sex offenders, raid and padlock commercial sex establishments or intimidate them into closing voluntarily. After a while this policing becomes routine harassment. Part of the everyday duties of law enforcement officials in controlling sexually stigmatized groups of people.<sup>14</sup>

While Bérubé has stated that sex panics have created repressive legislation for various groups, he particularly outlined how sex panics have oppressed homosexuals with the outbreak of HIV. Bérubé argued that, in 1985, an AIDS panic started in New York state. He contends that at this time, journalists and politicians debated over a number of policies that would affect individual civil rights.<sup>15</sup> During this time, a journalist for the New York Post wrote an exposé on gay sex in commercial establishments. Then the state instituted a new health code, “allegedly to stop the spread of AIDS.”<sup>16</sup> The state regulation prohibited oral, vaginal, and anal sex regardless of the use of condoms in commercial Bérubé said, “this was a classic, journalist inspired sex panic, followed by legal reform, a police crackdown, and still today, routine harassment.”<sup>17</sup>

While there is support for the proposition that there is a sex panic occurring in New York City,<sup>18</sup> this paper does not try to prove the existence of Bérubé’s sex panic concept. I

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<sup>14</sup> *Id.*

<sup>15</sup> Such policies included whether to quarantine people with AIDS, to report the names of people that tested positive for HIV, to criminalize sex for people with AIDS, and to close gay sex clubs and bathhouses. *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Audio recording of Allan Bérubé, *supra* note 10.

<sup>18</sup> There are reports that police have harassed and closed down gay and lesbian bars, commercial sex establishments, and adult movie theaters. Eighty-five percent of adult businesses have disappeared in New

am more concerned with the fact that there are gay men that *believe* that municipal governments are passing sexually repressive legislation that limit their constitutional rights. It is necessary to form policy changes that are sensitive to these fears.

Bérubé questioned the motives behind health code legislation that claim to prevent HIV infection. While some legislators may be motivated by a morality crusade against homosexual men, HIV is a legitimate health concern that must be addressed. How can legislation prevent HIV infection in commercial sex establishment without creating a morality crusade against homosexual men? My goal is to avoid moral preaching in the guise of HIV prevention.

### C. The Gay Culture Wars: Sex Panic! and The Neo-Conservative Gay Right.

At issue in San Francisco is the conflict between public health people wanting to keep private spaces out of commercial sex establishments, and some gay men that want sexual freedom and want private spaces. In New York, there is a similar friction, except that instead of private spaces, the debate is focused on the state's prohibition of sex in commercial sex establishments except for mutual masturbation. At issue in both cities is the tension between society's interest in public health, and some gay men's interest in preserving their sexual freedom. The discussion of this tension issues has culminated in a war of sorts amongst members of gay communities. Some might see any regulation of commercial sex establishments as a sexual panic.

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York City due to city re-zoning. The city is fencing off and patrolling many piers where gay men used to meet and socialize. See *Sex Panic! Queer New York Is Being Shut Down* (visited June 13, 1999) <<http://www.geocities.com/~sexpanicnyc/shut.htm>>.

On one side of the debate is Sex Panic!, an organization founded by a handful of New York City's best-known gay journalists, artists and academics who have organized to fight the backlash against homosexual sex practices.<sup>19</sup> SexPanic! describes itself as

a pro-queer, pro-feminist, antiracist direct action group. Our multi-issue agenda aims to defend public sexual culture and safer sex in New York City from police crackdowns, public stigma and morality crusades. We are committed to HIV prevention through safer sex, to sexual self determination for all people and to democratic urban space.<sup>20</sup>

Some gay men believe that gay sexual panics directly attack gay civil liberties. One supporter of Sex Panic! wrote,

Sex between two consenting adults should be their business and not the business of government or the religious right or sexpanic subscribers.<sup>21</sup> I don't think anyone has "promoted" unsafe sex. Barebackers are, for the most part HIV+, and they know the risks involved with unprotected sex. To me, [a] sexpanic [sic] occurs whenever the government or a group of people or a person tries to take away the right to have sex with another consenting adult - or tries to make GLBTs less equal under the law of the country than anyone else.<sup>22</sup>

Ben Shepard of the Greyston Foundation distinguishes between the conservative backlash known as sexual panic, and the Sex Panic! organization that is mobilized to fight this backlash. He adds that sexual panics can take many forms and mean different things to different people.

SexPanic! nyc is a sexual civil liberties group[,] a sex panic is a morality crusade [sic] in which moral guardians seek to protect innocent victims from sexual outsiders. sex panics have been happening for centuries. from

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<sup>19</sup> See Stolberg, *supra* note 9.

<sup>20</sup> *SexPanic!* (visited Nov. 13, 1998) <<http://www.geocities.com/~sexpanicnyc/>>.

<sup>21</sup> This individual is writing a letter to a list-serv. A list-serv is composed of subscribers who send electronic mail on a particular theme. When this individual talks about "sexpanic subscribers" he is talking about the individuals that are members of the Sexpanic listserv sponsored by Queernet.

<sup>22</sup> Electronic letter from Zenger, [willpe@swbell.net](mailto:willpe@swbell.net), to Sex Panic Listserv, [sexpanic@queernet.org](mailto:sexpanic@queernet.org), (Nov. 8, 1998) (on file with author).

savorolla to hoover to giuiani [sic] to ken starr. Panics come from any number of internal and external forces. New York is going through a very specific sexpanic but different people were effected in different ways. they tell different sexpanic stories. many began when a favorite club was closed down or they experienced the panic of a lover. there is his panic, her panic, my panic and your panic.<sup>23</sup>

Another gay man believes that sexual panics infringe on gay rights. He says that Sex Panic! was organized to protect these rights.

I though [sic] Sex Panic [sic] was to preserve consenting adult's [sic] absolute right to practice the sex they want, without intervention, scorn, or prejudice from the government, special interest groups, or individuals.<sup>24</sup>

On the other side are the gay neo-conservatives, prominent gay male authors such as Gabriel Rotello, Michaelangelo Signorile, and Larry Kramer. These authors warn that promiscuity, often seen as a cornerstone of gay sexual freedom, can perpetuate the AIDS epidemic.<sup>25</sup> While Signorile does not support police entrapment—setting up gay men in public restrooms and other public places—he criticizes Sex Panic! for expecting gay men to put the issue of sex in rest rooms and public parks at the front of gay liberation movements. He stated that the issue of sex in public places is not an issue to most openly gay men, and that men that use such places are often “conflicted married men, often tormented about their sexuality and deeply closeted, sometimes working against us in their day jobs on Wall Street or on Capital Hill or in Hollywood.”<sup>26</sup>

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<sup>23</sup> Electronic letter from Ben Shepard, [ben@greyston.org](mailto:ben@greyston.org), Greyston Foundation, to Sex Panic Listserv, [sexpanic@queernet.org](mailto:sexpanic@queernet.org), (Nov. 9, 1998) (on file with author).

<sup>24</sup> Electronic letter from Sam Ebeid, [whthawk@rocketmail.com](mailto:whthawk@rocketmail.com), to Sex Panic Listserv, [sexpanic@queernet.org](mailto:sexpanic@queernet.org), (Nov. 10, 1998) (on file with author).

<sup>25</sup> See Stolberg, *supra* note 9.

<sup>26</sup> See also Michaelangelo Signorile, *Nostalgia Trip*, Harv. Gay & Lesbian Rev., Spring 1998, at 25, 25 (criticizing Sex Panic! as a nostalgic organization yearning for a past gay promiscuous sexual culture).

Rotello believes that bathhouses and commercial sex establishments should be closed. After the West Side Club, a bathhouse, opened in New York City in January 1995—the first in over a decade—Rotello called it "a bathhouse like the legendary bathhouses of old, those bustling hives of contagion that helped spread death throughout the gay male world."<sup>27</sup> Rotello condemned what he labeled the "condom code," the notion that condoms can prevent HIV transmission and preserve gay promiscuity.<sup>28</sup> Using ecology as a metaphor, Rotello stated that the condom is a "technological fix," that attempts to erase HIV transmission without confronting multiple partner sex.<sup>29</sup> Rotello called for a change in the sexual behavior of gay communities, not just individuals, because predictions show that as long as a core group of homosexual men are promiscuous, HIV transmission rates will not fall.<sup>30</sup> Rotello advocates for less promiscuity in order to slow the transmission of HIV.

In these calls for change, members of Sex Panic! saw a sex-negative message and a desire to abandon gay sexual liberties and a moral repression of sexual freedom.<sup>31</sup> Sex Panic! believes that underneath Rotello's ecological metaphor is a hidden "moralistic" agenda.<sup>32</sup> Additionally, Sex Panic! claimed that their critics are blaming gay men for the deaths caused

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<sup>27</sup> See Caleb Crain, *Pleasure Principles: Queer Theorists and Gay Journalists Wrestle Over the Politics of Sex*, *Linguafranca*, (Oct. 1997) <<http://www.linguafranca.com/9710/crain.html>>.

<sup>28</sup> See *id.* See also Gabriel Rotello, *This is Sexual Ecology*, *Harv. Gay & Lesbian Rev.*, Spring 1998, at 19, 20-21 (defending the thesis of Gabriel Rotello's book *Sexual Ecology: AIDS and the Destiny of Gay Men*).

<sup>29</sup> See Crain, *supra* note 28.

<sup>30</sup> See *id.*

<sup>31</sup> Sex Panic! has accused some gay leaders of consulting with government in order to close gay sex clubs. See Richard Schneider, Jr., *Spring, 1998: "The New Sex Wars"*, *Harv. Gay & Lesbian Rev.*, Spring 1998, at 4, 4. Crain stated that a group associated with Gabriel Rotello, the Gay and Lesbian HIV Prevention Activists (GALHPA), met with New York city officials and asked the government to intervene. Requesting government intervention broke an unspoken gay activism rule. Health officials agreed that more careful monitoring of sex clubs was warranted. The city made nearly fourteen hundred separate inspections of between forty and fifty establishments, issued warnings to thirty, and shut down nine. Crain, *supra* note 28.

<sup>32</sup> See Schneider, *supra* note 32.

by HIV. A supporter of Sex Panic!, Columbia University law professor Kendall Thomas distinguished between the gay culture and the HIV virus that causes AIDS. In criticizing Rotello, Thomas stated that a promiscuous culture does not kill people, but that the HIV virus does.<sup>33</sup>

Adding to the seriousness of the debate is evidence that homosexual men are returning to unprotected anal sex, which is also known as “bareback sex” to homosexuals.<sup>34</sup> Dr. William W. Darrow, in a survey of 205 gay men in Miami’s South Beach area found that 45 percent had unprotected anal sex in the past year.<sup>35</sup> This area is of particular importance because it is this behavior that should be eliminated from commercial sex establishments.

From a public health perspective, there are problems with both sides of the debate. Gay neo-conservatives forget that merely attending a bathhouse does not transmit the HIV virus. Transmission depends not only on the type of sex that occurs,<sup>36</sup> but also whether or not the sex is protected. Sex Panic! is problematic because they see they see any limit on sexual behavior as oppressive legislation. They ignore that well thought public health regulation might have beneficial effects. Examples of regulations may include closing commercial sex establishments, or regulating the sexual behavior inside the establishments.

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<sup>33</sup> See Stolberg, *supra* note 9.

<sup>34</sup> See *id.* Kate Shindle, Miss America 1998, cited reports from the Centers for Disease Control and Prevention that the incidence of sexually transmitted diseases is on the rise. She stated that people were having unsafe sex now that the HIV/AIDS epidemic appeared to ending. Shindle, speaking about bareback sex said that “[r]isky behavior should be viewed as stupid, no trendy.” Kate Shindle, *Barebacking? Brainless*, *The Advocate*, Feb. 3, 1998, at 9, 9. In an interview with Camille Paglia, Michael Hattersley stated that in talking with people in their twenties and thirties, most told him that their friends and social groups practiced unsafe sex. Hattersley recognized that his survey of Provincetown bars was “highly unscientific.” Interview with Camille Paglia by Michael Hattersley, *“I am a celebrator of decadence.”*, in *HARV. GAY & LESBIAN REV.*, Spring 1998, at 11, 11.

<sup>35</sup> See Stolberg, *supra* note 9.

<sup>36</sup> Certain sex acts are riskier in terms of HIV transmission. For example, mutual masturbation and oral sex are not as risky as anal sex. See Bay Area Physicians for Human Rights, *supra* note 1.

This paper argues that such regulations are constitutional as long as they are narrowly tailored and fulfill the compelling governmental interest of curbing HIV transmission. The next section constitutionally examines whether municipalities should close commercial sex establishments.

### III. A CONSTITUTIONAL ANALYSIS OF COMMERCIAL SEX ESTABLISHMENT LEGISLATION.

Governments have closed and regulated homosexual commercial sex establishments throughout history.<sup>37</sup> The previous chapter showed that some gay men believe that these closings and regulations are motivated by morality and homophobia. Yet another rationale behind these state actions is the preservation of public health. This chapter examines the closing of sex establishments in order to curb HIV transmission. Closings, however, are not the only methods that states can utilize. States can conduct police raids or regulate the actual behavior in bathhouses. Regardless of whether the state seeks to close or modify the behavior in these venues, when challenged constitutionally, the standard remains the same.

#### A. The Constitutional Levels of Scrutiny.

Is it constitutional for a state to pass legislation that closes bathhouses? The answer to this question depends on the language and the purpose of the legislation. Individuals can constitutionally challenge closing legislation as a violation of substantive due process.<sup>38</sup> The Fifth and Fourteenth Amendments<sup>39</sup> protect citizens against deprivation of life, liberty, and property without “due process of law.” The Supreme Court has historically held that there

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<sup>37</sup> See Allan Bérubé, *The History of Gay Bathhouses*, in POLICING PUBLIC SEX 295, 298 (Dangerous Bedfellows eds., 1996), for a discussion of police crackdowns on gay bathhouses.

<sup>38</sup> Equal protection is not likely to be at issue because the laws are neutral on their face. This paper assumes that if heterosexual commercial sex establishments exist that the state will enforce public health laws in the same way they regulate homosexual establishments.

<sup>39</sup> The Fifth Amendment is applicable to the federal government, while the Fourteenth Amendment is applicable to the states.

is a “substantive” feature to the due process clause that empowers courts to strike down laws that are purely arbitrary or that unduly burden people’s “fundamental” rights.

A court must undergo a number of steps when deciding whether to invalidate a state law as a violation of substantive due process. First, the court must determine whether the legislation burdens the exercise of an individual’s constitutionally protected fundamental right. This is a very important question to answer because it determines what level of scrutiny the court is going to apply to the challenged legislation. There are two standards that courts can apply: (1) strict scrutiny, and (2) rational basis or rational relation standard.

Courts decide cases where fundamental rights are at issue using the strict or heightened scrutiny analysis. There are two components of the strict scrutiny test: (1) compelling state interest and (2) narrowly tailored requirement. The Supreme Court has held that regulations that limit fundamental rights must be justified by a compelling state interest.<sup>40</sup> Even when there is a compelling state interest, the Court has ruled that the legislative enactment must be narrowly tailored to state’s interest.<sup>41</sup> The legislation must be the least restrictive method of achieving the state’s goal.

For example, assume that the Hawaii legislature passed a bill that stated that all commercial sex establishments must be closed in order to preserve public morality. The police then close Bathhouse A. Bathhouse A and its patrons, believing that closing the bathhouse to preserve morality violates their fundamental right to privacy, and sue the state for violating their constitutional rights. If a court believes that the legislation is a burden on

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<sup>40</sup> See *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406, (1963).

<sup>41</sup> See *Eisenstadt v. Baird*, 405 U.S. 460, 463-464 (1972) (White, J., concurring); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 307-308 (1940).

the right of privacy, it must strictly scrutinize the legislation to determine if it is narrowly tailored to achieve a compelling state interest. Under a strict scrutiny analysis, the Hawaii court would ask whether the Hawaii bill was the least intrusive (narrowly tailored) way of preserving public morality. The court would also ask whether preserving public morality was a compelling state interest. Under the strict scrutiny standard, the legislation must leap a number of hurdles in order to remain valid.

If a court concluded that no fundamental right existed, then it would determine simply whether the legislation bore a rational relation to a legitimate government interest.<sup>42</sup> Under a rational relation test, the Hawaii court in the example would ask whether preserving public morality was a legitimate governmental concern. It would then ask whether there was a rational relationship between the purpose of the statute and the goal of the state. Most laws survive the rational basis standard, because the level of scrutiny is very low compared the strict scrutiny standard.

There are many questions that courts must answer when analyzing commercial sex establishment closings for the purposes of preserving public health. First, they must answer whether preventing the spread of HIV is a compelling government interest, and if regulating commercial sex establishments satisfies that interest. Secondly, courts must decide if individuals' fundamental rights are violated when municipalities close these establishments. This paper argues that state and municipal governments have a compelling interest to curb the transmission of HIV and preserve public health. In addition, I argue that courts should recognize the individual right to participate in consensual adult sexual activity. If courts recognize this fundamental right, commercial sex establishment closings and regulations will

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<sup>42</sup> See, e.g., *Heller v. Doe*, 509 U.S. 312 (1993).

have to meet the strict scrutiny standard of review. If these measures are upheld, this higher standard of review will require government actions to be narrowly tailored, in order to reduce the intrusion on the rights of gay patrons.

B. Compelling government interest.

The Supreme Court has recognized that protecting public health is a legitimate exercise of the state's police power.<sup>43</sup> In *Jacobsen v. Massachusetts*, the state charged Jacobsen criminally for refusing to allow the town board of health to vaccinate him.<sup>44</sup> Finding for Massachusetts, the Supreme Court ruled that states have general authority to act in the name of public health, and may at times violate individual rights to the full extent necessary to protect the public health.<sup>45</sup> The Court in *Jacobsen* recognized that public health was an essential duty of local government.<sup>46</sup> Regulating public health is a state, not a federal power. When trying to control communicable diseases, states—depending on their respective legislatures—may exercise their police power in a variety of ways, including quarantine and nuisance abatement.<sup>47</sup>

The government has a compelling interest in stopping the transmission of HIV, because it is a dangerous epidemic that threatens the public health. As of June 1998, 665,357

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<sup>43</sup> See *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905). See also *Roe v. Wade*, 410 U.S. 113, 163 (1973) (stating that the states have an important and legitimate interest in preserving and protecting the health of the pregnant woman).

<sup>44</sup> 197 U.S. at 36.

<sup>45</sup> *Id.*

<sup>46</sup> See Scott Burris, *Rationality Review and the Politics of Public Health*, 34 VILL. L. REV. 933, 960 (1989).

<sup>47</sup> See Stephen Collier, Comment, *Preventing the Spread of AIDS by Restricting Sexual Conduct in Gay Bathhouses: A Constitutional Analysis*, 15 GOLDEN GATE U. L. REV. 301, 309-10 (stating that bathhouse regulations should face heightened scrutiny in the courts). This paper looks at nuisance abatement laws used to close and/or regulate the behavior in gay commercial sex establishments.

AIDS cases have been reported to the CDC.<sup>48</sup> Today, at least 344,060 people are living with HIV or AIDS in the United States.<sup>49</sup> There is no known cure for AIDS, nor is there a vaccine to prevent HIV contraction.

Some argue that there are no conclusive scientific studies on whether or not commercial sex establishments facilitate or reduce the spread of HIV.<sup>50</sup> Others believe that the state should not close commercial sex establishments because they have no direct relation to HIV. These activists state that the closing of bathhouses does not meet the state's prevention interest because there are no scientific studies that demonstrate that the environment offered by commercial sex establishments raises significantly the rate of HIV transmission.<sup>51</sup>

Although the location of sexual activity is unlikely to be related directly to the rate HIV transmission, commercial sex establishments have performed for gay men in the same way that "shooting galleries"<sup>52</sup> have functioned for intravenous drug users in increasing HIV transmission.<sup>53</sup> The National Research Council (NRC) states that commercial sex establishments "provide settings that promote transmission-related behavior at a rate far

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<sup>48</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, No. 1, HIV/AIDS SURVEILLANCE REPORT 3 (1998).

<sup>49</sup> *Id.* at 5.

<sup>50</sup> Evelyn Nieves, *supra* note 3.

<sup>51</sup> See Collier, *supra* note 48, at 313. San Francisco gay activist Michael Petrelis has said that the state cannot present science to substantiate claims that commercial sex establishments promote HIV transmission. See Liz Highleyman, *Fracas Ensues at DPH Sex Club Meeting*, BAY AREA REP. (April 1999).

<sup>52</sup> A shooting gallery, often found in large cities, is a communal injection site located in apartments or abandoned buildings. See NATIONAL RESEARCH COUNCIL, AIDS SEXUAL BEHAVIOR AND INTRAVENOUS DRUG USE 192-93 (1989). At shooting galleries, drug users can rent inadequately sterilized injection equipment possibly contaminated with HIV. See *id.*

<sup>53</sup> See *id.* at 135.

beyond that possible outside these settings.”<sup>54</sup> The NRC’s conclusion is supported by data from New York City that indicated that in 1981, the median number of sexual partners reported in extra-domestic settings was 36; in contrast to 5 sexual partners in domestic settings.<sup>55</sup>

State governments have an interest in controlling the devastating effects of AIDS. This interest is present in commercial sex establishments because these places arguably provide settings that promote behaviors that increase HIV transmission. Whether this interest justifies closing depends on whether the closing violates the right to privacy.

C. Homosexuals’ fundamental right to privacy—personal autonomy.

When courts try to determine what substantive due process standard to apply, they must first ask whether the constitution protects an individual’s right to engage in consensual sex. The right to personal autonomy and decision-making lies in the constitutional privacy right. Although there is no constitutional right of privacy as such, emanations of liberty guarantees found in the Bill of Rights form penumbras of privacy.<sup>56</sup>

Individuals and courts have argued that the Supreme Court’s prior privacy cases confer a right of privacy that extends to adult consensual sexual activity in private.<sup>57</sup> These cases have extended the right of privacy to choice of marriage partner,<sup>58</sup> choices concerning

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<sup>54</sup> *Id.*

<sup>55</sup> See J. L. Martin, *The impact of AIDS on gay male sexual behavior patterns in New York City*, 77 AM. J. PUB. HEALTH 578-81 (1987), cited in NATIONAL RESEARCH COUNCIL, *supra* note 53, at 135.

<sup>56</sup> The *Griswold* Court held that various guarantees found in the Bill of Rights (1st, 3rd, 4th, 5th, and 9th amendments) create zones of privacy. 381 U.S. at 484-85.

<sup>57</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 189, 191 (1986).

<sup>58</sup> See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

familial relationships,<sup>59</sup> the use of contraception,<sup>60</sup> decisions concerning procreation,<sup>61</sup> and a woman's choice to pursue an abortion.<sup>62</sup> The Court in *Bowers*, however, refused to extend the right of privacy and held that no federal fundamental right existed for homosexuals to engage in consensual sex.<sup>63</sup> The Court upheld the constitutionally challenged Georgia sodomy statute<sup>64</sup> to consensual same-sex sodomy.

Justice White, who wrote the *Bowers* opinion, narrowly framed the issue as the fundamental privacy right to engage in homosexual sodomy, and found that the right did not exist.<sup>65</sup> The *Bowers* Court found that there was no connection between homosexual activity and protected activities dealing with family, procreation, and marriage.<sup>66</sup> The Court ruled that the Georgia statute did not infringe on any fundamental right, and analyzed the constitutionality of the statute by performing a rational relation test. Under this minimal level of scrutiny, the Court engaged in a highly deferential examination of the state interest involved, and found a rational relationship between the sodomy statute and Georgia's interest in regulating morals.<sup>67</sup>

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<sup>59</sup> See *Prince v. Massachusetts*, 312 U.S. 158, 166 (1944).

<sup>60</sup> See *Griswold*, ; *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972).

<sup>61</sup> See *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942).

<sup>62</sup> See *Roe v. Wade*, 410 U.S. 113, 154 (1973).

<sup>63</sup> *Bowers*, 478 U.S. at 191.

<sup>64</sup> The Georgia statute stated that: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 16-6-2 (1988).

<sup>65</sup> *Bowers*, 478 U.S. at 190.

<sup>66</sup> *Id.* at 190-91.

<sup>67</sup> See *id.* at 196.

1. The flaws and limits of *Bowers*.

The *Bowers* decision is binding precedent when interpreting the United States Constitution but not state constitutions. The *Bowers* court stated that no *federal* fundamental privacy right exists that protects homosexual conduct, it said nothing about state recognized liberties. A state court could rule that a state constitution recognizes a fundamental right of privacy that protects homosexual consensual adult sex.

State courts should refuse to follow the flawed reasoning in *Bowers* and recognize a state right protecting adult consensual activity emanating from their respective state constitutions. There are numerous reasons state courts should refuse to apply *Bowers* reasoning when deciding state privacy issues.<sup>68</sup> First the majority did not examine the regulated conduct in *Bowers* at the same level of generality used in previous federal privacy decisions. While it is true that *Griswold* and *Eisenstadt v. Baird*<sup>69</sup> focused on procreative freedom, the Court's decisions go beyond this matter. If the privacy protection was extended only to procreative matters, the state could restrict contraceptives because individuals could abstain from sexual relations.<sup>70</sup> The constitutional protection extends to personal autonomy and is not limited to marriage and family. The Court in *Stanley v.*

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<sup>68</sup> This paper only gives a brief critique of the majority's flawed ruling in *Bowers*, and leaves more in depth analysis to other authors. Many commentators have already voiced their criticism of *Bower's* reading of the Court's line of privacy cases. See, e.g. Rhonda Copelon, *A Crime Not Fit To Be Named: Sex, Lies, and The Constitution*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 177 (David Khairys ed., rev. ed. 1990); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-21, at 1422-35 (2d ed. 1988); Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1987); Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. Chi. L. Rev. 648 (1987); *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 210-20 (1986).

<sup>69</sup> 405 U.S. 438 (1972).

<sup>70</sup> HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW 13 (1990).

*Georgia*<sup>71</sup> ruled that, in the privacy of one's home, the Constitution allows an individual to view pornography. In *Roe v. Wade*, the Court held that the privacy protection extends to a woman's decision to use her body to give birth. In both *Stanley* and *Roe*, the Court protected conduct because of importance of sexual freedom to individual autonomy.<sup>72</sup>

## 2. Leaving *Bowers* behind.

In addition to invalidating *Bowers*, civil rights activists should fight for the right of consensual adult sexual conduct because of the importance of sexual freedom to individual autonomy. If the Court overturned *Bowers*, and a right to adult consensual sex in the privacy of the home existed, courts and legislatures could still close bathhouses under the rational basis analysis because the location of bathhouse activity is outside of the home—the site where the conduct would be protected. Additionally, the Court has allowed states to prohibit public sexual activity.<sup>73</sup> Privacy in the home—while similar—is not the same as the right to personal autonomy that flows from the penumbras of privacy and surrounds an individual wherever he goes.

When challenging legislation that closes or regulates behavior in commercial sex establishments, one must step outside of the *Bowers* framework in order to (1) raise strict scrutiny and (2) recognize the personal autonomy interest at stake. What bothers patrons of closed bathhouses is that they feel that their privacy is infringed on. But this is not a privacy of the home, but a privacy to be left alone in order to make personal decisions. It is a fundamental right of the body—analogue to the body autonomy right recognized in *Roe*—

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<sup>71</sup> 394 U.S. 557 (1969).

<sup>72</sup> See *TRIBE*, *supra* note 69, § 15-21, at 1423-24.

<sup>73</sup> See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

which exists in both public and private spaces. This right exists whether a homosexual watches pornography in his bedroom, engages in anal sex in a bathhouse, or masturbates in a park. This right is not absolute and is subject to a number of limitations.

Some may argue that legislation banning sex in public spaces and in public accommodations does not trigger strict scrutiny because the Supreme Court has consistently distinguished sex in public from sex in private in two of its obscenity cases, *Paris Theatre I* and *Stanley v. Georgia*. Yet there are some reasons why sex in public should be a protected right. First, individuals have a right to be left alone when their conduct does not harm others. In the famous dissent from *Olmstead v. United States*, 277 U.S. 438, 478 (1928), Justice Brandeis said,

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feels and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.

A gay man having sex in a private room in a public commercial sex establishment does not infringe on the liberty interests of others. Secondly, the personal decision to have sex in public places should be protected because the decision concerns intimate emotional and psychological issues. The government's denial of choice fundamentally impacts individual expression and potential social relationships.<sup>74</sup>

As stated earlier, *Bowers* states only that the federal constitutional right to privacy does not prevent states from prohibiting gay sex in private. Just because a state government

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<sup>74</sup> See Collier, *supra* note 48 at 322.

is permitted to criminalize gay sex does not mean that it must outlaw it. Instead of relying on the federal constitution for protection of privacy, gay men may find more support if they constitutionally challenge state legislation based on their respective state constitutions.

D. Rational Basis—The Right to Privacy and Commercial Sex Establishments.

Gay men who challenge legislation that closes bathhouses using the Federal Constitution's right of privacy will likely lose. Courts are required to follow the Court's ruling in *Bowers* when deciding federal (not state) constitutional challenges. Reading *Bowers*, a court will likely hold that if gay men do not have a right to engage in consensual adult sexual activity in the privacy of their homes, they certainly do not have a right to privacy in quasi-private bathhouses.

Courts have decided a few cases where commercial establishments were closed because men were engaged in consensual sex on the premises. The level of scrutiny changes depending on the jurisdiction providing the constitutional analysis, and which constitutional rights are challenged (federal or state). Courts reviewed the following cases using the rational basis standard.

1. *City of New York v. New St. Mark's Baths*.

In *City of New York v. New St. Mark's Baths*,<sup>75</sup> the city sought an injunction closing the New Saint Mark's bathhouse as a public nuisance because high risk sexual activity took place at the bathhouse on a regular basis. The law defined high-risk sexual activity as including

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<sup>75</sup> 497 N.Y.S.2d 979 (Sup. Ct. 1986).

anal intercourse and fellatio regardless of whether condoms were used.<sup>76</sup> The city wanted to close down the gay bathhouse as a public health nuisance.<sup>77</sup> The defendant owners and patrons argued that the bathhouse closing was an infringement on privacy and freedom of association.<sup>78</sup>

The *St. Mark's* court held that closing the bathhouse did not infringe on any of the owners' constitutionally recognized fundamental rights.<sup>79</sup> The court ruled that protection of sexual activity in a private home does not extend to the commercial settings of bathhouses.<sup>80</sup> The court ruled that the commercial owners did not have a privacy interest. Additionally, the court ruled that closing the bathhouse was not an infringement of the First Amendment right to freedom of association.<sup>81</sup>

When discussing the rights of patrons, the *St. Mark's* court used a total scrutiny approach.<sup>82</sup> After the court stated that the patrons had no fundamental rights, it added that

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<sup>76</sup> See *supra* note 17.

<sup>77</sup> *St. Mark's*, 497 N.Y.S.2d at 982.

<sup>78</sup> *Id.* at 981.

<sup>79</sup> *Id.* at 982.

<sup>80</sup> *Id.* at 983 (relying on *Griswold*, *Stanley*, and *People v. Onofre*, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980)).

<sup>81</sup> *Id.* (relying on *People v. Morone*, 198 Cal.Rptr. 316, 318, 150 Cal.App.3d Supp. 18; *Sunset Amusement Co. v. Board of Police Comm'rs of City of Los Angeles*, 7 Cal.3d 64, 74, 101 Cal.Rptr. 768, 773-74, 496 P.2d 840, 845-46; *Cornelius v. Benevolent Protective Order of Elks*, 382 F.Supp. 1182, 1195-96). This paper does not address the closure of bathhouses from a First Amendment freedom of association perspective, and leaves this issue for the analysis of other authors. While the Constitution does not specifically mention a right of association, the Supreme Court in *NAACP v. Alabama*, 357 U.S. 449 (1958) stated: "[I]t is beyond debate that freedom to engage in association for the *advancement of beliefs and ideas* is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." (emphasis added). It is clear that in the case of bathhouses one of the primary purposes for association is for the advancement of sexual gratification. *But see* Marc E. Elovitz and P.J. Edwards, *The D.O.H. Papers: Regulating Public Sex in New York City*, in *POLICING PUBLIC SEX* 295, 298 (Dangerous Bedfellows eds., 1996) (stating that the New St. Mark's bathhouse was a place where gay men escaped persecution, developed a cultural and political identity, and participated in voter registration and safer sex education programs).

<sup>82</sup> See *Burris*, *supra* note 47, at 969 (1989). The court attempted to analyze the New York nuisance statute under both the rationale relations and heightened scrutiny tests.

that the closure of the bathhouse “did not extinguish their opportunities for unrestricted association in establishments which avoid creating a serious risk to the public health.”<sup>83</sup>

Applying a total scrutiny approach, but relying on the rational basis test, the *St. Mark’s* court upheld the bathhouse closing.

## 2. *Commonwealth v. Bonadio*.

In *Commonwealth v. Bonadio*,<sup>84</sup> the police arrested four people at a pornographic theater for voluntary deviate sexual intercourse.<sup>85</sup> The state defined deviate sexual intercourse as “sexual intercourse per os or per anus between human beings who are not husband and wife, and any form of sexual intercourse with an animal.”<sup>86</sup> The court refused to address whether a fundamental right was at issue, and applied a rational basis analysis. The *Bonadio* court stated that while the state clearly had an interest in protecting the public,<sup>87</sup> it did not have an interest in regulating morals. The court ruled that the Voluntary Deviate Sexual Intercourse Statute did not serve any interest that protected the public.<sup>88</sup> According to the court, the only possible purpose of the state was to regulate the private sexual activity of consenting

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<sup>83</sup> *St. Mark’s*, 497 N.Y.S.2d at 983.

<sup>84</sup> *Commonwealth v. Bonadio*, 415 A.2d 47 (1980).

<sup>85</sup> While two exotic dancers, employed at the Penthouse Theater, engaged in sexual acts with members of the audience. The police arrested the performers, the theater’s cashier and manager, and the patrons who participated in the sex acts. *See id.* at 52 (Nix, J., dissenting).

<sup>86</sup> *Id.* at 49 (1980) Fn. 1 (citing Act of December 6, 1972, P.L.1482, No. 334, § 1, 18 PA. CONS. STAT. § 3101 (1973)).

<sup>87</sup> The court stated that the state can protect the public from “inadvertent offensive displays of sexual behavior, in preventing people from being forced against their will to submit to sexual contact, in protecting minors from being sexually used by adults, and in eliminating cruelty to animals.” *Bonadio*, 415 A.2d at 49.

<sup>88</sup> *Id.*

adults.<sup>89</sup> The court stated that under the state constitution, individuals have a right to be free from government interference in decisions related to morality, as long as no one was harmed by the activity.<sup>90</sup> The statute exceeded the boundaries of the police power because the court held that regulating public morality is not a sufficient government interest.<sup>91</sup>

The dissent argued that this case was not about private consensual adult sex, because the sexual activity took place in a theater with an audience.<sup>92</sup> While an adult theater does not afford the same privacy as the home, it is not as public as a street corner or a park. An adult theater is a quasi-private space. The general public is not allowed into a club, an individual has to pay admission in order to enter, children are not allowed, and the theater is private in the sense that someone owns the theater. Justice Nix's dissent is incorrect because it confuses a public accommodation with a public space. In addition, the dissent assumes that all space falls into two categories, and ignores the complex public-private spectrum.

*Bonadio* is an important case against the closing of commercial sex establishments, however, its ruling does not address the state's interest in preserving public health. The *Bonadio* court was very clear that regulating public health, not morals, was a legitimate state interest. The case in *St. Mark's* is clearly distinguishable from *Bonadio*, because in *St. Mark's*, the state's interest was to preserve the public health, not regulate morality. Applying a rational basis analysis, *Bonadio* would likely uphold a statute closing a commercial sex establishment in order to prevent HIV transmission.

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<sup>89</sup> *Id.* at 50.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 51.

<sup>92</sup> *Id.* at 52 (Nix, J., dissenting).

3. The problems with the rational basis standard.

There is debate over whether or not commercial sex establishment closing can withstand even the weaker rational basis test. Advocates for bathhouses have stated that the closing of bathhouses is not rationally related to the state's interest in preventing the spread of HIV. These individuals state that closing bathhouses will not stop unsafe sex from occurring, it will only change the location and drive unsafe sex underground.<sup>93</sup> Instead of having sex in bathhouses, people could organize condomless sex parties, or have sex in public. Their claim is that the closing of bathhouses will not meet the state's interest.

Advocates of bathhouse closings reiterate the standard for rational basis review. They argue that the state's interest is to limit the spread of the disease by limiting behavior that can transmit HIV.<sup>94</sup> Reasonable public health officials have asserted that closing bathhouses might move the location of unsafe sexual activity, but would still probably reduce overall transmission.<sup>95</sup> Under a rational basis standard, a court would uphold closing bathhouses in order to stop HIV transmission.

Unable to grant privacy under the federal constitution, courts in states that have not recognized a state constitutional right of privacy to homosexuals are likely to follow the reasoning in *St. Mark's*. A state government can easily meet the rational basis requirement and provide a minimal showing that bathhouse patrons engage in conduct that is likely to transmit HIV, and that closing them is a reasonable means to stop this transmission.

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<sup>93</sup> See Audio recording of Mickey Wheatley: Combating The Sex Panic, National Sex Panic Summit (Nov. 13-15, 1997) (<<http://hivinsite.ucsf.edu/ram/sps/berube.ram>>); Collier, *supra* note 48, at 321.

<sup>94</sup> Collier, *supra* note 48, at 321.

<sup>95</sup> Burris, *supra* note 47, at 968.

The rational basis standard allows courts to make decisions that ignore the reality of gay men's lives. Gay men have fundamental rights to privacy that are infringed when bathhouses are closed. Additionally, statutes, like the one in NYC that prohibits all forms of sexual activity using the mouth and the anus do not address the reality of HIV. The risk of HIV transmission is very low when individuals engage in oral sex, and most HIV/AIDS educators consider oral sex a form of safer sex. Additionally, banning all anal sex without regard to condom usage does not address the fact that using condoms during anal sex is a widely recognized as safer sex. Additionally, closing bathhouses prohibits a forum where gay men can learn about HIV prevention, and have access to free condoms and lubrication.

E. Strict scrutiny.

The state would have to show that closing commercial sex establishments would reduce the spread of HIV. Under a strict scrutiny analysis, a correlation between sex in bathhouses and increased HIV transmission does not mean that the state could close its bathhouses. The state must also show that no other methods exist that have a lesser intrusive impact on the privacy rights of bathhouse patrons. Stated differently, a closing will only be successful if the government can show that its action is narrowly tailored to its prevention interest, and that it infringes on the bathhouse patrons' rights in the least intrusive way.

Closings of bathhouses rarely satisfy the narrowly tailored requirement because there are lesser intrusive regulations that governments can use before closing a commercial sex establishment. A court would uphold a bathhouse closing, under a strict scrutiny analysis only as a last resort. States would have to exhaust the least intrusive remedies before a court would grant an injunction for a closing.

Some argue that even under a strict scrutiny analysis, courts should uphold bathhouse closings because this type of injunction would not be unduly restrictive, because it would not prevent gay men from “engaging in intimate association elsewhere.”<sup>96</sup> Commercial sex establishments, like bathhouses, occupy a unique niche in gay communities. To some gay men, closing bathhouses is extremely restrictive because finding locations to engage in gay intimate association is difficult—especially in a homophobic society. A court injunction restricting the operation of commercial sex establishments should only be as broad as necessary to reduce HIV transmission.<sup>97</sup>

Although government closings of commercial sex establishments may not be the least intrusive methods, the governmental interest in preventing HIV transmission continues to exist. Government methods to prevent the spread of HIV/AIDS must be narrowly tailored in order to preserve the liberties of gay men. Governments have a number of alternatives available to them. These least intrusive alternatives, along with the cultural controversy surrounding them, are the focus of the next chapter.

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<sup>96</sup> See Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1286 (1986).

<sup>97</sup> Collier, *supra* note 48, at 314.

#### IV. NARROWLY TAILORED REMEDIES

Courts must weigh the seriousness of the HIV/AIDS epidemic against the individual right to personal autonomy. Closing bathhouses violates broadly the right to personal autonomy. States can still meet their public health goals, however, by employing HIV prevention methods that narrowly regulate gay commercial sex venues. Is there a way to construct the law maximally to protect public health interests, while minimally infringing on homosexual liberty interests? This paper argues that the public health laws in San Francisco that ban sex behind closed doors in commercial sex establishments<sup>98</sup> and require monitoring<sup>99</sup> satisfy the substantive due process strict scrutiny analysis. Re-designing the social spaces in commercial sex venues, combined with self-policing, is a narrowly tailored regulation method which satisfies the compelling government interest of reducing HIV transmission.

In *California ex rel. Agnost v. Owen*,<sup>100</sup> a trial court in San Francisco, recognized a privacy interest and refused to close commercial sex establishments. The court also recognized a correlation between bathhouses and increased HIV transmission.<sup>101</sup> Using a strict scrutiny analysis, the court allowed the establishments to remain open, but allowed the city government to regulate behavior and change social spaces in bathhouses.<sup>102</sup> The *Owen* court removed the doors from all private rooms available to patrons so sex establishment

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<sup>98</sup> See *supra* note 4.

<sup>99</sup> See *supra* note 5.

<sup>100</sup> No. 830-321 (Cal. Super. Ct. Nov. 30, 1984).

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

employees could monitor patron conduct.<sup>103</sup> The effect of the trial court order in *Owen* was to re-designed San Francisco commercial sex establishment spaces and to require self-policing.

Visual artist John Lindell stated that well-designed commercial sex establishment space can not only attract patrons that want to practice safer sex, but can also reinforce safer sex practices.<sup>104</sup> Commercial sex establishments could encourage mutual surveillance by building rooms without doors.<sup>105</sup> Lindell defines mutual surveillance as “non-invasive observation done only by patrons themselves, as opposed to by the Health Department or by sex club staff.”<sup>106</sup> He argued that monitoring by establishments forces patrons to have sex in private. Lindell believes that the display of safer sex acts in a sex venue eroticizes those acts therefore encouraging safer behavior. In addition, Lindell stated that instead of providing actual private space, cul-de-sacs, niches and columns could provide the illusion of privacy.<sup>107</sup> Lindell, however, is not in opposition to private space in commercial sex establishments: “the right to private space in a sex club is undeniable and should be provided for in any design. To deny private space would be force [sic] some patrons back to the bedroom, which is no safer than any other space, and certainly less potentially instructive.”<sup>108</sup>

Lindell is correct in saying that denying private space is potentially less instructive, but ignores the fact that many gay men and sex establishment patrons are aware of the

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<sup>103</sup> *Id.*

<sup>104</sup> John Lindell, *Public Space For Public Sex*, in *POLICING PUBLIC SEX* 73, 77 (Dangerous Bedfellows eds., 1996)

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 80 n.3.

<sup>107</sup> *Id.* at 78.

<sup>108</sup> *Id.* at 80 n.4.

modes of HIV transmission. When courts re-designing sex spaces and requiring self-policing forces commercial sex establishments to take responsibility for its patrons, and creates a safer sex norm for patrons. Self-monitoring, if approached in a proper manner, could be a very useful way to encourage safer sex and discourage unsafe sex. Monitors employed by bathhouses and sex clubs should be HIV educators going around the club, searching for unsafe practices and then encouraging individuals to have safer sex. Sex clubs must go beyond posting a notice, and should bring HIV education directly to its clients.

Supporters of SexPanic! oppose any type of policing or regulation. The self-policing concept treads on sensitive ground because homosexual men have had their desire policed throughout time. Some individuals in gay communities see regulating commercial sex establishment behavior, as restrictions of an already oppressive heterosexual ruling majority.

For example,

I was recently in a San Francisco sex club for the first time, and noticed that this club had no private spaces at all. Not only no private rooms, but they do not even have private stalls for the toilets. I have been used to the baths in San Jose, where privacy is plentiful. Because it seems systematic, I am assuming something --- that [sic] the lack of privacy in San Francisco sex clubs is an intentional measure to assure that people can be watched/monitored, to verify that safer sex is being practiced.

This is a form of sex panic. Even though this is not new policy, I'd like to comment that attempts to legislate morality always fail. Attempts to play big brother with other people's sex acts do not encourage safer sex practices in other contexts, or limit the spread of disease. It's just an example of the larger gay community deciding that policing is a good idea, even at the expense of personal freedom. I have no desire to submit to a policing of my sexual activities. San Francisco needs to get over its panic over AIDS and HIV, and to realize that restricting people's civil liberties is not productive, but simply debases the quality of our lives.<sup>109</sup>

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<sup>109</sup> Electronic letter from Jay Turner, [jaytu@earthlink.net](mailto:jaytu@earthlink.net), to Sex Panic Listserv, [sexpanic@queernet.org](mailto:sexpanic@queernet.org), (Nov. 11, 1998) (on file with author).

The writer in the previous passage complained that the San Francisco policy was an attempt to legislate morality. Sometimes, state legislatures and city council's pass public health nuisance ordinances in hopes of restricting, criminalizing and regulating homosexuality, while having little concern for HIV transmission. The state has used security interests and public health interests to justify previous civil rights violations.<sup>110</sup> Courts should strike those portions of the state legislation that have no affect on HIV prevention. Although the state may have ulterior motives, the gay community cannot deny that the HIV/AIDS epidemic is real. Re-designing public spaces and monitoring is one way to help curb this epidemic.

#### A. Scientific Support.

There is considerable debate over the effectiveness of the San Francisco open-door policy in satisfying the governmental interest in reducing HIV transmission. The goal of banning private space in commercial sex venues is to reduce the spread of HIV by reducing the amount of unsafe sex. Dr. Mitchell Katz, the Director of Public Health, said that “common sense strongly argues that more unsafe sex will occur in clubs that have closed rooms and no monitoring than in clubs that have monitors, insist that all patrons have safe sex and ask those who are having unsafe sex to leave immediately.”<sup>111</sup>

Proponents of privacy in commercial sex venues, “bathhouse proponents”, believe that by promoting unmonitored sex that bathhouses could provide a safe-sex alternative for those who do not want to perform in front of audience at an establishment without privacy.

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<sup>110</sup> An example of such discrimination based on race, not sexual orientation is evidenced in *Koremastu v. United States*, 323 U.S. 214 (1944).

<sup>111</sup> See Evelyn Nieves, *supra* note 3 (quoting Dr. Mitchell Katz).

They also argue that these bathhouses can be safer alternatives for men who pick up strangers and engage in unsafe sex in cars or restroom stalls.

Michael Petrelis, a proponent of privacy in public-sex venues, said that San Francisco should allow establishments to have private spaces, and mandate that these business supply condoms, safe sex education and testing for sexually transmitted diseases.<sup>112</sup> Bathhouse proponents have argued that commercial sex establishments offer an opportunity for reaching and educating homosexual men about the risks of HIV.<sup>113</sup>

Still other bathhouse supporters argue that the lack of privacy inhibits safe sex, and that privacy provides dignity and self-respect which leads to greater discussion of sexual safety issues.<sup>114</sup> Dr. Ron Stall, an epidemiologist at the University of California at San Francisco, stated that this idea is not supported by scientific evidence. Stall stated that his surveys found that patrons of commercial sex establishments did not ask each other about HIV status, and that men hardly spoke in these locations.<sup>115</sup> Stall's surveys and studies that liken commercial sex venues to "shooting galleries"<sup>116</sup> provides scientific evidence that supports San Francisco's open-door/monitoring policy.

## B. The public/private dichotomy.

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<sup>112</sup> *See id.*

<sup>113</sup> *See Collier, supra* note 48, at 321. The court in *St. Mark's* stated that the defendant bathhouse owners argued that bathhouses attempt "to educate its patrons with written materials, signed pledges, and posted notices as to the advisability of safe sexual practices, provide a positive force in combating [sic] AIDS, and a valuable communication link between public health authorities and the homosexual community." 497 N.Y.S.2d at 983.

<sup>114</sup> *See Evelyn Nieves, supra* note 3 at A10.

<sup>115</sup> *See id.*

<sup>116</sup> *See supra* notes 53-56 and accompanying text.

Courts must decide what distinguishes regulating public actions as opposed to private behavior in the home. They must also determine how sex establishments, which enjoy a quasi existence—neither public nor private (yet both)—fit into the public-private regulation spectrum.

The individual privacy right to personal autonomy enunciated in *Roe v. Wade* exists wherever a person goes. It does not necessarily change as a person moves from a private space to a public one.<sup>117</sup> What changes, however, is the government's interest. The government interest becomes more compelling, the more public the space becomes. For example, the government has a compelling interest to regulate commercial sex establishments because of the increased opportunity for transmission they provide. In a private home, it is not as easy to come across a multiple people to have sex with, therefore the government's interest in the home is not the same. Courts should not regulate private sex—sex in the home. If individuals want to have sex without condoms in their homes, the state should do nothing but encourage these people to practice safer sex. But when individuals move into a more public sphere, i.e., a commercial sex establishment, the government's goals are triggered. Commercial sex establishments are usually open daily, sometimes twenty-four hours a day, and the sexual access to individuals is fantastic. Controlling access to the public is what constitutes the compelling component of the interest.

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<sup>117</sup> The right transforms when a person moves from private space to a public one, and the public space is not an enclosed area, and there is a threat of harming the liberty interests of those who choose to enter. See Elovitz and Edwards, *supra* note 82. For example, the right does not change when a person moves from the privacy of their home to the private room of a public commercial sex establishment. The right does change when a person moves from the home to a public park, because anyone can enter a park, and unwillingly observe sexual conduct, (e.g. children).

Central to this discussion is the socially constructed spectrum between public and private. In the excerpt from the letter complaining about the San Francisco sex clubs, Jay Turner wrote, “that this club had no private spaces at all. Not only no private rooms, but they do not even have private stalls for the toilets.” The commercial sex establishment is a peculiar location on the public/private landscape. It is a privately owned establishment that is open to the public. These quasi-public/private spaces fall into the category of public accommodations.<sup>118</sup> There is nothing that mandates that a bathhouse should or must have private rooms. In fact some bathhouses have private rooms while others don’t.

### C. Absolute Rights

There are a lot of things that one cannot do in a bathhouse or public accommodation. For example, under federal law, a bathhouse cannot discriminate against people of color trying to enter the establishment.<sup>119</sup> But an individual can discriminate on any basis (i.e. race or religion) to determine who can enter his home.<sup>120</sup>

The reader may ask, “what do people of color have to do with this?” This is an example of the state balancing civil liberties against civil rights. There exists a constitutionally recognized civil liberty that protects an individual’s freedom to associate with

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<sup>118</sup> Note that all public accommodations are not quasi-public private spaces, some public accommodations, like parks, are completely public. Under federal law, an establishment that serves “the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action: (b) (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment.

<sup>119</sup> 42 U.S.C. § 2000a (a) states that “[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.”

<sup>120</sup> 42 U.S.C. § 200a(e) states that “[t]he provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are

whomever he wants. But this civil liberty is pre-empted by the civil right not to be discriminated against on account of race. Society and the state have an interest in destroying race-based discrimination, even if this impedes on the individual freedom of association. That is why bathhouses cannot discriminate against people of color, even though the freedom of association exists.

Now let's contrast this to the right to have the kind of sex you want. You are right, arguably there is a civil liberty to have sex with whomever you want, in whatever fashion you want. However, the gay community (let's ignore the government for now) has an interest not to allow unsafe sexual practices because of the HIV epidemic.

As far as I'm concerned, the gay community can spew forth as many scare tactics and propaganda (like it's doing now) to discourage sex without condoms as much as it wants - that's freedom of speech. But not to "ALLOW" someone to have "unsafe" sex? That's not the gay community's place, or anyone else's. Furthermore, while the gay community should do what it can to curb HIV (just not with it's current lame tactics), or better yet get a CURE or VACCINE for HIV, that goal should never come in conflict with ones [sic] right to freedom of association or expression, and thus freedom to have whatever kind of sex partners agree to.

No one is forcing anyone to have any kind of sex with anyone else. So there can be no compelling argument that an UNinvolved party is effected enough by other involved party's sexual acts, such that the UNinvolved party should have any say over the involved parties. If you're that worried about HIV, don't have sex, or always use barriers - if you do that, you won't have to worry about getting HIV or other diseases; you also won't have to bitch about other people's choices.<sup>121</sup>

Some of the extreme libertarianism displayed by supporters of Sex Panic! appears to be a form of selfishness. Some supporters believe that they have an unlimited or "absolute" right to do, sexually, whatever they please, without any constraints. We are not atomized

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made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."

<sup>121</sup> Electronic letter from Sam Ebeid, [whthawk@rocketmail.com](mailto:whthawk@rocketmail.com), to Sex Panic Listserv, [sexpanic@queernet.org](mailto:sexpanic@queernet.org), (Nov. 11, 1998) (subject re: San Francisco sex clubs) (on file with author).

individuals but members of a community (or communities). When the expression of one's individual rights imposes on or threatens the rights of others, limits to individual rights are warranted. One supporter of Sex Panic! wrote,

could [sic] you PLEASE explain how my ABSOLUTE right to have any kind of sex I please with a consenting adult has a damn thing to do with you?

Let's just say that I'm HIV+ (I'm not and get tested 3xs a year at work) and I have sex with people without condoms with their consent (informed of my status or otherwise - in this day in age a reasonable person should assume all are HIV+ until proven otherwise), possibly infecting them. This would have no effect on you, if you worship the condom like so many in our community. No one's forcing you to have any type of sex with anyone.

So you may argue that because people MAY be getting infected by sex without condoms that it's costing you tax dollars? Spare me that lame argument as well. The \$.50 to \$1 a year each American pays in taxes specific to AIDS healthcare does not entitle them to restrict the sexual choices of others. Were that the case we'd have outlawed booze, cigarettes, and any other risky activity years ago. Welcome to the monetary price of freedom.

Your message that consenting individuals don't have an absolute right to ANY private sexual activity they want, and that the idea of said is "monarchist", to me is scary and in opposition to sex panic! Sex is one of, if not the MOST fundamental, sincere, and honest ways a person can express himself, and associate with others - two fundamental concepts of the United States Constitution. Does our Constitution seem anarchist or "monarchist" to you? Perhaps you should just worry about yourself. I see nothing extreme about consenting adults having the right to do whatever they want sexually, in private.<sup>122</sup>

The author of the above excerpt believes not only that he has a right to personal autonomy with regard to sexual decisions, but that this right is absolute. This argument lacks balance. Every person is entitled to privacy to the degree that it does not invade the privacy of any other person. The public in general has a right to be free from and prevent the transmission of HIV, and every individual has a right to conduct his or her own affairs. The rub is to make sure that the public does not overly infringe on individual liberties, and

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<sup>122</sup>Electronic letter from Sam Ebeid, [whthawk@rocketmail.com](mailto:whthawk@rocketmail.com), to Sex Panic Listserv, [sexpanic@queernet.org](mailto:sexpanic@queernet.org), (Nov. 11, 1998) (on file with author).

vice versa. The previous excerpt does not recognize that there are degrees to infringing on individual liberties. Closing a bathhouse is much more intrusive than banning unsafe sex in a bathhouse. Yet both are infringements on personal liberties.

## V. C o n c l u s i o n

A conflict exists between gay men's rights to personal autonomy in decisions concerning public sex and governments' need to protect the public health from the transmission of HIV/AIDS. What makes the conflict more difficult is that this is an area where reasonable people who care about the rights and health of gay men can disagree in profound ways. Courts and municipal and state legislatures are faced with the difficult task of balancing the competing interests involved.

Individuals have a right to make personal decisions regarding their sexual activity. This right, while qualified, follows a person everywhere he goes. With a compelling interest, the government can infringe on the right to personal autonomy, if it is done in the least intrusive way possible.

The government has a compelling interest to take actions to lower the transmission rate of HIV. Closing bathhouses, however, is not the least intrusive method of achieving this governmental interest. An alternative to closing is to re-design public sex spaces so that they discourage unsafe sex. In addition to re-designing spaces, sex establishments can train monitors to be sensitive to safer sex issues and encourage safer sex in clubs, and at times, eject individuals that do not comply to safer sex rules.

Unlike closings, re-designed sex spaces do not create a sexual panic, because they do not stop sex totally. It takes unsafe sex out of a location where it is very easy for people to meet and have sex, while maintaining a degree of personal autonomy. Courts must be sensitive to this issue, and should treat personal sexual decision making as a fundamental right, and must be careful to fashion remedies that both prevent HIV transmission, while minimally intruding on protected freedoms.