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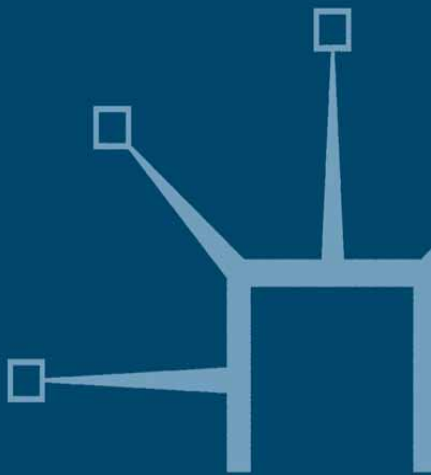
AIDS and the Sexuality of Law

Ironic Jurisprudence

Joe Rollins



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This book is dedicated to the Garner sisters, those indomitable women who taught me that irony is also a strategy for survival.

For Cecil, Mabel, Jean, and Babe, but most of all, Evelyn.

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Acknowledgments

AIDS and the Sexuality of Law was inspired by a series of events that began in 1990. That year, my first in graduate school, one of my closest friends, Donald Tichy, was diagnosed with AIDS. He died in August of 1992. Within six months of his death, my sister, Ronda Rollins, was diagnosed with cancer; she died in October of 1995. Although I certainly would have preferred otherwise, I spent my time in graduate school struggling to stay afloat as a student while simultaneously coping with the harsh spectacles of medical treatment, the politics of disease, sexuality, and grief. Like many other people who write about disease and politics, these events sparked the imagination, outrage, and curiosity that kept me working on this project. If not entirely ironic, death itself is certainly a mixed metaphor.

The intellectual debts that I have accumulated in the writing of this book are many. I am especially grateful to the faculty with whom I worked at the University of California. Their patience and tutelage got me through the dissertation research that formed the basis of this project: At Santa Barbara, M. Kent Jennings, Beth Schneider, and John Moore; in San Diego, H. N. Hirsch. While in Santa Barbara, I was also fortunate to have had the opportunity to learn with and from Madelyn Detloff, Peter Digeser, Jane Dini, Mark Kerr, David and Ann Lynch, A. E. Keir Nash, Jeanne Scheper, and Donna Schuele. The project was made possible, in part, by a research grant from the Gay and Lesbian Business Association of Greater Santa Barbara and I am thankful to Steve Pfeffer, Tyler Trull, and Lucia Snowhill for their research assistance. An earlier version of Chapter 3 appeared in *Law and Sexuality*, Volume 6 (1996):63–82.

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Introduction

The 1993 film *Philadelphia*[1] manipulated middle America's understanding of AIDS in some very effective ways. It tells the story of two lawyers: Andrew Beckett (Tom Hanks), a gay white man with AIDS who has been fired from an elite law firm, and Joe Miller (Denzel Washington), an African American attorney and classic ambulance chaser who reluctantly represents Beckett in a discrimination suit against his employer. Despite the criticisms that can be leveled at the film, it accomplished, in Paula Treichler's words, "important cultural work."[2] For many audience members, the film challenged blatant myths and misconceptions regarding AIDS and homosexuality. As the story unfolds, it cleverly invites the audience to identify with homo- and AIDS-phobic characters, and then, by providing all the right tidbits of information, ushers us along the path to enlightenment. By the time Beckett wins his lawsuit and dies, viewers have been provided with a short course in AIDS facts: HIV is not transmitted through casual contact; not all gay men have AIDS; not all people with AIDS are gay men; gay men and people with AIDS have families who love and support them; discrimination on the basis of sexual orientation or HIV serostatus are frequently indistinguishable; not all gay men fit the effeminate stereotype. As is often the case in Hollywood films, many of these factual fragments are spoken to the audience from the witness stand in a courtroom scene. Opposing attorneys collide upon hapless and dramatic witnesses and when the film has finished, we are left with some very sculpted and identifiable "facts."

The elaborate choreography of the trial process translates nicely onto the screen and provides filmmakers with an ideal setting to tell their story in a way that is condensed, focused, and narratively tidy.

J. Rollins, *AIDS and the Sexuality of Law*

These organizational possibilities allowed *Philadelphia* to direct knowledge about AIDS toward particular political ends.[3] In this instance, the management of information was designed to disrupt and replace trenchant cultural codes built on misinformation. The audience could be educated and enlightened as the film provided a vehicle whereby viewers could identify with the main characters and thus become receptive to "correct" images and information. The heterosexual audience was less likely, however, to notice what got left out. Despite its accomplishments, *Philadelphia* succeeded and had wide box-office appeal in part because it did not challenge too forcefully widely held beliefs about gay men and sexuality. Films by Marlon Riggs and Derek Jarman did much of the same important cultural work, but could not have had the same wide audience appeal because those directors employed images, artistic choices, and cultural codes that *Philadelphia*'s audience would have found unpalatable. For many queer viewers, what was most troubling about *Philadelphia* were the film's silences—notably, the absence of intimacy between Andy and his lover; the failure to acknowledge that gay men do not have a monopoly on promiscuity; the invisibility of a gay and lesbian community response to AIDS.

This book is about these same strategies for managing information, particularly silences, and their role in legal discourse. The legal language of AIDS is full of gaps, absences, missed opportunities, and unarticulated possibilities, and when courts were called upon to settle the vexing questions that arose in the early years of AIDS those gaps got even wider. Such silences are the substantive foundation upon which my argument is built. Most court cases involving AIDS and HIV are relatively routine, and significant numbers of litigants with HIV have won important legal battles. Nonetheless, reading the growing body of case opinions dealing with HIV, one is struck by how many times obvious questions remained unasked, how often judges missed opportunities to write opinions in ways that could assuage the fears of a hysterical public or to establish precedents protecting people with HIV. Even when judges make such rhetorical attempts, the underlying logic is strangely heterosexist. Would it have been possible to support

these same legal conclusions with language that depicted AIDS in less homosexualized and foreboding tones? Oftentimes, the answer is yes. When these opinions are examined for their logic, narrative structure, and symbolic content, we see that they depend upon a specific sexual epistemology that is always present, often damaging, and generally unarticulated.

In these cases, we see judges managing evidence offered by litigants and expert witnesses in ways that rhetorically shepherd us toward some ostensibly determinative set of truths: The facts are obvious and they point us toward an outcome. More potent, however, are the fragments of information that must be relegated to the realm of the unknowable in order for these scripts to make sense. Rather than imagine that these are contests about compelling and displaying some identifiable set of truths, my argument is that these opinions also compel, reveal, and rely upon fundamental fictions, absences, and occlusions that participate in the social construction of AIDS. More specifically, they participate in the construction of a particular type of gay/AIDS subject. In the language of judges, witnesses, litigants, and experts we see the influence of the closet, the rhetorical and epistemological mechanism by which HIV is conceptually contained within the population of gay men. The narratives of threat, containment, and expertise are common in AIDS discourse, and all too frequently, they invoke another imagined threat to Western culture: the homosexual. The materials examined here show that, for many, AIDS is a gay disease that requires state policy to operate at the boundaries of sexuality. Thus, the logics of threat, containment, and expertise come to regulate AIDS and the person living with HIV through the same strategies by which our culture regulates sexuality. This effect is achieved in part by managing the relationship between what we know for certain and what we do not know, but even more fundamentally, it succeeds by actively pushing out of view things we really do know. In short, available information, obvious "truths," scientific facts, and fragments of the apparent must be carefully overlooked or negated—rendered unknowable—in order for the whole to make sense. Such intentionally negational tactics mark these texts as ironic. Unlike other metaphoric strategies that draw direct association between symbols

and meanings,[4] irony relies on coded forms of knowledge—a paradoxical relationship between what is literal (the statement) and what is figurative (what the statement symbolizes). To invoke another potent Hollywood image, these case opinions only become logical if we pay no attention to the man behind the curtain.

Well before HIV was identified as the causative agent behind AIDS, scholars and activists were cataloguing the silences of the Reagan administration, noting the opportunities missed by the institutions of biomedical science, and screaming to draw attention to the numbers of lives lost while the federal government debated whether discussions of homosexual sex could be included in educational materials.[5] In significant ways, AIDS has occupied a closet of its own, defined by the same type of unspeakability that characterizes homosexuality in Western culture.[6] Curiously, however, as homosexuality and AIDS are discursively highlighted, it is heterosexuality and health that are reunited by default and conceptually placed beyond the gaze of the state. Heterosexuality, and consequently heterosexual sex, escape the types of regulation that are commonly directed at gay men. Containing HIV requires regulating bodily fluids, including the sanctified fluid exchanges attendant to marital, monogamous, reproductive, private, heterosexual sex.[7] And yet, in the cases examined below, fluid exchanges take on an oddly protean quality, sometimes standing in for homosexuality, at other times disappearing altogether, and in still other moments being magnified beyond reason.

That AIDS and homosexuality are conflated in the public imagination hardly bears repeating, but the mechanisms by which this conflation occurs and the impact it has on people's lives and on beliefs about the syndrome are issues of real and pressing importance. When statutes are interpreted restrictively, plaintiffs with HIV lose benefits to which they might be entitled. When statutes are applied more generously, plaintiffs with HIV gain valuable access to medical treatment. The precedents established by such cases define the future of statutes and add detail to AIDS policy at both the state and federal levels, but they also tell us a great deal about the meaning of AIDS, sexuality, and what it means to be part of the American "mainstream." The doctrinal result of AIDS-related

litigation is only one of the outcomes. Another is the production of images of heterosexuality and health in American society. In some of these opinions, homosexuality and AIDS are brought to the foreground while heterosexuality, health, and the potential for sexual border crossings are relegated to the background, minimized, and negated. In others, homosexual bodies, subjects, and sex are literally absent, but their epistemological presence girds the opinions. Throughout, homosexuality and AIDS fade into and out of view selectively such that the resultant texts remain consistent with heterosexist logic.

A Brief Legal History of AIDS

AIDS-related legal cases have been heard at all levels of the American court system, and as with any issue area, the bulk of those cases have happened in state and lower federal courts. Litigants in the first decade were often prison inmates, recipients of blood products, and people making claims of job discrimination. When the whole corpus of federal court cases dealing with AIDS is summarized, one notices immediately that the demographics of the litigants are, on the whole, rather different from the demographics of people with HIV. At the time these cases were being heard, gay men were the largest population subgroup with HIV, yet the demographic profile of litigants for the first ten years of the crisis is composed largely of prisoners and individuals infected with HIV through blood products. Prison litigation has been advanced by inmates who are both seropositive and those who are seronegative. Litigation brought by inmates with HIV tends to involve questions about access to medical care, drugs, and claims of discrimination arising from employment restrictions or segregation policies. Cases brought by prisoners who are HIV negative generally attempt to have prisoners with HIV segregated from the "general" prison population. These tensions have appeared frequently since 1982 and, in general, courts have granted prison administrators wide latitude to cope with circumstances as best they can.

One of the more interesting features of these cases is the way they investigate how HIV is transmitted. Judges acknowledge that

HIV is transmitted sexually and by sharing injection materials, but the possibility that sex and drug use occur in the prison setting is strikingly invisible. Sexual intercourse, consensual and otherwise, not to mention injection drug use, are rampant in American prisons, but acknowledging the fact that these aspects of inmate life are beyond the control of prison administrators would undermine the belief that prisoners are serving "hard time" and that guards are, in fact, in control. While governments in some countries acknowledge their inability to completely dominate and manage inmate behavior,[8] and make sterile injection materials available to inmates who use them, we in the United States are loathe to admit any cracks in the facade of puritan authority with which we view our penal system. This group of cases brings deeply troubled meanings to our understanding of the closet and the silences it enforces. These cases also show us a great deal about the mechanisms of power and powerlessness.

Cases brought by people infected with HIV through blood products and medical procedures raise a variety of questions about who is liable, under what conditions, and how much compensation is owed to whom. At what point did the Red Cross become aware that the nation's blood supply had been infected with HIV? Was the Red Cross obligated to test all blood in stock once the ELISA test became available, or were they obligated to test only newly drawn blood? Were the Red Cross and its employees responsible for confirming the sexual identity of blood donors, and for tracking donors who were seropositive because of flawed interpretations of risk in their own behaviors? These questions recur throughout cases involving litigants infected through medical procedures and the answers, often, require finding and interrogating the "implicated homosexual" donors whose identity/behavior composition is called into question. Privacy protections for anonymous blood donors pose difficult questions in these cases and, in the end, the scripts are often judicially rewritten as stories of careless men who were confused about their sexuality, innocent victims, and an overworked Red Cross doing its best to survive in a time of uncertainty.

Gay men number few among these cases despite the fact that sexuality and its attendant epistemologies figure prominently

throughout.[9] Meanwhile, other groups affected by AIDS have been marginalized or ignored in political and legal discourse. Scholars from various discursive perspectives have gradually accumulated a history of AIDS that calls attention to the people who have been left out of official renderings of the pandemic. These renderings have been regularly demarcated by events that received broad media attention: initial recognition of the syndrome in the early 1980s; discovery of the HIV virus and widespread marketing of the ELISA test in 1985; Ronald Reagan's first mention of AIDS in 1986; celebrity announcements of their seropositivity—most notably those by Rock Hudson and Magic Johnson; the Food and Drug Administration's approval of new drugs, from AZT to protease inhibitors, just to name a few. Initial associations of the syndrome with gay, white men prompted political responses that set in motion biomedical and governmental actions that simultaneously had both privileging and marginalizing side effects. When the institutions of government and science belatedly got involved, white men emerged at the forefronts of organizing, activism, research, and treatment. Consequently, issues of importance to women, people of color, and more socially marginal groups like sex workers and injection drug users were regularly overlooked. Writers across the history of HIV/AIDS have, therefore, focused their efforts on bringing excluded populations into greater prominence and gaining access to prevention programs and health care.[10] The crisis narratives that dominated the early years have been replaced more recently with rhetoric that depicts HIV/AIDS as just one of many equally pressing global problems, little different from illicit drug use, starvation, poverty, or any number of other illnesses.

AIDS-related cases are still moving through the American legal system and the questions being asked by litigants continue to change. Judges who had to deal with AIDS in the early years were required to draw analogies, establish causality, and produce coherent decisions in a climate of considerable confusion. As scientists have learned more about HIV and legislative bodies have slowly amassed statutes and policies specifically directed at HIV/AIDS, some of that uncertainty has abated. The earlier decisions represented here

helped construct the social facts of AIDS in a much more volatile environment, as judges were called upon to decide how HIV/AIDS was to be given meaning in legal language.[11] One of the first pieces of federal legislation designed to combat discrimination against handicapped persons was the Rehabilitation Act of 1973. Whether that act could be applied to HIV disease was an uncontemplated question until litigants with AIDS raised the issue before a judge. Privacy protections for anonymous blood donors seemed relatively secure, until HIV was found in the nation's blood supply. Whether donated blood is a product or a service, and who should be held liable when medical treatment causes disease, are questions that have sparked thorny legal contests. As I argue in the chapters that follow, judicial answers to these questions rely on an epistemology of sexuality that trumps other possibilities.

Understanding this constructive process is the primary concern of this book. My goal is to map the construction of AIDS and sexuality in judicial opinions, and I want to tell that story from a different perspective. Instead of weaving together chains of precedent, focusing on distinctions between holdings and dicta, illuminating what is known about AIDS law in America, and producing a coherent jurisprudence of AIDS, I will instead examine these cases for their silences and gaps. Hiding in these lacunae are volumes of information about how AIDS and sexuality are constructed in legal language. These are contests over knowledge, but more importantly, they are also contests about what to make unknowable. Silences are ubiquitous, and the relationships between what we know, what we do not know, and what is rendered unknowable are aspects of these social contests that deserve contemplation. These silences establish the logic through which these scripts become coherent.

Reading AIDS in Law

This project began as a quantitative study of metaphor, symbolism, and rhetoric, and that original project asked essentially the same questions that drive this book.[12] Originally, I collected and coded all case opinions involving HIV/AIDS from the Circuit Courts of Appeals dated between 1983 and 1995.[13] Using statistical

modeling, that work reconfirmed what other scholars had been saying about the discourses of AIDS since the crisis started: AIDS is an epidemic of enormous signification.[14] A key feature of that signification process draws boundaries around people, establishes systems of power and knowledge, and privileges some people while marginalizing others. Deepening and expanding our understanding of those processes is my main objective here.

My analysis relies primarily on texts selectively drawn from that body of materials because they illustrate the prominent trends in my argument, but in some instances, other textual materials were used to supplement the stories the opinions tell. For example, the media took notice of some of the cases discussed in Chapters 2 and 4 and, where necessary, those sources were used for elaboration. The cases examined in Chapter 3 received little media attention, but the analysis of those cases would be incomplete without paying some attention to the statutes and policies that were challenged by the plaintiffs therein. As a result, the discussion in that chapter also includes policy statements and legislative materials. Chapter 5 makes extensive use of extralegal materials for two reasons: The press was much more attentive to those cases and there is a clear interaction taking place between the work of the judges and the stories being told in the media. Although some cases from this period received a good deal of media attention, they were the exception and not the rule.

Throughout the twentieth century, legal scholars have been rethinking the formalism that marked legal education in the late nineteenth century. Since the legal realists first recognized that law was not science, but a human art, participants in various legal movements have been exploring and mapping the multiple strategies and effects of legal language. Some of the most vexing but fruitful analyses have arisen because scholars have undertaken surprisingly different approaches to the subject matter.[15] We might prefer to follow Richard Posner and reduce our subject to an economic formula, or we may aspire to the theoretical elegance of Kendall Thomas and map the Supreme Court's rhetorical desperation, or, we might, like Carol Clover, turn the inquiry inside out and think about the ways that cultural products are already like

law. Whichever strategy we choose, it is crucially important to develop and deploy varied techniques because each strategy reveals something new.

Since the introduction of the Brandeis brief, if not earlier, the nexus of scientific and legal narratives has become increasingly complex. It would be shocking if judges were so frequently drawing on discourses other than science to ground the logic of their opinions. Although the Supreme Court has been known to reach for the bible to support its rhetorical strategies,[16] nothing rivals the frequency with which judges turn to science for ostensibly "factual" and "objective" material with which to undergird or varnish legal reasoning. The exalted social and political position afforded to scientific discourse, not to mention its place atop a hierarchy of credibility, masks the extent to which science and scientists are often just as confused, innocent, befuddled, or wrong as anyone else—perhaps sometimes even more so—and the recognition that science is a cultural product is seldom made manifest in legal language. The cultural cache afforded to scientific discourse is so potent that it inspires heightened levels of belief in credibility and objectivity wherever it is used. Adding scientific narratives to any discourse gives the appearance of moving the subject matter out of politics and into the realm of pure meaning, free from interpretation, beyond further examination, and unsullied by the venality that is so apparent in more blatantly political materials. But despite valiant attempts to the contrary, science cannot shield the law from the insights of critical analysis.

The growing body of literature investigating legal rhetoric offers a variety of useful theoretical possibilities for thinking through the ways that legal language wrings meaning from conflict. The science of AIDS and the science of sexuality continue to produce rather volatile and endless debates. Thus, the growing body of literature on legal language and storytelling offers a fertile place to start thinking about the ways HIV and AIDS are given meaning in the law. Reading these cases for what is missing, and for their role in the ongoing process of constructing both sexuality and AIDS calls for a method that is broad, textual, and critical. I begin with the premise that scientific knowledge about AIDS has

been contested and unstable since the crisis began, and that this instability provides dubious foundations for legal reasoning. Furthermore, as social and political crises driven by AIDS have been settled through litigation, the fear, hysteria, uncertainty, and moral panics circulating around both AIDS and sexuality have driven the production of some very slippery and problematic legal decisions. When standard narratives are unstable or unavailable, rhetoric becomes shrill. These decisions, and the interaction of legal and scientific discourses, are narratively complex, negational, and rely on an established set of unarticulated and unspoken convictions. These features become clearest and most potent when read through the lenses of irony. Thus, I am arguing here that the AIDS/law/science intersection is an ironic narrative space from which problematic and contested meanings emerge. Moreover, I argue that these opinions are built on a heteronormative logic that works to the detriment of people who organize their intimate lives in nontraditional ways.

Critical legal and race scholarship and the contributions of feminists have illuminated the many ways that law produces and maintains power hierarchies, juridical subjects, and categories. Legal manifestations of the homosexual subject are often read for metaphoric associations, but articulating a fully developed theory of ironic jurisprudence is not a task to which many others have set themselves. In most instances, irony is intentionally negational, actively denying what is apparent or known. It can be sarcastic, cynical, mean-spirited, or funny, drawing attention to circumstances or conditions that others might prefer to escape notice. Ironic jurisprudence relies on some of these characteristics and, as I argue in Chapter 1, draws our attention to relationships between the literal and the figurative and thereby calls attention to the often-unnoticed effects of judicial language.

American political identity has a long history of self-righteousness grounded in a set of convictions and rituals that must be performed continually in order to perpetuate themselves. These opinions do a great deal of work in the production of a facade of certainty that is a key feature of American political identity; questioning that certainty becomes particularly problematic in times of

crisis.[17] The things that Americans hold dear are fundamentally grounded in a particular conception of the heterosexual familial unit.[18] Heterosexuality is central to American national identity, as well as essential to capitalism as it functions in the United States, and its importance must be continually reestablished as the most important and desirable way to organize life's intimate associations. By calling into question the safety, normalcy, or impermeability of the heterosexual marital unit, AIDS carries the potential to undermine more than just the lives of people with HIV. AIDS has also shown us the weaknesses in American national identity. Certainty is something that Americans have come to expect, and embracing doubt, or the grace and humility it might inspire, are anathema to the American way of life. Maintaining a coherent ideology, inspiring support for wars, cultivating political loyalty, and justifying imperialism all require a singularity of meaning that can be undone by ironic readings of state action. Irony shows us the holes in our national logic, the gaps in our ideological convictions, and may cause us to stop and reconsider our actions.

On Absence

Asking unasked questions and mining these opinions for what is negated also highlights the absences, exclusions, and contradictions that I have made in the writing of this book. There are undoubtedly many, some of which bother me more than others. Among the most troublesome absences are sustained analyses of race and gender. Over the last twenty years, HIV/AIDS has increasingly become a problem for women and communities of color. Issues of health, longevity, access to treatment, and prevention efforts vary dramatically along racial and gender lines, making it increasingly important to consider why so many efforts are failing and how the global situation might be improved. The case opinions examined below are often silent about race, making it difficult if not impossible to understand the central role it undoubtedly played when some of these cases were tried before juries or when plaintiffs or defendants appeared before judges. Sometimes a litigant's race becomes apparent in the language of

an opinion or the record of a case, and at other times it is identified in media reports, but on the whole the absence of race in these case stories demonstrates how very important determinative information may be missing but still central. Race is an important constitutive element in legal discourse, and its negation from these opinions should be read as further testament to the value of critical race theories.

The case materials I have chosen to explore should not be read as reflecting the universe of possible cases or even a representative sample, and the analysis here is neither doctrinal nor historical.[19] In his book *Bodies of Law*, Alan Hyde aspires not to show how one true body is constructed in legal discourse, but to multiply those constructions profusely; my goals are similar. I hope to show again, in another way, how legal meanings are made in confusing, contrived, and ironic ways, but moreover, I hope also to show that this inability to render linear, literal, and organized meaning from legal and scientific materials has political potential and that an ability to accept uncertainty should be cultivated. My critical and ironic goals thus stand happily in contradiction to and coexistence with my liberal and productive tendencies. Despite its bad reputation and a general suspicion of irony, ironic communication makes meaning.

Another point to consider is this book's limited and limiting definition and use of irony. Throughout these pages, irony appears as a strategy for reading and interpreting texts, and as I edit and reexamine this analysis I notice the absence of other possibilities. Irony is, indeed, strategic, evaluative, slippery, political, exclusionary, suspect, transideological—all points that recur throughout the book. Unfortunately, what is lacking here is the acknowledgment that irony is also playful, wry, funny, sophisticated, surprising, and urbane; it reifies discursive communities, and that is not always a bad thing. But such positive depictions are not to be found among these stories, and, indeed, would be out of place.

Prelude to the Text

Chapter 1, "Ironic Jurisprudence," develops a theoretical framework for understanding the links between AIDS, sexuality, science,

and the law, working from the premise that AIDS, sexuality, and scientific facts are constructed phenomena that emerge from linguistic rituals. Although the links between law and science are being explored with increasing frequency, few approach science and law as cultural products that become coherent through predetermined schemas. The processes of foregrounding and negating particular sets of facts (perhaps better understood as convictions) happen in both discursive domains. Thus, these legal opinions and the scientific contributions they incorporate, may be read as ironic, but when the reader closes this book the cast of characters are not relegated to the imagination; real people with real problems found on these pages continue to live happily or unhappily ever after.

As with any literary work, these legal stories operate on more than one level. They tell us about the intimate details of people's lives, their grief, their misfortunes, and their victories; they also establish precedents that are supposed guide the work of other judges. They tell us about the law and what it means given a particular set of factual circumstances. But they also tell us a great deal about our culture, the systems of knowledge and power with which we live, and the mechanisms by which those hierarchies are held in place. They tell us what is on the minds of judges faced with certain issues, and they tell us who is or is not entitled to the protections and privileges afforded by the state. Reading these stories requires shifting our attention away from the doctrinal, the constitutional, the statutory, and the factual; we need to readjust our sets in order to make sense of the images here. We will have to pay attention to the mechanisms of the closet, and keep an eye turned toward the ways that American culture imagines itself as a safe, heterosexual space.

Blood donation and employment issues form the subject matter of Chapter 2, "The Implicated Homosexual." These cases illustrate a variation on what Lee Edelman calls "homographesis":[20] the fantasy by which homosexuality is written upon the body. In short, they are judicially enforced contests wherein (presumably) heterosexual actors search for the body of a legible gay subject to serve as a source of authority, knowledge, and information that will provide focus and direction to the courts' rulings and structure the logic of the opinions. The body and the truths it might reveal are

central to these scripts, and the homosexual subject must be identified and ritualistically enlisted in the process by which AIDS is defined and controlled in order for society to remain unpolluted by either HIV or homosexuality. Here, gay men are cast as the original source of the AIDS epidemic and, as such, are responsible for bringing the syndrome to heterosexual litigants. In these cases, I argue, judicial narratives strive to locate AIDS on the body of an identified homosexual, producing a gay/AIDS subject with the ability to organize and make coherent the logical structures of the opinions.[21]

Adult theater regulations are central to the cases examined in Chapter 3, "Secondary Effects." These cases all involve statutes that are ostensibly designed to stop the spread of HIV and the methods they use are unique: changing the architecture of the adult theaters, raising the lighting within them, and limiting their hours of operation. Arguably, the intention behind these statutes may well have been the suppression of pornographic materials in each community, but the mechanisms chosen in each statute, and the judges' uses of the materials indicate that identification and surveillance of sexual transgressors is a more viable interpretation. In order to be read coherently, these cases require an epistemology of the closet that relies upon shame, anonymity, and a self-perception of perversity on the part of the pornography consumer. Ironically, the system of sexuality they portray does not allow for the regulation of sexuality between "out" gay men; stopping HIV transmission between openly gay men would require very different approaches. These cases can be read only as a means to police the borders between gay and straight and to make sure that heterosexual men who cross the line can be identified and expelled from what Janet Halley aptly describes as an apparently monolithic heterosexuality.[22] In the end, these cases extend the power–knowledge nexus in subtle ways through the use of space and surveillance. These cases regulate spaces within which male–male sex might occur and offer a troubling challenge to the established understanding of how sexual acts and sexual identities are aligned.

Chapter 4, "Unusually Indifferent Cruelty," examines AIDS-related litigation raised by prison inmates. Taken as a whole, this

group of cases works to shore up the power of prison administrators by granting judicial imprimatur to almost any policy adopted by them. These case opinions tell some of the most difficult stories to emerge from this body of litigation. In them we see some inmates convicted of attempted murder for spitting while HIV positive, in others we see stories of rape and abuse being deliberately ignored by prison officials. They tell graphic stories that, in many ways, defy not only medical/scientific knowledge about AIDS, but even the most rudimentary forms of logic, reason, and fairness. The argument developed in this chapter emphasizes the production, maintenance, and uses of ignorance that, at the end of the analysis, seem to be the goals of all the parties involved. They exemplify, in virulent terms, a Foucauldian power–knowledge nexus in a carceral regime.[23]

Chapter 5, "Impossible Burdens," tells the story of gay men who won their cases, had their interests protected, and were recognized by the courts as important, contributing members of society. The utility of an ironic critique in these cases serves to underscore what is negated or silenced in order for the opinions to make sense. Two of the cases in this chapter were drawn from employment-related disputes and a third from an arrest made during a scuffle at a gay pride parade. What is most notable about them, especially when juxtaposed with the materials above, is that the judges here construct opinions that go to great lengths to uphold the rights of gay men. These cases are antihomophobic in tone, yet at the same time are remarkable for the lengths to which the judges go to sustain their rhetorical coherence. Here, the power–knowledge nexus seems to have expanded seamlessly, regulating the homosexual subject by bringing him into the regulatory machinery of the state.

The concluding chapter, "Valuable Uncertainties," re-evaluates the utility of an ironic mode of analysis and contemplates its political potential. Uncertainty, contested meanings, scientific and legal doubt are not as problematic or troubling as we tend to think, I argue here. Indeed, I assert that for many, irony is a survival strategy that makes it possible for queers (and other marginalized peoples) to survive within a culture that so often and so boldly contests the value of difference. Although sexuality is at the center of discussion,

the negation and silencing effects of legal language are apparent in other areas and work to police and marginalize other groups. Notably, as queer politics continue to challenge our conceptions of gender and sexuality, we need increasingly subtle conceptual tools to understand how legal language constructs other queer subjects.[24] The construction of threats, systems of containment, and expertise are summarized and the potential utility of an ironic mode of analysis can well be imagined in other discursive areas.

Finally, a caveat is in order about the historical tone of this work. The history of HIV/AIDS has been told and retold as ways of framing research on the subject,[25] and another retelling of that story will not occur here. Nevertheless, recent developments in the treatment of HIV disease, as well as breakthroughs in diagnostic tools and viral load indicators have dramatically altered the meaning and medical science of AIDS. The cases analyzed here predate most of these important advances; consequently, this work fails to reflect current trends of optimism felt by many in the HIV community. These changes have layered new meanings on top of the old, and have dramatically changed the way that many in the gay community think about HIV disease, sometimes for better, but sometimes for worse. Nevertheless, the argument of this book remains salient because AIDS-related cases are still coming to court, and although new constructions are continually being layered upon the old, the influence of sexuality remains fundamental to their outcome.[26]

CHAPTER ONE

Ironic Jurisprudence

For the past twenty years AIDS has been constructed at myriad discursive sites. What we know about the syndrome and how we have come to know it result from contests over representation and meaning.[1] As Paula Treichler points out, "[t]he AIDS epidemic is cultural and linguistic as well as biological and biomedical."[2] She writes:

> The nature of the relation between language and reality is highly problematic; and AIDS is not merely an invented label, provided to us by science and scientific naming practices, for a clear-cut disease entity caused by a virus. Rather the very nature of AIDS is constructed through language and in particular through the discourses of medicine and science; this construction is "true" or "real" only in certain specific ways—for example, insofar as it successfully guides research or facilitates clinical control over the illness.[3]

Several aspects of this passage merit emphasis: the problematic relationship between language and reality; the constructed nature of AIDS; the primacy of medical and scientific discourses in that constructive process; the importance of effective clinical control of the illness. What is especially lovely about the quote is the way it forges a conceptual chain by which fighting AIDS (a real, true, material goal that takes place among the physical bodies of social actors), is directly linked to the language used to communicate

J. Rollins, *AIDS and the Sexuality of Law*

how we know the illness itself (symbols, cultural codes, hierarchies of social value, sites of regulatory power). Although Treichler is quite right to locate medicine and science as the most powerful discursive sites for the construction of AIDS, they are certainly not alone. Legal discourse also plays a potent role and merits our attention. This is so not only because law is a site at which AIDS is constructed—although it serves as such a space—but also because it serves as a site for the regulation of sexuality.

As a new and frightening phenomenon in the early 1980s, and one with no immediately apparent symbolic content of its own, the earliest AIDS narratives relied instead on cultural codes borrowed from other social locations. AIDS initially became coherent through biomedical and political discourses that drew extensively upon the vocabulary of sexuality. More specifically, AIDS came to be known through the same volatile codes through which homosexuality is made meaningful in Western culture: shame, stigma, secrecy, and deviance. These codes interact in legal scripts: in this instance, judicial opinions, in mutually constructive ways, shaping the contours of legal and sexual consciousness in ways that are backed by the coercive power of the state. This process has had two rather curious effects. First, although the metonymy established between AIDS and homosexuality seems to preserve the privilege and sanctity of heterosexuality, it has had a detrimental effect by creating the appearance of safety where it does not exist. Second, because the meaning of sexuality is in such a state of disarray, the science of AIDS has come to stand in as its proxy, and thus two highly unstable discursive fields wind up in the same place bracing against each other for support.

This chapter proceeds in something of a dialectic fashion, alternating between the "domains of script" and the "domains of consciousness."[4] In the first section, I consider the turn to language and narrative among legal scholars. A good deal of productive work has amassed in this area, focusing not only on the narrative and rhetoric of legal language, but also on gaps and silences. In this section of the chapter I argue that we need to push beyond the literal and the absent, and to consider how the relationship between the two is not simply a matter of oversight, but of negation, and

thus ironic, signaling the prominence of a sexual epistemology. In the second section of the chapter I consider what these scripts can tell us about the "domain of consciousness," and argue that the judicial language of AIDS displays a form of sexual consciousness that strives in vain for scientific certainty. Reading the judicial scripts of AIDS provides some surprising insights into the ways that sexuality works in our culture. They also show us some unexpected moments in the relationship between science, law, sexuality, and the power of the state.

We must engage the domains of script and consciousness simultaneously to make sense of the relationships between them. In a useful reconfiguration of theory, Sociolegal scholars Patricia Ewick and Susan Silbey urge us to consider legal consciousness as part of a reciprocal process by which individuals give meaning to their world and through which the world becomes "patterned, stabilized, and objectified."[5] They present their approach as a departure from theories that depict legal consciousness as either an attitude or as an epiphenomenon. In the former, linked to classic liberalism, legal consciousness is seen as an aggregate of individual actions and preferences that places the individual at the center of analysis. Such an approach, they argue, fails to integrate people's accounts with their experiences and overlooks the limited range of interpretive options that are available. In the latter approach they see that consciousness is regarded as a by-product of the operations of social structures and thus social relations take center stage. Here, the problem they identify lies with a tendency to overlook the knowledge and agency of the individual.

Bridging these dualisms, Ewick and Silbey propose that what was once understood as an oppositional relationship is actually mutually defining and provides opportunities for thought and action. Consciousness, by their definition, is a cultural practice that emerges from the interaction of individuals and social structures. They also observe that through language or schemas—which are defined to include cultural codes, vocabularies of motive, logics, hierarchies of value, and conventions—society gains access to the materials needed to make sense of the world and give it meaning. Through these mechanisms we learn "how the world works, what

is possible and what is not."[6] Furthermore, they link schemas and their meanings to distributions of resources, variations in social power, and agency. The possibility of invoking different schemas, they observe, "opens up the potential for generating new resources and the ability to challenge or revise cultural meanings and the distribution of resources."[7] The theory of ironic jurisprudence developed here incorporates these insights. More pointedly, consciousness here encompasses not only legality, but also sexuality and its place in the construction of AIDS. The ways that the world works, what is possible, what is not, and allocations of resources—specifically within this single issue area—are things we can know through the schemas that emerge from the interaction of judges, litigants, experts, and witnesses in the institutional setting of the courts. These elements can show us how we know AIDS, and therefore also how we can continue to fight it.

Scripts

Drawing from the insights of legal realism, feminism, critical legal scholarship, and critical race theories, researchers have increasingly turned their attention to legal language. Some people explore the ways that language transforms disputes into public discourse, others examine concepts such as rights and their place in political life, and still others consider how disputes operate within the specialized language of the law.[8] Broadening the analysis has shown how race, gender, and sexuality are constructed at multiple sites of representation.[9] The emotive possibilities of personal narrative have become more prominent, drawing attention to the explanatory potential of weaving together legal discourse, storytelling, social theory, or psychoanalysis.[10] Legal scholars exploring these concepts have offered some extraordinary insights into the power they have to maintain established hierarchies.[11]

The turn to narrative and symbols in legal language has become increasingly important in recent years. As Paul Gewirtz observes:

> To some extent, I also think the turn to narrative among legal academics, like their interest in law and literature generally, is a reaction against the

> two most important contemporary movements in legal scholarship: law and economics, with its reinvigorated scientist approach to law, and critical legal studies, with its own form of abstraction. Those who are drawn to the subject of narrative and rhetoric in law frequently see themselves as resisting the scientism and abstraction of these other legal movements.[12]

Gewirtz's observation is very diplomatic, and his point is well taken. Critical legal scholarship—particularly that dealing with sexuality and queer theory—has often been faulted for its obscurantism.[13] The law and economics movement, on the other hand, displays the increasing influence of science on legal work. What we must bear in mind is that scientism and abstraction are both powerful because they are narrative structures with which we organize the schemas that make the world meaningful. Although scientism, abstraction, and narrative are conceptually distinct and can be parsed, we should not overlook the fact that scientism and abstraction are subsets of the latter term, and that those narratives are a fundamental element through which the power of the state is enacted.

Where sexuality is concerned, abstraction remains the order of the day. The dominant legal narratives seem to have shifted as the Supreme Court's decision in *Lawrence v. Texas* has overturned *Bowers v. Hardwick*.[14] The privacy claim that Justice White dismissed as "facetious" in 1986 is now, in 2003, an articulated right that protects same-sex relationships between consenting adults. The legal and political victories signaled by the decision are monumental, yet what the ruling also reflects is the recognition that sexuality is constructed and epistemological. Ultimately, what has evolved since 1986 are the schemas through which we know and make sense of sexual expression. Whereas Justice Scalia, and many others on the political right, would clearly prefer to maintain more damaging analogies—that is to say, that gays and lesbians are most like criminals, alcoholics, and prostitutes—the dominant narratives are now different. Justice Kennedy's majority opinion in *Lawrence* recognizes what gay rights opponents fear most: Gays and lesbians are most analogous to heterosexuals. Fewer people explore the nexus of law and sexuality through economic narratives, but there are some notable exceptions.[15]

AIDS has received little play at the Supreme Court level, making that a less powerful site from which to glean a better understanding of AIDS knowledge and its position in legal discourse. State and lower federal courts have, to date, played the more prominent role in managing and regulating knowledge about HIV. That expanding body of materials significantly influences the ways that AIDS policy is shaped, and thus it has an impact on the lives of people with HIV. While it would be foolish to deny the very real, material, bodily, and economic effects of AIDS-related litigation, it would be equally remiss to deny that these effects are mediated by and given force through language.

Several questions drive the litigation represented in these case materials: Who was HIV positive? When did they know it? Did they put other people at risk? What were the chances of transmission? Disputes about regulating work places, adult theaters, prisons, and medical practices show that managing perceptions of the risk of viral transmission is the determinative element that can be minimized or magnified in support of a case outcome. Fact patterns established in support of these decisions manifest a need for information that is sometimes available, and sometimes not. Where some fragment of information is unknown, case opinions must be made coherent with what is available. These scripts prominently rely on the products of science. But even more potent, however, are the bits of information that are unknowable. Throughout the texts examined here, scientific narratives import factual evidence into case opinions, making outcomes appear inevitable. More importantly, however, specific pieces of available information get relegated to the realm of the unknowable, and with specific interpretive effects.[16] The unknowable is neither simply information that existed but was unavailable at the time of trial, nor is it merely some set of unproven facts. The unknowable, as I am using the term, refers to factual and informational fragments that were present, available, and demonstrable, but that had to be overlooked in order for an opinion to make sense. In other words, it involves obvious fragments of information that are very deliberately written out of these legal scripts and relegated to a closet. The goals of these occlusions are several, but most clearly

they evince a desire to maintain the conceptual association of AIDS and homosexuality, producing a gay/AIDS subject who occupies a surprisingly powerful narrative position. Through the construction of this subject, AIDS remains associated with homosexuality and heterosexuality remains pure. The scripts through which AIDS is made coherent, given meaning, and drawn into economies of social power employ schemas that are not merely latent but that actively negate other viable possibilities. AIDS and homosexuality here become mutually constitutive, and in ways that require ironic communication.

At the level of the literal, this process takes effect through the language of science. In the Western imagination, science is an especially potent symbol and the invocation of scientific language carries enormous weight. But the use of science in legal discourse operates in the same way that Kenji Yoshino describes uses of the American flag: Its symbolic uses are overdetermined and simultaneously signify both the nationalism of the xenophobe and the pluralism of the liberal. AIDS legal scripts are similarly overdetermined in that they rely on the symbolism of science to simultaneously represent what is known about AIDS as well as what is not. Scientific narratives imported into legal discourse provide coherence images made from powerful mythological sources, producing what law professor Nancy Levit calls "tribal legends."[17] These legends can provide coherence and stability, but they can also produce meaning in unexpected and troubled ways, particularly where uncertainties and contested significations are at stake. "Meanings are advanced and resisted strategically, though neither the meanings advanced nor the goals purportedly served in advancing those meanings exist independent of one another. Power is seen in the effort to negotiate shared understandings and in the evasions, resistances, and inventions that inevitably accompany such negotiations."[18] Sometimes judges invoke the mythology of science to produce coherent logics that are grounded in factual information. At other times, the mythology of science is used to render misinformation as fact. In the cases examined here, AIDS, sexuality, and law intersect, and the tendency is to push factual information into the background, thereby organizing the logic of an opinion around

something that has been carefully rendered unknowable. In either scenario, these rhetorical maneuvers carry the same force of social power.

It is instructive to briefly consider how scientific narratives are invoked in the pages to follow. The baseline issue throughout is HIV transmission risk. At the time that these cases were litigated, HIV had been identified as the causative agent behind AIDS and the ELISA test had been developed. Although the events that gave rise to some of these controversies took place in an earlier period of uncertainty, at the time all of these opinions were published scientists had established that HIV was transmitted through exchanges of bodily fluids: This fragment of information stands as the central "known" in the scripts below. Many possibilities for viral transmission are represented here, some of which are actually risky and some of which are not: masturbation, sexual intercourse, transfusions, needle sticks, bites, spitting, injection drug use, and rape. Scientific narratives appear in these texts primarily as a method for managing our perceptions of the risks attendant to these fluid exchanges, but oddly, the discussions tend to slip away from what was known or unknown, and toward what was unknowable. Rather than think of these cases as negotiating tensions between what information was available, what scientists had discovered (the known), and what remained mysterious (the unknown), it is productive to think about what was, in fact, known in each instance, but was made invisible in the language of each opinion (the unknowable). On more than one occasion, we see science, with all its rhetorical and cultural potency, enlisted in the production of the unknowable, ironically negating fragments of information that had the potential for undermining the predominant heterosexist logic.

A good deal of scholarship has been directed at exploring the intersection of legal and scientific narratives.[19] Much of this discussion contemplates the legal questions that arise when science and technical knowledge must be regulated and legitimated in the courtroom: Who qualifies as an expert? When is evidence admissible? What constitutional or jurisprudential principles should guide the actions of legal practitioners? Debates about the admissibility of

evidence and the qualifications of experts turn, in part, on the language used to define science, and these scripts are replete with semantic instability.[20]

The relationship between law, fact, and scientific evidence has been a subject of growing discussion among legal scholars. A recent Note in the *Harvard Law Review* makes the point quite well. In an attempt to provide navigational guidance for judges faced with scientific uncertainty, the Note asserts that "judicial hackles are rightly raised in situations of strong scientific uncertainty—a phrase used in this Note to denote situations in which a qualified expert proposes to testify on an issue that hard science can resolve, but upon which substantial scientific study has yet to be done and (given cost or time constraints) could not reasonably have been done in preparation for trial."[21] In a footnote, "hard science" is defined like so: "This Note uses 'hard science' to describe scientific methodologies characterized by careful quantification and rigorous testability. In the context of medical causation, the reference is primarily to population studies and laboratory experimentation, the methodologies associated with epidemiology and toxicology, respectively."[22]

The optimistic attempt to define "hard science" and bolster its credibility is laudable, but such certainty is often impossible to achieve and nearly always contestable. Modifiers like strong, qualified, substantial, careful, and rigorous have the rhetorical effect of strengthening readers' conviction that certainty is possible. By reaching out to scientific materials legal practitioners can perform credibility rituals that shore up legal uncertainties in ways that appear to constrain judicial agency.[23] Importantly, quantification becomes a hallmark of scientific certainty. But the relationship is not so simple. The recognition that "judicial hackles" are raised signals an additional interpretive possibility that should not be overlooked. Hackles go up because in such circumstances judges are left with limited schemas through which their rulings can be made rhetorically viable, signaling both the necessity and presence of judicial agency—i.e., making meaning from uncertainty—as well as judicial constraint—i.e., having to do so with limited schematic resources.[24]

One of the Supreme Court's most detailed discussions governing scientific language in legal scripts outlined four criteria for

judges to consider: whether the theory or technique supporting the evidence is "falsifiable," its reliability and potential rate of error, whether it has been subjected to peer review, and whether it enjoys "general acceptance."[25] Not surprisingly, much of this debate among legal scholars centers on the power judges wield as evidentiary gatekeepers and the problematic conceptual issues that arise when the two discursive universes collide:

> It would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. There is no clear line that divides the one from the others. Disciplines such as engineering rest upon scientific knowledge. Pure scientific theory itself may depend for its development upon observation and properly engineered machines. And conceptual efforts to distinguish the two are unlikely to produce clear legal lines capable of application in particular cases.[26]

Edward Imwinkelried here recognizes the skepticism in the Court's language and then proceeds to offer some suggestions and criteria for judges that might guide their hand in difficult credibility contests. By commending the Supreme Court's good sense in not directing lower courts to establish credibility criteria for every discipline or "constraining nonscientific expertise with an ill-fitting straightjacket,"[27] he avoids moving the discussion entirely into the domain of consciousness but recognizes the social power inherent in these schemas that emerge from the interaction of individuals and social structures.

Heidi Li Feldman's discussion of science and law is more concerned with deciding how to determine what information is admissible in court and the relationship between scientific uncertainty and the goals of the legal system. She observes that the two systems of knowledge production operate very differently and, clearly, her objectives are to rescue the practical nature of the law from uncertainties that are acceptable in science.

> The more closely legal standards hew to scientific ones for selecting information worth considering, the more often it will be apparent that science is severely uncertain about the causal effects of the substances and products that figure so prominently in contemporary tort litigation. When

> scientists are severely uncertain about the general causal powers of a substance, legal factfinders will lack a basis either for concluding that the substance is more likely than not to cause harm to humans or for concluding that it is more likely than not to be safe for humans.[28]

This uncertainty is, according to Feldman, a serious problem. "Strong uncertainty about general causation is more threatening to the traditional objectives of tort law than either *identity uncertainty about specific causation or probabilistic uncertainty about specific causation*, two other types of uncertainty about causation sometimes encountered in mass exposure litigation."[29] She continues, "At one level, science pursues correct information simply to achieve a better understanding of the natural world. At another level, science seeks information in order to predict—and ultimately, to control—what happens in that world." Law, she argues, is different. "Law pursues correct information in order to settle disputes promptly, decisively, and justly."[30] Feldman's analysis, like that of Imwinkelried, also works predominantly at the level of scripts and considers the articulated standards by which judges can evaluate the admissibility of evidence. Her treatment of uncertainty and the differences she sees between the purposes of law and science start to move the discussion away from scripts and into the domain of consciousness, but ultimately she brings the focus back again to textual expressions of social power.

Joseph Sanders offers a notable treatment of this discussion, asking, in part, "What is the law's implicit epistemology with respect to scientific knowledge, and how does scientific knowledge differ from other forms of knowing?"[31] The question is an important one that moves the debate further toward the domain of consciousness. The Supreme Court's decision in *Daubert*, he argues, appears to straddle the positivist–constructivist divide in its philosophy of science but, he cautions, may be read convincingly from either perspective. In fact, he observes, courts are not alone in drawing from both sides. Summarizing, he writes:

> Both legislatures and administrative agencies frequently distinguish the process of science from its products. They accept the constructionist insight that the process of doing science is a social enterprise and is subject to the buffeting, often distorting winds of social, political, economic,

> and legal influences. At the same time, they cling to a realist belief that the products of science may state a truth about the world, or at least something so similar to truth as it is commonly understood at a given point in history, that the practical discipline of law does not need to concern itself with the difference.[32]

This compromise position recognizes that science takes place in the laboratory as well as in a broader cultural setting and admits that what counts as knowledge is the result of political, social, and cultural practices.[33] Nonetheless, a legal epistemology of science also, "holds that there are a set of (social) practices often given the shorthand name 'the scientific method' that increase the likelihood that someone will make positive contributions to knowledge; a set of practices to which scientists themselves frequently point as the source of past scientific success."[34] In somewhat different terminology, Sanders devotes the remainder of his argument to underscoring the point—that legal knowledge emerges from a set of practices. At the literal level his argument focuses on social psychology and cites research showing that people process information in at least two different ways: rationally and experientially. Although he explicitly states, "one type of processing is not inherently better than the other," each has proper (his word), and thus improper (my allegation), places.[35] Rational processing "operates according to an individual's understanding of rules of logic and evidence." Experiential processing works more simply, and is likely to be useful when an individual is under an "emotional load." While the former is analytical, logical, and abstract, the latter is holistic, associative, and more likely to rely on stereotypes.[36] Individuals do not rely on one type of processing alone, the extent of influence of either type may vary according to each situation, and neither is really an ideal type. It is no surprise that, given this summary emphasis on rationality, Sanders concludes that epistemological needs of the legal system are best served by rational processing.

There are at least three elements of Professor Sanders' argument that are of interest here. First, his emphasis on process intersects nicely with Ewick and Silbey's description of legal consciousness: Both scientific knowledge and legal consciousness emerge from

the interaction of individuals and institutions. Second, certain processes are valued more than others for legal purposes. Specifically, scientific processes, and thus scientific narratives, carry more weight in legal discourse. Third, we can see that the underlying logic of the article itself also emerges from an interactive process. His article works to justify and legitimate one type of legal knowledge through a process of supplanting one form of knowledge for another. The criteria articulated in the Supreme Court's 1923 decision *Frye v. United States*, he argues, has been replaced by those articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc*. and *Kumho Tire Co. v. Carmichael*, and these latter cases are an improvement because they move legal knowledge production closer to the rituals accepted in science; this epistemological equivalence test is achieved with reference to the knowledge production rituals of social psychology.

This brief sampling exemplifies some notable variations in the ways that people are thinking (and not thinking) about the intersection of legal and scientific scripts. They display strategies that range from almost entirely textual to a recognition of consciousness, but all are most centrally concerned with the types of criteria that courts should put into practice to negotiate the interactions of individuals in social structures. Despite forays into the realms of consciousness and construction, each returns to the practical and textual question of how science should be rendered in judicial scripts. Much of this literature is marked by the determined insistence on factual solidity, seldom considering the deeper structures by which knowledge and information circulate and come to be anointed with conviction. Dean Hashimoto identifies four possible categories that describe the rhetorical uses of science by the Supreme Court: (1) the Court conforms its conclusions to the findings of science; (2) the Court claims scientific guidance but misapplies available findings; (3) the Court ignores, misunderstands, or finds inconclusive available findings; or (4) the Court dismisses the importance of scientific fact and relies on some other authority. He persuasively argues in conclusion that the legal use of science is primarily rhetorical, serving a mythological function.[37] But what gets used literally is only part of the story.

Although she is less centrally concerned with legal uses of science, Rosemary Coombe offers an enticing imperative:

> From the perspective of a critical cultural legal studies, the (social) life of the law cannot be explored simply in terms of its logos, positivities, or presences. It must be seen, as well, in terms of "counterfactuals," the missing, the hidden, the repressed, the silenced, the misrecognized, and the traces of practices and persons underrepresented or unacknowledged in its legitimations. The law's impact may be felt where it is least evident and where those affected may have few resources to recognize or pursue their rights in institutional forums.[38]

Coombe's advice to consider the relationship between statements and silence, the present and the hidden, the obvious and the misrecognized, echoes Yoshino's attention to the exclusionary power of narrative.[39] Such suggestions invite us to rethink the narrative and rhetorical mechanisms by which HIV/AIDS has been infused with meaning in legal discourse. On its surface, AIDS-related litigation appears to function like any other social contest between competing parties that results in an affirmation or reallocation of power and resources. But AIDS has never been so interpretively simple and sexuality has a special discursive power. Although legal language contains potent and vivid messages, its sexual logic is not always manifest. Exclusions do not require presences but they are evaluative; they also define who are the "insiders," and rhetorical impact can be derived from counterfactuals.

The practical necessities of legal language are apparent in the pages that follow. The scripts related below contain expert testimony, summaries of HIV transmission risks, evidence of serostatus, and evidence of potentially transmissive events, and at the level of the literal, they echo the concerns of scholars writing about law and science. Specifically, they display the complexities that arise at the intersection of the two discourses: When is science determinative? Who qualifies as an expert? Under what conditions, and to what extent, should scientific narratives drive the logic of judicial opinions? But what is made literal in these scripts is exclusive. In some moments, pieces of potentially useful information are simply not available; undoubtedly, judicial hackles were raised frequently in the early years of AIDS. But, in other

moments, these scripts exclude not simply through a lack of information, but through negation. That HIV transmission is not contingent upon sexual identity is an oft-negated element that grounds the heterosexist logic of these scripts. They depend instead on logical structures whereby AIDS acquires meaning through the same epistemological structures as sexuality. These tensions between ostensibly scientific knowledge and what is relegated to the unknowable open a gap between the literal and the figurative and invite us to think about legal scripts as ironic. These scripts "make sense" because they are literally framed by what scientists knew about HIV transmission, but those bits of knowledge are figuratively organized through the unknowables that comprise our sexual epistemology.

Irony

The usual sites for discussing irony are literature, philosophy, and sometimes politics. It is useful, however, to read law as ironic not only because we might see judges as ironists (which they may or may not be), but also because the science of AIDS and its place in legal discourse displays an ironic relationship between what is known, what is unknown, what is unknowable, and the ways that knowledge is allocated in accordance with existing hierarchies of social power. I do not want to argue that judges manipulate the figurative and literal meaning of language in order to be funny, generate confusion, articulate disdain, or express themselves through coded expressions aimed at a limited discursive community (points I will address in more detail below). Instead, an ironic reading of legal discourse should expose another mechanism by which judicial language negotiates power, renewing a call for awareness, introspection, or a more genuine humility about how the law includes and excludes groups from the benefits of social and political community and how legal facts are established relative to scientific ones.[40] Irony can, "facilitate the habitual practice of modesty and reflexivity, working as what Foucault would call a practice of the self, specifically, a non-ascetic, non-absolutist, kind-but-critical relation of the self to the self."[41]

The philosopher Søren Kierkegaard described irony as "a vampire who has sucked the blood out of her lover and fanned him with coolness, lulled him to sleep and tormented him with turbulent dreams."[42] It has a long and checkered political history, and Kierkegaard is certainly not alone in depicting it as subversive (or, interestingly, as female). People are suspicious of irony. Its indirection, its reliance on the unsaid, the unseen, or the unheard plant it firmly on perpetually shifting sand. It might be used as a weapon, give form to an insult, or it might serve as a technique of exclusion, creating an "in" group of people who get the message and an "out" group who do not. It opens us up to the possibilities of critical complements, revolutionary fealty, superior obeiscence, and aversive veneration.

Resisting the slippery tendencies of irony occupies many critical theorists and literary scholars writing on the subject. Theorists of the more semiotic stripe attempt to make it formulaic, mapping its contours and charting a course through its uncertainties. Others stumble through irony's maze, looking for ways to stabilize and organize the way it transmits meaning.[43] These attempts to concretize irony suggest conservative political impulses that privilege a value hierarchy and favor order, certainty, and literality; things are what they seem, and thus we can properly script and plan our responses to the world. Some may fear that irony stands in contrast to truth. Ironists might seem to engage politics from a radical position, one hampered by doubt, instability, and dedicated to destabilizing existing structures of power. But, as Linda Hutcheon reminds us, "there is nothing *intrinsically* subversive about ironic skepticism or about any such self-questioning, 'internally dialogized' mode; there is no *necessary* relationship between irony and radical politics or even radical formal innovation."[44] Or, as Hayden White describes it, "[i]rony would appear to be transideological."[45] Indeed, Hutcheon points out that irony may serve to reinforce dominant ideologies as well as it undermines or calls them into question. Irony need not be problematic, and, in fact, as Fish asserts, we might take comfort in its endless succession of certainties.[46] But what are the components of irony, how does it work, and of what use might it be to understanding AIDS legal discourse?

White writes that "Irony, Metonymy, and Synecdoche are kinds of Metaphor, but they differ from one another in the kinds of *reductions* or *integrations* they effect on the literal level of their meanings by the kinds of illuminations they aim at on the figurative level. Metaphor is essentially *representational*, Metonymy is *reductionist*, Synecdoche is *integrative*, and Irony is *negational*."[47] The ironic expression affirms on one level what it denies on the other, the literal and the figurative conflict. Irony presupposes a perspective against which the representation functions and, consequently, indicates a stage of consciousness "in which the problematical nature of language itself has become recognized."[48] Meaning is slippery and elusive, and irony, perhaps better than other poetic devices, exposes the disjunctions between symbols, referents, intent, agency, and message.

White's discussion of irony highlights the tempestuous relationship between the literal and the figurative and, from this perspective, irony may appear to be primarily a property of texts. But such a view is too cramped, as White and Hutcheon strive to make clear, for irony is also an interpretive strategy that relies on the existence of discursive communities. The collision of the literal and the figurative conveys a message that becomes intelligible only against a background of preexisting knowledge, and while it may serve to reinforce discursive communities (that is to say, those "in the know" who get the irony), it does not produce that community and, in fact, depends upon it in order to succeed. Extant discursive communities with shared frameworks of knowledge are prerequisites for ironic communication. In addition to this semantic dimension of irony, therefore, we must also be attentive to what the interpreter brings to the task of interpreting irony: When an interpreter locates irony in a communicative act, he or she finds there a critical evaluation. This evaluative component of irony is what Linda Hutcheon calls "irony's edge." To summarize thus far, irony has at least three components: (1) a semantic dimension by which the literality of a communicative act conflicts with its figurative intent; (2) a subjective dimension whereby the sender (the ironist) and receiver (the interpreter) might or might not work in concert to "get" the irony—this interaction determines a discursive

community and either includes or excludes participants; (3) an evaluative dimension that allows for the expression of a judgment—resulting from the rubbing together of the said and the unsaid.[49] Ironic communication is a process of refraction, splitting the components of communication and redirecting them in predictable ways. The intersection of legal and scientific discourse can exhibit this same refractive property, complexifying our perception of facts, symbols, messages, and the production of knowledge. The case opinions examined here display the problematic nature of language, showing how gaps open up between the literal and the figurative. They emerge from and perpetuate a heterosexist discursive community.

Consciousness

The legal scripts examined here rely on two overlapping and mutually reinforcing schemas. Literally, they rely on the language of science, drawing on the powerful mythology of that rhetoric. Figuratively, however, they depend on the epistemology of sexuality; in this case, meanings are rendered from silence and absence, processes that historian Michel Foucault identified in *The History of Sexuality*. These scripts literally display the biomedical language of AIDS woven together with the practical but powerful language of the law, but the governing epistemology is that of sexuality. Factual fragments and misinformation are dragged to the level of the literal and become coherent, meaningful, orderly, and predictable through the narratives of science. In these moments, we overlook the possibility that AIDS, sexuality, science, and the law all emerge from the intersection of individuals and institutions, and that the resulting schemas take narrative form. Because AIDS is part of the same unspoken cultural codes through which we make sense of sexuality, these interactions reveal a discursive relationship between AIDS and sexuality that is constitutively ironic.

Sexuality is itself both ironic and queer. Ours is "a society which has been loudly castigating itself for its hypocrisy for more than a century, which speaks verbosely of its own silence, takes great pains to relate in detail the things it does not say, denounces

the powers it exercises, and promises to liberate itself from the very laws that have made it function."[50] As Foucault demonstrated, sexuality in Western cultures is a field of intense discursive proliferation wherein we have witnessed an institutional incitement to speak endlessly of sex, to hear it spoken about, and to cause *it* to speak in expansive detail. Building from this premise, Foucault showed that this discursive proliferation involved several components: Sex is ostentatiously hidden; it is spoken of from multiple viewpoints in myriad institutions; silence functions alongside what is spoken; incitements to speak were orchestrated from all quarters and required various apparatuses for listening, recording, observing, and questioning; at the "threshold of modernity" the life of the species is wagered on its politics.[51] Several features of his analysis are of importance here, each of which show how AIDS is part of the same process of discursive production, power relationships, and the propagation of knowledge.

AIDS and sexuality are bound together in obvious ways, yet it is productive to adumbrate the less apparent ways that the two interact. Because HIV is transmitted most often through behaviors associated with shame and stigma, and because most people with the virus are infected sexually, being seropositive has often been subjected to similarly ostentatious forms of secrecy and privacy. Throughout the chapters that follow, case scripts are marked by a tension between privacy and disclosure, and a prevalent theme centers on the regulation of knowledge about an individual's serostatus. Four types of contests dominate. In some instances, we see litigants who avoided knowing their own HIV status; in others, litigants with HIV knew they were positive but suffered unfortunate consequences because that information was disclosed without their consent. In still other cases, seronegative litigants sought information about the serostatus of other people; and in the final scenario, litigants sought to trace when and whether other individuals knew they were HIV positive. The contests at the center of these cases involve individual control over knowledge about oneself and the degree to which that control should be compromised by institutional interests that ostensibly serve a larger social goal. A notable element tying these cases together is an expectation of secrecy and

shame. Whether litigants with HIV win or lose the ability to maintain control of knowledge about their serostatus, these scripts rely on the conviction that HIV is something ostentatiously private and hidden.

Knowledge about HIV is regulated in many institutional settings: prisons, hospitals, blood banks, businesses, schools, and courts. Within these different settings the contests vary, and when the interests of the individual are subsumed beneath institutional goals some curious transformations occur. Case materials in the following chapters often show how regulating and maintaining the unknowable was much more useful than producing or compelling knowledge regarding serostatus; innocence is indeed a prized commodity. Blood banks and hospitals managed to avoid liability by demonstrating their innocence and producing arguments designed to show how other players—usually gay men—should know, or did know, that they were HIV positive. Prison administrators found themselves in a particularly difficult position. In some instances they benefited from the maintenance of their innocence, as knowledge about HIV would have triggered expensive policy changes. On the other hand, ignorance was also potentially damaging and carried the possibility of undermining order and health among inmates. Shoring up the prestige, credibility, expertise, and efficacy of institutions brought knowledge about HIV into a complex web of possibilities spun from thin filaments of information, one littered with fragments of misinformation but composed predominantly of open, empty gaps.

Regulating the circulation of knowledge and information requires schematic strategies that rely heavily on what is not said, even more than on what is said. Following Foucault, Eve Kosofsky Sedgwick observes that the speech act of silence is multiple, and the accuracy of her observation is continually apparent in the cases examined here.[52] For each of the questions asked in these contests, there are multiple unasked questions that immediately appear. "There is not one but many silences, and they are an integral part of the strategies that underlie and permeate discourses."[53] Determining who had HIV, when they became infected, and when they knew of their infection should open up an infinitely

expanding chain of possibilities, but in these materials the causal chains are truncated for specific results. As is usually the case with litigation, circumscribing an event for the purposes of assigning liability is a primary goal, but here these processes are especially contrived. Janet Halley observes that, "the ways that homosexual identity is *not* sodomy are subject to an organized forgetting," and her observation becomes even more acute when AIDS is at issue.[54] The ways that homosexual identity is not serostatus are also forgotten in very organized ways.

The technologies of surveillance Foucault identified as part of the machinery for regulating sex are deployed in similar and overlapping ways in the regulation of HIV. "Incitements to speak were orchestrated from all quarters, apparatuses everywhere for listening and recording, procedures for observing, questioning, and formulating."[55] The schemas of AIDS and sexuality are mutually reinforced through these technologies, as is made evident repeatedly through legal rhetoric. Centrally, however, they rely on compelling and reinforcing confessions about the related matters of sexuality and seropositivity, each standing in as proxy for the other. Where serostatus was indeterminate, a confession of homosexuality provided sufficient evidence to assume the presence of HIV; where vectors of infection were indeterminate, seropositivity inspired a search for the homosexual. "Thus sex gradually became an object of great suspicion; the general and disquieting meaning that pervades our conduct and our existence, in spite of ourselves; the point of weakness where evil portents reach through to us; the fragment of darkness that we each carry within us: a general signification, a universal secret, an omnipresent cause, a fear that never ends."[56] The same can be said of HIV.

Foucault's treatment of the right of death and the power over life displays a fascinating resonance with the politics of AIDS. The move from a society of blood, to one that speaks through sex and the management of life are important schemas by which AIDS and sexuality came to make sense from one another in the late 1980s and early 1990s. What he calls bio-history, or bio-power, whereby knowledge/power and regulation were transferred to the level of life and population more than death and the individual, becomes

especially clear in the case materials to follow. Throughout them we see a determined insistence to resist the possibility of death; they display a power–knowledge nexus that operates at the level of lives, health, institutions, and populations. Institutional, social, and political concerns appear on the surface to outweigh individual ones, and the scripts reveal the consciousness that Foucault identified. As he also noticed: "[W]hat might be called a society's 'threshold of modernity' has been reached when the life of the species is wagered on its own political strategies. For millennia, man remained what he was for Aristotle: a living animal with the additional capacity for a political existence; modern man is an animal whose politics places his existence as a living being in question."[57] Indeed, and the politics of AIDS are not entirely unlike the "atomic situation" to which Foucault referred.

These proliferating vocabularies, institutional developments, and technologies of compulsion established a discursive community grounded in a sexual epistemology particular to the twentieth century. As historians of sexuality have repeatedly demonstrated, the evolution of homosexuality and heterosexuality as distinct identity categories is a relatively recent and specifically Western development.[58] One result of this bifurcation, to use Gayle Rubin's terminology, has been to establish a hierarchy of sexual value.[59] Heterosexual bodies, identities, and acts are afforded privileges; homosexual bodies, identities, and acts are simultaneously overlooked and devalued, but also required to remain visible, so that others may escape notice. Fragments of information—what we know, what we think we know, and what we may not know—about sex circulate in erratic but predictable patterns in order to keep the hierarchy in place. Within this discursive space some things are foregrounded and made central, while others are denied or occluded through the silences that open up among those same speech acts. A good deal of the work done in these scripts shores up the value and sanctity of what Rubin calls the "charmed inner circle," that space of sanctity defined by marital, private, reproductive, heterosexual sex.[60]

It is not surprising that AIDS legal scripts should rely on these same erratic but predictable schemas. Throughout the past

twenty-five years AIDS worked in much the same way that Foucault described sexuality: not as something that was repressed, but as something that was spoken of endlessly with an increasingly specific vocabulary accompanied by elaborate technologies of compulsion. In the same ways that sexuality establishes a hierarchy of sexual value, AIDS legal discourse establishes a hierarchy of culpability, privileging some people with HIV and sorting them into "innocent" and "guilty" victims, marginalizing others, and ultimately functioning in many of the same ways that Foucault recognized with sexuality. This discourse serves to reinforce our understanding of what constitutes normalcy, health, and desirability, but, curiously, it does so without making those qualities manifest. The consciousness reflected in these scripts assumes hierarchies of sexual as well as human value and they reinforce them through communicative acts of negation. Irony means never having to say you really mean it. Or, stated another way, it means that what is said is open to a limitless succession of interpretive possibilities that vary by speakers and context; meaning is never fixed.

And neither are facts. As science historian and critical theorist Donna Haraway reminds us, "'nature' outside artifactualism is not so much elsewhere as nowhere, a different matter altogether."[61] With Haraway, we can see in these scripts a relentless artifactualism, but one that is lacking her reflexive insight and political goals. As Treichler has shown, AIDS is natural, discoverable, predictable, visible, and material because it emerges as such from a set of discursive practices operating through the interaction of scripts, schemas, and consciousness. Martha McCaughey observes that "science has not been an explicitly political discourse, and enjoys a discursive position as absolute authority, as though 'objective' knowledge exists and scientific knowledge is it."[62] In *Laboratory Life*, sociologists of science Bruno Latour and Steve Woolgar describe the ways that facts are rendered as such, mapping the movement of statements through the processes of scientific experimentation. According to their map, there is an important distinction between facts—object statements that ultimately come to be understood as objective, neutral realities possessed of what they call

"out-thereness"—and artifacts—statements that are the by-products of scientific processes but are not interpreted as neutral, objective, and "out-there." In a very simplified version of their argument, most scientific output is artifact; seldom do the outputs of scientific discourse attain the status of fact. Fact-making is the result of a constructive process by which facts are split away from the scientific processes that gave rise to them, and inverted to become, instead, the objects of scientific discovery. "Splitting" and "inversion" allow statements to give way to objects that in turn become subjects, and are then constructed as part of reality. Latour and Woolgar are very careful not to argue that reality and facticity do not exist, but instead that reality is constructed through the processes they have identified.

AIDS has called into question established scientific methodologies, shifted our barometers of representation and representability, and fundamentally altered the business of science. While scientists have had to reconsider the utility of such concepts as Koch's postulates, double-blind drug testing, and falsifiability, the effect of AIDS on legal practices has been somewhat more subtle.[63] Illustratively, the rules of evidence, standards for evaluating expert testimony, and mechanisms for determining legal expertise have changed little, if at all, as a result of the pandemic. Fact-finding by either judge or jury requires the players on the agnostic field of the courtroom to assess the credibility of claims made by litigants, and to identify which qualifications are to be dropped from given statements and which are to be appended to them.[64] In this respect, the processes are similar in the two domains. There are some notable differences, however. In legal scripts, statements are always qualified and requalified in an ongoing process of citation, thus at the literal level legal fact-finding is always contestable and the symbolic content of facts may be called into doubt. Legal scripts do not establish facts, but instead ostensibly rely on them (or find them) and work them into justifications for reallocations of social power.

AIDS emerges from legal and scientific scripts through these same processes but in ways that are dependent upon the schemas of sexuality. At the same time, sexuality emerges from these legal scripts

through the schemas of AIDS. When we compare the production of legal and scientific facts we see that the two are similar in their denial of constructedness, but the point of denial is somewhat different. While scientists eventually deny the constructedness of the facts themselves, players in the legal arena eventually must deny the constructedness of the results. In scientific discourse, facts are transformed into independent objects, and we can forget that "nature" is constructed; it is the objectivity and neutrality of judges, judicial processes, evidence, and experts that are produced in the agnostic arena of the courtroom.

Synthesis

A good deal of gay-affirmative legal scholarship is devoted to identifying and strategizing the ways that gay and lesbian people might be brought into the fold of American constitutional discourse. H. N. Hirsch's *A Theory of Liberty* emphasizes liberty and looks to the Constitution to find textual and historical support for keeping the state out of the lives of queer people.[65] Richard Mohr's return to Millian principles in *Gays/Justice* takes a historical path toward this same position where the state might be excluded from queer lives in the same way that it appears to be excluded from the lives of heterosexuals.[66] Privacy rights also figure prominently in the growing industry of queer legal theory; Morris Kaplan's *Sexual Justice* is a rich example of how privacy rights protecting intimate association might expand to include queers.[67] David Richards, in his *Women, Gays, and the Constitution*, makes a particularly interesting contribution by articulating a concept of "moral slavery," which he hopes might bring gays and lesbians into the constitutional fold.[68] These contributions illuminate important strategies for rethinking the legal status of queer people, and each author advances an argument either grounded in the premise or moving toward the conclusion that queers are (or should be) socially, morally, politically, or epistemologically equal to heterosexuals.

In her critique of *Bowers v. Hardwick* (1986), Janet Halley observes that Justice White's opinion for the Supreme Court casts the relationship between acts (sodomy) and identity (homosexuality)

as metonymic. In her reading, sodomy defines homosexuality, and homosexuals, by definition, violate legal prohibitions against sodomy simply by virtue of their identity; status and conduct become indistinct, and the Court's opinion moves back and forth between the two, relying on whichever suits the rhetorical needs of the moment.[69] Legal scripts establish a similar form of metonymy between AIDS and homosexuality, but the "organized forgetting" required to avoid the dissimilarities between the two requires more negational rhetorical effort.

The gay and lesbian community is engaged in numerous projects designed to advance its social, political, and legal position within the larger context of the American body politic. Same-gender marriage, domestic partnership benefits, military service, parenting and child custody, definitions of safer-sex and responsible sexual expression all appear as sites of tension between the queer community and some mythical "general" public. These same issues raise tensions within the queer community as well, and prominent figures debate the strategic promises of assimilationism (i.e., removing the differences between gay and straight—"We really are just like you!") versus liberationism (i.e., celebrating the differences between gay and straight—"We're here, we're queer, get used to it!").[70] Activists, scholars, and the apolitical disagree about epistemology, praxis, and how best to further the cause of gay rights. These tensions have played out as battles on a number of fronts and in some arenas—most notably, biomedical research—compromise and cooperation are increasingly apparent.[71] On others fronts, the contestants have reached a stalemate—such as in debates about social construction and essentialism.[72] In some areas, these debates have become entrenched sources of antagonism. Public sex, promiscuity, and the party circuit pitted gays against each other at the beginning of the epidemic, and the acrimony continues into the present.[73] How to study queer politics, and to what end, are often loaded questions. But advancing the political, legal, and social cause of sexual minorities through institutional means cannot occur without simultaneously engaging the domains of scripts and consciousness and making visible the schemas through which we understand ourselves as citizens.

The cultural codes, vocabularies of motive, hierarchies of value, and conventions of AIDS are among the newest such schemas currently in circulation. As an entirely new reality with no original symbolic content of its own, AIDS became legible and coherent through overlapping schemas borrowed from other social locations. Oftentimes, AIDS was conceptually organized through metaphors that drew on the language of war—battle, invasion, hostile forces, enemies, territory—and as Susan Sontag points out, these associations were often detrimental to people with HIV, who also became their target.[74] Rather than purging society of the enemy that was AIDS, people with HIV became the excludable hostile agents. A second prominent source for meanings came, not surprisingly, from the institutions of biomedical science, and as Treichler makes clear, that constructive process emerged from the points at which scientific narratives were used in film, television, and print media, and became equally bound up with dominant constructions of race and gender.[75] Most vividly, however, AIDS was infused with meanings that seeped in from the discourse of sexuality. The same girders that hold the structures of sexuality in place—shame, stigma, the closet, sexual peril, a hierarchy of sexual value, a charmed inner circle—also gave meaning to AIDS and cast damaging social judgments around people with HIV. Having AIDS brought shame and stigma to sick people in ways that no other illness had previously, even illnesses that could be attributed to "intentional" and "avoidable" behaviors. Being HIV positive assumed a rhetorical power similar to that associated with homosexuality: Compelled confession by those who were infected—that is, coming out as seropositive—marked desperate boundaries between safety and danger, health and pathology, the desired and the abject. Rubin's theory of sexual peril became even more stunningly potent with a mysterious new virus added to the mix.[76] Officially, people with HIV were expected not only to come out as such, but, especially if gay, were expected to remain celibate. The hierarchy of sexual value privileging monogamous, reproductive, heterosexual, missionary-position, at-home sex overlapped with routes by which people became HIV positive. A hierarchy of culpability categorized people with HIV as "innocent" or "guilty"

victims, assigning them to the former camp if they became infected perinatally, iatrogenically, or unsuspectingly. Guilty victims—gay men, injection drug users, prostitutes—were seen as partially responsible for their illness, and thus as entitled to less sympathy.[77] These schemas organized and gave meaning to AIDS from the beginning of the pandemic, and although some have changed over the course of its history, many are still active and visible.

The ironies of AIDS legal discourse cut simultaneously in two directions. Within the domain of sexuality, AIDS functions as a mechanism by which heterosexuality is privileged at the expense of homosexuality. AIDS, rendered as a marker of identity, stands in as proxy for homosexuality, homosexuality becomes analogous to AIDS, and heterosexuality is rendered invisible and thus safe. In these moments narrative and rhetoric echo the discourses of sexuality mapped by Foucault, and the privilege of unknowing is even more potent than what is known.[78]

In the realm of science, AIDS does double duty. At some moments, the language of biomedicine is enlisted to construct AIDS: Epidemiology, virology, risk assessment, and transmission routes provide a vocabulary through which we can know AIDS as a cultural event. In other moments, the biomedical language of AIDS serves as the science of sexuality that, if any such thing can be said to exist, is a mess. Researchers have yet to come up with a fixed definition of homosexuality (Is it determined by desire, identity, behavior? All three? None of the above?), prompting optimistic scientists to measure aimlessly in the hope of identifying its anatomical manifestation: lesbians' fingers and ears, gay men's hypothalamuses, chromosomes, hormones, and genes.[79] Absent the certainty that legal discourse requires of scientific narratives, the fragmentary science of AIDS has sometimes been enlisted to identify and concretize the homosexual.

A theory of ironic jurisprudence moves the interpreter into the position of liberal ironist, and asks her or him to recognize and develop doubts about the law's final vocabulary, to recognize that the final vocabularies of others are equally impressive, and to realize that his or her final vocabulary is no closer to reality or truth than anyone else's.[80] Reading law in an ironic mode may cast

doubt upon, and bring more temperate interrogation to, the mechanisms by which legal rulings are built on the discourses of science. As Sedgwick writes in *Epistemology of the Closet*, "it's only by being shameless about risking the obvious that we happen in the vicinity of the transformitive."[81] Furthermore, she reminds us that ordinary passive ignorance and its accompanying conceptual instability does not mean we should understand either as inefficacious or innocuous, and that, indeed, such absences and lack may be enlisted to very potent and damaging ends.[82] The stories the prison cases below tell are often about the management and preservation of ignorance, indeed, very specific types of unknowing that are necessary to the preservation of identity claims as well as existing distributions of power. In a particularly elegant contemplation of ignorance, Sedgwick writes:

> Inarguably, there is a satisfaction in dwelling on the degree to which the power of our enemies over us is implicated, not in their command of knowledge, but precisely in their ignorance. . . . Insofar as ignorance is ignorance *of* a knowledge—a knowledge that may itself, it goes without saying, be seen as either true or false under some other regime of truth—these ignorances, far from being pieces of the originary dark, are produced by and correspond to particular knowledges and circulate as part of particular regimes of truth.[83]

The materials explored in the following chapters maintain very useful regimes of truth that we should also think of as the unquestioned assumptions behind the schemas with which society maintains order, prioritizes values, distributes resources, and marginalizes transgressors. Regimes of truth are givens, things we simply know without having to investigate why we know them. The regimes of truth we see at work here exhibit a determined insistence to preserve the cultural privileges of heterosexuality by putting heterosexual AIDS into a closet of its own. With heterosexual AIDS rendered unknowable, the priorities of the charmed inner circle remain intact. Moreover, by literally orchestrating scientific information to manage HIV transmission risks, the figurative influences of sexuality slip from view. Sedgwick's observation that knowledge is not itself power but its magnetic field, and that ignorance and opacity collude to establish the terms of debate, inspires us to think about how state

power—wielded here in the form of judicial opinions—is also framed by the unknowable, and that sexuality is one of the most intense fields of knowledge and power in existence.[84]

The case opinions that comprise this book sit at the intersection of scientific knowledge, the unknowable, and the exercise of legal power. The stories they tell are complex. In some of them, legal practitioners were called upon to referee symbolically fraught contests using statutory tools and precedents ill suited to the task. Other stories were written at a time when little was known about HIV and thus the questions courts were being asked to adjudicate were beyond anyone's grasp. Centrally, however, they all turn on a single issue: HIV transmission. Who had HIV? Who might have had HIV? Who might have transmitted the virus to others, by what means, and under what circumstances? Who had the requisite knowledge to prevent viral transmission? These, then, are the questions at the bottom of each of the conflicts described in the chapters to follow.

AIDS is embedded in a history of biomedical science and technological advances, and despite appearances to the contrary, most of the case opinions examined here were written after certain fragments of knowledge had already come to light. Although other events certainly appear in these texts (advances in medical treatment, changes in public opinion, political events), the technologies of naming, identifying, and preventing transmission of HIV are most central to my argument because, in each chapter below, these widely available "knowns" of AIDS serve as a baseline against which to read the stories told in each case. These baseline fragments of information often become irrelevant and are judicially relegated to some imagined space of the unknowable, leaving instead meanings that are wrought from silence. In each instance, the science of AIDS is disrupted by the social construction of the syndrome, and that construction is drawn most forcefully on the social facts and coherence images provided in the mythology of homosexuality.[85]

To see most clearly how ignorance and uncertainty circulate through science, one need look no farther than the science of sexuality. As psychologist Peter Hegarty makes clear, scientific

discourse engages sexuality at very specific points and in very contrived ways in order to materialize and manifest differences that exist largely in the collective imagination of Western culture.[86] One need not push to the extreme constructivist position in order to recognize the peculiarity of measuring the fingers of lesbians and drawing from that data an explanation for homosexuality built from testosterone levels and birth order in men.[87] The processes by which AIDS and sexuality are given meaning in legal discourse closely resemble the same mechanisms by which courts have given meaning to race. As legal scholar Ian Haney-Lopez asserts, "The social construction of the White race is manifest in the Court's repudiation of science and its installation of common knowledge as the appropriate racial meter of Whiteness."[88] The compelling aspect of Haney-Lopez's argument is also apparent here, that common knowledge, science, and fact-making are very selectively and deliberately used in legal materials. Haney-Lopez observes also that this has had a morphological effect; who people have been legally allowed to marry and where people have been legally allowed to live and travel raise the possibility that legal regulation has, to some degree, altered biological morphology. The same observation pertains to HIV. It is not beyond the realm of imagination that the racial, gender, and socioeconomic demographics of AIDS at this moment in history are not unrelated to state-mandated and legally supported constructions that provided education and prevention technologies to some groups, but not to others, and privileged some beliefs about transmission but ignored others.

If irony is the rubbing together of the said and the unsaid, if it opens a gap between the literal and the figurative, if it contests the distinction between fact and conviction, then it is an especially useful poetic device for understanding how AIDS and sexuality work in legal discourse. Scientific narratives are especially potent and in the scripts examined here those narratives retain their potency but are used in contradictory and elusive ways. Moreover, what qualifies as scientific narrative is, itself, a contested issue in many of these texts. Although knowledge about HIV, transmission routes, acts, and identities are central to these narratives, it would

be an overstatement to characterize these assertions at all times as scientific. These debates are grounded in scientific and medical knowledge, but they use and recycle those fragments of knowledge in ways that neither scientists nor judges can make sense of unless we tie them to an unspoken sexual epistemology. These statement objects—these artifacts—are continually split off from one another and while some are foregrounded, others are ignored or relegated to positions of silence. These processes and the rhetorical effects they produce display evaluative judgments about who matters and who does not; they bring some members of society into the center of the charmed inner circle and offer them protections of the state, while others are excluded; they rely extensively on the discursive assumptions and vocabulary attendant to an epistemology of sexuality. As legal scholar Martha Umphrey explains:

> Such trials circulate in and through both formal law and everyday life, as potential material for the articulation and elaboration of legal principle and procedure, and as cultural texts for public consumption (whether as moral lesson, as object of parody, as site of social self-definition, or as entertainment). In other words, these trials (if not trials in general) not only constitute the legal domain mediating between script and consciousness; they also partially instantiate the domains of script and consciousness themselves.[89]

The stories related here mediate between legal scripts and consciousness, producing public texts that are heavily weighted with moral lessons, parodic performances of science, and sexual epistemology. The following chapters reveal these mechanisms and proceed in a manner that echoes the timeline Foucault followed in *Discipline and Punish*. The cases in Chapter 2 are marked by the need to locate AIDS on the body, forcing sanguine confessions and writing the effects of HIV onto the blood, physicality, and sexuality of the people involved. They display a variation of what Lee Edelman refers to as "homographesis," which makes the body a site of sexual identification and regulation, and the language of science appears to determine the presence of the virus.[90] Figuratively, however, AIDS and homosexuality are continually realigned here, and some fragments of the known are made unknowable. The stories told in Chapter 3 show the same regulatory tendencies, but the

technologies deployed there reach beyond the body and effectuate a more gentle form of regulation through the organization of space. Here, the power–knowledge nexus and the potency of the state become more subtle and diffuse, relying not on corporeal sanguine confessions, but on panoptic surveillance. Again, the science of HIV is made literal in support of policies designed to stop viral transmission, but, I argue, these policies work best toward other ends. Figuratively, they rely on a sexual epistemology that serves best as a form of border patrol. The potency of the power–knowledge nexus becomes most apparent in Chapter 4. Cases involving prisoners incorporate forms of regulation that include bodies, surveillance, and space, but the authority of the carceral regime stands out above all. Here again, debates about viral transmission are given a scientific gloss, but the relationships between events and the possibility of transmission are ironically negational, shoring up instead the authority of prison administrators. The cases in Chapter 5 provide evidence of the complete functioning of state power, bringing the gay/AIDS subject seamlessly into the regulatory machinery of the state. In each of these places, the schemas reveal an ironic heterosexist logic that relies on a sexual epistemology, the mythology of science, and establishes the charmed inner circle as *the* discursive community.

CHAPTER TWO

The Implicated Homosexual

One of the largest categories of cases to arise in the early years of AIDS involved iatrogenic disease. People infected with HIV through medical treatment, transfusions, needle sticks, and hemophiliacs were among the litigants most prominently represented in the first decade. Although users of the Factor VIII or IX blood clotting agents were ultimately somewhat successful in court, individuals infected with HIV through other types of medical treatment or accidents were less so.[1] Three of the stories told in this chapter arose from medical settings, one of which was an employment dispute and two from transfusions of contaminated blood. The fourth case, although unrelated to medical treatment, began with a needle stick. One arose when a gay male nurse was fired from his job. Two involve young mothers infected with HIV through blood transfusions, and the fourth involved a welder who feared HIV infection from an accident he suffered at work. Thus, they are alike and dissimilar in some important ways: Two involve men and two women; two arose in from workplace disputes and two involved medical malpractice; three of the four cases involve medical institutions; three involve plaintiffs designated as heterosexual; one plaintiff is a gay man. Nonetheless, the epistemology of homosexuality structures the logic of all four opinions.

J. Rollins, *AIDS and the Sexuality of Law*

In these scripts, a particular kind of gay/AIDS subject, presumably male, works at the level of consciousness to organize its logic. The conflation of AIDS with homosexuality is so seamlessly assumed, that clear knowledge of one term stands as a sufficient marker of the other. These scripts work to identify the gay/AIDS subject through some aspect of his physical presence. Thus, they centrally involve the ELISA test and policies intended to manage HIV transmission risks. Here, the gay/AIDS subject is judicially conscripted into an active role. He is put into a position of agency whereby his compelled confession organizes the logic of the scripts and assumes extraordinary forms of social power. He becomes the narrator whose voice—whether present or not—determines the boundaries of the discursive community that speaks from the charmed inner circle. He speaks knowledge, divulges necessary information, articulates explanations, but more importantly, he has exculpatory abilities. The gay/AIDS narrator is called upon to locate a source of HIV and when he refuses, he suffers extreme consequences. When he is absent, the structures organized by his articulations collapse into the heterosexual/AIDS closet. It is not unusual for the outcome of AIDS-related litigation to hinge on claims articulated by experts, but a particular curiosity apparent in these texts lingers near the question of who qualifies as an expert. Unlike the epidemiologists, doctors, virologists, and other scientists who eagerly display information in the courtroom, these cases compel reluctant witnesses to speak not about HIV itself, but about their identities, acts, and bodies. Who is qualified to speak and about what is realigned in very useful ways.[2]

Putting AIDS information into the mouth of a homosexual narrator has several epistemological and rhetorical consequences. First, it maintains the well-entrenched conceptual binaries that align the concepts gay and AIDS with danger, while excluding (excusing) heterosexuals from the latter two terms. Second, it produces degrees of certainty about HIV transmission where risks might be impossible to determine from scientific or medical materials or from the lines of causality that are established in the case scripts. A third consequence is to realign social power in such a way that the gay/AIDS subject is granted agency and thus blame; everyone else can be excused of their

recklessness because he is responsible. Finally, the identification and compelled testimony from an AIDS narrator can resolve conflict in ways that minimize the potential for wider social damage. Once the homosexual narrator is identified and his testimony processed, he can become the bête noire upon whom blame might be placed, thus freeing from culpability the other actors involved.[3]

At the time these cases came to court, HIV had been isolated and identified, tests were widely available to determine if people were infected with HIV, and the standard window of seroconversion was understood to be six months. In other words, people infected with HIV could be certain of their serostatus if they waited six months after potential exposure to be tested. Despite these advances, the science was new, frequently uncertain, and thus gave rise to some imperfect policies. Illustratively, at the time, the Red Cross had the ability to test blood for HIV, but the costs and logistics of testing all blood already in its possession was prohibitive. Ergo, screening blood donors for their sexual histories played a crucial role in that agency's safety precautions. Where HIV status was unknowable, sexuality served as the nodal point around which these scripts organized the science of AIDS. The gay/AIDS subject possessed knowledge about HIV that could not be determined from other sources, therefore his confession became necessary. Importantly, he served as the narrator who knew about HIV, the risks of transmission, and the history of his own behaviors and status, and he was compelled to provide that information. The AIDS narrator found himself in a position that resembles that of women as Paula Treichler described. As she observes, women are often depicted as "inefficient transmitters" of HIV, and are thus seemingly overlooked in rhetorical fantasies that emphasize men "inserting" the virus into bodies of other men, while ignoring the risks to women.[4] The gay/AIDS narrator called upon to organize the outcomes of these cases seems not to suffer the same ill health or social consequences of his "victims."

These cases show how difficult it can be to manage conceptions of HIV transmission risk, particularly when there are so many dissonant voices represented and so many different contests taking place at once.[5] Cases involving porn consumers or inmates test the boundaries of the first amendment and the eighth amendment, and

yet the legitimacy, social status, and value attached to either group is minimal. To articulate the importance, cultural impact, social value, or economic importance of the pornography industry would, in itself, raise cries of alarm or derision. Unlike those cases, however, litigation involving health care professionals and respected community members raise much thornier questions for public policy. While we might easily regulate the former through criminal statutes or other punitive state action, actors in the latter arenas are accustomed to seeing their legitimacy promoted, their interests guarded, regulation by inducement, and relative professional autonomy.

Political and legal struggles regarding iatrogenic disease have raised among the most trenchant and complicated legal issues throughout the history of AIDS.[6] At the same time that this litigation acknowledges the accepted practice of compensating people for injuries caused by others, the enormity associated with compensating hemophiliacs and other recipients of blood products could have had disastrous effects. Doctors, hospitals, health care workers, the Red Cross, and manufacturers of blood products could have been devastated by judicial rulings that compensated victims of iatrogenic disease. Here, these practices of compensation have also served to police the boundaries of the sexual periphery and to secure its purportedly virtuous center.

Four cases exemplify these processes at work.[7] The case of Kevin Leckelt tells the story of a gay nurse who lost his job after his lover was treated for AIDS in the hospital where Leckelt worked. The cases of Carol Marcella and Cynthia Coleman were part of a large category of litigation wherein plaintiffs infected with HIV through blood transfusions brought suit against medical professionals alleging that they were negligent in their blood-screening practices. The final case involves a welder, John Marchica, who won a sizeable settlement for psychological damage he suffered after being stuck with a discarded hypodermic needle.

Kevin Leckelt

Kevin Leckelt was employed as a licensed practical nurse at Terrebone General Medical Center (TGMC) in Houma, Louisiana,

from June of 1978 until May of 1986. During the eight years of his employment, he held both surgical and medical assignments, worked with pre- and postoperative patients, and practiced in the hospital's intensive care unit, emergency room, and surgical recovery room. In April of 1986 hospital administrators asked Kevin Leckelt to have an HIV test and to submit results of that test to the hospital. When he refused, they fired him for insubordination; he filed suit, and lost in both the district and appellate courts.

The pathways along which knowledge, information, and authority circulate in this case, and where they eventually come to rest, are especially interesting. On one level, both the district and appellate court opinions tell the story of a gay man who suspected that he was HIV positive. Moreover, both opinions suggest that he was hesitant to confirm those suspicions for himself and that he was even more reluctant to divulge that information to his employers. What is tricky and confusing about both opinions is the rhetorical strategy by which Leckelt's firing is upheld. Leckelt was fired because he refused to have an HIV test and to report the results to hospital administrators. Rhetorically, the problem for the court lies with producing an argument justifying the need to test Leckelt for HIV. If there had been a potentially transmissive work-related event such as a needle stick or a surgical accident, the hospital's need to determine Leckelt's serostatus would have appeared more clearly justified—but no such event had occurred. Instead, bits of information were unearthed and brought to court in support of a decision made by hospital administrators only after Leckelt's "roommate"—a man by the name of Marvin Potter—was treated at TGMC, suggesting that administrators were looking for some concrete justification to investigate Kevin Leckelt's HIV status. The relationship between Leckelt and Potter provided a concrete event that was positioned as a pivotal element in the logic of the opinion, despite the fact that the relationship was characterized in opaque legal language unfettered by evidence or material support. By the end of the text, the reader is never entirely certain as to the nature of the relationship between Leckelt and Potter.

Tension and confusion surface early in the script. After a brief summary of facts and conclusions, the opinion shifts to a section

entitled "Infection Control." "An important function within any health care facility is infection control, which is concerned with preventing the spread of disease, either from employees to patients or from patients to employees."[8] According to the infection control officer of TGMC, the hospital had no written policy specifically tailored to HIV or AIDS, but policies concerning TB, hepatitis, or syphilis were considered applicable. That policy required an infectious employee to submit test results, to take sick leave with pay while being treated, and to receive clearance from his physician before returning to active employment. The next section of the opinion presents a summary recitation about the facts of AIDS, informing the reader that "once a person has become infected with HIV, he may not show any signs of illness" but "is a carrier," that "there is no known cure for AIDS" nor any vaccine, and that "medical consensus is that HIV is primarily transmitted in one of three ways: intimate sexual contact, exposure to blood or blood components, and from mother to fetus in utero or through breast milk."[9] The court specifically notes that HIV is not transmitted through casual contact. Additionally, evidence is cited from the Centers for Disease Control (CDC) indicating that three health care workers (HCWs) have been infected with HIV through "unexplained or unexpected" means.

The opinion cites CDC regulations at length, bringing to the fore information that seems to have complicated the judge's rhetorical plan. The CDC summary states at the outset that there is no evidence of HIV transmission from HCWs to patients, but admits that the risk would exist under two conditions. First, if there were a high degree of trauma to a patient that could provide a portal of entry for the virus, and second, if there were a scalpel injury or needle stick that would allow blood or serous fluid from the HCW to enter that wound. The report specifically states that "HCWs known to be infected with HTLV-III/LAV [an early name for HIV] who do not perform invasive procedures need not be restricted from work unless they have evidence of other infection or illness for which any HCW would be restricted." Routine testing of HCWs was not recommended.[10] The summary concludes with a paragraph attesting to the risks HIV-positive HCWs

face, informing the reader that HCWs with HIV should be counseled about how to avoid putting their own health at risk, and stating that determinations should be made on an individual basis as to whether or not the HCW can adequately and safely perform their duties without risk to themselves.

At least four complications arise from the court's extensive summary. First is the issue of whether or not Kevin Leckelt performed "invasive procedures." Second, the CDC guidelines are clearly intended to protect the health and safety of health care workers as much as they are intended to protect patients. Third, the guidelines explicitly state that routine testing of HCWs is not recommended, that transmission of HIV from a HCW to a patient had not been documented, and that the risk "is extremely low" for HCWs who do not perform invasive procedures. Fourth is the "evidence of other infections" for which HCWs would have been restricted. A comprehensive reading of the guidelines suggests that Leckelt did not perform invasive procedures and that in the absence of a potentially transmissive event TGMC had no need to test Kevin Leckelt for HIV. After the long rehearsal of the CDCs recommendations, however, the court opinion resumes with a contrary assertion: "[A]t trial, all medical experts admitted that it would be impossible to follow the above stated CDC guideline unless the health care facility knew the health care worker's HIV status. In his expert report, Exh. D-19, Dr. Peter Mansell, defendant's medical expert, stated that: 'The CDC guidelines, in my opinion, both provide for and suggest that hospitals may seek to have an employee tested who it reasonably suspects has been exposed to the virus.' "[11] Although the guidelines were designed to protect health care workers and patients in the hospital setting, the court's rhetorical project becomes something of a variation on that theme. Persuading the reader that Leckelt had been exposed to HIV is tricky in the absence of a work-related incident. In order to uphold the hospital's decision the court must persuade the reader that Leckelt had been exposed to HIV and that his duties put him in situations where he posed a potential risk to patients. This line of logic should have required, at a minimum, demonstrating that Leckelt and Potter were lovers, if not also that they

had engaged in unprotected sexual acts. Ironically, their relationship is never discussed or defined in the court's opinion, and there is certainly no evidence offered to support the contention. The reader leaves the opinion without knowing exactly how Leckelt and Potter were related, and yet the logical structure of the opinion relies entirely on the assumption that they were exchanging bodily fluids.

Following his reiteration of CDC recommendations, Judge Carr summarizes: "a seropositive employee may have to be restricted from caring for patients with highly contagious diseases due to the impairment of their immune system," and "[i]f an individual has [an] exposure to blood or other body fluids, the source patient should be assessed. If the source patient has AIDS or other evidence of [HIV] infection, declines testing, or has a positive result, the exposed individual should be tested clinically and serologically for evidence of [HIV] infection." Judge Carr goes on to state that, according to expert testimony, "the same protocol should be followed where the exposure is outside of the hospital rather than from a source patient."[12]

These, then, are the guidelines upon which the judge builds an opinion. Although each element is directed at protecting HCWs and patients in the hospital setting, the court uses them to reach beyond the workplace to justify determining Leckelt's serostatus on the basis of his homosexuality. Once his homosexuality is established, his serostatus is logically drawn from it and he is positioned as a threat to his patients. Solidifying these conceptual necessities is rhetorically challenging given the evidence available. Shoring up the hospital's need to know Leckelt's serostatus is the foundation upon which the court's opinion must be built but routine testing is not recommended and there was no concrete event that put Leckelt or his patients at risk. Purportedly, the initial motivation for the hospital's concern was that Leckelt's "roommate" sought treatment for AIDS at TGMC. The potentiality of Leckelt's HIV exposure depends not on a work-related event—for which there could conceivably be some evidence—but instead relies on the fact of his homosexuality—a transmissive possibility that the court has neither evidence to support nor an

inclination to discuss. Consequently, the court must develop an argument that foregrounds Leckelt's potential seropositivity and his carelessness as a health care worker.

After a brief survey of Kevin Leckelt's work history at TGMC, the court acknowledges that "starting IVs (intravenous lines) has not been considered by the medical community as being an invasive procedure. However, this is under debate at this time." Furthermore, Judge Carr informs us that IVs provide a route to a patient's bodily fluids, and that Leckelt's duties in the emergency room and the intensive care unit would have brought him into contact with high-trauma patients. Thus, the court concludes that, "the plaintiff's duties come within the situations outlined by the CDC guidelines." The court follows each assertion of the CDC's guidelines with a blunt interpretation that redirects the reader's attention to his own rhetorical needs. After reviewing the CDC guidelines and the brief survey of Leckelt's employment history, Judge Carr explained:

> In March, 1986, plaintiff's friend and roommate of eight years, Marvin Potter, was admitted as a patient at TGMC and was later diagnosed as having acquired immune deficiency syndrome (AIDS). Many of the employees at TGMC knew that plaintiff and Potter lived together and understood that they were homosexuals. [Here, the court inserted a footnote: "All of the experts agreed that homosexual males are in a high risk group for contracting HIV and AIDS. Plaintiff does not dispute that he is in a high risk group."] Potter remained at TGMC until April 9, 1986, when he was transferred to New Orleans where he died on April 21, 1986, of a secondary infection incident to AIDS.[13]

This information, then, stands as the court's evidence of Leckelt's "exposure" that has happened outside of the hospital. It is supplemented by informing the reader that Leckelt had had an anonymous HIV test while in New Orleans, but had not picked up his test results. These fragments of information are drawn together in order to position Leckelt as the gay/AIDS subject who poses a risk to the general health; the fact of his undisputed homosexuality, his "roommate's" illness, and his fear of being HIV positive are used to convince the reader that Leckelt is not only dangerous, but insubordinate.

At this point in the opinion, the dramatis personae expand unexpectedly with the introduction of Gladys Verbus. Ms. Verbus, a patient at TGMC for ten days in January of 1987, testified regarding Kevin Leckelt's treatment of her. "Verbus testified that the plaintiff had a cut on his finger that was covered by a blood-soaked Band-Aid and that without wearing gloves, plaintiff removed bandages from Verbus' surgical incision and manipulated her wound while a watery, bloody substance was dripping from plaintiff's cut through the Band-Aid and a paper towel wrapped around his finger. Plaintiff also manipulated Verbus' intravenous line which had moved out of place."[14] Although Judge Carr expresses reservations about the credibility of Verbus' testimony, he concludes from it that there are opportunities for "blood to blood or blood to body fluid contact" between health care workers and patients and that some health care workers, "even those in high risk groups, negligently fail to use proper infection control procedures at all times."[15] The generality of Judge Carr's conclusion and his invocation of Leckelt's membership in a high-risk group seem strangely at odds with the particularity of the testimony offered by Verbus. We are supposed to read Verbus' testimony as evidence that there was a potentially transmissive event, and that piece of information might bring Leckelt within the testing requirements of CDC policy if *he* had been potentially infected in the process, or if there were good reason to suspect that he had infected Verbus. But since Verbus presumably did not have HIV, and Leckelt's serostatus was unknown, his risk-group membership must be brought back into the foreground so that he can instead be perceived as careless and threatening. The potentially transmissive event, the possibility of HIV seroprevalence, and the hospital's need for testing are apparently being rendered visible here, but the logical structure collapses if we fail to assume the confluence of homosexuality and AIDS.

These rhetorical moments have a kaleidoscopic effect that refract Leckelt's sexuality and serostatus such that the hospital's regulatory gaze is situated upon Leckelt's body. One of the arguments advanced on Leckelt's behalf drew an analogy between him and another nurse who had been stuck by a needle contaminated

with Potter's blood. When hospital administrators did not receive Leckelt's HIV test results, he was suspended immediately; the other nurse had been allowed to work while she awaited the results of her test, and, as Leckelt argued, the results of that test would likely have been meaningless since the nurse had not had time to seroconvert after the incident. Judge Garwood's appellate opinion discounts Lecklet's argument swiftly, observing numerous disparities between the two incidents. First, he observes, the nurse had complied with the hospital's requests to be tested and to submit those results. Leckelt, he points out, had already taken an HIV test because of his own health concerns and refused to either obtain or divulge that information. Consequently, while the nurse had to await her results, Leckelt did not. Second, the opinion notes the fact that Leckelt was already on leave because of a draining lesion and that he did not have medical clearance to return to work on those grounds either. Finally, the court informs us:

> Further, the evidence supports the conclusion that Leckelt, unlike the RN, was known to be a homosexual, a group at high risk for contracting HIV and AIDS. Therefore, there is adequate evidence that TGMC reasonably suspected that Leckelt had been exposed to HIV at some point during his eight-year relationship with Potter, who suffered (and soon died of) AIDS-related complications. It could reasonably be concluded that, if Leckelt were infected with HIV, there probably was an enhanced likelihood, as compared to the RN when she was tested, that Leckelt would have seroconverted by the time that he voluntarily submitted to HIV antibody testing in New Orleans.[16]

Judge Garwood's reasoning is unimpeachable on the first two points because, after all, Leckelt was fired for insubordination—an interpretation of events that seems to be captured in his first argument. It is also quite unlikely that the other RN would have tested positive for HIV so soon after exposure, and it was also agreed upon by all the parties that Leckelt's own health was suspect. What is puzzling though is the gratuitous invocation of Leckelt's sexual orientation, his opaquely referenced relationship to Marvin Potter, and what that might have meant for possibly determining his serostatus. In addition to blurring the distinctions between infection, being infectious, and seroconversion,

Judge Garwood here highlights whether or not Leckelt could have been *determined* to be dangerous at the time the hospital demanded his HIV test results. That determination would have been dependent upon knowing that Potter and Leckelt were lovers, a piece of information that is occluded by the language used throughout the opinion. Furthermore, inasmuch as the needle-stick incident of the other nurse is here analogized to Leckelt's homosexuality, her suspected window of infectivity was located at a specific moment in time while Leckelt's suspected infectivity was timeless and ongoing.

Throughout his opinion, Judge Garwood refers to Marvin Potter as Leckelt's "roommate" or "associate" of eight years, without ever discussing whether or not the two were, in fact, lovers or investigating whether their "association" might have caused Leckelt to become HIV positive. References to their relationship are uniformly obscure. What was that relationship and how might it have caused HIV infection? Absent both evidence and the inclination to discuss it, the court's opinion relies instead on information that can only have been assumed and, in order for the logic to succeed, that depends on a particularly homosexualized construction of AIDS. There are two possibilities: If the relationship between Leckelt and Potter was platonic, it provided no justification for determining Leckelt's HIV status and his firing was upheld by an entirely specious argument. In this scenario, the logic of the opinion requires readers to assume that all gay men always have unprotected sex with all other gay men—thereby relying upon and perpetuating a specifically flawed "truth" about homosexuality, one that stands centrally in the court's opinion without evidence, discussion, or contemplation on the part of the judge. In the second scenario, Leckelt and Potter were lovers, in which case we are still left without evidence, discussion, or contemplation of that fact. The court's argument depends upon something that is never shown to exist: "Under all the circumstances respecting Leckelt, including his apparent homosexuality, medical condition, and long-term relationship with a man who was hospitalized with and ultimately died from AIDS-related complications, [TGMC] was justified in demanding the results of Leckelt's HIV antibody

test."[17] At the end of an opinion that has ignored, in fact obscured, whatever relationship existed between Leckelt and Potter, this final passage renaming their "association" as a "long-term relationship" allows the reader to weave together the conceptual threads of homosexuality and AIDS without ever having to do the explicit work of demonstrating that the possibility for HIV transmission existed. Even if the intimacy of the relationship between Leckelt and Potter were clear at the time the case was heard, the absence of that explicit acknowledgment raises an important question about its erasure from the court's language.

In Leckelt's case, sexual orientation is the fixed point of knowledge and swirling around that bit of information are several unarticulated assumptions, fragments of information, and a large dark space of the unknown. That the hospital unearthed and presented and then the court accepted and arranged these fractured bits of information—Verbus' testimony, Leckelt's sexual history, the slide from protecting health care workers in the CDC policy recommendations to protecting patients—turn the opinion into an indictment of a silent homosexuality as it legitimates and supports the hospital's actions. AIDS and homosexuality stand as proxy for one another and Kevin Leckelt is the gay/AIDS subject who is compelled to confess. His body, sexuality, and serostatus are made legible so that the institution of the hospital may be seen as a space of health and safety.[18]

Carol Marcella and Cynthia Coleman

In 1985, Carol Marcella received donated blood during emergency treatment for injuries resulting from an automobile accident. Through a "look back" program designed to find out if transfusion recipients had been put at risk, the Red Cross determined that she had received HIV positive blood and Ms. Marcella, her husband, and children filed suit. Named as defendants in the suit were the hospital where Marcella had been treated, the physicians who treated her, and the American Red Cross. The district court granted summary judgment in favor of the Red Cross, and on appeal the Third Circuit ruled that Marcella was entitled to a

jury trial. One of the central questions addressed by the court on appeal was whether or not the Marcellas should be allowed to depose the blood donor who had been identified as HIV positive; the court ruled that they should be able to do so.

The outcome of the case and the rhetorical strategy of the opinion work hard to strike a balance between the competing interests involved, especially the Red Cross and Carol Macella, and much of the opinion is committed to examining the role of the Red Cross, its function, and its potential immunity from suit. What is curious about the opinion, and what reads as more troubling, however, is the imbalance achieved in the alignment of HIV infection with sexuality and the way the court determines infection risks as a function of identity categories. Although the story as a whole is less tendentious than that of Kevin Leckelt, there are still large informational gaps organizing the logic of the text.

After taking note of the fact that Carol Marcella was infected with HIV during treatment for injuries sustained in an automobile accident, Judge Weis informs the reader that:

> [Marcella's] condition has deteriorated to the point that it is inevitable she will soon develop full blown AIDS. The blood had been donated through the Red Cross on January 29, 1985 by a homosexual male who was HIV+. He gave blood again on June 8, 1985. At that time, the Red Cross performed an ELIZA [*sic*] test, which can determine whether a blood sample is contaminated by HIV. The test did not receive approval from the Food and Drug Administration until March 1985 and was not available at the time of Marcella's transfusion. Through a "look back" program, the Red Cross discovered that she had received infected blood.[19]

A central issue on appeal was the plaintiffs' discovery request to depose this "homosexual male" identified by the Red Cross and referred to throughout the opinion as the "implicated donor."[20] The district court opinion is devoted largely to determining whether or not the Red Cross' screening procedures were simple enough to be understood by a person of average intelligence. In that opinion, the implicated donor, referred to as "Donor X," is evaluated on the basis of his education, sexual identity, and sexual history. Evidence introduced at trial demonstrated that the Red

Cross had altered its screening policies, looking for "high-risk behaviors" instead of "high-risk groups," as was done early in the AIDS crisis. Donor X testified that he did not identify as a member of a high-risk group because he had had no sexual contact for 18 months prior to donating blood and had not engaged in any recent high-risk behaviors. Although the court found that the Red Cross had kept with evolving policy to the best of its ability, Judge Fullam remarked, "at the time Donor X made the fatal January 29, 1985 donation, the defendant was still using the old cards and instructions."[21]

The district court determined that the Red Cross' screening procedures were unreasonably "turgid" and asserted that even if they had "dotted all the 'i's' and crossed all the 't's' " the "implicated donor" would not have been stopped from giving blood.[22] As reiterated in the appellate opinion: "The judge, as fact finder, evaluated the demeanor, education and sophistication of the donor to determine that he would have persisted in giving blood even if the correct instruction had been given at the January donation. The credibility evaluations of the donor were essential to the factual findings from his testimony."[23]

Marcella, who has been described as deteriorating, advancing inevitably toward full-blown AIDS, is allowed to pursue her case regardless of the donor's privacy interests because his testimony is necessary for the recovery of damages by "victims of contaminated blood."[24] The donor's privacy was also taken into account. In consideration of the donor's privacy claims, Judge Weis asserted on appeal that: "because a human tendency to deny or attempt to excuse conduct that created disastrous consequences to a victim is not uncommon, a more extensive interrogation probably will be necessary. A wide-ranging discovery deposition most likely would be of great assistance to both parties and would improve the presentation made at trial."[25]

The juxtaposition of these two passages summarizes the conflicting interests: The privacy of the donor and Marcella's right to recover. In the first instance, it seems that the Red Cross has failed to clarify its instructions to potential donors; a person of average intelligence would not have grasped their exclusions. Nevertheless,

the second passage seems to suggest that the donor's capacity to understand those unwieldy instructions was limited, in which case he would have to be further examined in order to know for sure if he individually understood their proscriptions.

Not unlike many court opinions from this era, the issue eventually coalesces around the Red Cross' policies for screening blood donors. Such opinions explore the policy shift that defined HIV transmission risk as a problem of high-risk *groups* to one that involves high-risk *behaviors*. Initially, the Public Health Service recommended that the Red Cross exclude members of high-risk groups, that is, homosexual and bisexual men, intravenous drug users, and Haitians. That policy was changed in 1984 and 1985 to reflect the realization that group identification and membership did not serve as a proxy for HIV status, but that particular *acts* might. In short, HIV is transmitted not through identity or group membership, but through behaviors that exchange bodily fluids. Recognizing the importance of this change in conceptualization, the Public Health Service recommended that the Red Cross update their screening policies and avoid donations by men who have sex with men but who do not identify themselves as homosexual. This shift in policy was explicitly intended to increase the likelihood that blood donors would willingly exclude themselves from making donations without also forcing them to self-identify as part of a stigmatized sexual minority. Judge Weis considered this shift in policy:

> Among other screening procedures, a brochure was given by the Red Cross to the donor in January 1985. It did not contain the guidelines on exclusion of high-risk groups recommended by the Public Health Service in December 1984. That guideline defined the high-risk group as homosexual and bi-sexual "[m]ales who have had sex with more than one male since 1979." Instead, the Red Cross brochure described the high-risk group as "[s]exually active homosexual or bisexual men with multiple partners (more than one)."[26]

The court wrestles here with the Red Cross' policy change, but the placement of the first quotation mark in the passage also marks a common misunderstanding. The Red Cross hoped, then as now, to screen out blood donations from "males who have sex

with males," an identity-free category intended to target particular acts. But while the policy change—from the latter quote to the former—was explicitly intended to avoid forcing such men to identify as homosexual, a move they would likely resist, the first clause of the sentence returns the definition by act to an identity marker and thereby defeats its purpose. The court's language undermines the intent of the policy change, reverts back to a designation of sexual identity, and the key element seems to have become the number of partners in a donor's sexual history. In contrast to the Public Health Service's intended goal, the passage reinforces a conception of AIDS as a problem properly belonging to promiscuous homosexuals. Although little more than a minor slip of the pen, the ultimate result reinforces a perception of AIDS that stands in contrast to the policy goals recognized by the Public Health Service.

Another mother, Cheryl Coleman, was transfused with HIV prior to the availability of the ELISA test, and her infection was discovered when the donor attempted to donate blood again after the ELISA test became available. The questions raised in that case regarding identification of HIV, and the technologies available for doing so, are located at a historical moment of pronounced scientific uncertainty. As with the *Marcella* case, donor identification was at issue as the Colemans asked the court to grant them access to various records kept by the Red Cross. Specifically, the Colemans asked for information by way of interrogatories and document requests, including documents that discussed the blood industry's decision to exclude homosexuals from the donor pool, and documents relating to donors' sexual orientation during screening.[27] Although the trial court ordered the Red Cross to provide the donor's records to the Colemans, the judge also ruled that identifying information should be redacted in an effort to protect the privacy interests of the donor. According to the court, after a second donation tested positive, the Red Cross interviewed the donor who "denied being a member of any high-risk group, but the interviewing nurse concluded from his demeanor that he was not being truthful."[28] Although the Red Cross sought to protect the privacy of its blood donors, arguing that identity disclosure could have

a negative impact on future donations and litigation, if it were demonstrated that the agency followed proper guidelines but the donor foisted his contaminated blood on them anyway, that fact could shield the Red Cross from liability.[29]

The Colemans, in their discovery attempts, subpoenaed donor records from the Red Cross, and

> [t]he Red Cross subsequently delivered several information cards to the Colemans. On one of the cards, the Red Cross inadvertently failed to redact the donor's social security number. The Coleman's attorney immediately hired a private investigator who was able to determine the donor's name and address from information he obtained as a result of having the social security number. When the Red Cross learned of this, it moved for a protective order to prevent the Colemans and their attorney from using this information. The district court ordered the Colemans and their attorney to turn over any documents containing the donor's name and enjoined them from using the information for any purpose, including using the name to bring an action against the donor.[30]

The district court dismissed the case because the Colemans' attorney had violated a protective order against revealing the donor's identity. On appeal for the third time, Judges Guy, Ryan, and Contie for the Sixth Circuit grappled with whether or not the Coleman's case against the donor should have been dismissed because of attorney misconduct. The appellate court reversed the dismissal, and asserted that the attorney's misdeeds should not be allowed to compromise the Coleman's case.

> The donor's privacy interests are substantial, as is the public interest in maintaining a safe and adequate blood supply. However, we believe the Colemans' right to litigate their claims against the donor substantially outweighs the competing interests, especially since there is significant evidence to suggest that the donor's conduct was suspect. Accordingly, we conclude that the district court abused its discretion by enjoining the Colemans from bringing a separate action against the donor. Similarly, we find that the Coleman's right to sue the Red Cross outweighs any harm demonstrated by the Red Cross.[31]

In this case, the "implicated donor" died before the trial started.

The Coleman case was obviously problematic for all the players involved, as evidenced by Judge Ryan's dissent. Central to the appellate court's opinions was the question of whether or not the

case should have been dismissed because the Coleman's attorney used inadvertently disclosed information to identify and locate the HIV positive donor contrary to a court order. The attorney's "contumacious conduct," that resulted in dismissal at the district court level—an issue emphasized and positioned as determinative by Judge Ryan in dissent—is, however, only one fragment of problematic information brought to light in the opinion. The thornier questions are whether or not the nation's blood supply might be compromised by revealing the identities of anonymous blood donors, and the extent to which people infected with HIV through blood products ought to be able to make identity determinations about those donors. The most difficult questions in the case do, indeed, circulate in the vicinity of the closet and the search for and identification of an AIDS narrator become central.

It is impossible to determine whether the nation's blood supply would be better protected by assuring donor anonymity or enforcing donor revelation. The certainty of AIDS in these scripts is located with the gay men whose sexual identity and HIV status are organized as the truths that ground the logic of both opinions. Ultimately, the court concludes that there is no reason why the Colemans should be barred from filing suit against the donor; in fact, his conflicting testimony clearly raises serious questions about his conduct as a blood donor. The determinative problem in the case is what is, and what becomes, unknowable throughout the history of the case. That the interviewing nurse determined that the donor was not being truthful regarding his membership in any "high risk groups" raises troubling questions that are never answered. The opinions do not align that fragment of information with the potential that the donor was homosexual; the reader is left to wonder whether the donor's mendacity concerned his sexuality, his history of disease, his past drug use, or if there were some other potential route by which he could have become infected. He is undoubtedly, however, exactly the person at whom the Public Health Service directed its change in policy; denying membership in high-risk groups failed to screen him from the pool. We must also ignore the fact that the court overlooked an attorney's contumacious conduct. At the same value that the rights of litigants and

the importance of litigation are being championed by the court, the unethical acts of legal practitioners that made those things possible are negated. The ironic circulation of knowledge in the vicinity of the closet, the unchartable relationship between the known and the unknowable, between the explicit and the inexplicit, is here kept in that state because the implicated donor died before litigation could be finished.

The credibility contests represented in the opinion are never resolved. Illustratively, the court informs the reader that the donor "frequently gave inconsistent information in response to the screening questions. In particular, the cards contain inconsistent information concerning the donor's age, date of birth, and number of previous donations. It also appears from the cards that on some occasions the donor falsely stated that he had not been exposed to hepatitis and that he had not donated or sold blood plasma."[32] That the interviewing nurse determined that the donor was not being honest emphasizes his lack of credibility—but positions the nurse as credible, although we are left to wonder exactly what dishonesties she had diagnosed. We get a hint in a footnote at the end of the opinion:

> The Colemans sought information by way of interrogatories and document requests that included the following: (1) identification and production of documents relating to the decision to implement and relating to the use of the hepatitis B core antibody test in Central Region; (2) identification and production of documents relating to a December 1983 meeting which discussed the use of the hepatitis B core antibody test to screen blood; (3) documents relating to the use of a screening procedure whereby donors could designate their blood for non-transfusion or laboratory use; (4) documents which discussed the plasma industry's decision to exclude homosexuals from the donor pool; and (5) documents relating to donors sexual orientation as part of donor screening.[33]

Although the lines of logic are not woven together in the opinion as clearly as they were in the case of Carol Marcella, it is made clear to the reader that the Colemans expected or intended to reveal the donor's sexual identity. Whether he considered himself to be gay, whether they could identify him as such, or whether the court could determine that he was gay remains a mystery.

Another logical gap appears when we consider the extent to which the Colemans could establish the utility and desirability of that closetude itself. Their tactic of revelation had a two-pronged approach. First, was the donor hiding his sexual identity? Second, was the Red Cross' furtherance of his closetude useful and necessary to maintain a safe blood supply? Curiously, the Red Cross is here put in the position of working to maintain the effect of the closet through the language of privacy and its centrality within the rhetorical strategy of these opinions. "The Colemans argue that the national blood supply would be safer if high-risk persons were discouraged from donating by the possibility of disclosure. The Red Cross counters that disclosure would make the blood supply less safe. Dr. Shafer [executive director of the Red Cross's Regional Blood Services for Southeast Michigan] explained that donors would not be candid during pre-donation interviews if they knew their identities could be disclosed. Therefore, Dr. Shafer opined that pre-donation screening would become less effective and more high-risk blood would be donated."[34] It is impossible to know—then or now—whether or not compromising the anonymity of blood donors and compelling them to confess their secrets would undermine the Red Cross' ability to maintain an adequate blood supply. And yet, who qualifies as an expert, whose testimony is brought forward as legitimate, and what determinations are made as a result of those contests fundamentally shape the outcome of the case. Centrally, however, the exigencies of the closet and maintaining its coherence within our sexual consciousness are the organizing features. The Public Health Service's policy change recognizes the epistemology of the closet, and its logic is manifested in the Red Cross' language.

In *Coleman* and *Marcella* the sexual identity of a blood donor becomes an escape route through which the Red Cross can avoid liability—ignorance and knowledge circulate in the vicinity of the closet and revelation of identity becomes the nodal point of the contest. The scripts of both cases are organized around the shame, stigma, and exclusion of the closet, revealing the ironic tendency to believe that the gay/AIDS subject is readily identifiable, but at

the same time, elaborate technologies of compelled confession are needed to locate him with certainty.

John Marchica

"Certain words when directed at a person deliver such a dread message as to strike terror in that person's heart. AIDS, a modern word, less than 20 years old, is accompanied by many myths and misconceptions; it also carries with it in the public's mind such an image of inevitable death as to bring home that terror."[35] These lines open Judge Cardamone's opinion for the Second Circuit, upholding a six-figure damage award for a man by the name of John Marchica. In October of 1989, Marchica was working as a welder for the Long Island Railroad (LIRR) in the deteriorating Hempstead station. Part of the architecture of that building included a metal grating that could be removed, allowing access to a shaftway leading into the trainman's room in the basement. The secluded location attracted various undesirable persons and activities. "Drug paraphernalia consisting of hypodermic instruments and crack vials was often found on the floor and in the environs of the Hempstead station, which was reputed to be a center for drugs, illegal aliens, and prostitution."[36] As the LIRR welders attempted to seal the metal grating over the shaftway, debris at the bottom began to smolder from falling sparks; Marchica volunteered to crawl into the shaft to clear it out. Despite wearing heavy gloves to protect his hands from the heat and glass, a discarded hypodermic needle hidden in the refuse stuck through the gloves and impaled Marchica's hand. Co-workers testified that Marchica bled from the puncture wound and that there was blood in the chamber of the syringe. Marchica sued the LIRR for damages.

Much of the court's opinion is committed to relating the traumas Marchica suffered as a result of these events. He was first taken to Winthrop Hospital where he was advised to get vaccinations for both tetanus and hepatitis, to wash his hands, and to get tested for HIV. When Marchica reported to the LIRR's medical department, he was told that the instructions concerning the HIV test were ridiculous and that he should just go home and wash his

hands with soapy water. "Nonetheless, Marchica followed the orders of [doctors at Winthrop Hospital] and had an AIDS test a couple of days later."[37] On a return visit several months later, he had another HIV test, the second in a series of three tests taken over a two-year period. In the meantime, the syringe was disposed of in accordance with the railroad's policy.

The psychological traumas caused by the event take center stage in the court's opinion. One month after the accident Marchica began seeing a psychologist due to sleeplessness, nightmares, and irritability. Testimony from his wife and co-workers indicated that he was seen crying and vomiting on multiple occasions, leading one individual to assert that he seemed to have lost approximately thirty pounds. He was advised to abstain from having sexual relations with his wife. His psychologist prescribed antidepressants. Within the first few paragraphs of the opinion the reader recognizes the plaintiff's very real suffering and is drawn into sympathy with him. After presenting a legal analysis, the opinion returns to the question of whether Marchica could have dispelled his fears and psychological damage by becoming more informed about the "facts" of HIV transmission. "Had Marchica educated himself about HIV and AIDS, defendant insists, he would not have had a rational basis for his fear."[38] The court disagrees with this assertion: "[W]e are unable to embrace the notion that a reasonable person, punctured by a discarded hypodermic needle with blood in it, in a location known to be frequented by drug users, exercising due diligence, would not fear developing AIDS. Just the opposite is true; any reasonable person would have such fear."[39] The court recognizes that HIV is transmissible through sharing needles, and acknowledges that drug paraphernalia is a primary vector of infection. Consequently, the damages Marchica suffered are construed as reasonable, grounded in a physical fact and having debilitating physical consequences. What is striking about this opinion is the extent to which the court draws the audience into sympathy with the plaintiff by framing our understanding of the story as tragic. The rhetorical logic relies upon and reinforces a particular set of beliefs about AIDS that is absent from Leckelt's case, and only sparingly appears in either Marcella or Coleman.

The court's use of the words "terror," "dread," and "inevitable death," in the very opening lines of the opinion frames the readers conception of AIDS by invoking our own fear of death; we can certainly understand why the plaintiff is entitled to a large cash settlement.

The variation in the emotional tone of these opinions is striking, but even more important are their similarities. All four cases write AIDS and homosexuality upon the bodies of the players involved. John Marchica's negative HIV tests cannot inscribe AIDS upon his body, but the nightmares, vomiting, weight loss, denied sexual pleasure, and emotional trauma can. In the first three cases, the "proper" links can be established and the ELISA test can definitively locate the virus in the body of the homosexual. For Marchica, no such possibility exists. His is an example of the second closet of AIDS, and it is the anomaly and horror of that revelation—the fact that AIDS cannot be properly reinscribed onto an appropriate body—that casts him as the exception who deserves compensation; the charmed inner circle has been breached and the possibility of heterosexual AIDS is made visible. The horror of revelation from the heterosexual-AIDS closet and the absence of an identifiable other—in this case more likely a heroin user than a homosexual—mark Marchica with a level of fear and uniqueness that can be compensated without damaging existing social hierarchies or creating widespread economic havoc.

The operative revelatory mechanisms in these cases echo what literary theorist Lee Edelman refers to as homographesis, "the disciplinary and projective fantasy that homosexuality is visibly, morphologically, or semiotically, written upon the flesh so that homosexuality comes to occupy the stigmatized position of writing itself within the Western metaphysics of presence."[40] More potently, however, they reflect what Edelman identifies as the schizophrenic tendency to depict homosexuals as difficult to identify and at the same time markedly visible. What Edelman identifies as Cold War anxieties about masculinity and infiltration echo through the rhetorical logics of these opinions. The moral panic surrounding AIDS produced a similar effect, inspiring an

even more desperate need for the national, political, and bodily reassurances of purity and security that arose from the tearoom arrest of Walter Jenkins, Lyndon Johnson's chief of staff.[41] These cases work at a similar intersection by dragging disease, sexuality, and the physical damage of AIDS into the same scrutinized space, and at the same negating their relationship to sanctified bodies, acts, and identities. In the same way that a dominant discursive community could not bear to face the homosexuality of Walter Jenkins, these legal scripts reveal an inability to face HIV transmission risk defined at its most general level: as an exchange of bodily fluids regardless of identity. These scripts display a form of homographesis whereby AIDS and homosexuality are made corporeal. For the most part, HIV and sexuality are here determined from the blood, interviews, and physical symptoms of the players involved and through these processes the homosexual becomes an identifiable object, a body upon which AIDS can be written. At the same time, the heterosexual/AIDS closet becomes even more trenchant.

The fragments of scientific information spread throughout these opinions work in peculiar ways. A central element in *Leckelt* was the CDC's recommendations regarding infection control and work-related incidents that carry the potential to transmit HIV. Those guidelines were clearly written to protect both employees and patients. In order to overcome their caution against testing health care workers in the absence of a transmissive event, hospital administrators offered two specious bits of evidence intended to invent such an event: the testimony of Gladys Verbus and the unknowable relationship between Leckelt and Potter. Ostensibly scientific guidelines were negated through strategies that produced a gay/AIDS subject and compelled evidence of homosexuality and disease from his body, although the links between the concepts was literally relegated to the realm of the unknowable. *Coleman* and *Marcella* are also drawn in the vicinity of scientific information, and turn on the policies of the Red Cross. Specifically, they emerge from the moment when HIV was identified and from when testing for its presence in donated blood became possible. In those cases, the medical advances of the ELISA test were eclipsed

by the identification of a gay/AIDS subject; the new and unstable promises of science were no match for the more potent revelation of the implicated donors' sexual identity. The scientific narratives in *Marchica* are even more ironic. There, Marchica's failing health is portrayed in scientific and medical terms. These bits of information, literally featured and prominent displayed, served well to negate three negative tests for HIV over a two-year period.

Drawing analogies between these cases should be done cautiously because they vary in fundamental ways. *Leckelt* and *Marchica* both arose from employment-related events, but the problems they have asked courts to solve are quite dissimilar. Kevin Leckelt was fired for insubordination because his employer suspected that he was HIV positive and refused to comply with the hospital's infection control policy. The language of the opinion makes apparent that Leckelt was fairly certain that he was positive for HIV at the time the dispute arose—and he avoided making that determination for reasons that are ultimately undisclosed to us through the story told by the court. It seems likely, and is ironic, that the same fears and emotional trauma for which John Marchica recovered damages were also motivating Kevin Leckelt's resistance to knowledge about himself. It is also strangely ironic that while Carol Marcella and Cynthia Coleman were denied compensation for being infected with HIV, John Marchica won damages in its absence. The cases are dissimilar in the legal claims they raise and the arguments upon which they rely.

Nevertheless, there are important similarities here as well. Centrally, each of these opinions renders HIV and homosexuality visible and the gay/AIDS subject speaks authoritatively about the presence or absence of the virus and its movements, providing narrative cohesion to the scripts.[42] The narrator has the discursive power to ascribe risks and danger, and to locate liability within the rhetorical strategy of each opinion. Kevin Leckelt was the narrator of his own case, but not the only one. Marvin Potter also played that role by initiating the chain of events ultimately leading up to the suspicions and demands of the hospital. The implicated donors in *Marcella* and *Coleman* organized the logic of the opinions through the confession of their identities, actions, credibility,

intelligence, and persistence. In each instance, the plaintiffs sought to depose the donors in the hopes of demonstrating liability on the part of the Red Cross. The Red Cross, meanwhile, was caught in a precarious situation between protecting the privacy interests of its donors, its own institutionalized practices, and the desire to escape liability. The courts, meanwhile, allocated conviction among these competing credibility interests through the voice of the gay man with AIDS who acted as narrator and who could speak definitively about the presence of HIV.

Perhaps the most telling aspect of these cases lies with the inability of John Marchica to identify and depose a gay man with HIV, and the resulting tactics that are required to locate HIV on an appropriate body. Nowhere in the series of events surrounding his case was there an identifiable subject who could assuage the plaintiff's fears or organize the logic of damage recovery. Given that absence, the court is left instead to ground the decision in the language of tragedy, horror, fear, and physical decline, writing AIDS onto the body of a married, ostensibly heterosexual, man. Carol Marcella is described in the opinion as in decline, advancing toward full-blown AIDS, painting a picture of general illness but providing the reader with no specific instances of opportunistic infections. Cynthia Coleman's health, meanwhile, is not discussed at all, possibly because she was not ill at the time her case was being litigated, or potentially because the decline in her health was relegated to the margins of her case by the judge authoring the opinion. Kevin Leckelt is judicially diagnosed with a draining lesion and a history of sexually transmitted diseases, but the language used there is strikingly clinical.

The minimally sympathetic language used to describe these litigants would be unremarkable were it not for the fact that they are so starkly different from the language used to describe John Marchica. He is described in visceral terms. He has been advised to abstain from having sex with his wife. He has difficulty sleeping, has nightmares, and is irritable. He has lost approximately thirty pounds, is seen crying and vomiting, and is taking antidepressants. This catalogue of physical manifestations provides evidence of emotional distress. The body is wrecked as an effect of a mind that

might have been calmed by three negative HIV tests over a two-year period, but was not. Even when three ELISA tests failed to write AIDS upon his body, its effects appeared nonetheless. These opinions illustrate quite aptly several of the constructions identified by Alan Hyde in his *Bodies of Law*. The heterosexual bodies of Carol Marcella, Cynthia Coleman, and John Marchica are at once damaged properties and sentimental bodies in pain; the bodies of Kevin Leckelt and the implicated donors are abject, offensive, and obscene.[43]

The schemas through which these cases make sense should not be seen as built on malicious intent or a drive toward exclusion. Early constructions of AIDS eagerly linking the syndrome to gay bodies, sexual acts, and specific population subgroups were, in many ways, specious and, as others have documented, the gay-AIDS link has been maintained despite advancing knowledge about the virus and its effects on the body.[44] These cases arose and were litigated during an era when many of these assumptions had already been dispelled, but *Coleman* and *Marcella* reach back to an earlier era of Red Cross policy regarding donors. The stories told there map a chronology that is designed to establish a credible relationship between the known and the unknowable, and it is the missing piece of information, the unknowable, that organizes their logic. Ultimately, the courts have identified the other salient factual information relevant to those cases, including moments of donation and infection, the change in the Red Cross' policy, and the physical consequences attendant thereto. What cannot be resolved however, and what remains an open question at the end of each opinion, is the determination that each opinion most desperately needs to establish: How did the donor understand the relationship between his sexual acts and his sexual identity? Rendering legible this open secret complexifies the logical structures of both opinions, leaving the courts in the difficult position of overlooking the contumacious conduct of the Coleman's attorney, and hanging the credibility determinations of the donor in Marcella's case on a slender evidentiary hook. In each instance, the tone of the language and the utility of fixing AIDS on a homosexual body reestablishes a discursive community

and the fact that AIDS and homosexuality are not the same thing is negated.

Juxtaposed, these cases raise yet another possibility. In *Coleman, Marcella*, and *Leckelt* we read the stories of at least six different people with HIV, some of whom did not survive the time frame of the litigation. Two of the identified players are women, at least three of the men—and we are led to suspect the fourth—are gay. None of them is described in language intended to invoke our sympathy; none of them suffers the severe rhetorical fate of John Marchica, the only distinctly identified heterosexual man in the lot. Whether the effect results from variation in fact patterns or legal issues raised in the cases, the tendency nevertheless minimizes the perception of risks and damage to women and gay men, while magnifying them for a heterosexual man.[45]

It is instructive to imagine how these cases might have functioned if they had been drawn in more or less sympathetic language. Would it have been possible to read expressions of sympathy with Kevin Leckelt and still understand why he was fired? Of course. The case was purportedly driven by the plaintiff's insubordination—the hospital wanted to know his HIV status and he refused to supply it. His fear and illness might easily have come to represent the specter of risk for which he was fired in the first place. Either narrative would have served equally well to support the hospital's suspicions, the reader's understanding of his insubordination, and thus legitimated the court's ruling. Could the reader have been convinced of John Marchica's entitlement to damages without the elaborate description of physical manifestations of post-traumatic stress? The answer here is perhaps a bit more tricky. The plaintiff's initial injury was easily established through hospital records and witnesses' testimony. Undoubtedly, Marchica was injured by the discarded needle. The logical chain forged through the opinion requires the initial injury, but beyond that there must also have been some *potential* for dire and debilitating possibilities. AIDS supplied the latter, and Marchica's physical symptoms provided evidence. Marchica could well have recovered damages in a pre-AIDS world, and he might have won in the absence of physical symptoms, but the force and effect of all these factors working together

was far more persuasive and credible. The physical damage caused by a needle stick alone would warrant very little monetary compensation; the possibility of HIV infection made the event much more lucrative.

Speculation is risky, and these ruminations should not be read as normative. In other words, I do not intend to argue that the emotional needs of the players should have been considered by the judges authoring these scripts. Nonetheless, the presence and absence of such emotionally fraught language serves as another mechanism by which these scripts reinscribe the boundary between the sexual margin and the charmed inner circle. As Dershowitz observes, life is not a dramatic narrative, but sometimes the imposition of a dramatic narrative can prove useful.[46]

CHAPTER THREE

Secondary Effects

In *Discipline and Punish*, Michel Foucault locates the body of the condemned man as an initial site of regulation whereby the convict's crimes and the power of the state are inscribed upon the flesh through rituals of public torture and execution. The cases in Chapter 2 display a similar form of spectacle as AIDS was written onto the body in such a way that produced the reality of disease and the power of the state even when the virus itself was absent. In this chapter, the regulatory technologies become somewhat more diffuse, extending beyond surveillance of the body and operating instead through the organization of space. Instead of situating the body as the site of the power–knowledge nexus, and compelling confessions from the physical presences of the people involved, these stories display a more efficient and subtle microphysics of power at work between and among the bodies of adult theater patrons.

Pornography has been a favorite target of state and local censure for some time, but using AIDS as a reason to regulate adult theaters presents a novel approach to an old issue. Regulating public spaces in which HIV transmission might occur was a hotly contested policy option during the early years of the crisis,[1] and for a while it appeared that the storm had passed. Arguments about closing public sex venues—particularly those where male–male sex

J. Rollins, *AIDS and the Sexuality of Law*

may occur—occasionally flare up around the country,[2] as arguments about pornography and protecting children butt up against the constitutional protections of the first amendment. The case opinions examined in this chapter are fundamentally concerned with managing HIV transmission risks, and the primary worry for legislatures, litigants, and judges is the exchange of bodily fluids: regulating the conditions under which men may share semen. The resultant policies are strangely ineffectual at curtailing the spread of HIV, and although that is their purported target, they operate best as means to legally institutionalize the closet and stigmatize homosexuality while symbolically purifying heterosexuality through the regulation of nonmarital, nonprivate, nonprocreative sex.[3] In the final analysis, the impact of such policies on the spread of HIV is slight.[4] What they are most likely to accomplish is further marginalization of people who might be well served by HIV education efforts and economic damage to segments of the porn industry that have not gone online.

These scripts provide a striking illustration of the powerful symbolic force Kenji Yoshino identifies at the intersection of law and sexuality: the triangle, closet, and body.[5] The homosexual stands as a potent symbol here and one that is metonymic with AIDS. Literally, these scripts display attempts to prevent HIV transmission, but in order to read them logically we must locate our discursive community at the center of Gayle Rubin's charmed inner circle whereby monogamous, heterosexual, private, procreative, penile–vaginal sex is the assumed standard. At the same time that they foreground the risk of HIV transmission between men they negate the risks of transmission among heterosexuals. While literally denying or ignoring that acts are not identities, they rely on a sexual consciousness that "knows" homosexuality but never makes it manifest. The regulatory technologies Foucault identified organize these scripts: Sex is ostentatiously hidden, compelled to speak through silence, and the apparatuses for observing, measuring, and recording it are prolific, indeed. Here again, AIDS and homosexuality are mutually constitutive. The interesting feature of these cases is that they operate most potently at the level of architecture and space; the body of the (potential) homosexual is rendered visible,

but bodies themselves escape direct contact with the state. Foucault observed that the secondary schools of the eighteenth century showed an intense preoccupation with masturbation or the possibility of interactive sex, preoccupations that were never addressed directly, but that became visible in the architecture of the school. The arrangement of seats and the placement of the instructors made it possible to maintain surveillance of pupils at all times, thus limiting the possibility for sexual contact. A similar form of regulation is apparent in these adult theater cases as same-sex interactions are practically invisible at the level of these scripts; the state's regulatory preoccupations are instead revealed in architecture.[6]

Policies designed to curtail the spread of HIV in public sex venues invoke a number of legal and constitutional questions, including most prominently first amendment issues, zoning regulations, and criminal statutes.[7] Frequently, however, these legal contests overlook the subtleties of identity construction and the gulf between it and sexual acts,[8] an oversight that marks these scripts with a distinctively binary conceptualization of sexuality (i.e., gay vs. straight), thereby taking sexual orientation and identity categories as given.[9] This approach has three symbolic consequences that resemble those we saw in Chapter 2: First, it produces the subject of a fictitiously stable gay-AIDS identity; second, as a result of the first, it produces the subject of a fictitiously stable AIDS-exempt heterosexual identity;[10] and third, it ignores the fact that sexual behavior transmits HIV while sexual identity does not. Policies premised upon and directed towards identity-based assumptions instead of behaviors are destined to fail. A "straight" reading of AIDS law and policy indicates that governmental attempts to stop new HIV infections are less than successful. Unpacking the sexual baggage of these opinions and engaging a queer reading of AIDS law and policy suggests an explanation.

But what might it mean to queer legal discourse under these circumstances? Martha Merrill Umphrey offers a useful possibility and merits quoting at length:

> [T]o talk about "queerness" is to talk about a relation between something perceived to be solid or stable and its destabilization into something else. The "solid" need not be the "normal" and the something else need not be

> the "pathologized." Rather, the solid is the commonly understood, the taken-for-granted in any given context, standing in relation to its distortion. One focuses not on the identities of those labeled normal and those labeled abnormal, but on the oblique relation between two (or more) identities, positions, or practices that have no certain and timeless definition or content. . . . Thus, the "queered" position is related to and dependent upon the stable position, rather than being a separate position in itself. It undermines the stability of the primary term and opens up the possibility that the solid has never been solid at all.[11]

Recognizing the oblique relationship between homo- and heteroidentity forms the center of the analysis here. Sexual identity categories are most often understood to be solid, fixed, identifiable, and thus contiguous with sexual acts, yet the argument here begins from the premise that they are none of these things. The case opinions examined below are coherent and logical only when they are read from the premise of solid and fixed relationships between acts and identities. A queer reading shows how they work to solidify what is, in fact, unknowable about the self-conceptions and behaviors of the people they attempt to regulate.

The first part of this chapter summarizes four case opinions that grew out of regulations purportedly designed to stop HIV transmission. Nothing is particularly remarkable about the legal or policy issues presented in each one; as first amendment, secondary effects cases, they are quite routine. The next section distills from these opinions the models of HIV transmission apparent in each, and in this moment, they become more interesting. Here, the relationship between AIDS and homosexuality is the unspoken premise grounding the logic of each case. The final section argues that the HIV transmission models apparent in each opinion are based on such a stridently heteronormative construction of gay male sexuality that they completely paper over the very real potential for HIV transmission among heterosexuals.

Four Cases

Each of these cases, *Bamon Corp. v. City of Dayton, Berg v. Health and Hospital Corp. of Marion County, Doe v. City of Minneapolis*, and *Mitchell v. Commission on Adult Entertainment Establishments*

of the State of Delaware,[12] was generated by conflict over a statute passed in one of the following legislative bodies: the state of Delaware; Marion County, Indiana; and the cities of Dayton, Ohio, and Minneapolis, Minnesota.[13] Since each statute regulated the adult entertainment industry, it comes as no surprise that lawsuits challenging the regulations were brought by the owners and customers of adult entertainment establishments in each jurisdiction. All four statutes stated containment of HIV as a primary objective and, in each case, building codes were the policy tools of choice. In other words, these legislative bodies set out to contain HIV by regulating the design, structure, and lighting of buildings within which "high-risk" sex might occur, as well as the hours of operation during which patrons would be allowed to enjoy pornographic entertainment.

The architectural design and layout of the theaters was similar in all four cases and each contained viewing booths described in *Bamon* as "totally enclosed, constructed with floor-to-ceiling walls, and contain[ing] a full length door that [could] be locked by the patron from the inside."[14] Judge Gibson's opinion in *Doe* provided a synopsis of the ordinance in that case that accurately summarizes the statutes challenged in each of the other three. In each instance, the statute

> (1) prohibited the construction, use, design, or operation of a commercial building for the purpose of engaging in, or permitting persons to engage in, sexual activities which include high-risk sexual conduct, (2) specifically prohibited partitions between subdivisions with apertures designed or constructed to facilitate sexual activities between persons on either side of the partition; and (3) provided that booths or stalls have at least one side open so that the area inside is visible to persons in the adjacent public room if the booth is used to view motion pictures or other forms of entertainment.[15]

The logic of this passage presents several clear intentions, as well as some more opaque possibilities. Most apparently, the second element of the statute, coupled with sections (1) and (3), prohibits the intentional construction of glory holes in adult theaters. Whether or not the owner of a commercial establishment (e.g., a gas station) could be penalized for failing to repair a glory hole in

a public restroom is less certain. Section (3) is worded in an attempt not to require the removal of doors from the stalls of men's rooms (assuming, of course, that movies are not being shown there). Satisfying the state's need for surveillance-friendly architecture in an adult theater without imposing on other needs for privacy in public men's rooms makes this an especially delicate passage to balance.

Having brought adult theater patrons into public view is insufficient, however, because surveillance is useless if the state cannot actually see the individuals revealed. Consequently, the statutes also regulated the intensity of the lighting within the theaters. In *Bamon* the statute stated that lightbulbs used in viewing arcades would have to be 25 watts or greater, veiling the intent of the clause behind the technology of illumination.[16] In *Berg* the statute stated that lighting must be such that persons in the viewing booths would be visible to persons in the adjacent rooms, brightly clarifying the actual purpose and intent of the regulation.[17]

Additionally, the statute in *Mitchell* restricted operation of the theater to "the hours between 10:00 a.m. and 10:00 p.m. Monday through Saturday"[18] and required the business to remain closed on Sundays and legal holidays. Regulating hours of operation may reflect a combination of factors, but two seem most probable. First, it reflects the same puritanical tendencies that organize liquor regulations in states with blue laws: No sinning on Sundays or holidays. Second, it would cause most traffic into and out of the theater to occur during daylight hours, and it would insure that the theater was closed before local bars.

The plaintiffs in all four cases challenged the new regulations on first amendment grounds, alleging that the statutes presented a prior restraint on expressive activities. Central to this line of argument, therefore, was the distinction between content-based and content-neutral regulations. Although the U.S. Supreme Court has afforded some first amendment protection to sexually explicit, nonobscene performances,[19] the Court in *Barnes v. Glen Theatre, Inc.* determined that some expressive activities were only "marginally" protected.[20] The Court has thus sidestepped the problem of blatantly regulating sexually explicit materials by focusing instead

on the businesses that sell or distribute them. While the Court did not grant states carte blanche authority to prohibit sexually explicit performances, "the state may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."[21]

The resulting classification scheme makes it possible for legislative bodies to impose regulations on "adult" businesses, defined by the type of materials they disseminate, without impinging on the first amendment rights of "legitimate" business owners. Businesses that disseminate sexually explicit fare can be regulated on that basis alone without reference to the content of the materials that define them as adult businesses. Furthermore, although the states may not expressly prohibit sexually related expression, they may regulate other socially adverse conditions—the secondary effects—that arise as a result of allowing adult businesses to operate. According to this logic, adult theaters draw unsavory patrons who cause other social problems like traffic, crime, litter, noise, discarded condoms, prostitution, drug use, and so on.[22] As Judge Hutchinson asserts in *Mitchell:* "[I]f the regulation of sexually explicit materials is aimed primarily at suppression of First Amendment rights, then it is thought to be content-based and so presumptively violates the First Amendment. . . . But if the regulation's predominate purpose is the amelioration of socially adverse secondary effects of speech-related activity, the regulation is content-neutral and the court must measure it against the traditional content-neutral time, place, and manner standard."[23] Accepting the stated purposes of the statutes—containment of HIV—the judges in each of the cases used HIV as an additional factor, a secondary effect, to support the logic of their decisions upholding the regulations.[24] While the first amendment questions in these cases are nothing new, relying on HIV as a secondary effect of pornography is a recent innovation.[25] Although first amendment issues clearly dominate all four opinions, the plaintiff in *Doe* also asserted that the ordinance violated the equal protection clause due to the fact that the restrictions applied only to bookstores and not to hotels, motels, and condominiums, which could also be construed to fall within the statute as locations facilitative of high-risk sexual activity.[26]

In each case the judges found that the statutes in question were directed at the secondary effects of pornography as opposed to pornography itself, and thus their opinions reviewed the time, place, and manner restrictions established by the statutes. The applicable test was drawn from *Ward v. Rock Against Racism*: "[T]he government may impose reasonable restrictions on the time, place or manner of protected speech, provided restrictions are [1] justified without reference to the content of the regulated speech, that they are [2] narrowly tailored to serve a significant governmental interest, and that they [3] leave open ample alternative channels for communication of the information."[27]

The first hurdle of this test was easily cleared in each case. In *Doe*, Judge Gibson opined that the Minneapolis ordinance was clearly content neutral because it "would apply to a showing of 'Rebecca of Sunnybrook Farm' as well as any other film or performance."[28] Given the wording of the statute, however, this would seem to depend on whether *Rebecca of Sunnybrook Farm* was being shown in a manner or structure intended to facilitate sexual activity. The finding of content neutrality prevails in all four opinions, and Judge Gibson's reference to *Rebecca of Sunnybrook Farm* is quoted by both Judge Manion in *Berg*[29] and Judge Hutchinson in *Mitchell*.[30]

The second hurdle of the first amendment test was cleared by each of the statutes as well. As Judge Manion stated in *Berg*, "The ordinance also serves a legitimate government objective. HHC [Health and Hospital Corporation] has the responsibility '[t]o protect, promote or improve public health' and to 'control disease' within Marion County. [*sic*] Further, combating the spread of a deadly disease which has no known cure doubtless constitutes a legitimate governmental objective."[31] While stopping the spread of HIV is unarguably a significant government interest, the other clause of the applicable test requires narrowly tailored statutes. This posed no problem in any of the opinions, however, and as Judge Manion asserts, "Berg identified no less restrictive alternatives, nor do we think any exist."[32] Accordingly, the judges in each opinion uphold the statutes and imply that building codes are an effective, non-intrusive means for slowing the spread of HIV. The resultant

rhetorical maneuvers are designed to convince the reader that AIDS is being regulated, not pornography, and certainly not sex.

The third hurdle of the *Ward* test is met when the statute leaves open ample alternatives for the expressive activity in question by adopting the least-restrictive means available for achieving its goals. This requirement receives considerable attention from Judge Hutchinson in *Mitchell* and Judge Gibson in *Doe*. In *Mitchell* the plaintiffs attempted to find a less-restrictive means of stopping high-risk sex by offering to put saloon-type doors on video booths.[33] Theoretically, this would allow persons outside the booth to see the legs of the person inside, thereby allowing enumeration of occupants so that a "one customer per booth" rule could be enforced. The plaintiffs also proposed spacing the booths one foot apart from each other so that interactive sex could not take place through the glory holes in the walls separating the booths. The plaintiffs in *Doe* made similar arguments, but in each case the judges were unpersuaded. As stated by Judge Hutchinson in *Mitchell*, "Delaware did not have to adopt the means Adult Books preferred to regulate the undesirable health effect of the marginally protected speech and expression it purveys. The state must be allowed a reasonable opportunity to experiment with solutions to problems."[34] Curiously, AIDS is the "undesirable health effect" at issue and is, according to the structure of this statement, caused by pornography. The rhetorical mechanism of the secondary effect slips into the background and in each case the open door regulations stand. The judges reason that the showing of films within the booths would be unimpaired by the lack of doors, while the secondary effect—HIV transmission—would be stopped by allowing employees and police to monitor patrons using the booths.

Pornographic Transmission

These types of regulations have a history of constitutional success, thus their legal legitimacy is well established. What merits closer inspection, however, are the models of HIV transmission present in each case and the ways in which those models are used.

Two questions guide the discussion. First, what is the legislature attempting to stop in each of these cases? Second, how has the legislature attempted to stop it? As a prelude to this examination it is useful to reiterate that HIV is transmitted through exchanges of bodily fluids irrespective of sexual identity, gender, or the types of acts that exchange them.

Near the beginning of the *Berg* opinion Judge Manion states that the ordinance is designed to combat "high-risk sexual activity with multiple partners."[35] He also observes that the ordinance was designed to "curtail anonymous high-risk sexual activities and, thus, the spread of AIDS."[36] In a footnote, Judge Manion quotes the ordinance that defines high-risk sexual activity as "fellatio and anal intercourse."[37] Judge Gibson, also in a footnote, puts forth the following: "The city council defined high-risk sexual conduct as: (1) fellatio; (2) anal intercourse; or (3) vaginal intercourse with persons who engage in sexual acts in exchange for money."[38] In *Mitchell*, Judge Hutchinson construes the purpose of the ordinance as an attempt to curb "unprotected promiscuous sexual activity."[39] The reference to the possibility of "protected" sex is highly unusual in these opinions. Quoting from Delaware state Senate Bill no. 164, the opinion states: "Magazine and newspaper articles, from time to time, contain articles relating to 'anonymous sex' which takes place within certain adult entertainment establishments or similar places. It is the basic premise of this Act that such conduct is conducive to the spread of communicable disease; and is not only a danger to persons frequenting the adult entertainment establishment, or those engaged in such conduct, but it is also of danger to the [public]."[40] Presumably, the persons using these theaters are not part of the public, which leads to the conclusion that they are part of some "other" identifiable subgroup, most likely, homosexuals.[41] Conversely, we must also wonder who is contained in the court's definition of the public.

Taken as a group, these statutes designate four specious components of high-risk sex that appear consistently throughout the opinions. Ironically, references to exchanging bodily fluids—an actual mechanism by which HIV is transmitted—are absent. The first specious component of high-risk sex, according to these

opinions, is multiple partnering or promiscuity. Judge Manion's opinion in *Berg* cites testimony from a Marion County Health Official who attests to the rapid increase in the spread of AIDS due to "engaging in high-risk sexual activity with multiple partners."[42] In *Mitchell* Judge Hutchinson states that the ordinance would serve the purpose of deterring "promiscuous sexual contacts that can spread deadly disease."[43] The possibility of high-risk sexual activity with a single partner does not seem to raise any concern. None of these statutes or opinions acknowledges the fact that HIV can be transmitted to nonpromiscuous (monogamous) partners by their more adventurous husbands or boyfriends.

A second component of unsafe sex, according to these opinions, is anonymity,[44] and once again the scripts include something that is not essential for HIV transmission in a definition of high-risk sex. People can have anonymous sexual encounters without transmission of HIV and conversely, HIV is transmissible between people who know each other quite well.

A third component of unsafe sex as defined in these opinions emerges with reference to specific sexual acts. In *Berg*, Judge Manion defines "high-risk" sexual activity, for the uninformed reader, as "fellatio and anal intercourse."[45] These acts are also specified in *Doe*. Once again, the acts themselves are defined as high-risk without any qualification regarding exchanges of bodily fluids or its possible prevention, and nowhere is there a recognition of the possibility that those two acts actually carry very different risks of viral transmission. The only qualification in these opinions exempts vaginal (heterosexual) intercourse from the repertoire of high-risk sexual activities, provided it is noncommercial. Realistically, the acts explicitly outlined in the statutes pose no particular risk for the transmission of HIV and are possible during male–female sexual intercourse, but the construction of risk is associated only with acts that fall outside the purview of reproductive intercourse. As is often the case in such materials, the subject is male and women, aside from sex workers, are conspicuously absent and the different risks to women's health are never contemplated.[46]

According to the *Doe* opinion, money is a fourth component of risky sex,[47] and this aspect of the statute is directed at heterosexual

prostitution. Although prostitution involves numerous and varied risks, an exchange of money is neither necessary nor sufficient for transmission of HIV. Presumably, the risks of HIV transmission from male–male prostitution would be included by references to fellatio and anal sex, but this gender configuration is oddly exempted by the definition explicitly linking monetary exchange with vaginal intercourse. As described here, the act of prostitution assumes a male consumer who must be protected from a possibly infectious vendor who is a woman. Aside from this reference to commercialized male–female sex, the obvious association of HIV with male–male sexual behavior is pervasive, and each statute contains provisions designed to allow the state (police) to monitor individuals engaging in such behavior. These designated components of high-risk sex appear at first glance to rely on the scientific information available at the time, but in each instance, the force of such information is narrowly tailored with negational effects.

Read together in this light, these aspects of the statutes and ordinances indicate that the state has regulated male-male sex, and although men are indeed the primary customers of the theaters in question, the results remain quite Foucauldian. Each statute contains "open door" provisions intended to facilitate police scrutiny, multiplying the strategies for monitoring and observing sex. Combined with the lighting requirements and restrictions on the hours of operation, it becomes apparent that the purpose of these regulations is identification and surveillance of adult theater patrons. The state insures that it has access to the booths within the theaters, that police officers will be able to identify the occupants within the booths, and that traffic into and out of the theaters will be restricted to times that are convenient for the purpose of police surveillance. Customers who are not deterred by the regulations will certainly be watched. These requirements echo Foucault's discussion of the Panopticon, the spatial and architectural arrangement designed to extend the reaches of state power by expanding the mechanisms of surveillance.[48] For Foucault, the possibility of continual state surveillance signaled the deployment of a subtle, pervasive, and constant mode of power that began with the architecture of the prison, but was soon incorporated into the

design of the hospital, the school, the mental institution, and the factory, and in his words, "induce[d] in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power."[49] Thus, knowing that he is always being watched, the subject will conform to the dictates put upon him and the actual brute usage of power becomes unnecessary. By adding the adult theater to list of institutions that facilitate surveillance, the state can enforce a heterosexual norm without explicitly exposing the process by which it attempts to do so; surveillance is sufficient to insure compliance. The technologies of surveillance and compelled confession are apparent and directed at homosexuality, despite its literal absence from the scripts. Heterosexual HIV is negated out of possibility.

In response to the plaintiff in *Mitchell* who offered to put saloon doors on the booths in his establishment, Judge Hutchinson, in a moment of contortionist judicial imagination, offered the following response: "[A] partial door would not necessarily prohibit an individual from engaging in sexual intercourse with others in the same booth because he could simply hold his or her partner so that his or her legs would not be exposed."[50] The logic beneath this response is questionable. The owners of the establishments offered to make reparations that would be more expensive than simply removing existing doors. Spacing the booths apart and changing the doors altogether would undoubtedly incur greater costs to the owners. It would, however, circumvent an unstated purpose of the regulations—to reveal the patrons using the booths. Surveillance and identification are unrelated to stopping HIV; they are necessary, however, to the maintenance of the closet and to the construction of heterosexuality. In order for the state to enforce a heterosexist norm, sexual transgressors must see themselves as deviant subversives who resist identification. Ergo, the state redesigns the video arcade in the service of panopticism.

It is particularly enlightening to contemplate what is left out of this debate about saloon doors, glory holes, and sexual gymnastics. The underlying and unwritten logic behind the statutes and the court opinions omits all discussion of autoeroticism but does so with a voyeuristic flair that is ultimately quite tantalizing. It is safe

to assume that the theater owners' offer of structural change was intended to accommodate the masturbatory interests of their clientele while at the same time minimizing opportunities for exchanges that might transmit HIV. The supporting logic beneath the state's refusal of this option opens up at least three interesting possibilities. It assumes that the patrons would masturbate in the theaters only if they could not be seen doing so. Or, ironically, it assumes they could be arrested for masturbating in public if they availed themselves of the opportunity in an open viewing booth. It is possible, however, that the statutes could generate a spatial configuration whereby theater customers, denied individual viewing booths, could engage in acts of group masturbation and voyeurism. The fact that masturbation cannot transmit HIV is unknowable but helps to organize the logic of these opinions. It is unlikely that that these statutes were drawn to multiply the voyeuristic spectacle of the video arcade. It seems, then, that the ultimate goal here is the suppression of all sexual pleasure in these theaters—even masturbation—under the guise of HIV prevention.

Pornographic Possibilities

If they are incapable of achieving their stated purpose, what else might these statutes accomplish? One might argue that the intended but unspecified target of these regulations was pornography, and they may certainly have a detrimental economic effect on adult theaters. However, such an argument seems improbable since neither the statutes nor the rulings attempt to stop the dissemination of pornographic material. It is also conceivable that these statutes were designed to supplement ineffectual laws prohibiting sodomy or prostitution, but fellatio and anal intercourse were already illegal in Minnesota at the time *Bamon* began,[51] and prostitution was illegal in all four jurisdictions long before any of these cases came to court.[52] Given the statutes already in existence, it would seem that additional regulations would be redundant.

In these opinions anonymous sex, multiple partnering, fellatio, anal sex, and prostitution are marked as the causes of AIDS not because they are acts or circumstances that necessarily facilitate the

transmission of HIV, but because their exclusion from the dominant sexual system is necessary for the maintenance of a positively constructed heterosexual identity and its attendant privileges. They require and reify the charmed inner circle.[53] Each of the specified acts is regulated because it falls outside the norm of reproductive male–female intercourse and, with the exception of clauses directed at prostitution, is associated with the dominant construction of homosexuality. All of the acts specified are possible and likely to occur during male–female sexual encounters, and prostitution occurs between men as well, but designating these acts as definitively gay reinforces the discourse of punitive fidelity.[54] The monogamous, reproductive, heterosexual union is symbolically situated as the only place to remain safe from AIDS, and the threat of being designated as homosexual stands guard at the door of the closet.

It is unlikely that most policymakers truly want to prohibit the sex acts in question. It is equally unlikely that HIV prevention was the central driving force behind these statutes and the courts' decisions. Twenty years into the era of AIDS we are still witnessing hysteria and resistance to sexually explicit educational materials and prevention efforts that acknowledge the possibility, much less the value, of same-sex sex. What policymakers actually regulated with the statutes here are identity categories and what is required, therefore, are policy tools that will effectively regulate sexual identity without encroaching upon the private space established to protect the sanctity of reproductive heterosexual unions. Statutes designed to regulate and enforce the homo–hetero binarism depend upon a hierarchically organized system of sexuality and require effective operation of the closet.

At the beginning of *Epistemology of the Closet* Eve Kosofsky Sedgwick argues that many of the "major nodes of thought and knowledge in twentieth-century Western culture as a whole are structured—indeed, fractured—by a chronic, now endemic crisis of homo/heterosexual definition, indicatively male, dating from the end of the nineteenth century."[55] The closet defines the relationship between what is known and what is unknowable in our culture—that which is explicit as opposed to that which is inexplicit.[56] Sedgwick's theory places the closet at the center of sexual definition,

and thus heterosexuality is defined in *bas* relief, positioned against its binary opposite: homosexuality. This epistemological process places heterosexuality in a position of cultural superiority by granting benefits and privileges to persons identified as heterosexual, holding up heterosexual unions as paradigmatic positive social goods, and relegating homosexuality to a cultural position of shame, illegality, and moral opprobrium. The cases here rely upon this homo-hetero binarism in order to produce a Foucauldian juridical subject and then regulate it.[57] Echoing Foucault, Judith Butler argues, "[t]he question of 'the subject' is crucial for politics, [*sic*] because juridical subjects are invariably produced through certain exclusionary practices that do not 'show' once the juridical structure of politics has been established."[58] The closet allows the state to promote the privileges and benefits of heterosexuality while penalizing alternative variations on sexual identity and behavior. The AIDS crisis lends itself to the furtherance of these heterosexist interests when specious public health measures are concocted and aimed at specific segments of the population.

A process of erasure is at work here and the closet functions as the operative exclusionary mechanism; a heteronormative and heterosexist construction of identity categories does not "show" when homosexuality is conspicuously situated as the target of regulation. Heterosexual behaviors and identities are negated from these statutes and opinions, but are constructed by designation and regulation of what they are *not*; thus, the regulatory mechanisms are erased. Furthermore, the statutes, ordinances, and opinions examined here are nonsensical in the absence of the closet because they rely most forcefully on an expectation of shame and a resistance to identification. In other words, they fail to function if their intended targets are immune to or not intimidated by the prospect of surveillance and identification. This is also made clear by what these statutes and opinions omit as targets of regulation: noncommercial heterosexual transmission between partners who know each other, *the* group, one might accurately and unfortunately argue, the state would most want to protect from HIV. These statutes and opinions primarily serve to ritually purify the male–female nexus of the traditional heterosexual reproductive

family unit by constructing a diseased homosexual who is ostensibly *not* a member of the desirable social group.[59] AIDS is the stated target of these regulations, but they are incapable of achieving their goal. Gay sexual identity is reified through the process of public identification and the heterosexual penis maintains its position of cultural privilege behind a cloak of privacy; it remains invisible to and exempt from the gaze of the state.

Gayle Rubin's hierarchy of sexual value casts "good sex" as "heterosexual, marital, monogamous, reproductive and non-commercial."[60] "Bad sex," she argues, is constructed as "homosexual, unmarried, promiscuous, non-procreative, or commercial. It may be masturbatory, take place at orgies, may be casual, may cross generational lines, and may take place in 'public' or at least in the bushes or the baths."[61] This distinction, she asserts, assumes a theory of sexual peril. Ergo, "if anything is permitted to cross this erotic DMZ" between good and bad sex, "the barrier against scary sex will crumble and something unspeakable will skitter across."[62]

The adult theater sits nicely as a guardhouse/closet in this DMZ. The capital center of the charmed inner circle stands protected by the state's ability to identify and shame anyone who attempts to cross from either side. Homosexual and heterosexual identities must occupy positions on opposite sides of the border that is held in place by the closet. Assigning value to what is defined as "good sex" cloaks "bad sex" with an aura of shame. "Good sex" is so private, so sacrosanct, so necessary to our political system that it has become invisible; its conspicuous absence from the above opinions is striking. Male same-sex sex, masturbation, and public sex are constructed as shameful, wrong, immoral, disgusting, and it is assumed that men who engage in such activity will fall prey to the self-flagellation deemed appropriate of porn consumers. Adult theater patrons are men who engage in "bad sex" and must see their behavior as consonant with this construction for the policies discussed here to be effective. In other words, they must subscribe to cultural norms. Sexuality is arranged according to Rubin's hierarchy and the closet is the epistemological structure that keeps the system in check.

The individuals who patronize adult entertainment theaters are assumed to fall within the boundaries of a homosexual identity

because they engage in same-sex behavior, and the specious argument looks like this: (1) Gay men occupy a closet; (2) gay men have AIDS; (3) remove the closet; (4) stop gay men; (5) stop AIDS. But the state's logic overlooks the distinction between gay identity—and the assumption that HIV risks are associated with particular groups—and potentially transmissive acts. The policies discussed here require an identity that is predicated upon shame and self-denigration.[63] What the state fantasizes as central to identifying as gay, and works in the vicinity of the closet, circulates awkwardly in the moments before coming out and rejecting the mechanisms by which gay and lesbian people are excluded. But without the stigma and shame that a heteronormative culture associates with gay identification the policies cannot achieve their stated purpose. Policymakers *assume* that adult theater patrons suffer the ignominy of the closet and will strive to avoid identification. They *assume* that people outside the closet—either gay or straight—are without shame. But as the gap between behavior and identity widens these underlying assumptions appear to be false.

Coming out as gay or lesbian is a process of rejecting the stigma and shame that the dominant culture *assumes* gay men and lesbians *should* feel; being "out" means moving in public space while identifying oneself as gay or lesbian. By definition, men who remain in the closet are those who publicly identify themselves as heterosexual while at the same time engaging in sexual activity with other men. Within the sexual system established by the statutes and opinions examined here, the ostensibly "straight" patrons of adult theaters who do not adopt a gay identity can continue to perceive of themselves as exempted from AIDS and are likely to exempt themselves from HIV prevention education as well.[64] Consequently, the stories these cases tell, and the logic that upholds their disposition, are driven by and reinscribe the closet as an operative mechanism.

In *Doe* an appellant named Campbell, described as a gay activist, testified regarding the "sexual habits" of adult theater patrons:

> the booths serve "a physical setup that [could] be converted to that [sexual] use. The bookstore cubicle is best for watching a movie in, but an alternative use is highly possible and frequently seen in my experiences for uncommitted, anonymous pseudo sex [*sic*]." . . . Campbell also stated that

> bookstore sex has a legitimate function in that "[i]t provides people with an opportunity to try it and see if they like it, to try a form of pseudosex to get their toes in the water." . . . Campbell concluded that the new ordinance would not decrease the number of sexual encounters considered to be high-risk, but would only push them into more dangerous situations.[65]

This testimony, offered in defense of the adult entertainment establishment, is clearly intended to support and protect men who are unsure about their sexual identities, although the reader also leaves the passage unsure about what defines sex. According to Campbell's testimony, pseudosex was defined as oral or masturbatory, leaving a definition of "real" sex as anal or vaginal. If fellatio and masturbation are not, in fact, sex, then most of what happened within the adult theater could be excluded from state regulation. Although Campbell's rhetorical intentions are not blatantly apparent in the text of the opinion, the judge was not receptive to the point. Most clearly, Campbell's testimony was driven by an understanding of the coming out process and the need to maintain opportunities for disseminating information on safer sexual practices. Judge Gibson responds by stating, "[t]he net result of this testimony is clear; sexual encounters occur in bookstore booths."[66] The import of Campbell's testimony is brushed aside, his narrower definition of sex is ignored, and Judge Gibson concludes that the "health risk results from the booth being closed."[67] Safer sex becomes irrelevant; identification and border patrol emerge as the dominant themes. No one stops to contemplate or imagine the possibility of two heterosexual men having sex in a public place, and indeed, the absence of sex is impossible to prove.[68]

The appellants in *Doe* raised an argument unique to that particular case. They asserted that the ordinance denied the bookstore owners' equal protection rights because it applied only to bookstores. Hotels, motels, condominiums, and rooming houses were specifically excluded from the ordinance despite the fact that unsafe sexual practices would likely occur in such locations. Judge Gibson's response upholds the trial court's rejection of this claim, arguing that "the difficult nature of the health problem presented by the AIDS virus" justifies "giving the City a reasonable opportunity to deal with it."[69]

Judge Gibson also acknowledges that the ordinance does not classify commercial establishments by those that distribute protected material and those that do not. In a footnote, he asserts that the ordinance was crafted to apply to commercial establishments where high-risk sexual activity was known to take place, and those that by "design or use" *promoted* such behavior.[70] The distinction being made here is between those establishments that might promote high-risk sexual contact, and those wherein it might simply occur. Judge Gibson thus implicitly admits the absurdity of attempting to stop HIV by imposing regulations on all environments wherein high-risk sex might occur. What this perspective fails to recognize is that HIV can be transmitted by any act of unprotected sex when one partner is HIV positive, in any environment, whether the act is being *promoted* or is simply *occurring*.

Allowing the trope of the closet to fundamentally shape AIDS prevention policies is not only ineffective, but is also dangerous. The conflation of AIDS and homosexuality produces policies that are not only incapable of achieving their stated purpose, but that construct a second closet containing the unknowable: heterosexual HIV.[71] "Good sex" is symbolically and rhetorically exempted from the possibility of HIV transmission despite the unrealistic nature of such a construction. Human reproduction requires an exchange of bodily fluids, and as Rubin suggests, the procreative potential in sexual activity is largely what makes bad sex good.[72] This procreative aspect of "good sex" necessitates constructing a heterosexual/AIDS-closet if the dominant sexual and reproductive system in Western culture is to maintain a position of privilege. The non-AIDS–AIDS binarism constructed here places heterosexual AIDS into a confined conceptual space that allows the reproductive system outside to exist unfettered by a need to prohibit exchanging bodily fluids. This development produces an ironic tension between the figurative sanctity of the charmed inner circle, and negates the literal reality of HIV transmission risks that are also present in that space. As with the homo–hetero binarism, the first term must exist as an open secret in order to maintain the purity of the second.

If state AIDS policies were to acknowledge the necessity of preventing the exchange of bodily fluids, condom distribution and

needle exchange programs would have to take center stage. Policy debates surrounding these alternatives are fraught with moralistic rhetoric and politicians opposed to them worry about promoting homosexuality. Such arguments assume that people will begin using illegal drugs and engaging in same-sex sexual activity if they have access to the means of protecting themselves from HIV. At first glance this argument seems to assume, somewhat ludicrously, a widespread desire to inject drugs and engage in same-sex sexual activity, suggestions that may not be so far off the mark as many imagine. In order to maintain its position of dominance in the sexual and gender hierarchy, the heterosexual penis must retain its unfettered privileges. Honest and realistic attempts to regulate the exchange of bodily fluids would seriously impede the processes of gender dominance and subordination; ergo, identity stands in for behavior where state AIDS policy is concerned.

It would be lunacy to suggest that the state should combat unwanted pregnancy by regulating the design, structure, and lighting of all spaces within which heterosexual intercourse might occur. Still, the argument in favor of regulating HIV by regulating spaces for male-male sex continues. The effect of this policy approach is to maintain heterosexist legal and legislative norms that rely on and perpetually construct the closet, but that cannot account for a queer perspective: Sexuality is fluid and the boundaries between gay and straight are seldom as concrete as they are imagined to be. Men who patronize the establishments targeted by these policies move between the closet and the presumptively heterosexual space outside.[73] The need to maintain the closet as an architectural border between gay and straight identity constructs a gap between identity and behavior and HIV continues to move through this gap.

It is extremely unlikely that building codes will slow the spread of HIV. As new infection rates are rising more quickly among women than any other population group, one must stop and wonder if the closet is undermining policy. Men who identify themselves as gay eschew the confines of the closet and are the demographic group least likely to have sex with women. Men who identify themselves as bisexual admit their sexual attraction to

other men and also reject the closet.[74] Opening or removing the door to the closet allows its symbolic presence to be maintained while the "dangerous" occupants inside are identified and regulated. What policymakers fail to notice, however, is that the men inside the closet identify themselves as straight despite their sexual activity with other men. If AIDS prevention policies are to be effective, the distinctions between identity and behavior must be taken into account. Policies must be designed to target behaviors while avoiding false assumptions about the solidity of categories built around sexual identity. Legally institutionalizing the closet only perpetuates the construction of a divisive homo–hetero binarism, and to borrow again from Rubin's eloquent language, something unknowable continues to skitter across the fictional DMZ between "good" and "bad" sex.

CHAPTER FOUR

Unusually Indifferent Cruelty

Some of the most complicated strategies for managing knowledge about HIV/AIDS arise from cases involving inmates. These scripts contain stories about architecture and bodies that echo the regulatory mechanisms we saw above, but here the unceasing discipline of the "complete and austere institutions" of the prison allows for much greater discursive latitude. Knowledge about both AIDS and sexuality is especially indeterminate here. The management of unknowability is more important but can also be done with less effort. HIV is transmitted among prisoners in the same ways that it is transmitted among the nonincarcerated, but injection drug use and sexual contact among inmates pose especially thorny problems in the penal setting.[1] More troubling to some, perhaps, than the intractable health and safety concerns they raise are the cracks they reveal in the prison system, particularly the possibility of pleasure among inmates.

Distinguishing between rape, consensual sex, coercive sex, prostitution, intimacy, and ignorance can be difficult outside prison walls, but among inmates the definitional boundaries are blurred even further. What prison officials might or might not know about such matters adds an additional layer of opacity to understanding HIV transmission risks among incarcerated populations.[2] Extensive

J. Rollins, *AIDS and the Sexuality of Law*

networks and economies exist among prisoners and breaking the walls of silence is forcibly discouraged by inmates and guards alike. When these issues and the problems that arise from them are moved beyond the prison setting and into the courtroom, the prevailing constitutional and statutory principles that organize evidence and information swirl around concepts like "deliberate indifference" and "intent." Power–knowledge relations are indeed mutually constitutive here, as Foucault observed. But even more accurately, "it is not the activity of the subject of knowledge that produces a corpus of knowledge, useful or resistant to power, but power–knowledge, the processes and struggles that traverse it and of which it is made up, that determines the forms and possible domains of knowledge."[3] The forms of knowledge established in these scripts show clearly that secrecy, ignorance, and denial are key aspects of unknowability that form that constitutive process.

Deliberate Indifference

Most prison litigation addressing AIDS policy issues comes to the court under the auspices of a statute commonly known as section 1983 or the Ku Klux Klan Act.[4] The history of that statute indicates that it has been subjected to a broad range of judicial interpretations. Originally passed in 1871, the act was intended to provide avenues of legal redress for wrongs committed by individuals who wore "black robes during the day and white robes at night."[5] In short, the authors of the act intended to address the action as well as the inaction of individual state agents who were unwilling to enforce the newly passed fourteenth amendment. With the passage of section 1983, Congress created a course of civil action by which aggrieved citizens could seek redress in federal court.

Legal scholar Allise Burris argues that litigation involving section 1983 has been a story of courts carving out spaces of immunity from civil liability for state officials acting in their official capacity.[6] Over the history of such litigation, courts have extended immunity to officials acting within all three branches of state and federal governments. On the whole, courts have been deferent to

the actions of state agents—including prison officials—often exempting them from liability for actions taken in the line of duty. Prison inmates have frequently relied upon section 1983 to challenge the sufficiency, effectiveness, and timeliness of medical treatment provided by prison officials; treatment and diagnosis of HIV disease is no exception.

The modern history of section 1983 and health-care claims began in 1957. Between 1957 and 1976 six different circuits decided nine cases, applying five legal standards to determine if prisoners' constitutional rights had been violated.[7] During the 1970s, the Circuit Courts applied varying standards to such claims. For example, the Fifth Circuit has held that the Constitution was violated when an inmate was denied the "basic elements of adequate medical treatment."[8] Two years later, the Ninth circuit ruled that "deliberate infliction of pain through a calculated withholding of medication" violated the Constitution and was tantamount to assault.[9] While standards have varied among the circuits, decisions from the U.S. Supreme Court have attempted to reconcile these variations by refining standards and developing applicable tests that sharpen the uses and definition of applicable knowledge.

The Court provided some guidance in 1976 when it decided *Estelle v. Gamble*.[10] There, the Court articulated a standard of "deliberate indifference" as a means of determining when prisoners' constitutional rights were violated. J. W. Gamble, an inmate in the Texas prison system, had suffered a hernia when a bale of hay fell on him while he was unloading a truck. Gamble was allowed to see the prison doctor, given prescriptions for pain medication and muscle relaxants, and allowed to remain off-work and in his cell for seven days. Throughout the subsequent three-month period, Gamble was seen by prison medical personnel on seventeen separate occasions, and, despite repeated prescriptions for pain and muscle relaxants, he refused to return to his work assignment. Justice Marshall's opinion, joined by seven other members of the court, articulated a standard for deciding when prison officials are indifferent to the medical needs of prisoners. According to Justice Marshall, "[i]n order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate

indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment."[11] A majority of the Supreme Court agreed that Gamble's treatment by prison officials could not be considered cruel and unusual punishment. Gamble's claim, at best, might be litigated under medical malpractice statutes in the state of Texas.

The Court also noted that the eighth amendment prohibits cruel and unusual "punishments," but not cruel and unusual "conditions," therefore, the Court reasoned, prison officials must know of risks to inmates before liability may be imposed.[12] Arguably, if officials do not know of the risks to inmates, they cannot have inflicted punishment. As the Human Rights Watch summarizes, "the legal rules that the courts have developed relating to prisoner-on-prisoner sexual abuse create perverse incentives for authorities to ignore the problem."[13] Managing the unknowable is very important in cases involving inmates, and the necessities of unknowability are central to prison policy, criminology, and constitutional standards involving the eighth amendment.

The "deliberate indifference" standard was further elaborated in 1994 in the case of *Farmer v. Brennan*.[14] There, a transsexual prisoner serving a sentence for credit card fraud was transferred into the general population of a male prison where she was beaten and raped. Dee Farmer's complaint asserted that prison officials knew that the prison was a violent place with an established history of sexual assaults, and that as a transsexual with distinctly feminine features she would be exceptionally vulnerable. The newly clarified standard realigned the balance between subjective knowledge and ignorance in some fundamental ways. Instead of requiring prisoners to demonstrate that prison officials believed that an inmate would actually be harmed, the newer standard required only that officials knew of a substantial risk of serious harm. More specifically, knowledge of a general climate of substantial risk might be sufficient to trigger the standard. Furthermore, the Court emphasized that prison officials could not escape liability simply by striving to maintain their ignorance of conditions within prison walls. As legal scholar Brian Saccenti argues, the application of *Farmer* by lower courts has been somewhat mixed. In some instances, knowledge of

a general climate of risk, and the presence of physical factors thought to inspire rape were not enough to impose liability. By contrast, the Eleventh Circuit has held that knowledge about the general conditions of risk within a prison may be sufficient to impose liability. These variations in interpretation and application signal distinctly divergent tactics for organizing specific moments of knowledge and their relationships to particular fragments of ignorance.

Despite the Court's attempts to articulate a standard in *Estelle* and *Farmer*, prison officials may still rely on ignorance of specific events as a shield to civil liability in cases wherein inmates alleged that they had failed to protect them. As Saccenti argues regarding sexual assault among inmates:

> When courts grant summary judgment to prison officials on the ground that the plaintiff-inmates have not proven that the officials had the requisite state of mind, the cases do not make it to trial. As a result, the adequacy of the officials' efforts to protect inmates is never placed at issue in the public forum occasioned by trial. Worse still, these summary judgments undermine 1983's potential to encourage officials to take steps to protect prisoners because they made the actionability of 1983 suits turn on the knowledge of the officials rather than the adequacy of their protective measures. The Supreme Court has said in the context of 1983 and constitutional rights that the "conscientious officer who desires clear guidance on how to do his job and avoid lawsuits can and should look to the standard for actionability in the first instance." It seems unlikely that prison officials would be as motivated to protect inmates if they knew that they could avoid liability by simply challenging the inmate's proof that they had actual knowledge of the risk.[15]

The unknowability, then, of actual risk, general conditions, or the constellation of factors that might inspire assault within prison walls plays an important role not only in prison culture but also in establishing constitutional standards. The power–knowledge nexus requires elaborate technologies for maintaining silence, deflects the gaze of prison officials, and keeps the realities of prison life unknowable. This scenario is not lost on either inmates or judges.

Testing and Segregation

Cases involving AIDS and prison inmates raise numerous questions, but three issues demonstrate with particular force the ways

that HIV transmission risk is discursively managed: (1) testing and segregation policies; (2) biting and spitting incidents; and (3) rape. Prison administrators have experimented with various strategies for coping with HIV: Some systems decided to test inmates at induction; others chose to test only inmates who presented symptoms of disease. In addition to revealing this specific kernel of information—HIV serostatus—prison administrators were then faced with the question of what to do with seropositive inmates. Should they be segregated from nonseropositive prisoners? Should their access to prison facilities and programs be limited? These questions came to court in the first decade of AIDS, and when the corpus of opinions is examined as a whole, it seemed that prison officials would be challenged regardless of what policies they put in place. Some inmates filed suit when they were required to undergo HIV testing; other inmates filed suit when prison administrators refused to test them; some seropositive inmates filed suit when they were separated from the nonseropositive population; other seronegative inmates filed suit when officials declined to test and segregate the infected. Whatever choices prison officials made, inmates challenged them, and, in most instances, those policy choices were upheld in court.

What is perhaps most striking about these cases, as exemplified by the opinions below, is that they forcefully attest to the ways that rape and injection drug use are relegated to the realm of the unknowable. Testing and segregation policies, taken as a group, show the difficulties faced by prison administrators, judges, and inmates. Here, the unknowable is especially potent, ultimately serving to protect existing power arrangements between inmates and prison officials. They conspicuously avoid discussions of how and whether HIV might be transmitted among inmates. By the end of these opinions, ignorance and fear solidify into factual convictions that protect power arrangements in surprising ways.

Dennis Glick

Dennis Glick and two other inmates in the Arkansas prison system filed suit against prison administrators in 1985, asserting that

officials were negligent in their failure to test all inmates for HIV. According to the court's opinion, a "sampling of blood from blood plasma donors had revealed that at least five inmates of the [Arkansas Department of Corrections] had tested seropositive for the virus which causes AIDS."[16] Furthermore, the inmates alleged, failing to segregate known seropositive inmates from the prison population, coupled with "the presence of practicing homosexuals" within the prison, "placed inmates in immediate danger of contracting AIDS because of the daily interactions which take place among inmates."[17] Writing for the Eighth Circuit, Judge Hanson tiptoed carefully between knowledge and innocence. "On the one hand, this Court can envision situations in which courts would be warranted in involving themselves in the administration of a prison in order to protect inmates from practices conducive to the spread of AIDS. On the other hand, Glick's complaint, as it is framed, asks this Court to involve itself in a medical controversy and to dictate medical guidelines in an area where the medical profession has not yet spoken, a task this Court is hardly suited for."[18] Judge Hanson then proceeded to argue that the alleged risks Glick faced are "based on unsubstantiated fears and ignorance."[19] The specific worries outlined in Glick's complaint are that (1) he comes into contact with the sweat of other inmates; (2) he is bitten by mosquitoes that have bitten other inmates; (3) he has been sneezed on by a known homosexual; (4) officials untested for HIV prepare food in the prison; and (5) prison administrators regularly transfer prisoners to different cells. Judge Hanson is undoubtedly correct to note the hyperbolic fear and tenuousness of Glick's claims, but even more prominent is what they neglect to articulate: An inmate is more likely to be raped than sneezed on and the transmissive risk of the former is considerably greater.

Judge Hanson recognizes that medical science is beyond the legal expertise of his court and goes on to acknowledge that the Arkansas Department of Corrections has not violated proper health policy of the time. Interestingly, however, Glick's unfounded worries—his ignorance and misinformation—become the central feature of the opinion. Because the particular vectors of transmission stated in this instance are born of fear and ignorance, and are rather

hyperbolic, the court dismissed the claim without prejudice, leaving open the possibility that the case might begin again if Glick were to state a more persuasive claim. In fact, Judge Hanson agreed with Glick "that he could have a colorable claim under section 1983 if he could show that there is 'a pervasive risk of harm to inmates' of contracting the AIDS virus and if there is 'a failure of prison officials to reasonably respond to that risk.' "[20] In other words, if Glick came back to court with evidence of a potentially transmissive event, his claim might survive judicial scrutiny.

What such a showing would require is the prisoner's demonstration that sex and/or injection drug use occur in prison. Despite the invocation of "practicing homosexuals" at the outset, it seems unlikely that an individual in the powerless and risky position occupied by a prisoner would want to come to court bearing evidence of forbidden behaviors. Doing so would entail serious risks to the inmate and would likely jeopardize relationships with his peers as well as prison officials. For Glick to convince the court that sexual transmission risks exist, he would have to either confess his own victim status, confess his status as assailant, or confess to the adoption of a highly stigmatized identity category. Providing a court with evidence of injection drug use in prison would require similarly dangerous revelations. This dismissal of Glick's case—which began as a challenge to institutional authority—turns on Glick's specific factual ignorance about HIV but ultimately has the effect of shoring up and maintaining other more general invisibilities that organize prison life. Breaking through the walls of silence and conformity surrounding prison sex, rape, and drug use is almost impossible for experts who study such issues.[21] At the end of the opinion, the code of silence remains intact.

Terry Darnell Dunn

Ironically, the Tenth Circuit referenced *Glick* a year later in the case of an inmate challenging prison officials' enforced testing for HIV against his will. Terry Darnell Dunn, an Oklahoma inmate, filed suit alleging that prison officials assaulted and threatened him with disciplinary segregation for refusing to submit to an HIV

test.[22] In contrast to Glick's complaint that prison officials refused to test, and thereby protect seronegative inmates, Dunn challenged a program whereby prison officials mandated testing, but then took no actions to treat the seropositive or separate them from the uninfected. The testing program, Dunn argued unsuccessfully, violated fourth amendment protections against unreasonable searches and seizures, encroached on expectations of privacy, and ran afoul of first amendment protections against medical treatments contrary to religious beliefs. None of these arguments found fertile ground at the district court or before the Tenth Circuit, and the legal justifications for the courts' decisions are unremarkable: Maintaining prison stability and security outweigh minimal intrusions on the constitutional rights of inmates.

Two fragments of information are rendered unknowable in this per curiam opinion: first, the HIV transmission routes present in the prison setting, and, second, the fact that prison officials took no affirmative steps to segregate or treat HIV positive inmates. At the very outset of the opinion, the court informs us, "[i]n his objection to the magistrate's report and recommendation, plaintiff argued that AIDS testing served no legitimate purpose, because after identifying carriers, the prison neither treated nor quarantined those prisoners."[23] After a lengthy discussion dismissing Dunn's fourth amendment argument, the court returns to the issue of HIV testing and its important role in public—or more specifically, inmate—health. That strand of the argument begins with a reference to Glick, emphasizing that, "the Eighth Circuit suggested that in limited circumstances, a prison's failure to protect prisoners from fellow inmates carrying AIDS may violate the eighth amendment."[24] Whereas the Eighth Circuit required Glick to provide more evidence of transmission risks before mandating testing, the Tenth upheld a testing program despite the fact that such information prompted no change in the treatment of inmates. For the Tenth Circuit the need to "ascertain the extent of the problem is certainly a legitimate penological purpose."[25] In other words, collecting information alone was justifiable.

The ironic regulation of the unknowable becomes particularly clear when we consider the court's conceptualization of HIV

transmission risks within the prison setting. After asserting that collecting HIV seroprevalence data among inmates is justified in and of itself, the court noted that

> the lack of any indication in the record that AIDS is communicable among prisoners who do nothing but live together does not diminish the prison's interest in testing. The United States government has stated that everyday contact does not create a risk of infection. For this reason, the Eighth Circuit has rejected the argument that even without specific allegations supporting a personal risk of contagion, a prison's failure to test for AIDS and segregate infected prisoners constitutes cruel and unusual punishment. The eighth amendment, however, defines only the minimum treatment of prisoners; regardless whether the prison has a constitutional obligation to do so, it has an interest in making an extra effort to protect prisoners from a fatal disease. Moreover, the prison, as caretaker, has an interest in diagnosing and providing adequate health care to those already infected with AIDS. In light of the seriousness of the disease and its transmissibility, we conclude that the prison has a substantial interest in pursuing a program to treat those infected with the disease and in taking steps to prevent further transmission.[26]

There are several striking features to this passage and its assumptions about prison culture. The homey reference to "prisoners who do nothing but live together" shifts our mental image to an unrealistically peaceful version of prison life, masking the myriad ways that HIV is transmitted among prison inmates and the silences that surround them. The reappearance of *Glick* is truly ironic, but this time the court recognizes the need to draw some distinctions between the refusal to test upheld by the Eighth Circuit, and the present project of upholding a compulsory testing program.

The key to the court's rhetorical strategy seems to lie with the word "even." Indeed, the Eighth Circuit threw out the argument that failure to test inmates constituted cruel and unusual punishment, but the insertion of the word "even" allows the Tenth Circuit to move on to the "however" comparison of the following sentence. By realigning a refusal-to-test policy as a constitutional minimum the court can here portray compulsory testing as an "extra effort to protect prisoners," to "treat those infected," and to "prevent further transmission." For a moment, the court overlooks the fact that prison officials neither treated nor quarantined inmates found to be seropositive, but in a flash of remembrance

rephrases: "The remaining question therefore is, does AIDS testing by the prison in fact serve the goal of appropriately responding to the presence of AIDS in the inmate population?"[27] In this moment, the court is no longer concerned with treatment, quarantine, prevention, or control—affirmative courses of action mentioned in these passages—but is instead considering if testing is among the "appropriate responses" to the presence of HIV. The court cinches up with the following:

> The alleged lack of a current medical response to the problem does not mandate this court's forbidding prison officials from continuing to collect information on the spread of AIDS within the prison walls. The prison will ultimately bear responsibility for decisions on segregation and treatment, and certainly it is reasonable to attempt to avoid making such decisions in a vacuum. . . . At the very least, "the logical connection between the regulation and the asserted goal" of treating and preventing the spread of AIDS is not "so remote as to render the policy arbitrary or irrational."[28]

So, while Glick is required to provide a court with evidence of specific HIV transmission risks within prison walls, the state of Oklahoma is justified in collecting HIV seroprevalence data under the guise of inmate health, despite the absence of any programs or policies that might actually use such information. In both cases the courts negate the possibility that sexual contact and injection drug use are prevalent in American prisons and render unknowable the fact that prison administrators did nothing to actually benefit inmates with HIV. Both cases uphold the dominant discursive community, in this case, the authority of prison officials, and do so by rendering important information unknowable.

This ironic reallocation is not lost on Judge McKay who dissented from the majority opinion in *Dunn*.

> Plaintiff has alleged that there is no treatment or segregation for persons testing positive for AIDS in the prison where he is held. While under prevailing cases the prison would have to make only a small showing to justify AIDS testing, they must show some penological interest—not just curiosity or statistics gathering—to overcome the plaintiff's Fourth Amendment interest in the integrity of his body. . . . No matter how serious a disease, unwilling prisoners may not be made mere guinea pigs for its study. The state must show some penal interest. The effect of the majority opinion is far too sweeping.[29]

Judge McKay goes on to argue that if the prison had demonstrated some response to the AIDS crisis, either segregation or treatment, then the testing program might survive constitutional scrutiny. Without any such justification, the dissent asserts, the plaintiff's objections may have merit.

Harris

In *Harris v. Thigpen* (1991) the Eleventh Circuit considered a challenge to an enforced testing program, but the opinion there focused centrally in the issue of segregating HIV positive inmates from a "general" prison population.[30] The court begins with a long and thorough exegesis on HIV transmission risks, detailed transmission routes, the progression of HIV disease, the state of treatment options—particularly the marketing of AZT—the lack of an effective vaccine, and a general epidemiological profile of risk-group demographics. The court's discussion appears thorough and balanced, although there are some curious moments. Citing primarily Hammett's "Update 1988: AIDS in Correctional Facilities,"[31] Judge Fay offers the following overview of HIV transmission concerns in the prison setting:

> "Sexual transmission has been most common among homosexual men, although heterosexual transmission has been clearly established. . . . Anal intercourse (especially for the receptive, as opposed to the insertive, partner) and other practices that may involve trauma or bleeding" have been determined to be especially risky with regard to transmission of HIV infection. . . . Anal intercourse is considered far more likely than vaginal intercourse to result in direct insertion of the virus into the bloodstream. . . . Although the future is uncertain, the risk of heterosexual transmission at present still seems to be confined to cases involving direct sexual contact with a member of one of the currently predominant risk groups such as homosexual and bisexual men, or IV drug users. . . . Indeed, this fact, along with the estimated low probability of transmission through a single sexual encounter with a member of the non–IV drug using heterosexual population, the apparently much less efficient transmission of the virus from female to male, and the higher incidence of anal intercourse among homosexuals, is often cited by those who argue against a "breakout" of HIV infection in the non–IV drug using heterosexual population. . . . Nevertheless, even accepting this still-debated proposition, heterosexual transmission must continue "to be of concern to correctional

> administrators—particularly with regard to pre-release education—because intravenous drug users are over-represented among inmate populations."[32]

At first glance this somewhat lengthy passage appears to provide the reader with a list of factual information about HIV transmission risks. A more careful reading shows how it highlights particular "facts," minimizes others, and resembles the list of risks we saw rehearsed in Chapter 3. Despite the qualifying acknowledgement that heterosexual transmission has been "clearly established," the first three sentences position gay men as an epidemiological threat and then proceeds to consider the risks that they might pose to heterosexual men. The first sentence locates transmission risks among gay men as a group, but the second and third sentences complicate the knowledge transmitted in the passage as a whole. The second sentence informs us that anal intercourse is riskier for the receptive partner—who could be a woman—but that possibility is then troubled by the comparison of vaginal with anal intercourse in the third. During acts of vaginal, heterosexual intercourse, men often "directly insert" the virus into the bloodstreams of women, but this fact seems to have been overlooked.[33] The remainder of the paragraph slides back and forth between risky acts and risk groups, working to confine a perception of certain acts within specific groups, that is, the "higher incidence of anal intercourse among homosexuals." One might walk away from this passage oblivious to the fact that women are at risk for HIV; this is especially ironic in a case that originated with a plaintiff who was a seropositive female inmate. The final sentence of this passage raises an additional query: Despite the laudable efforts of post-release educators, why, in a women's prison, is heterosexual transmission of concern to correctional administrators? Absent any glimmer of acknowledgment that HIV transmission may occur during lesbian sex, the risks of heterosexual transmission rehearsed here push an even more troubling fragment of information into the realm of unknowable: specifically, whether sexual relationships were taking place between inmates and guards.

After this detailed discussion of the science of AIDS, the Eleventh Circuit proceeded to evaluate the constitutional claims

of the seropositive plaintiffs, prison officials, and the seronegative inmates, who also intervened as litigants with interests at stake in the case. From the language of the district court:

> Prison officials or this Court must also consider the rights of other inmates within the prison walls, and whether or not those persons have a right to be shielded from such dangers as are known to prison authorities or may reasonably be expected to result from the close confinement associated with a prison environment which, at best, is volatile. It appears to this Court that the Plaintiffs in this case selfishly assert their rights to expose other inmates to their problems independent of any right of the other inmates to be protected from what is admitted to be a dread fatal disease of the plaintiffs (all of whom are capable of transmitting the disease). This Court must consider the rights of the general population inmates in determining whether or not the policies in question are constitutionally permissible.[34]

After a discussion of the reasonableness of segregation policies, the court offers the following scenario:

> For example, assume that nonviolent seropositive prisoner A is integrated into the general prison population because he appeared to pose no direct threat of HIV transmission. A is raped by inmate B, who as a result contracts HIV. B later forcibly rapes C, further transmitting the disease. In the above example, education, as urged by appellants, would alert B to the risk, and would teach him the deadly consequences of his behavior. But suppose B ignores the risk. The above scenario consequently yields not only B, a prisoner who has contracted the disease through his own maliciousness or folly (by ignoring AIDS education), but also C, a completely faultless prisoner whose punishment for whatever crime has now in effect been increased to a sentence of certain death. A, who apparently posed no direct behavioral threat, has nevertheless become an agent for further transmission of the disease in the general population.[35]

Several points are particularly noteworthy in these passages. First is the assertion by the district court that prisoners with AIDS are described as "selfishly" asserting their "rights to expose" other inmates to HIV, an interpretation that stretches the claims of the plaintiffs. The inmates with HIV who initiated the suit challenged their enforced segregation not only because it was a de facto revelation of their HIV status and, in their opinion, a breach of privacy, but also because their restricted movement within the prison curtailed their access to educational programs, job opportunities,

and recreational facilities. Recasting these interests as a right to expose other inmates to HIV constructs them as an epidemiological threat regardless of their propensities to exhibit behaviors that might or might not transmit the virus. This designation of threat is underscored by the court's hypothetical scenario. It is distressing to note that this scenario is described as "yielding" prisoner B—who is described as culpable—and also inmate C who has been painted as a "completely faultless prisoner." Evidently, the court has forgotten that the actual HIV "yield" of this scenario still includes inmate A. Additionally, we are left to wonder as to the culpability of inmate A who was, after all, the victim of a rape. With inmate A's culpability and health status minimized, he or she is positioned primarily as an epidemiological threat and his or her other constitutional and penological interests fade into the background. Given the fact that the case arose from a women's prison, the gender confusion of the passage becomes striking. The rape scenario depicted in this passage and its rhetorical potency once again raise the unknowable specters of rape and sexual intercourse among inmates and guards.

Throughout these opinions, courts base their decisions on the rationale that prison administrators have a difficult job that requires considerable latitude in order to be effective. Unwilling to substitute their judgments for the policy determinations of prison officials, judges in this instance send a message to prisoners and prison officials that the status quo will be maintained. Given the nature of the relationship between these two groups of litigants, budgetary constraints, and problems of overcrowding, these opinions imply that prison administrators are attempting to curtail HIV transmission with whatever means are possible given the exigencies of prison life.

Biting, Spitting, and HIV Transmission Risk

Like the testing and segregation cases, the following opinions maintain institutional power dynamics, but they do so in more specious and contrived ways by allowing misinformation and fear to solidify into facts. Here, the science of HIV transmission itself becomes unknowable. Although an inmate's teeth might be considered a

dangerous or deadly weapon—a determination supported by established precedents—it is the presence of HIV that ultimately appears as determinative.

James Moore and Jeffrey Wayne Sturgis

One of the first cases to address the issue of biting and HIV transmission involved James Moore, a 44-year-old inmate at the Federal Medical Center (FMC) in Rochester, Minnesota. Dr. Gastineau, an employee at the center, tested Moore because he had a long history of heroin addiction. After two positive tests in November and December of 1986, Dr. Gastineau told Moore that the "disease could be transmitted by way of blood or semen and counseled him to avoid unprotected intercourse and not to share needles, razor blades or toothbrushes,"[36] and that the disease could be fatal. In January of 1987, Moore was called into Correctional Officer Ronald McCullough's office and informed that he was to be placed in seclusion and administrative detention for smoking in a non-smoking area. When Moore refused to move, Officer Voigt arrived, attempted to handcuff him, and a struggle began during which Moore apparently bit both officers.

The first two bites, on officer McCullough's left knee and hip, did not break the skin even though he held his mouth over the bite on the knee for several seconds. Moore also bit Voigt on the right leg but the parties were in dispute as to whether or not the bite punctured Voigt's skin. Moore, on the one hand, asserted that his teeth did not penetrate Voigt's pants, and that the friction of his teeth against Voigt's pants caused the wounds. The government, on the other hand, cited Voigt's testimony and asserted that Moore bit into Voigt's thigh and punctured the skin in three places. Three days later Moore told a nurse at FMC that he "wanted to hurt them bad, wanted to kill the bastards," and also that he, "hopes the wounds that he inflicted on the officers when he bit them were bad enough that they get the disease that he has."[37] In April Moore was indicted for willfully assaulting McCullough and Voigt, federal correctional officers engaged in official duties, by means of a deadly and dangerous weapon.

Specifically, the indictment charged that Moore was a "person then having been tested positively for the [HIV] antibody."[38]

Moore's case received more media attention than most inmate-related cases because, "[s]everal experts said it was the first assault case in which a person with the AIDS virus was convicted of purposely trying to infect another person."[39] In an article about the case, Moore's attorney, Kevin Lund, called the evidence presented "a reflection of hysteria over acquired immune deficiency syndrome," and furthermore, he said that "Mr. Moore was the first person with the AIDS virus to be convicted on a charge of using his mouth and teeth as a deadly and dangerous weapon for assault."[40] Notably, Moore's case was not the first to raise the question of whether body parts could qualify as weapons.[41] Referring to this history the court noted, "…it is the capacity for harm in the weapon and its use that is significant, not the actual harm inflicted."[42]

The opinion carefully balances the distinction between Moore's teeth and mouth and his HIV infection:

> As Moore points out, Dr. Gastineau's testimony, which was the only evidence on the transmissibility of the HIV virus, established only a remote or theoretical possibility that the virus could be transmitted through biting. He asserts that the government did not try the case on the theory that any human bite—regardless of the presence of the HIV virus—was a deadly and dangerous weapon. His assertion rests on the facts that the indictment charged that Moore, "a person then having been tested positively for the [HIV] antibody, did willfully and forcibly assault" the two officers "by means of a deadly and dangerous weapon, namely, his mouth and teeth"; that the indictment failed to make any similar charge with respect to his hepatitis infection; and that the government introduced a substantial amount of evidence at trial concerning the transmissibility of AIDS by way of biting.[43]

The court goes on to state, "We reject Moore's massive emphasis on the AIDS aspect of this case."[44] We might ask, however, if it was indeed Moore's emphasis, and if that emphasis ultimately shaped the outcome of the case. Moore's mouth and teeth are constructed as a deadly and dangerous weapon and, at least at the literal level, HIV becomes irrelevant while the mouth and teeth of a human being are deemed to be a dangerous weapon. But the relationship distinction between the teeth and the virus is left vague.

Another biting-related case began in July of 1993 when Jeffrey Wayne Sturgis went to the Lorton Reformatory in Lorton, Virginia, to visit an inmate. As part of the admissions process, Sturgis was searched before entering the visitation trailer, and as prison officials patted him down, Corporal Price felt a lump near Sturgis' groin. When asked about the object, Sturgis suddenly changed his mind about the visit, stated that he wanted to end the search, reached into his pants and transferred something into his mouth. An officer referred to in the opinion as John Doe, suspecting that Sturgis was smuggling contraband, grabbed his jaw and attempted to force the object out of his mouth. After a few moments of struggle, Sturgis spit out a pink substance that was later determined to be bubble gum. Officer Doe lunged to retrieve the pink glob and Sturgis seized the opportunity to bite him, holding his teeth over Doe's thumb for several seconds and inflicting a "serious wound that bled heavily."[45]

According to the court's opinion, the struggle escalated and other correctional officers entered the fray. One of them, identified only as Jane Doe, grabbed Sturgis from behind and as the group lost footing and fell to the floor, Sturgis bit that officer on the arm and again held the bite for several seconds. The wound bled heavily. After Sturgis was successfully restrained, officers assert that he was seen slipping in and out of consciousness and, fearing that he had swallowed narcotics during the struggle, they took him to a local hospital. At the hospital, Sturgis continued to struggle, shout, and spit at hospital personnel. When asked to stop biting and spitting because he was HIV positive, Sturgis reportedly responded that he knew of his serostatus and stated that he was trying to infect the staff. According to Jane Doe, Sturgis told one of the hospital employees, "I'll bite you like I did her. I hope you get it."[46] Sturgis' stomach was pumped at the hospital and nothing was found. His blood tests were, however, positive for traces of cocaine and marijuana.

Sturgis was tried and convicted of assault with a dangerous weapon, and the majority opinion focuses, in part, on the question of whether or not a person's mouth and teeth can be defined as a "dangerous weapon"; at trial, the jury had concluded they

could and the majority opinion for the Fourth Circuit agreed. The majority opinion gives sustained attention to the question, and reviews other similar cases from other circuits.

> In terms of the statutory language, teeth may also be a dangerous weapon if they are employed as such. To make this case turn on whether parts of the human body can ever be dangerous weapons would be an exercise in empty formalism. The statutes in fact draw no such artificial line. Parts of the human body have been held dangerous weapons under circumstances in which the body part was employed to inflict death or serious physical injury. For instance, in Moore, the Eighth Circuit found that the mouth and teeth of an HIV positive inmate were dangerous weapons when used to bite two federal correctional officers, despite the lack of conclusive proof that HIV or AIDS could be transmitted by a bite.[47]

Although the court entertains the possibility that HIV might be transmitted by biting or through saliva, and evidence supporting that position is cited from testimony by a Dr. Morrison, the question is put aside and the court finds that teeth are a dangerous weapon whether or not the possibility of HIV transmission is present.

The ironic renegotiations of these opinions centrally investigate a definition of danger that contains uncertain references about the extent to which that might include HIV transmission risks. Both cases begin with biting incidents, and the charges brought against the suspects hinge on their seropositivity. Their defense strategies, in each instance, show attempts to disconnect the danger of HIV from the possibility that it might be transmissible via biting. Ironically, in neither case does the strategy succeed. The *Moore* court begins by noting that the defendant was HIV positive, weaves the potential danger of that status through a consideration of the danger presented by his mouth and teeth, and then "rejects" Moore's emphasis on the HIV component of his defense. In both instances, the mouth and teeth of the defendants are themselves construed as dangerous weapons, and HIV is literally set aside, and its figurative danger and the insufficiency of the evidence showing that the virus is transmissible through biting are negated to a space of the unknowable.

Curtis Weeks

One of the cases most noticed by the press was that of Curtis Weeks. Weeks, an HIV-positive Texas inmate serving a two-year sentence for aggravated robbery, was being transferred from one prison unit to another on June 7, 1988. Throughout the trip Weeks complained loudly about his restraints, yelled, threatened and cursed at the guards, banged his head against the wire mesh in the van, tore a panel from the door of the vehicle, ripped the headliner, and stated that he was going to "dog" the officers. Physical contact occurred between the officers and Weeks throughout the trip, at least once during a stop to change drivers and to feed him, and again during an attempt to control him by placing him on the ground and restraining him. While staring at guard Ron Alford, Weeks stated that he was "medical now," was "HIV-4," and spat in Alford's face.[48] During his trial, the guards testified that Weeks told everyone that he had AIDS and that he intended to take as many people with him as he could. On November 4, 1989, Weeks was convicted of attempted murder for spitting on Alford and because he had two prior felony convictions on his record, the jury sentenced him to imprisonment for life. That conviction was affirmed by the state court of appeals and the Texas Court of Criminal Appeals declined to review the case.

The legal arguments advanced by Judges Reavley, King, and Wiener for the Fifth Circuit circulate through the expert testimony presented in state and lower federal courts. The central feature of their argument is succinctly summarized: "In short, viewing the State's evidence in the most favorable light, the jury was presented with testimony that HIV transmission through saliva and spitting is possible. Although Weeks's counsel made a mighty effort to discredit the State's experts, the jury still chose to believe their testimony. We are not in a position to disturb its conclusions."[49] In a footnote, the court summarizes multiple cases demonstrating that "courts in other jurisdictions have split in their treatment of this issue."

Two rhetorical strategies that surface in the appellate court's opinion are notable for the way they depict the virulence of HIV.

Relying on the Texas statute under which he was convicted, Weeks notes that a conviction for attempted murder requires a person, who, with the specific intent to commit murder, commits an act that is more than mere preparation but that "tends but fails to effect the commission of murder."[50] Weeks's attorneys argued on appeal that the lower courts had erroneously equated "tends" with "could," thereby diluting the causal necessity between the act and its possible outcome. If a person with HIV were to spit on someone else, proving whether that "tended" to result in viral transmission would require more evidentiary support than demonstrating the theoretical possibility that spitting "could" put another person at risk. Although the Fifth Circuit judges recognized this slippage in the lower court opinions, they also declined the invitation to review Texas's interpretation of its own laws. "The relevant question then becomes whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found, beyond a reasonable doubt, that spitting could transmit HIV."[51]

Briefs filed by the American Civil Liberties Union, the Dallas Gay Alliance, the Texas Human Rights Foundation, and the Greater Houston American Civil Liberties Union urged the lower court to take judicial notice that it was impossible to transmit HIV through spitting. According to Texas criminal code Rule 201 (b), "A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned."[52] The court then proceeded to survey the testimony of four experts who offered testimony on the transmissibility of HIV, three on behalf of the state (Dr. Dowell, Dr. Cameron, and Dr. Day) and one on behalf of Weeks (Dr. Pollard). Not surprisingly, their opinions as to the transmissibility of HIV varied widely, producing the appearance of reasonable dispute among individuals apparently qualified as experts.

The lower court opinion neatly summarizes the arguments made by these experts. Dr. Dowell testified that studies had been conducted to determine if HIV could grow in saliva and that in 3 out of 55 instances it did—the sources of these figures are not

cited in the opinion. He further stated that a "certain number of HIV-positive patients will have HIV growing in their saliva at any given time."[53] The opinion also cites Dr. Dowell as stating that the possibility of transmission was low, but certainly not zero, and that the possibility would increase if there were blood in the saliva as well. Furthermore, Dr. Dowell softened the impact of his testimony by noting that there seems to be an inhibitor effect of saliva to the growth of HIV, and that he had not tested the saliva of Weeks himself.

The court's recitation of Dr. Cameron's testimony begins by observing that he spent a "goodly amount" of his time conducting literature research on AIDS and how it was spread. He asserted that it "seemed possible that HIV could be transmitted through saliva," and then proceeded to cite several studies wherein scientists agreed that there was unequivocal evidence of salivary transmission.[54] These cases remain uncited in the opinion, but Dr. Cameron further testified that there were a number of cases where homosexuals who had only allowed themselves to be fellated had become infected, and that there were a number of cases from the Soviet Union where HIV-positive children transmitted the virus to their mothers through nursing. The only cited study in the court's review of Dr. Cameron's testimony is a 1989 issue of the *Journal of the American Medical Association* case report of an elderly woman who infected her husband through kissing.[55] These same studies, still uncited by the court, are also referenced in the testimony of Dr. Day. Both Dr. Cameron and Dr. Day asserted that the amount of HIV in a person's body would increase with the progression of disease, and that, given the advanced state of Weeks's condition, his viral load would have been particularly high. Notably, Dr. Day also asserted that she did not know of any cases of HIV being transmitted through spitting, but qualified her response by noting that she did not think that "they're looking for spitting cases."[56] Further magnifying Weeks's position as a risk, Dr. Day noted that people would be more likely to have blood in their mouths shortly after eating, and the court noted that Weeks had just been fed lunch before the spitting incident took place. The significance of this possibility is underscored by a fifth doctor, Dr. Wells—not an AIDS

expert but someone who had actually treated Weeks—who testified that Weeks had tartar on his teeth and that gum irritation would tend to cause blood to be in his saliva.

In the lower court opinion, each of the state's expert witnesses is presented to the reader along with their area of practice and employment affiliation. Notably, the court's introduction of Dr. Pollard is somewhat more extensive: "Dr. Pollard testified that he was board certified in internal medicine and that he specialized in infectious diseases. Dr. Pollard had 11 years of training and experience in the area of virology. He directed a research program active in both clinical and scientific research focused upon infections with HIV. Dr. Pollard testified that he sat on a national panel which looks at all the drug studies conducted by the National Institute of Health for the treatment of AIDS infections."[57] Following this solidification of his credibility, Dr. Pollard's testimony is referenced, indicating that "it had never been proved that HIV could be transmitted by saliva being spit on another," and that it was "extremely remote" if not "impossible" for HIV to be transmitted as a result of contact with saliva alone. He went on to state that if HIV were in fact transmissible through saliva, there would be considerably more cases of AIDS than there are in the world, and that those cases would be appearing more frequently outside of the original risk groups with which it was associated. Finally, Dr. Pollard's testimony rebuts the validity of the studies cited by the state's witnesses, asserting that the Russian infant cases were poorly documented, and that it is difficult to ascertain with certainty the sexual habits and practices of people like the elderly couple previously referenced.

The relationship between facts, evidence, testimony, and legal rulings in this case are especially complicated. Both lower and appellate courts decline Weeks' invitation to disturb the jury's finding that HIV could be transmitted by spitting, thereby leaving in place a set of factual misconceptions produced through a series of logical errors. The state's experts, relying primarily on the same set of scientific information, offered seemingly modest and measured evidence that qualified each assertion. Each of the state's experts acknowledged that transmitting HIV through spitting had never been conclusively proven, or even studied; they offered the

possibility as theoretical and remote. Dr. Pollard's testimony on Weeks's behalf might well have destabilized the solidity of their assertions. That nowhere do the experts, the courts, or the jury members seem to have recognized the important differences between spitting (which involves no bodily contact) and nursing, fellatio, and kissing (which do), further amplifies the point. According to the New York Times, at a hearing in which Weeks was denied a new trial, "[h]e was placed in a rear bench in the courtroom and guarded by officers wearing full-length raincoats, rubber boots, gloves, and helmets with plastic shields."[58]

HIV and Prison Rape: Young

Kenneth McClure Young was serving time in Lewisburg Federal Penitentiary for counterfeiting $42 in U.S. obligations. Two days after his arrival at Lewisburg, Young was interviewed by prison officials who recommended that he should be transferred to a lower security prison, and suggested that he should await transfer in the Segregation Housing Unit because he was HIV positive, and, in Young's own words, "small, young, white, and effeminate," characteristics almost certain to predict an inmate's victimization.[59] The link between Young's looks and the likelihood of his victimization was not lost on the court: "These fellow inmates subjected Young to sexual assault on several documented occasions, most likely because of Young's youthful appearance and slight stature."[60]

Kenneth Young's ordeal at Lewisburg began when his cellmate began demanding sex. Young refused, but the cellmate climbed into Young's bunk and told him that he would be killed if he made any noise to attract the attention of a passing guard. After the guard was out of earshot, Young's cellmate slapped him repeatedly and continued demanding sex; Young was able to ward off the advances that night. The following morning, Young sent a note to Officer Steven Bilger who came to Young's cell and told him that he could not be moved because of his medical status. When Officer Bilger left, Young's cellmate began spitting in his face, slapping him, and shoving him into the wall of the cell. An inmate-orderly witnessed this incident and notified Officer Bilger, who told Young to write a

letter to the Lieutenant. When the officer left, Young's cellmate informed him that he would be killed if he wrote the letter. Young wrote it nonetheless and was moved to a new cell. One week later, Young was subjected to the same set of circumstances with his new cellmate, including death threats, assault, and dunking Young's head in a toilet in an attempt to force sexual compliance. Young wrote another letter to prison officials Keohane, Thomas, and London, informing them of the circumstances, and asking for their protection; the officers did nothing.

Another two weeks passed, and Young's cellmate "pulled a razor blade on him threatening to kill him if he did not decide real soon to become his wife and have sex with him."[61] Young again wrote to prison officials, asking to be moved, and the request was denied. In his despair, Young told one of the guards that he was not going to let his cellmate back in to the cell when he returned from showering; Young began pounding on the bars of his cell with a milk crate. After this escalation of events, Young was transferred to another cell, and given a disciplinary report.

At a disciplinary hearing a few days later, Young informed prison officials Steppie and McDermott about the events that had been taking place. According to his version of the events, McDermott told Young that he had better learn to get along, because "protection was not one of his duties, that plaintiff had better learn to get along because the officials at Lewisburg do not like cry babies."[62] The following day, Young again argued with his cellmate, who punched him in the face and stomach and forced him at knifepoint to perform fellatio. Young was informed that if he did not get out of the cell the following day, that the cellmate would "rape his anus."[63] The following day, prison officials refused to move Young and his cellmate told him to stop up the toilet and flood the cell; Young complied, and as a result was placed in a "dry cell" for ninety-six hours. A dry cell has no toilet, no running water, and, in Young's case, he was not provided with toilet paper. Despite having diarrhea, Young spent four days in the dry cell and was not allowed to wash or shower before eating. At one point he requested a blanket, informing a guard named Troutman that he was cold; Officer Troutman told Young that he had been informed that Young was not to be

given anything—but Troutman gave Young a blanket nonetheless, and told him not to tell anyone how he had obtained it.

Throughout the four days he was in the dry cell, Young repeatedly asked to be allowed out to urinate or to defecate, and his requests were refused. He was eventually forced to relieve himself on the floor of his cell, and after the guards' shift change, requested to be allowed out. An officer told Young at this point that he should be quiet or that he would be chained to a steel slab. After twenty-nine hours in the dry cell, Officer Troutman provided Young with a plastic urinal and told him that he could leave the cell to defecate if he wanted to. The inmate-orderly on duty refused to clean Young's cell because of the stench, but Young was given utensils to clean it himself.

Roughly ten weeks later, Young was again given a new cell, next to an inmate who had assaulted him previously. Fearing that he would be killed, Young asked to be moved because a death hit had been placed on his head by the Texas Death Syndicate. Officer Conrad denied the request, and stated that he did not want to listen to Young's "cry baby excuses."[64] Five letters to prison officials produced no results and almost five months into his ordeal, Young attempted suicide by slashing his wrists. He spent two days in an infirmary and was eventually granted a review hearing. After six months in Lewisburg Young was transferred to the Federal Correctional Facility in Phoenix, Arizona, and then to the Federal Correctional Facility Institution in Bastrop, Texas, where he served the remainder of his sentence.

Young's success is unusual, but there have been other cases that illustrate that courts do not take the claims of inmate rape and abuse seriously. As Human Rights Watch notes, "[n]ot all federal judges are so insensitive to prison abuses—indeed, a few worthy efforts have been made to put a stop to prisoner-on-prisoner abuse, including the filings in *LaMarca v. Turner* and *Redmond v. County of San Diego*—but it is fair to say that the courts have not proven to be an effective champion of the sexually abused inmate."[65]

Young's case shows how virulently the code of silence is enforced in the prison setting. His compliance with the sexual demands of other inmates, and the sincere wish that those remain

invisible, are enforced not only by the inmates who raped him, but by prison officials who did not want to hear his "cry baby excuses." The homey notion that HIV is not transmissible among prisoners who "do nothing but live together" seems all the more ironic when we consider that Young's story is not the anomaly, but the norm. Young became a serious problem at Lewisburg because he could show that prison administrators were deliberately indifferent to his safety and medical needs: The constitutionally unknowable was forced into the realm of the known.

Discussion

These case materials exemplify a complex relationship between scripts and consciousness, and although they emerge from within a coherent discursive community bounded by deliberate indifference, the ironic negations are more fluid. Inmates, prison officials, and judges have all been drawn into the realm of scientific uncertainty and required to make difficult decisions with limited information. Judges are clearly mindful of the fact that inmates frequently file frivolous lawsuits and the largest majority of such cases are dismissed early in the process.[66] That so many cases have been adjudicated and granted appellate review should, in itself, be taken as an indicator of the seriousness with which courts have greeted the problem of AIDS in prisons.

What is most notable about these opinions, however, is the ways that they manage the power–knowledge nexus by organizing misinformation and assigning bits of factual evidence to the realm of the unknowable. When cases involve the risks of HIV transmission between inmates, the risk is minimized and what prisoners do not know, or cannot demonstrate, eventually defuses their claims. When cases raise the possibility of HIV transmission from an inmate to a guard, the issue plays out differently. What jurors know, do not know, cannot know, or indeed refuse to understand becomes positioned as factual and once again shores up institutional power and preserves entrenched beliefs about prison life.

Despite a long history of research into prisoners' lives, behaviors, and prison culture, criminologists consistently find themselves

stymied by that culture's resistance to the processes of categorization and translation that render inmate life legible to the outside world. A first layer of ignorance is maintained by the methodological difficulty of conducting research on inmates. The regimes of truth by which academics and inmates organize their universes are quite different. Getting institutional clearance to study inmates is difficult, and the extent to which inmates accurately report life on the inside is questionable. The stigma of being considered a "snitch" prevents inmates from speaking candidly with researchers while they are on the inside. Recruiting participants from among the paroled raises other methodological problems: How can inmates be contacted? Will they have relapsed to the behaviors that caused them to be sentenced in the first place, thus potentially compromising their sobriety, clarity, and ability to participate as research subjects? A second barrier to knowledge is maintained by prison officials who are loathe to have the cracks in their carceral authority exposed to public scrutiny. Third, a shroud of ignorance hangs between the political arena where laws are written and prisons funded, and the realm of the electorate who have an intense desire not to see behind the shroud. The taxpaying public does not like to think that prisoners have access to any forms of pleasure, and prison administrators strive to maintain that impression.[67] Given these complexities, it is somewhat remarkable that we know what we do about the lives of America's prisoners; punishment is invisible indeed.

The most prevalent vectors for HIV transmission in the prison setting are sex, rape, and injection drug use, although some studies have indicated transmission through tattooing as well.[68] Despite overwrought mythologies built up around prison sex, research on the subject is uneven and unreliable. Even a brief look at the few studies that have been conducted says more about the frustrations and complexities of doing such research than it does about the HIV risks faced by inmates or how to prevent them: Many of the studies are dated; others rely on very small or flawed sampling techniques; and resources needed to conduct such research are scarce. Rape and sexual harassment are often dissected in legal discourse, carving discrete events into various components: consent, subjectivity, bodily acts, gendered expectations, social norms, reproduction, and so on.

One need not look far to find evidence of confusion about such matters in society at large.[69] Parsing, defining, and drawing meaning from these components produces an even more complex knot of confusion in prisons.

In her conclusions and summary of existing literature, Professor of Social and Community Services Helen Eigenberg points out that rape in prisons is thought to be rare, but that consensual homosexual sex is believed to be quite prevalent. Studies she cites that rely on information taken from prisoners themselves suggest that between 0.3 to 14 percent of inmates are raped, meanwhile, between 30 and 40 percent of inmates have consented to sex with other inmates. By contrast, Eigenberg found that correctional officers believe that homosexuality occurs less frequently than does rape. The frequency and definition of rape versus sex varies widely depending upon whom the researcher asks. "It is somewhat disconcerting," she writes, "that almost half the officers (46.4 percent) believe that inmates deserve rape if they have consented to participate in consensual acts with other inmates. This finding indicates that officers believe that some inmates precipitate their victimization."[70] This sentiment is echoed repeatedly through the case histories and analysis conducted by the Human Rights Watch.[71] The lines between rape, consent, coercion, seduction, stigma, instrumentality, and silence are particularly blurred in this setting.

Researchers working with such concepts find that their lexical certainty unravels very quickly as the already unstable definitions of these terms becomes even more volatile when applied to inmates. Two of the most vexing forms of ignorance circulating around inmate sexuality are consent and silence. Feminists writing about rape have long recognized the juridical value of ignorance. As Sedgwick puts it, "it matters not at all what the raped woman perceives or wants just so long as the man raping her can claim not to have noticed (ignorance in which male sexuality receives careful education)."[72] While these problems of definition, legibility, and epistemology are being debated somewhat publicly among feminists, academics, and in the media, the extent of the problem among men—especially incarcerated men—remains strikingly invisible. The problems vary in important ways. The issue of consent *might*

be debatable when considering sexual events between men and women who are at least acquainted; the terms of the debate shift considerably when events involve two incarcerated men.

Defining consent, and determining when it is or is not present is problematic in different ways among inmates. Eigenberg argues that even the homosexuals in some of the studies she surveys had a hard time deciding whether or not they had been raped or if they had had consensual sex. The difficulty in making the distinction becomes clear in an excerpt from an interview with a prison guard:

> Q: Do you feel that homosexual acts between consenting adults are wrong?
> A: No, as long as no force is used.[73]

Force is so completely bound up with the notion of inmate sex that it might be present even when sex is consensual. Men who are raped in prison suffer not only the physical and psychological trauma of rape, but are stigmatized among their peers for being insufficiently capable of resisting assault. Seeking protection from prison officials and making one's victim status known is seen as equally shameful, creating a double-bind of silence and stigma for individuals subjected to sexual assault.

Eigenberg recognizes that not all prison sex is entirely without consent, and that a scale of possibilities exists, ranging from propositioning and seduction at one end, to coercion—economic or social—and to violent rape at the other. Locating some sexual contact among inmates along this continuum might be possible, but it is often difficult. Prison scholar Alice M. Propper, in an article entitled "Love, Marriage, and Father-Son Relationships among Male Prisoners," strives to debunk the myth that male inmates form relationships that are instrumental, that is, sexually utilitarian, while women inmates do so with affectional motivations.[74] Despite the overall persuasiveness of her data and analysis, her baseline interpretation of "homosexual" seems not to include the possibility of emotional intimacy or affection. She writes: "Several inmates report prison marriages between males in American prisons, and one describes homosexual marriage in penal colonies off

French Guiana. These marriages often parody heterosexual roles and rites outside of prison. Most quasi-marriages between male inmates probably reflect a homosexual relationship, but they may sometimes reflect an affectionate emotional bond, mutuality, and closeness independent of a sexual partnership."[75] She goes on to offer the example of a jailhouse marriage between two men that was characterized by exchanges of gifts and friendship, but remained platonic. The "wife" engaged in sex with other men, but did not want to get caught and thus separated from the "husband" who occupied an adjacent cell. She also qualifies her use of the term "homosexual" in a footnote, stating that she means distinctly sexual or erotic same-sex relationships, underscoring the fact that sex among male inmates is unusual if viewed as anything other than violent, economic, or the enforcement of social hierarchy.[76] Even when inmates pair up, intimacy and affection are usually secondary motivations while protection, social status, and avoiding exploitation are most often primary.[77]

In addition to the difficulty of drawing lines between consent, force, sex, and rape, the issues of shame and silence are particularly pronounced among prisoners. Stephen Donaldson, the late president of the organization Stop Prisoner Rape, is quoted as saying, "the rape of males is a taboo subject for public discussion. . . . If ever there was a crime hidden by a curtain of silence, it is male rape."[78] But rape and the confusion of consent that it invokes is not the only type of ignorance protected by inmates and jailers; remaining free from the stigma of homosexual identification adds an additional layer of complexity. In a study of HIV prevention efforts in New York City, the author demonstrates the difficulty of promoting safer behaviors. "Male participants in the jail-based group refused to speak about sex, and one man left the group because he felt that by raising the issue, the cofacilitators were implying he was a 'homo.' One of the remaining men then explained 'the code of silence,' a tacit agreement among male inmates not to talk about sex behind bars to outsiders, or even among themselves."[79] Avoiding the homosexual identity marker is an important goal for inmates striving to retain a heterosexual identity in an environment restricted to same-sex contacts.

Inmate sexuality is not the only potentially transmissive behavior surrounded by a code of silence; what criminologists and penologists know about injection drug use in prisons is also miniscule. As of 1994, the time frame of these cases, none of the jail or prison systems in the United States had made sterile injection materials available to inmates, although bleach is often available for normal cleaning purposes. The dilemma faced by prison officials is to prevent HIV transmission among incarcerated populations without acknowledging that drug use occurs or appearing to condone such activities. But as one inmate-study participant put it, "just because I was locked up, didn't mean I was going to stop getting high."[80] What little evidence has been collected demonstrates that needles and syringes are available in prison, or that inmates fashion substitute injection materials from light bulbs, pens, or basketball pump needles. Because of their scarcity, these "works" are often obtained by going through the clinic's garbage and are then shared or rented out. One study participant explained, "[t]he first move I made was to get to know that guy in the clinic, the orderly or whatever, got a couple of sets of works this way. . . . Anybody that come in with drugs, that was my in because I always had money, cigarettes, whatever."[81] Some European countries make sterile injection materials available to inmates, but American prison officials have chosen instead to remain carefully ignorant of the realities of injection drug use among the incarcerated.[82] This orchestrated ignorance plays a very important role in American political culture. Specifically, it shores up the American faith in an all-powerful, all-knowing, all-limiting carceral regime in the most Foucauldian sense, spackling over cracks in the authority, efficiency, and effectiveness of the American government.

The scripts examined in Chapters 2 and 3 rely on logical structures that maintain social hierarchies by making AIDS and homosexuality mutually constitutive through panopticism and writing both terms onto the body. A similar form of hierarchical preservation occurs here. Managing HIV transmission risks in the prison is a protean endeavor: The threat of HIV transmission is rendered plausible from unlikely events; policies set by prison administrators are upheld despite their lack of rationale or potential for

success; injection drug use and sexual behavior are relegated to the realm of the unknowable. What is strikingly different in these cases is that they do not produce a consciousness that seamlessly unites AIDS and homosexuality; nor do they allow one term to stand as proxy for the other.

What these scripts do produce is the complete and unbroken power of the prison. The patrons of adult theaters, gay nurses, blood donors of indeterminate sexuality, and the mothers and husbands represented in earlier chapters exist outside prison walls where the technologies of social control Foucault identified are present, but more diffuse. Organizing and regulating space and bodies are, on the outside, part of the same project by which AIDS and homosexuality are drawn together; each aspect of the regulatory project bears weight that cannot be so completely repressed. Sex and sexuality must exist as part of the broader project of social organization. In the prison setting, the value of the terms shifts. Within prison walls, sex and sexuality stand as evidence of the failure of the prison itself, ergo, AIDS and homosexuality must be situationally divorced. Absent a charmed inner circle from which to expunge the dangerous terms, there is less need to relegate heterosexual AIDS to a closet of its own.

Because AIDS is here excused from its role in organizing a system of sexuality, the syndrome instead becomes the labile term that displays unusual discursive virulence, when required, or fades into the realm of the unknowable when such a rendering better serves the needs of the carceral regime. *Dunn*, *Glick*, and *Harris* minimize AIDS in ways that are indeed ironic standing next to *Moore*, *Weeks*, and *Sturgis*. Punishment is invisible here, as courts carve out immunities for prison officials and refine a standard of deliberate indifference to establish baseline treatment of inmates, as researchers fail to disentangle sex, consent, force, and rape.

Kenneth Young's success as a plaintiff, and the graphic details related in that opinion, should be read not as anomalous, but as evidence of the argument. Dennis Glick provided no concrete evidence of HIV transmission risks and Terry Dunn lived in a fantastical prison where "inmates do nothing but live together";[83] neither case reveals evidence that could threaten our perception of the

prison as complete and austere. The undeniable violence suffered by Kenneth Young carries such a threat. The horrors he suffered get marked as unique through his success as a litigant, ironically relegating the ubiquity of his situation to a place of conscious invisibility. All of the inmates, guards, and administrators depicted in this chapter, indeed all such players in American prisons, exist within an economy of extreme violence, sexual abuse, and addiction. What we on the outside refuse to see and comprehend organizes the field of unknowing on which these scripts become logical. In the textual gaps of these cases are missing voices and events that we would do well to remember because they show us how states are personified and people erased.[84]

CHAPTER FIVE

Impossible Burdens

The cases examined thus far illustrate a complicated arrangement of narratives that manage HIV transmission risk and deploy state power through technologies that operate on bodies, through space, and at the intersection of acts and identities. The scripts examined in this chapter also manage risk in the service of power, but do so through somewhat different strategies. Here, the gay/AIDS subject is maintained with ease because, in each instance, the principal characters are gay men who act to establish that identity as part of their litigation strategy. Unlike the scripts examined so far, the clarity with which we can see sexual identity and serostatus here affords no opportunity to rhetorically renegotiate the relationship between the two terms. Because sexuality is not labile, these scripts cannot hide, compel, or reveal the sexuality of the people involved in order to preserve some other hierarchy; that particular closet has lost its rhetorical power. Furthermore, whereas Kenneth Young's story threatened to reveal cracks in the carceral regime, the stories told here reveal a subtle expansion of the power–knowledge nexus. The clear legibility of these homosexual subjects outside the prison setting inspires a more gingerly judicial approach that expands state power, deploying it seamlessly and invisibly on other terrains.

These scripts tell stories about the political strategies of three gay men: Vincent Chalk—a teacher in a school for deaf children;

J. Rollins, *AIDS and the Sexuality of Law*

John Doe—a flight attendant who advanced a claim of privacy under a pseudonym; and Brian Barlow—a gay-rights activist whose legal troubles originated at a pride march. All three of these cases can be read, at least in part, as stories of individuals winning lawsuits against institutions.[1] Implicated in each script is the power of the state. Yet, these stories humanize gay men with HIV in ways that are inconsistent with the cases discussed above. Whereas the stories of heterosexual litigants with HIV were framed by narratives of decline, the stories told here are not about decline, deterioration, and illness, but more often about compassion, self-determination, and the temporal limitations imposed by HIV. In short, empathy and sympathy are reallocated in specific ways to achieve strikingly different effects.

Evidence of this trend is the fact that in each of the cases below the health status of the gay man involved is minimized. Whereas the litigants' deteriorating health—or fear of it—in the cases of earlier chapters is discussed in dark terms, clinical or vivid language, such discussions are minimal here. In part, this rhetorical shift reflects an important resistance to the "victim status" that others have identified as crucial to treatment and survival, insisting instead that people with HIV should resist victimization and work to see themselves as subjects who remain capable, valuable contributing members of society.[2] Furthermore, while Cynthia Coleman, Carol Marcella, and John Marchica were suing to recover for being damaged by HIV or the threat of infection, these litigants are gay men who filed suit because they were mistreated as a consequence of having or being perceived as having AIDS. Whereas *Leckelt* resisted fixing either sexuality or serostatus, the scripts depicted below provide no such potent discursive opportunity.

Vincent Chalk

An important victory for people with HIV was established by the case of Vincent Chalk, a teacher of hearing-impaired children in Orange County.[3] The circumstances that gave rise to the case began when Chalk was diagnosed with AIDS after a bout of pneumocystis carinii pneumonia (PCP) and the Orange County Department of

Education reassigned him to a non-teaching administrative position that involved no student contact. Chalk filed suit in federal district court, alleging that the department's action violated section 504 of the Rehabilitation Act of 1973. In essence, that act prohibits recipients of federal funds from discriminating against otherwise qualified handicapped employees.[4] At the district court level, Chalk's motion for a preliminary injunction ordering reinstatement to his job was denied and he appealed. On appeal, Chalk won his case and consequently his job. The *Los Angeles Times* hailed the decision and Chalk was described as the "first AIDS patient to win an appellate court decision protecting his right to work."[5]

The symbolic contests in Chalk's case operate on at least three different levels, circulating information with varying effects: in the use of science and medical knowledge; in the depiction of a gay teacher with HIV; and at the level of public hysteria. Media coverage of the case framed the controversy from the beginning. The first articles about Chalk in the *Los Angeles Times* foreground the uniqueness of his case by noting that it was the first case of its type in the nation. Although other cases received some attention in the presses, Chalk's story got considerably more attention than most. These scripts were somewhat distant in their initial depiction of Chalk and they recognized his difficult decision to become a public figure, but as the story progressed, the media became increasingly sympathetic. "At first, Vincent Chalk, 42, declined to give his name. But he agreed to do so after the television and newspaper reporters attending the press conference complained that it was hypocritical of him to allow his picture to be taken and broadcast if he was trying to remain anonymous."[6] Before long, a more intimate and detailed portrait began to emerge. Shortly after the case was filed we learn that Chalk was raised as a Mormon in Kansas, a graduate of Brigham Young University, an exceptional teacher, and a quiet-spoken man with a wry sense of humor who was uncomfortable with the level of publicity that resulted from his case.[7]

The questions raised in Vincent Chalk's case were distilled to a deceptive singularity—What risk might an HIV-positive teacher pose to students in a classroom setting? The question invokes a

host of symbolic phobias about disease, pedophilia, the state's role as parent/protector, parents' rights, gay rights, and students' educational interests. In contrast to cases examined above (most notably *Leckelt* and *Weeks*), the burden of proof of transmission risk seems here to have shifted. Kevin Leckelt and Curtis Weeks both lost their cases because they could not disprove specious evidence that exaggerated the risks HIV transmission. In Chalk's case the burden seems to have moved to the state to prove that risks existed despite ample evidence to the contrary. Chalk and his attorneys provided ample evidence in support of his claim that there was little risk of HIV transmission in the classroom setting. The court wrote,

> The only opposing medical opinion submitted by the Department was that of one witness, Dr. Steven Armentrout, that "there is a probability, small though it is, that there are vectors of transmission as not yet clearly defined. . . . I believe, sincerely believe that there is a significant, and significant here—it's significant even though it's small, potential for transmission of AIDS in ways which we have not yet determined and, therefore, may pose a risk. . . . If they don't occur now, it is my firm belief that with the almost inevitable mutation of the virus, they will occur. And when that does occur, they certainly could be—there can be a potential threat." Asked whether there was a scientific basis for such a hypothesis, Dr. Armentrout indicated that he had "no scientific evidence that would enable me to answer that or to have an opinion. . . . What we're saying is that we haven't proved scientifically a vector."[8]

The court's framing and use of this testimony rely on three different mechanisms to minimize our perception of Chalk as a threat. The information contained in the six briefs submitted on behalf of Chalk outweigh the single expert witness recruited by the school district. Notably, the court observes that, "Dr. Armentrout was not deposed as a witness in connection with this case,"[9] and that his testimony was taken from another suit, thereby minimizing his credibility as an expert witness. Judge Poole further undermined the witness' testimony by referring to it as a "know-nothing" argument. "That since we don't know everything [about AIDS], we must assume [every negative claim] is true." He went on to observe that the district had had some difficulty finding a doctor to support its position. "You looked at 20 to 25 people before you

found Dr. Armentrout, and he represents a fringe minority of the medical profession."[10] Second, the testimony of that witness might have been edited to amplify the effect of the risk to which he testified, but was not. In fact, the court's decision not to use the testimony more selectively creates the effect of stammering and inconclusiveness on the part of the witness. Finally, the testimony, its use in the opinion, and the ways it translated into media representations of the case signal contested processes by which scientific evidence is infused with meaning in legal discourse.

In his consideration of scientific certainty as construed by the lower court, Judge Poole writes,

> [The lower court's language] demonstrates that the district court failed to follow the legal standards set forth in *Arline* and improperly placed an impossible burden of proof on the petitioner. Little in science can be proved with complete certainty, and section 504 does not require such a test. As authoritatively construed by the Supreme Court, section 504 allows the exclusion of an employee only if there is "a significant risk of communicating an infectious disease to others." . . . In addition, *Arline* admonishes courts that they "should defer to the reasonable medical judgments of public health officials." . . . The district judge ignored these admonitions. Instead he rejected the overwhelming consensus of medical opinion and improperly relied on speculation for which there was no credible support in the record.[11]

After discussing this misapplication of scientific evidence, the appellate court judge cites three other published opinions wherein the risk of HIV transmission in educational settings was determined to be minimal.[12] He continues by asserting that, "it was error to require that every theoretical possibility of harm be disproved."[13] The voice of a single witness here is not allowed to determine the outcome of the case, and the gap between legal and scientific certainties is narrowed.

Underscoring the rhetorical allocation of knowledge and uncertainty Judge Sneed agreed:

> I concur in Judge Poole's opinion. Confronted with some uncertainties about scientific truth, judges, perhaps above all others, should act on the basis of that which is known, or, where that is not possible, on the basis of that which those best qualified to speak say is known. Judge Poole has set out clearly what those best qualified say they know, and we have no

> choice but to accept their version of the truth. We can neither await ultimate validation nor reject their version on the basis of our awareness that the truths of medical science are frequently revised in the light of new data.
>
> No doubt the possible catastrophic consequences of a substantial alteration of the current truth unduly influenced the district judge. His calculus was impermissibly flawed, however. Chalk, on the basis of current, and perhaps permanent, truth, demonstrated high probability of success, and on the basis of the same truth showed that the balance of hardships tipped sharply in his favor. This was his burden and he successfully carried it.[14]

These contests for rhetorical superiority were also taking place in the popular presses. Dr. Armentrout's testimony was cited in the *Los Angeles Times*, where he was identified as director of hematology and oncology at the University of California at Irvine Medical School and quoted as saying he believes that the AIDS virus is "potentially infectious" in tears and saliva. Furthermore, he was quoted asserting that it is "probable (that) other means of transmission will be discovered." Meanwhile, the same article quotes the American Civil Liberties Union's attorney, Paul Hoffman, as stating that the HIV transmission risk to students from a teacher with AIDS is "probably less than an airplane engine falling out of the sky onto the school." The county's lawyer, Ronald D. Wenkart, responded to Hoffman with the following: "Certainly, there might be a greater probability of an airplane crash, or a car crash. But they (the students) might survive an airplane crash. The might survive a car crash. So far, we don't believe that there is any possibility of surviving AIDS. We're not trying to hide away this teacher. We're not trying to put him in a closet. He'll be working with other adults; he'll be working in the same office I work in."[15] The article continues, citing Judge Gray's ruling from the district court that initially upheld the county's decision to take Chalk out of the classroom. There, Judge Gray acknowledged that Chalk had answered a great calling by becoming a teacher for the deaf, and invoked his own status as a parent and grandparent to support his concerns about the possibility of any child becoming infected. In the end, his doubts resurfaced: "It seems to me the problem is that we simply don't know enough about AIDS to be completely certain."[16]

These passages depict a nervous tension between the likelihood of HIV transmission, the damage associated with becoming infected, the status of the actors taking risks, and the hope of minimizing hysteria. In short, they evince contradictory motivations that place a child in a figural position of risks that must be minimized. The analogy of an airplane engine falling out of the sky and onto the school minimizes the risks but, in all likelihood, still overstates it. Narrowing the analogic gap the county's lawyer shifts the risk depicted in the scenario by suggesting that the figural child might survive an airplane crash (a statement that relocated the child, moving him or her out of the school and onto the airplane, thus amplifying the possibility of risk). But that risk is still too remote, so he moves the child out of an airplane, and into a car, and magnifies the risk even further. Once HIV transmission is as present and threatening as an automobile crash, however, he now is left in the awkward position of having to soften the possibility that he might be read as homo- or AIDS-phobic. The final quoted sentence denies these phobias by depicting himself and Vincent Chalk in a collegial relationship. Judge Gray's quotation of this contorted information displays extraordinary rhetorical balance. He, too, denies any homo- or AIDS-phobia through the acknowledgment of Chalk's noble calling, but then remagnifies the risk through the use of the figural child, calling upon his own status as parent and grandparent. Those moments of personal affect are then broadcast back out in the interests of protecting any child from the risks of the unknown. Seemingly lost, somewhere along the way, are questions about whether or not children should be protected from flying in planes or riding in automobiles.

Judge Poole's opinion for the appellate court is unusually sensitive to Vincent Chalk's interests, and takes into account not only his position and training as a teacher, but also considers the effect of HIV on his potential contributions and productivity. In his contemplation of the lower court's ruling allowing Chalk to be reassigned to a non-teaching position, Judge Poole noted:

> We believe this determination was clearly erroneous. In making its finding, the court focused on the monetary loss to Chalk and concluded that he was no worse off than before the reassignment. This approach failed

> to consider the nature of the alternative work offered Chalk. Chalk's original employment was teaching hearing-impaired children in a small-classroom setting, a job for which he developed special skills beyond those normally required to become a teacher. His closeness to his students and his participation in their lives is a source of tremendous personal satisfaction and joy to him and of benefit to them. The alternative work to which he is now assigned is preparing grant proposals. This job is "distasteful" to Chalk, involves no student contact, and does not utilize his skills, training or experience. Such non-monetary deprivation is a substantial injury which the court was required to consider.[17]

Shortly thereafter, the opinion hammers the point home even more forcefully:

> An additional factor favoring a preliminary injunction here arises from the very nature of Chalk's affliction. Studies and statistics of etiology and terminus of AIDS show that although the time during which such a person may be quick and productive varies, the virus is fatal in all recorded cases. Presently Chalk is fully qualified and able to return to work; but his ability to do so will surely be affected in time. A delay, even if only a few months, pending trial represents precious, productive time irretrievably lost to him. We therefore conclude that the district court's finding that Chalk had not demonstrated any possibility of irreparable injury was clearly erroneous and must be reversed.[18]

Several rhetorical features of these passages work to contest the depiction of risk, decline, irrelevance, and marginality of PWAs that were common in earlier chapters. Perhaps most striking is the hierarchy of values reflected in the court's language. That Chalk's monetary position is relegated to a position inferior to the satisfaction he gains from his job contrasts with the allocation strategies portrayed in earlier chapters, particularly given that such allocation first required the minimization of HIV transmission risk. A second unusual and remarkable feature of these passages is the extent to which the depiction of benefit is not drawn to include only Chalk, but his students as well. Perhaps the most compelling rhetorical moment, however, lies in the court's assessment of AIDS, longevity, and Chalk's happiness. Judge Poole has refrained from painting Chalk as in decline, thereby minimizing the perception of him as ill and potentially infectious, but has nevertheless amplified a sense of urgency by recognizing the limited

time period Chalk had to enjoy. The lower court's imagined airplane has crashed elsewhere and here the figural child reaps the benefits of her or his association with Vincent Chalk.

The figural child, five actual mothers, and several of Chalk's students further reinforced the symbolic effect of the decision allowing Chalk to return to work, and their efforts were not lost on the court. "The district court apparently miscalculated the reaction of at least some of Chalk's students and their parents. The mothers of five of Chalk's students joined amicus Disability Rights Education and Defense Fund in support of Chalk's appeal, and Chalk was greeted with homemade gifts upon his return to work following our order of November 18."[19] On May 6, 1988 the *Los Angeles Times* reported that Chalk and the county had reached an out-of-court settlement providing him with $35,000 and payment of $167,500 to his attorneys. Paul Hoffman, head of the ACLU of Southern California, said that employers had been warned by the case that if they discriminate against AIDS sufferers they would not only receive legal orders returning employees to work, but substantial damages as well. Vincent Chalk is quoted in the article as being very happy to be finished with the litigation. He added, somewhat optimistically, "It shows that people with AIDS are capable of continuing in their jobs as long as they are physically capable. They are no threat."[20]

The sanguine tone of victory was not, however, the only issue to emerge in these stories. The Orange County Edition of the *Los Angeles Times* noted the emotional welcome Chalk received when he returned to teaching, but also raised the issue of his impending death and its reception by students. " 'I would rather know (that he is going to die) than to have yet another shock,' said Rona Lev, 13, a freshman at University High who has worked with Chalk for three years. 'I can relish the moments that I have with him. It's so sad. He is so good, and it is so painful to (think) that he will be dead in two years.' "[21] The article proceeds to inform readers that, "many AIDS patients die within two to three years of diagnosis," and then to articulate the symbolic complexities raised by the settlement: "The county is concerned with how much kids are told, Chalk said. About how much I tell them about me, the disease and

how it is spread. They are concerned that too much is going to be said and that the kids are not ready for it."[22] Six months later, the *Times* attempted to put those fears to rest with an article written by Rebecca Leung, a junior at the high school where Chalk worked. The tone of that piece is clearly intended not only to shape our perceptions of Chalk, but to draw our attention to the transformative effects of his case. It begins with a description of the items pinned to the wall of his office, including a poem entitled, "I Love Myself the Way I Am," and the inspirational statement, "May You Walk Through Life With Courage and Optimism," then proceeds to describe Chalk in an interaction with a student preparing for a job interview. After a biographical sketch highlighting the teacher's accomplishments, the reporter offers the reader quotations from another student who has clearly overcome his homo- and AIDS-phobia as a result of knowing Vincent Chalk.

> Student Richard Brklacich, 17, said that because he had such a friendly relationship with Chalk, it stopped him from thinking negatively about AIDS victims. "It was difficult at first to accept Mr. Chalk because I was such a strong activist against gay rights," Brklacich said. "But when I discovered that he had AIDS, it was hard. It's different when you know a person well who has AIDS, so it changed me a lot. Before, I was an outspoken student against anyone with AIDS, but I don't say anything bad about anyone anymore because Mr. Chalk is a special teacher. He's probably the only teacher, who, as a teacher, makes friends with everyone. He has no personality conflicts."[23]

A curious transformation appears in this passage. The student expresses an initial reluctance to accept Chalk because of his homosexuality. AIDS, however, seems to have both confused and softened his opinions. Rather than turning Chalk into a potential threat, AIDS allowed the student to become sympathetic; but while we see a diminution of his AIDS-phobia, we may leave the quotation wondering if his homophobia was still intact.

Similar transformations reappeared in the coverage of Chalk's death. He died Tuesday, October 2, 1990, at the age of 45, and an often cited quotation from the court case was repeated in his obituary: "I really don't feel this is a gay issue, it's really a human rights issue." The usual range of emotions associated with grief are

depicted in the *Times*' coverage of his death, including sadness, anger, and contrition, but the transformative potential of the story continues to shape its tone. The school's superintendent who initially removed Chalk from teaching is quoted as saying, "All of us who are aware of Vince Chalk's excellent teaching ability regret his untimely departure. Our effort in going to court was to help chart a course through unknown territory at the time we learned of his condition. The danger posed by AIDS was still an uncertainty."[24]

The story of Vincent Chalk as related through legal and media discourse is, in part, a story of highly weighted linguistic snippets and a rhetorical realignment of knowledge and uncertainty surrounding AIDS, sexuality, and childhood. Headlines announcing that "Judges Must Confront AIDS Facts" suggest that innocence was indeed the more desirable condition, and one that courts had worked hard to maintain where AIDS and sexuality were concerned—a luxury that most gay men could not afford. The editorial following that headline then informed the reader that "[i]t is a well accepted medical fact that AIDS cannot be transmitted by casual contact," immediately displacing the vicissitudes of judicial knowledge with the authority of science.[25] Language from different court rulings across the life of the case was also quoted in selective reinforcement of Chalk's plight. Notably, references to his job reassignment as "irreparable injury," based on "irrational fear" that had placed an "impossible burden" on him to demonstrate that he was not a threat to students.

Brian Barlow

On June 7, 1986 Brian Barlow marched in San Diego's gay pride parade. As is often the case at queer political events, a number of antigay protesters gathered to express their homophobia. Court opinions and media coverage of Barlow's case display an unusual level of confusion, but all parties seem to have agreed on four points: Barlow was marching in the parade; there was an encounter of some kind between Barlow and one of the hecklers; there was a physical scuffle between Barlow and police officers during which he bit the officers; Barlow was taken to a hospital where a blood

sample was taken without his consent. As described in the appellate court's opinion:

> After an interchange between Barlow and the police, the facts of which are in dispute, a struggle ensued and Barlow was taken into custody. During the scuffle, Barlow bit two of the officers, drawing blood. Barlow was charged with two counts of battery against a police officer and one count of obstructing a police officer. Police took Barlow to the hospital for treatment of injuries he sustained during the arrest. In response to police questioning at the hospital, Barlow acknowledged that he is gay. The police then asked Barlow if he had AIDS. He said no. Police asked again and received the same reply. Finally, after continued questioning, Barlow said, "for the officers' sake, you better take it that I do [have AIDS]."[26]

This exchange remains potent despite being processed through the multiple filtering mechanisms of police records, court transcripts, and its final distillation into a judicial opinion. The court's opinion here acknowledges factual uncertainty surrounding the encounter between Barlow and the homophobic hecklers, and asserts with certainty that Barlow's bites drew blood. Some newspaper coverage of the case indicates that although Officer Raymond Shay was bitten on the knuckle, and that the wound bled, Officer George Ground testified that he was bitten through his uniform and tee shirt, and that neither his clothes nor his skin were punctured.[27] Other reports indicate that both bites drew blood from both officers, thus whether and to what extent Barlow actually injured the officers is somewhat debatable.[28]

The unremarked elision from Barlow's asserted gayness to the assumption that he was HIV positive deserves discussion. Court records and media reports all indicate that the dialogue between Barlow and Officers Ground and Shay was more than a casual question and answer exchange. The court opinion and media reports suggest that Barlow was asked repeatedly about his sexual orientation, and that it was the fact of his gayness that led the officers to assume that he might be HIV positive. In 1986, the automatic alignment between homosexuality and HIV is not surprising in itself. However inaccurate it may have been, the association of HIV with particular groups was common and reasonably reliable at a moment in history when tests for HIV were only a year old and

their use and utility were still being debated. What is surprising about the exchange is its display of variation in subtle understandings of HIV status between a politically active gay man and some presumably, although not certainly, heterosexual representatives of the state. In 1986, and oftentimes still, expectations about sexual practices, monogamy, and sexual orientation lead to assumptions about HIV status that are not always accurate. Gay men are more likely to recognize that their serostatus is not a static condition. Although Barlow may have been tested—and eventually reported in later media coverage that he was negative, indicating that he had been tested—his exchange with the officers may have signaled nothing more than an admission of sexual activity coupled with the knowledge that a person's status might change. The officers, on the other hand, seem to have been operating under the assumption that all gay men were potential risks. Throughout the history of AIDS, gay men working to protect themselves and their health have done so, in part, by assuming little and minimizing risks. Such a strategy requires knowing one's own status and behaving accordingly, and recognizing that testing one's partners says little about one's own health.

Following their exchange at the hospital, the officers asked for Barlow's consent to take a blood sample for HIV testing. Barlow refused, but upon returning to the police station the police took a blood sample without consent and without a warrant. Some time later, police obtained a warrant that allowed drawing a blood sample, but that did not authorize testing for HIV. Pursuant to the warrant, police obtained a second sample of blood. The California Court of Appeals held that the second sample was invalidly drawn for lack of probable cause and a jury unanimously acquitted Barlow of all criminal charges; neither blood sample was tested for HIV.[29] Subsequently, Barlow filed a civil suit against the officer responsible for his arrest and nonconsensual blood sampling, and the trial court granted summary judgment on behalf of the police officers. On appeal before the Ninth Circuit, Judge Pregerson ruled that there was a genuine issue of material fact regarding probable cause and the use of excessive force. Furthermore, he asserted that the police violated the fourth amendment through

the warrantless seizure of Barlow's blood. As a result, the case was remanded for further consideration before a jury.

The appellate court opinion explores the intersection of science and law, asserting that "[a]n analysis of the constitutionality of seizing Barlow's blood requires an understanding of AIDS, the Human Immunodefiency Virus (HIV) that causes AIDS, and the medical tests that are available to detect the presence of HIV."[30] The opinion proceeds with discussion of HIV infection routes, testing practices, and the progression of disease, followed by a comparison to *Schmerber v. California*.[31] There the U.S. Supreme Court upheld the warrantless seizure of blood from a drunk-driving suspect, asserting that accurate measurements of blood alcohol content required quick action on the part of police officers. The opinion in *Barlow*, by contrast, recognizes that HIV antibodies do not diminish with time and thus, "*Schmerber* does not permit the warrantless taking of blood to test for HIV."[32] Furthermore, the court argued,

> Even if Barlow was infected with HIV, it is highly unlikely that he could transmit the virus by biting. Moreover, even if such transmission were a realistic possibility, the officers could not decrease or increase the risk to their health by forcing an immediate nonconsensual blood test. Unfortunately, if the bite did infect the officers, there is no medical technique to reverse or retard the infection. It makes no difference to the officers' health whether Barlow was tested immediately, without a warrant, or a short time later pursuant to a warrant.[33]

Although post-exposure prophylaxis (PEP) has developed considerably since 1991, the court's assertion here is largely in line with established medical knowledge at the time. More important, however, is the way the passage allocates HIV transmission risks and the certainty of infection. It begins with a tacit acknowledgement that Barlow was not seropositive: "Even if. . . ." The following sentence distances the possibility of transmission even further by minimizing the utility of the immediate nonconsensual blood test. The passage concludes by disuniting Barlow's serostatus from that of the bitten officer(s), and establishes that the only way they can know their own serostatus is to have themselves tested for HIV.

Newspaper coverage of this story was extensive. In 1986, when it began, there was clearly a lot of uncertainty among members of

the legal, medical, and gay communities surrounding AIDS. From the *Los Angeles Times*: "In earlier hearings, [Defense Attorney] Hughes argued that testing Barlow for the AIDS antibody would not determine conclusively if the officers had been exposed to the disease. He noted, too, that medical experts know of no known case of someone contracting the disease by being bitten by someone carrying the antibody or infected with AIDS."[34] The passage reflects considerable confusion. It quite correctly recognizes that testing Barlow would not reveal anything about the serostatus of the officers he bit. Oddly, however, it makes a distinction between "someone carrying the antibody" and a person "infected with AIDS." This scientific uncertainty spills over into the following paragraph reporting the testimony of an epidemiologist who asserted that an individual with the antibody is "capable of transmitting the disease." Missing from these bits of reported evidence is the virus itself and recognition that Barlow was not HIV positive.

Media reports of the case pit Barlow against antigay counterdemonstrators; in early October, 1988, Barlow was described as a marcher in a gay pride parade involved in a skirmish with fundamentalists. By October 28 of that year, he is described as having been involved in a confrontation with fundamentalist Christian hecklers. The following day, we get more detail, and the fundamentalists are identified as members of the Bible Missionary Fellowship. On June 10, 1987, the *Los Angeles Times* reported that he had squirted water at antigay demonstrators. Barlow's attorney, C. Logan McKechnie, made use of these slippages, arguing to the jury that, "It's a case of contradictions from the beginning."[35] According to police testimony offered at his trial, Barlow ignored a warning to stop harassing protesters, knocked down a sign one of them was carrying, and squirted her with water. The woman was never located by the prosecutors and thus never provided evidence for the contention. After his acquittal, Barlow was quoted as saying that he was "happy to have the ordeal over with," and that "there were so many lies told." One of the jurors interviewed after the verdict claimed that the jury had not discussed much of the assertion that officers had used excessive force because they felt from the beginning that the arrest was unjustified. "AIDS is a very serious issue. I hate to see

it used as a political football or, in this case, to inflame the jury," Barlow said, adding that he does not have the virus.[36]

There are curious syntactical variations between different editions of the *Los Angeles Times* and the court opinion's presentation of Barlow's exchange with the officers regarding his HIV status. The court opinion indicates that Barlow was repeatedly questioned about his HIV status and that he repeatedly told the officers that he was not infected. The court's treatment of the exchange is pointed, concluding, "[f]inally, after continued questioning, Barlow said, 'for the officers' sake, you better take it that I do [have AIDS].' "[37] The bracketed insertion at the end of the sentence indicates that the officers asked Barlow, do you have AIDS?, and that after hearing the question repeated he replied, "for the officers' sake, you better take it that I do." The *Los Angeles Times* reported this quotation somewhat differently, "You better take it that I've got AIDS for the officers' sake." This minor shift would be unremarkable were it not for the fact that the *Times* further edited the quote and used it as a section heading within the article. The article begins with a summary of events leading up to the arrest, and then turns to the nexus of the resultant legal case under the heading "I've Got AIDS."[38] The subtle changes in Barlow's reported statement alternate between what could be read as an exasperated and clipped reply, to one that has been filled in and completed by the court, to the declarative "I've Got AIDS" subheading in the newspaper report that inspires a very different interpretation of the events. Some of the headlines published as the case progressed were confused, conflicted, and occasionally funny: "High Court Upholds Ban on AIDS Test for Cop Biter,"[39] "Jury Begins Talks in Gay Marcher's Case; Accused of Biting Officers During Tussle with Fundamentalists,"[40] "Gay Marcher Acquitted in Police-Biting Case."[41] Some, however inaccurate, had more potentially damaging effect: "Judge Upholds Blood Test for Victim of AIDS."[42] As noted above, Brian Barlow was HIV negative; how he became a "victim of AIDS" for the purposes of that particular headline remains a mystery.

The interaction of scripts and consciousness in the case of Brian Barlow is tricky. Media coverage of the events lapses into

the rhetorical tendencies we saw in earlier chapters, and draws together the homosexual litigant and AIDS in an attempt to produce a stable gay/AIDS subject whose malleable potential for transmission justifies state power. Such rhetorical elision does not, however, spill into the court's final decision here: Barlow was gay and HIV negative, thus managing transmission risk was less useful; it was the power of the state that was instead realigned.

John Doe

Doe v. The City of New York[43] arose in 1991 when Pan Am Airlines filed bankruptcy and Delta Airlines assumed some of their services and hired many of their employees. According to the *New York Times*, Delta interviewed ten thousand former Pan Am workers and hired seven thousand of them.[44] Three hundred people among the three thousand not hired filed complaints with the New York City Commission on Human Rights, alleging that when interviewed they were asked discriminatory questions about their sexual orientation and other private matters. John Doe, an employee of Pan Am, was among those three hundred employees and in February of 1992 he filed a complaint with the New York City Commission on Human Rights. In that complaint Doe alleged that he was denied employment because he was gay and HIV positive. In August of 1992 the parties entered into a conciliation agreement and Doe was hired by Delta with retroactive back pay, seniority privileges, and monetary damages. Part of the agreement reached read as follows: "Except as required by any court or agency or upon the written consent of Doe or his attorney, Delta and the [Commission's Law Enforcement] Bureau agree not to disclose Doe's given name through any oral or written communication which identifies Doe by his given name as the plaintiff in this lawsuit or as a settling party to this Conciliation Agreement to any person that is not a party to or involved with this proceeding."[45] Doe went to work for Delta airlines on August 4, 1992. On August 6, Delta issued a press release summarizing the terms of the agreement. On August 7 and 8, New York area newspapers published articles drawn from that information.

Although none of the articles identified Doe by name, they explicitly stated that the employee was HIV positive and provided enough information to readers that people who knew Doe were capable of determining his identity; for many of those readers, the news of Doe's HIV seropositive status was a revelation, and so Doe filed suit.

In his complaint Doe contended that he had suffered discrimination and embarrassment at work, as well as extreme anxiety, due to the unwanted publication of his HIV status. Prior to the article, Doe had informed only his doctor, attorney, and the individuals involved in his lawsuit that he was HIV positive. Doe had not shared the information with his family, friends, or colleagues at work for fear of ostracism and discrimination. Judge Griesa for the lower court dismissed the case, asserting that Doe's asserted constitutional right of privacy would not extend to an agreement that was already a matter of public record, and argued instead that the proper issue for litigation would be one of interpreting the contract agreement regarding confidentiality. Central to that discussion is a section of the New York City Administrative Code providing that every conciliation agreement would be a matter of public record, "unless the complainant and respondent agree otherwise and the commission determines that disclosure is not required" to further the purposes of the commission and the statute.[46]

Appellate court judges disagreed and reversed and remanded the case. After reviewing the factual and legal issues, the appellate court offered the following:

> Clearly, an individual's choice to inform others that she has contracted what is at this point invariably and sadly a fatal, incurable disease is one that she should normally be allowed to make for herself. This would be true for any serious medical condition, but is especially true with regard to those infected with HIV or living with AIDS, considering the unfortunately unfeeling attitude among many in this society toward those coping with the disease. An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information.[47]

Having provided this social context to frame the facts and issues in the case, Judge Altimari turns to the city's argument: Doe had

no privacy interest in his HIV status because the transcript of the case was already a matter of public record. "We find this argument to be meritless, in conflict with not only the actual language of the statute, but also with what is presumably the intended purpose of the statute."[48] Turning to the same language cited above from the lower court, Judge Altimari's opinion realigns our interpretation of the code by noting that the statute gives the Commission discretion to determine when information might be left undisclosed, and in particular observes that such circumstances are appropriate when the issue is one of confidential information. Furthermore, the court notes that the city's argument defeats the purpose of having a Commission on Human Rights. Indeed, the purpose of the commission is to guarantee human rights for the people of New York, including the right to privacy and control over certain types of personal information. "An Orwellian statute that mindlessly and indifferently mandated that any and all information provided to the Commission automatically became a public record—even in cases where the reason the complainant went to the Commission was because of a violation of a right to privacy—would be patently inconsistent with the protection of individual privacy rights, and thereby inconsistent with the purposes of the Commission."[49] Furthermore, the appellate court recognized the speciousness of the City's claim that "because the Commission is a public agency all information provided to it is a automatically a matter of public record is to undermine entirely the purpose of a Commission on Human Rights, and to heedlessly make public that which is often surely intended to remain private. We refuse to believe that the statute could have been intended to yield such a result."[50] The court concludes by ruling that Doe had a right of privacy in information about his HIV status and that that information did not automatically become public when he entered into the Conciliation Agreement. The court left open, however, the question of whether or not Doe's confidentiality was more absolute than other types of personal information that might have been released, how the city's interest in disseminating information might be balanced against confidentiality, and the factual issues of whether or not the press

release actually identified Doe. Doe's case attracted media coverage that, for the most part, emphasized the groundbreaking nature of the outcome. The *New York Times* and *Newsday* both reported on the decision, selectively quoting Judge Altimari's language asserting a constitutional right to privacy where HIV infection is concerned, and described the ruling as a milestone.[51]

Discussion

Like the cases examined in previous chapters, these scripts also organize the social facts of AIDS by managing perceptions of HIV transmission risks. They rely selectively on the medical "facts" of AIDS, rehearsing the contributions of science very succinctly and with specific rhetorical effect. In *Barlow*, Judge Pregerson's opinion took note of HIV transmission routes, stating that the virus is transmitted "only through the exchange of semen or cervical or vaginal secretions during sexual contact, from transfusions of blood products that have been contaminated with the virus, by the shared use of hypodermic needles that have been contaminated, and between an infected pregnant woman and her fetus."[52] A list of potential transmission routes is reiterated in *Chalk* but qualified by Judge Poole with regard to the educational setting at issue in that case.

> There is no known risk of non-sexual infection in most situations we encounter in our daily lives. We know that family members living with individuals who have the AIDS virus do not become infected except through sexual contact. There is no evidence of transmission (spread) of the AIDS virus by everyday contact even though these family members shared food, towels, cups, razors, even toothbrushes, and kissed each other. . . . The Surgeon General also specifically addressed the risk of transmission in the classroom setting: "None of the identified cases of AIDS in the United States are known or suspected to have been transmitted from one child to another in school, day care or foster care settings. Transmission would necessitate exposure of open cuts to the blood or other bodily fluids of the infected child, a highly unlikely occurrence. Even then, routine safety procedures for handling blood or other bodily fluids. . . . would be effective in preventing transmission from children with AIDS to other children in school. . . . Casual social contact between children and persons infected with the AIDS virus is not dangerous."[53]

This passage does important rhetorical work in its depiction of HIV transmission risks by appropriately circumscribing the risks in settings that involve casual contact. That Judge Poole has gone to such lengths to reassure a potentially alarmist group of parents stands in sharp contrast from his colleagues who authored *Coleman*, *Marcella*, and *Leckelt*, cases that centrally maintained the association between homosexual identity and AIDS. These cases contain several passages that indicate a different use of both sexual orientation, HIV transmission, and AIDS, as well as an understanding of the prevalence of widespread fears and ignorance and their potential to cause damage. Whereas acts and identities appear to shift in earlier chapters, the judges who authored the majority opinions in *Doe*, *Barlow*, and *Chalk* explicitly distinguished between them. Notably, in none of these case opinions does the word "homosexual" appear; Doe and Barlow are explicitly referred to as gay men,[54] and in those opinions their sexual orientation is pertinent to the case. In Chalk's case, sexual orientation had no relevance to the case and, unlike many of his colleagues on the federal bench, Judge Poole opted to leave the identity marker aside.[55]

The *Chalk* opinion rhetorically minimized HIV transmission risks and defused potentially unrealistic fears by relying on cautious language. The repetition of that language in media coverage furthered the effect. The tone of the passage cited above is one of certainty, reiterating what is "known" about the potential for HIV transmission through casual contact. The disassociation between Chalk's sexual orientation and his role as a teacher is established in the first sentence of the passage—there is no known risk of nonsexual transmission in our daily lives. The second sentence produces the same effect more forcefully by establishing a comparison between the domestic scene of cohabitation and the classroom. If the intimacies of domestic life such as sharing razors, toothbrushes, and kissing pose no threat of infection, then the classroom should be entirely risk free. Turning to the classroom specifically, the court further underscores the argument with reference to the Surgeon General's findings and, despite the shift that

momentarily addresses transmission between students, concludes by returning to the situation at hand. Transmission risks between teachers and students are portrayed as practically nonexistent.

The relationship between sexual identity and HIV status is equally disjointed in *Barlow*. Brian Barlow's troubles began in a setting that marked him as gay from the outset, and despite the media's confusion between that fragment of information and his negative serostatus, the courts were left with a scenario that provided no room to renegotiate the relationship between the two terms: Barlow was gay and HIV negative. The judge's rhetorical approach removes Barlow from the position of threat and realigns the possibility of infection onto the police officer who was bitten during the scuffle. In sharp contrast to the cases involving seropositive inmates who bit guards, the language in *Barlow* places the ability to determine infection at the point where the infection would have existed: in the blood of the bitten officer. Ironically, AIDS is here written onto the body, but not the body of the homosexual.

The case of flight attendant John Doe raises the problem of risk somewhat differently. There, the risk stemmed not from the possibility of HIV transmission but from the unwarranted transmission of knowledge about his serostatus. The threat, therefore, was to Doe himself who stood to lose control of information, and who feared emotional fallout as a consequence. Prejudice and irrational fear gird the language of the court's opinion here, and in the end, the city statute is upheld, and the plaintiff's ability to manage his own privacy interests is granted.

There are two aspects of these cases that distinguish them from those examined in earlier chapters. An important variation is to be found in the institutional contexts from which these cases emerged. These case scripts circulate through settings that are neither marginal nor carceral. Unlike the adult theater cases, they require no border patrol; the demilitarized zone between heterosexual and homosexual remains unchallenged. In contrast to the cases of Chapter 3, no one here has potentially infected an unsuspecting "innocent," and thus there is neither the need nor the possibility of writing either AIDS or sexuality onto a legible body.

Despite the tussle and biting incident at the origins of Barlow's troubles, his negative serostatus and the ability to fix that point of reference are an important point of divergence. Although Barlow was briefly in police custody, none of these litigants was a prison inmate. Finally, nowhere in these scripts can we find risk to the charmed inner circle; heterosexual AIDS is not present, and thus there is no need for that second closet. In sum, these cases emerged onto a field of social power that was diffuse, but more importantly, where such power must be more invisible in order to succeed. As Foucault observed of panopticism, when the technologies of social power are exercised seamlessly and completely, their inner workings do not show. The power–knowledge nexus in these cases exists outside the prison and therefore must be subtly deployed.

As with the opinions examined in previous chapters, *Chalk*, *Barlow*, and *Doe* are all driven by the unknowable, and it is the produced absences that set the terms of the debate and establish their rhetorical logic. Chalk's illness and decline are unknowable such that he may continue to be productive and quick. Because Brian Barlow was HIV negative, the state's power must there become unknowable. And in *Doe*, the closet remains intact as the plaintiff's privacy rights are assured, ironically, after his identity and serostatus had already been revealed. What differs here is that the absence of information stands up against declared certainties about the litigants' sexual identities and serostatus. Unlike the cases from earlier chapters, these scripts must reallocate the known and the unknown in different patterns. The case opinions in this chapter differ most visibly from those in earlier chapters through an explicit rebuttal of the "social facts" of AIDS through a deployment of the same medical/scientific facts that were used in other ways in other settings.

Each of these cases could have gone the other way; each litigant could have lost, but he could not have lost through the same linguistic strategies. Had that happened, the logical structures of each script would have to have shifted and such movements in these scripts would have been troubled by the fixed point provided by the visible and identifiable homosexual. We could not have read with sympathy of Vincent Chalk's limited time, John

Doe's entitlement to privacy and control over his own serostatus, and the jury's acquittal of Brian Barlow in cases that had had alternate outcomes. If the audience were drawn in to empathy with these litigants, and the state's exclusions of them had remained, the power of the state would have been rendered too visible and coarse. The effects would have resembled *Young*, but here the effectuating institutions would have been the courts. Moreover, in each instance, the evidence available would have to have been elevated to a point of extreme speciousness, and while such a tactic clearly succeeded in other settings, it would have been a risky rhetorical strategy in cases involving a popular gay teacher, a nondiscrimination statute, and a jury's determination of an overzealous police officer. With sexuality, serostatus, and HIV transmission risks stabilized in these scripts, the only flexible term would have been the power of the state. Ironically, in each of these scripts, that is precisely the term that shifted, and in very subtle but insidious ways, the power of the state expanded, protecting gay men from discrimination.

The discursive community wherein these scripts become logical is broader and more pervasive than what we have seen in previous chapters. Moreover, the consciousness of ironic negation is reflexive; the power of the state is established and denied in the same instance. Overruling Orange County school administrators and the San Diego police force, while at the same time upholding New York City's antidiscrimination statute, has, in each of these cases, brought the homosexual subject, and especially the gay/AIDS subject within the regulatory machinery of the state. The conditions obtaining within and around each of these scripts allow for regulation that displays, in Foucault's language, how effective punishment must have humanity as its measure; these scripts indeed reveal an "enigmatic leniency."[56] These cases would seem also to indicate, as legal scholar Mariana Valverde suggests, that "gays have become white—as the Irish did before them, and the Jews (in North America, at any rate) as well."[57]

CHAPTER SIX

Valuable Uncertainties

Irony and jurisprudence make quarrelsome bedfellows. The former displays the problematic nature of language itself, and forces us to recognize that there are always gaps between speaker and audience, utterance and silence, message and meaning, community and exclusion. If we stare too long, everything starts to lose coherence and the effect becomes kaleidoscopic; meaning disintegrates altogether.[1] The latter, meanwhile, asks us to overlook our doubts and to find continuity. History and reason provide patterns of predictability and a comforting sense of order whereby the past, present, and future appear linear and we can see where we are going; meaning is stabilized.

Juxtaposing the two as a way of reading law serves both ends simultaneously and with mitigating effects. Attending to the ironies of legal language invites us into randomness and entropy, and pushed to its extreme it might leave us without agency, predictability, or meaning. But before we get that far, jurisprudence brings things back into focus. Ironic jurisprudence shows how silences and gaps in legal language are not merely oversights, but constitutive absences that frame what is present. Identifying discursive communities and the schemas through which these scripts make sense allows us to see the techniques through which the charmed inner circle is reinscribed. The heterosexual/AIDS closet

J. Rollins, *AIDS and the Sexuality of Law*

and the gay/AIDS subject are made present and the "mediating institutional elements seem for a few moments to disappear."[2] We see more clearly the heterosexist logic of these case opinions. The regulatory power of the state operates seamlessly on the bodies of people with HIV and through space, and the ways we know AIDS has become a situated and effective power–knowledge nexus. Despite irony's complex optical effects, the patterns remain geometric.

The foregoing chapters should allow us to see more clearly the ways that knowledge of AIDS and sexuality "graces us with an endless succession of interpretive certainties," however slippery those certainties may be.[3] Linda Hutcheon's description of irony as evaluative, complexifying, and requiring a background of shared meanings can be well applied to the uses of science in the legal discourse of AIDS.[4] While it would be almost (if not entirely) trite to argue that law is evaluative, there is something satisfying in observing the many ways that such discourse complexifies the relationship between the known, the unknown, and the unknowable and generates new certainties with them. Even more interesting, however, is what it can tell us about the discursive strategies, political tactics, and power alignments deployed by those who indulge or resist these centripetal forces. From this perspective, there seems to be a stable and predictable jurisprudence of AIDS.

Implicated Heterosexuals

The stories told in Chapter 2 foreground the human tragedy of AIDS more than the others for several reasons, and with some noticeable if unintended effects. Three of the four cases examined involved heterosexual litigants, all of whom were married and/or parents, and whose illness and legal claims were represented in language that foregrounded their suffering and the disruption of their "mainstream" lives, and established both empathy and sympathy for the reader. That the stories of the Colemans, John Marchica, and Carol Marcella were so depicted contrasts with the rhetorical work done in the case of Kevin Leckelt. For Leckelt, whose life was equally disrupted, whose lover died during the

course of events, and who was also ill, but who was represented as a threat, the possibility of sympathy with the plaintiff was minimized. These former three cases rely on a second closet of heterosexual AIDS in order to maintain the stability and purity of the charmed inner circle.

Might it have been possible for Kevin Leckelt's story to have been told in language that manifested his illness, fear, and decline? The possibility certainly existed, and in fact, the lower court opinion, evidence offered by hospital administrators, and the policies cited by them in support of their position all contained the seeds of an argument that never germinated: HIV positive people face heightened risks of infection and injury that could be overlooked among the HIV negative. The court could have maximized the rhetorical effect of this point, linked it to available evidence and testimony, and the outcome of the decision could have been maintained, but it would have produced a sympathetic gay/AIDS figure who was treated unfairly by the actions of his employer. That the rhetorical economy of threat and risk depicted in these four opinions were allocated as they were, and that those allocations were unrelated to case outcome or their potential effect on policy suggests that the symbolic and interpretive potential in each instance served other goals. The holding could have remained static despite the tone of the opinion, and the only risk would have been to alter the relationships between scripts and consciousness. The heterosexuals are depicted as innocent victims of tragic circumstances; their relationships with their spouses are present; their health is represented as decimated by AIDS—even in the absence of HIV. The distinction between innocent and guilty victims of AIDS would have been undermined by such a rhetorical shift.

In addition to the strategic portrayals of the people who occupy figural roles in these opinions, the factual claims made by more peripheral characters might have raised doubts about their credibility. The ability of a phlebotomist to detect the dishonesty of a blood donor, the dramatic testimony of Gladys Verbus, the psychiatrist who profiled John Marchica—all are used to establish a baseline logic for each opinion despite the unstable nature of the information they offered. Yet the motivations, biases, fears, and

potential benefits of these individuals are relegated to a rhetorical closet. What might these players have gained from offering the testimony they did? For a phlebotomist with the Red Cross to protect her employer seems a reasonable response, particularly given the widening circle of investigation that could have potentially drawn her into suspicion. If a strategy of identifying HIV-positive donors and demonstrating that they were at fault for spreading HIV had failed, might the Red Cross have continued to avoid liability by demonstrating that the fault lay with its employees? Although the court recognized the shakiness of Gladys Verbus' testimony, exploring her reasons for participating in the case and how she came to be there are unremarked. What could have inspired her participation? Was she the only former patient of Leckelt's who was willing to testify? Was she the only one willing to offer potentially damaging testimony? Was she especially homophobic—and to what extent did Leckelt read as gay? And what of John Marchica? What interests were served by maintaining a credible depiction of him as psychologically unstable? His therapist's, perhaps? His own? I do not mean to suggest that these doubts should have surfaced in court opinions, or that there was even a legal or rhetorical opportunity for the judges to raise them. What I hope to accomplish by pointing to them here is to render legible other possible relationships between the known and the unknowable.

Unnoticed Secondary Effects

The adult theater cases examined in Chapter 3 display a form of sexual logic that relies on the conflation of shame, space, and commodification. On the whole, they most starkly display an inability to imagine a sexual epistemology beyond the one that is most trenchant, or to see the limitations of the dominant system. Establishing lighting requirements, hours of operation, and mandating the removal of doors within adult theaters can only deter HIV transmission if patrons are unwilling to be seen entering or leaving the theater or engaging in sexual acts. Read from this direction the cases in Chapter 3 circulate knowledge in the vicinity of the closet and resist having to contemplate sexual act/identity

configurations for which our present taxonomic scheme lacks the necessary vocabulary. The ever-expanding acronym intended to contain and describe sexual minorities as a subset of some mythical "general" public—LGBT, or sometimes Q, but the contests over that remain troubled, generational, and emotional— remains fixated with the legible identities adopted by people who behave in prespecified ways. Identity categories within that subset have ramified, queering relationships between public identity and less-visible behaviors (ff, cbt, femmes, bears, tops/bottoms, butches, boi toys, sissies, fuck buddies, etc.). What these case materials illuminate is the uncharted territory between publicly displayed and (in)coherent identities and individual desires and acts. These cases primarily involve men who display their sexuality as hetero and live their lives publicly displaying that identity and appearing to adhere to its requirements, but whose range of sexual desires and expressions are more omnivorous than either category can accommodate. We lack the vocabulary to describe straight men who fellate other men, or heterosexual-bottoms, or intergenerational pairings, despite the fact that there is nothing particularly new or novel about any of them.[5] Instead of accommodating limitless variations in human sexual expression, we simply lapse back into a gay/straight binary and categorize people according to the gender of their sexual partners. Our flawed, limited sexual vocabulary is a symptom of our culture's inability to accommodate non-heteronormative desires, identities, and behaviors, and without the schematic resources to make them legible, they remain within the category of unknowables that organizes these opinions.

The unmentioned targets of the regulatory policies described in Chapter 3 are pornography and public sex, and in those scripts censorship and first amendment infringements are rendered unknowable. Viewed from another angle, AIDS has the potential to organize and regulate sexuality on an even wider field. Not only is the gay/straight border patrolled and the contest of sexual identity marshaled in support of the state's position, but the spatial regulation and commodification of sexual pleasure are also contained. AIDS provides an apparently pressing reason for the state to regulate sexual expression without having to articulate or

contemplate the possibility that people enjoy the participatory opportunities and multiple sites of sexual display provided by a porn theater. Gayle Rubin's sexual hierarchy is reinscribed even more forcefully as the boundaries between good and bad sex are again made clear.

Unusual Indifferences

As I argued in Chapter 4, cases involving inmates are organized almost entirely around an especially trenchant yet capacious closet that is maintained by deliberate indifference, codes of silence, and a facade of penal authority. The possibility of rape or injection drug use haunts these opinions but is, for the most part, unknowable. When the possibility of rape surfaces in the case of Kenneth Young, the portrayal of him as a victim competes with his capacity to threaten the institutional power structures from which his case emerges. Judges, inmates, and prison officials carefully manage the information presented during the litigation process and, on the whole, the images that result are highly impressionistic. The other cases in Chapter 4 more prominently display the species of disregard with which Americans are likely to view many individuals that exist on the margins of society. They exemplify tactics of erasure that are not dissimilar from those that make it difficult to identify and organize the social, political, and economic needs of myriad other social groups.

More worrisome are the unasked questions that emerge from the cracks in the carceral facade. The demonstrated tendency toward the status quo illustrated in these cases is not unusual, but the scripts suggest an even more problematic set of failures. At the most visceral level, the brutality and disregard that organize inmates' lives and their relationships to prison guards perpetuate a spiral of violence that is not contained within prison walls. There is an ironic disconnect between the lack of political will to spend taxpayers' money on improving the system and our national propensity to define social transgressions in criminal terms, to mandate stiff prison sentences, and to build more prisons. Furthermore, as the Human Rights Watch documents, the American prison system is a

chaotic and dangerous place and the relief gained by inmates through litigation—often their only avenue of redress—is elusive. Together these cases demonstrate some of the problems and confusions generated by AIDS in the prison setting, but should also inspire us to rethink the ways that prisons are funded and managed, how the constitutional and legal issues that govern them are used and organized, and the ways that prisons are not in fact separate from the societies that build, operate, and fill them. The power relationships among inmates, prison guards, and courts, and the ramifications of them are part of these stories, but so are the symbolic and constitutional issues raised. What we should also see here are the health problems, the damaging technologies of social control, and the way they impact inmates' families and public health more broadly. These issues are far too often neglected on the American political and social agenda.

Impossible Burdens

It is instructive to compare the judicial rhetoric in *Leckelt, Marcella, Coleman*, and *Marchica* with that of the three gay men represented in Chapter 5: John Doe, Vincent Chalk, and Brian Barlow. The latter can be read as respected and valued members of their communities who were also targets of overzealous state actors. The somewhat distant language used to characterize their health status distinguishes them from earlier cases. Brian Barlow was not HIV positive, but the other two plaintiffs were, and in the case of Vincent Chalk, his health was in a state of decline at the time the litigation began; John Doe's health status is unclear from the opinion, but mention of his doctor and the historical moment of the case suggest that he may have been experiencing some early symptoms of HIV disease. It is ironic that in these instances the transmissibility of HIV, its threatening potential, and the threat represented by a teacher with AIDS are relegated to the background of the opinion, lessening our perception of them as dangerous as well as our sympathies with them. The irony deepens when we consider the extent to which Carol Marcella and Cynthia Coleman were described in terms of decline and imminent demise; it deepens even more when we examine the

visceral language used in the case of John Marchica, a married man who was never infected with HIV.

These patterns of language work at the intersection of sexual orientation, health status, state power, and case outcome, drawing from and at the same time perpetuating problematic constructions of AIDS. Centrally, however, they are all concerned with issues of HIV transmission and the conditions under which it might occur. In the final analysis, these opinions all tell stories about defining risk, assessing the possibilities for transmission, and enlisting state power to prohibit its transmission.[6] Drawing analogies between these cases is risky because they vary in so many ways and on so many levels. They raise different issues, involve different types of litigants, came from different parts of the country, and they ask very different questions about AIDS and people with HIV. Nevertheless, they invoke AIDS knowledge and circulate its attendant metaphors in ways that produce rhetorical effects within an established set of cultural codes.

Most obviously, they maintain a hierarchy of infection wherein gay men are positioned as an epidemiological source of HIV, thereby magnifying the horror and inappropriateness of AIDS when it has transgressed its "natural" borders. Evidence of this effect is apparent in several places. Although the health status of Vincent Chalk is lamented in the court's opinion, it lacks the medical detail and grimly worded predictions seen in the cases of Carol Marcella, Cynthia Coleman, or John Marchica. The latter three case opinions, involving litigants who are identified as married, are infused with an extra level of horror absent from cases involving gay men and thus have the rhetorical effect of augmenting the extent to which the audience can perceive heterosexuals with HIV as unusual or abnormal. Indeed, judges writing opinions in cases involving gay men who won their claims faced daunting linguistic challenges, but we can plumb the rhetorical effects of these opinions by considering whether or not the opinions would have remained logically coherent (or would have been more logically sound), if the AIDS narratives, case outcomes, and reliance on scientific evidence had been otherwise.

Even in opinions with outcomes that challenge our expectations, the courts were caught in a linguistic double bind: The language standing alone in those opinions worked in ways that could have been endorsed by many with HIV who very intentionally resisted the designation of victim status, but at the same time the absence of such a requirement among heterosexuals worked to further inscribe the gay/straight boundary among people with HIV. The absence of sympathetic language in cases involving gay men who won their claims, coupled with dark language among heterosexuals with HIV creates an ironic double bind that perpetuates the construction of AIDS as properly belonging to gay men. These rhetorical necessities and their unintended effects maintain a gay/straight boundary and allocate AIDS across it, minimizing the health effects when gay men are positive, and magnifying it when heterosexuals are.

Making Meaning

The cases examined in the preceding pages demonstrate shifting emotive affect and multiple rhetorical tones, but despite their variation there are commonalities. First, in each instance, it is the unknowable that establishes not only the terms of the debate but also its intensity. In each instance, some fragment of logic is relegated to a closet so that the resulting image may remain coherent. Furthermore, the debate echoes with political potential. Sexual consciousness is renegotiated when gay men and people with HIV are written into their communities or excluded from them, granted the ability to manage revelation of their identities and/or serostatus, and in the ways that they are positioned relative to the effects of state power. The argument here is not that the Coleman's should have lost their case, or that Kevin Leckelt should have won, but that the outcomes of those cases, the knowledge upon which they relied, and the perceptions they produced were not only dependent upon evidence, information, science, and facts, but on how elements of each of those things became unknowable. Building a solid rhetorical structure around

such uncertainty requires considerable effort, evoking drastic metaphors that have the ability to cause considerable damage.

Legal discourse privileges the scientific over other types of evidence, literally positioning it as relying upon the known, the facts, the observable evidence, the qualifications of experts—but even in those moments it is not always knowledge or solidity that matters. In the domain of the script, these debates swirl around the admissibility of evidence and nonscientific testimony. Discussions often track back to the Brandeis Brief, and move forward in an orderly manner until present scientific controversies surrounding cloning, abortion, the internet, environmental regulation (the list goes on) can be marshaled in support of a particular legal outcome.[7] It is rare for these discussions to consider the rhetorical effect of scientific discourse in a legal setting, or the ways that that silence shapes debates or outcomes.[8] At the time these cases were decided biomedical information about HIV disease was somewhat unstable and what science could tell us about sexuality was even more uncertain.

Drawing AIDS and sexuality together within a framework of scientific certainty has had the truly ironic effect of allowing legal certainties to emerge from discourses of doubt. Sedgwick's observation about the power of ignorance and its uses by our enemies is especially vivid in these cases, and the virulence of unknowing organizes their logic. Without referencing the charmed inner circle, with no attention paid to the ways that HIV is not homosexuality and vice versa, these scripts reveal an entrenched form of consciousness that vibrates between sexuality and legality. These scripts rely on schemas signaled by language, emerging from the interaction of litigants, witnesses, and judges in legal institutions, and the results make meaning in very scripted and intentional ways. The needs of the legal system and the needs of a dominant sexual system are reified and reproduced.

The impact of scientific and technological change on legal processes is frequently examined in media reports and has given rise to new debates about the relationship between scientific advancement and legal processes.[9] Current debate most notably highlights the uses of DNA evidence, illuminating with particular

clarity the accuracy of Sedgwick's observation that knowledge and ignorance do not correspond on a one-to-one basis. Scientific advances tend to destabilize legal processes and decisions in ways that are highly problematic for state institutions. The work of Barry Scheck and Peter Neufeld and the Innocence Project makes the point clear, as they work to see that DNA evidence is made available and used responsibly to exonerate inmates who have been wrongly convicted. Because of their work, and the growing accuracy and availability of DNA testing procedures, prosecutors and judges nationwide wrestle over the place of such technologies in legal processes. Is the better tactic to reopen cases, retest new evidence, or grant appeals to individuals who may be exonerated due to advances in the testing of DNA evidence? Or, do these advances have the potential to produce more convictions and facilitate the work of prosecutors? These contests reveal political dangers, sparking debates that threaten to undermine prosecutors, embarrass judges, and expose to public scrutiny the inner workings of a system that depends upon public support and conviction for its budgetary and political survival. This single scientific technique threatens, in profound ways, to redraw the power dynamics that currently stabilize criminal courts, prison administrations, and the (perhaps waning) American zeal for capital punishment, but it is not alone. Just as the Scopes trial continues to haunt the American educational system, giving rise to varying permutations of argument, so will the specter of DNA testing haunt criminal prosecutions.

Part of what is fascinating about AIDS in legal discourse are the techniques it calls up to make sense of the world. Consider the following discussion of irony offered by Stanley Fish: "Membership in the category of the indisputable is determined in the course of disputes; givens are not given but made, and once made, they can serve as the basis for unchallengeable observations, until they are themselves challenged in the name of givens that have been made by someone else."[10] The observation parallels Latour and Woolgar's description of scientific fact-making from *Laboratory Life*. They write: "Facts and artefacts do not correspond respectively to true and false statements. Rather, statements lie along a

continuum according to the extent to which they refer to the conditions of their construction." As statements solidify they move from being statements about objects to being the reason why the statement was made in the first place. An inversion takes place. Objects, and statements about objects, circulate in the laboratory setting and at some point the statement becomes a split entity: partially a statement about an object, and partially assuming the status of factual object. "Before long, more and more reality is attributed to the object and less and less to the statement *about* the object."[11] Latour and Woolgar here describe in a scientific context the same phenomenon articulated by Fish. "But what I have been trying to show is that interpretations rest on other interpretations, or, more precisely, on assumptions—about what is possible, necessary, telling, essential, and so on—so deeply held that they are not thought of as assumptions at all; and because they are not thought of as assumptions, the activities they make possible and the facts they entail seem not to be matters of opinion or debate, but a part of the world."[12] His observation neatly mirrors the constructive process that Latour and Woolgar identify regarding the relationship between statements, facts, artifacts, and objects. Facts are slippery and contingent. Legal conflicts happened in uncertain social, political, medical, scientific, and personal terrains in the first decade of AIDS, and as we have seen, were often short on indisputables and "out there-ness." By the time these cases were decided, scientists had established that HIV was transmitted through exchanges of bodily fluids. As we have seen, these conflicts were then organized around the question of whether or not bodily fluids had been exchanged and to what extent those events foreshadowed viral transmission. It is ironic that these legal scripts rely so heavily on scientific narratives to determine HIV transmission risks while scientists themselves would be much less likely to assert such certainty. The likelihood that HIV will be transmitted through fellatio, biting, or spitting is still scientifically debated, and yet here, we see those questions answered by judges. Throughout these scripts are rehearsals of the "facts" of AIDS, and they are organized and used in very specific ways that reflect a sexual epistemology. AIDS is homosexualized, drawn onto gay bodies, and

regulated there; heterosexual AIDS is rendered unknowable. The interactions of these individuals in these institutional settings rely upon and perpetuate a heterosexist discursive community and the mythological potency of science gives the process credibility. Damaging assumptions about AIDS and homosexuality continue to be laden with social value and lead to troubling allocations of important political resources.

This adulterous (if not also incestuous) marriage of scientific and legal discourses relies upon ironic logic. When uncertainty, technological or otherwise, was most pronounced and contained the seeds of political backlash, the legal language needed to render the obvious unknowable became more emotional. The adult theater cases, the transfusion cases, and the cases involving inmates foreshadowed little political or social backlash and the tone of the opinions there is relatively detached and clinical. Compensating John Marchica—an HIV-negative welder—at a time when people infected with HIV through medical treatment were failing to recover was socially and politically risky. We see especially ominous language used to frame his story. Returning Vincent Chalk—an HIV-positive gay man—to a classroom of children was politically and socially risky, and, once again, we see language in that opinion that amplifies our ability to sympathize with the plaintiff. We saw this tendency performed with severe effect in the aftermath of the acquittal of the officers who beat Rodney King; it manifested itself at multiple discursive sites when O. J. Simpson was acquitted; we find the same phenomenon alive and well—with some slight variation—in the rhetorical flourishes of Supreme Court justices at either end of the political spectrum.[13] Our shared certainties are easy, we agree upon them, and they require little rhetorical work in order to remain stable, but when the available narratives are uncertain, rhetoric becomes shrill. The gaps in our knowledge inspire contentious struggles that require more virulent judicial language in order to retain their persuasive force. Even more telling is what such uncertainties reveal about our conception of ourselves.

These ironic negations are indeed troubling, but because they are ironic, they are also cause for optimism. How we know AIDS and homosexuality, and how that knowledge circulates among the

unknowables, says a great deal about how we know ourselves. Richard Rorty offers us a figure he refers to as the "liberal ironist," a person (notably female—not unlike that of Kierkegaard), possessed of humility, who "faces up to the contingency of his or her own most central beliefs and desires," someone who has "abandoned the idea that those central beliefs and desires refer back to something beyond the reach of time and chance."[14] Aware of the contingency of language and prescribed systems of morality, the liberal ironist, Rorty believes, will move us away from an "us" versus "them" conception of society by separating the question "Do you believe and desire what we believe and desire?" from the question "Are you suffering?"[15] He writes: "I cannot imagine a culture which socialized its youth in such a way as to make them continually dubious about their own processes of socialization. Irony seems inherently a private matter. On my definition, an ironist cannot get along without the contrast between the final vocabulary she inherited and the one she is trying to create for herself. Irony is, if not intrinsically resentful, at least reactive. Ironists have to have something to have doubts about, something from which to be alienated."[16]

Rorty goes on to tell us that, "there was a time when [Marxism, Christianity, and utilitarianism] served human liberty. It is not obvious that ironism ever has."[17] Redescription (the project of the ironist) inspires humility, raises doubts about one's final vocabulary, and presents us with an opportunity to think more creatively about social structures we might otherwise perceive as rigid.[18] But ironically, identifying ourselves as ironists has the potential to destabilize the fundamental identities around which we organize our lives and make them meaningful. While it is certainly optimistic to hope for an end to AIDS, it is premature and possibly dangerous to hope for an end to the cultural category "homosexual."[19] Nevertheless, because the homosexual subject is interpretively unstable so is societal homophobia. Ironism may not proximally serve human liberty, but its ability to inspire humility, raise doubts, and call into question our final (heterosexist) vocabularies is cause for optimism.

Mapping the unknowability of AIDS and homosexuality suggests that what is preserved most assiduously in these materials are social privileges, hierarchies of institutional and political power,

and identity categories. These case materials show how judicial language not only distributes and regulates power relationships among the litigants involved, but also the schemas through which they function. Scientific evidence, expert testimony, the gay/AIDS subject, the charmed inner circle, the power of the state, the production of knowledge, and the expertise of legislators provide the coherence images that allow these rulings to make sense. Coloring judicial opinions with materials drawn from outside the courtroom distracts the reader from the stark displays of power that are enacted by judges and juries.[20] The point is apparent in cases wherein litigants with HIV lost their claims and in cases centrally involving gay men. But the point is also made clear by the rhetorical necessities of the cases where gay men with HIV won. In each of these instances, judges contested standard scripts about AIDS by writing against the fears and stigma that saturated the unknowns. The court's opinion justifying Vincent Chalk's victory positioned him not only as a litigant who was entitled to state protection, but did so by refuting the limited understanding of HIV among district administrators who would have removed him from his job. Brian Barlow's successes are written in terms that contest the fears and ignorance of police as much as they portray him as a victim of an overzealous state. John Doe's success is built on a strategy that exposes the logical disjuncture between the acts of his employer, the ruling of the lower court, and the appellate court's reinterpretation of events. Each of these cases relies on ironic rhetorical strategies that highlight some information while negating the impact of other information and then relegating important bits of information to the unknowable.

To assert that legal contests occur at the point of the unknown is, in a very real way, a truism. The known is not usually a source of conflict, it is agreed upon by everyone involved, and demonstrating the veracity of a mutually accepted truth claim requires very little evidence or argument. What is asserted less frequently is that the unknown establishes the terms of debate and often inspires a need for the unknowable. AIDS and homosexuality generate the multiple unknowables that provide schematic organization for these scripts. In some instances, the sexuality of the players is veiled,

in other moments it is serostatus that is unknown, at still other times, it is the risk of HIV transmission that remains opaque. In each instance, AIDS and homosexuality serve as an "open secret" around which the rhetorical logic of these scripts functions, drawing from a sexual consciousness whereby homosexuality is always present but most useful when unarticulated. The cases examined in Chapters 2, 3, and 4 show the trend most clearly. In those cases, sexuality and HIV transmission are indeterminate at the level of the script, and therefore each can be epistemologically reoriented to constitute the other. When these reorientations occur, the fact that one is not the other gets negated; AIDS and homosexuality are mutually constituted through ironic negation.

The scripts explored in Chapter 5 reveal a relationship between AIDS, sexuality, and HIV-transmission risks that is more stable; the gay/AIDS subject is presented intact at the outset of each story. Thus, it is the power of the state that becomes more malleable in those moments, exemplifying with special force Sedwick's claim that the major nodes of thought and knowledge in the late twentieth century are structured by a crisis of homo-/heterosexual definition.[21] Despite the presence of an identifiable gay/AIDS subject in each of these scripts, each is organized in the vicinity of the closet, a schematic strategy wherein some forms of knowledge must be rendered invisible in order for the whole to become coherent. For Vincent Chalk and Brian Barlow concern about HIV transmission was part of the story, was known, and drove the resultant litigation, but important pieces of information were closeted in each case. In order to produce Chalk as a sympathetic figure, his illness and the possibility of his imminent physical decline had to be carefully managed. Although we read of the time limitations imposed upon him, the visceral narratives of disease and debilitation that were so legible in other cases were absent there. A similar logic structures Brian Barlow's story. There, the circumstances of the scuffle, most prominently the violence of his interaction with police, were present as grounding elements of the case, but were ultimately clouded by the language of the opinion. The story of John Doe also takes shape in the vicinity of the closet, but there the occlusion is more to be expected. By upholding the

protections of the New York City statute granting privacy to employees with HIV, the language of the opinion both recognizes and reestablishes the shame and stigma associated with being gay and having AIDS.

Even in these cases where sexual identity appears to be fixed, the presence of a gay/AIDS subject cannot stand as an "out-there" fragment of knowledge by itself. The presence of visible gay men, the possibility of HIV transmission, and the power of the state must still be renegotiated in order for the opinions to become meaningful, to achieve their desired effect, and to maintain both the institutional and epistemological status quo. Martha Merrill Umphrey's description of the queer position highlights the instability of our sexual system and invites us to consider the ways that solidity is an illusion.[22] Over the history of queer theory we have increasingly come to see the value of undermining our own expectations about sex and gender. In very real ways, then, ironic readings are queer readings in that they force us to acknowledge that meaning is always contingent and emerges from a continual process of negotiation. Irony is inherently queer.

Conclusion

As Hutcheon points out, the cutting edge of irony is both a tool and a weapon, and either way, it carves meaning from something unstated. The reigning sexual epistemology of late twentieth- and early twenty-first-century Western culture depends on irony in order to remain coherent. Homo- and heterosexuality require, in the words of Janet Halley and Milan Kundera, an organized forgetting, but also intentional negation. The stories told in these pages are fractal images made from fragments of many things: bodies, desires, identities, acts, exchanges of bodily fluids, state policies, litigants, rules, power, laws, money, fear, hope. Bits and pieces of each are forgotten, overlooked, or ignored in order to make sense of the whole, but there is also evidence of deliberate negation articulated from within common discursive frames. AIDS meanings emerge from multiple positions of narrative overlap and these stories, drawn from spaces of medical science, law,

and sexuality, are given meaning through negational processes. As Patricia Ewick and Susan Silbey articulate in their conclusion:

> Because meaning and sense making are dynamic, internal contradictions, oppositions, and gaps are not weaknesses or tears in the ideological cloth. On the contrary, an ideology is sustainable only through such internal contradictions. These contradictions become the bases for the invocations, reworking, applications, and transpositions through which structures (schemas and resources) are enacted in daily life. In short, contradictions and oppositions underwrite everyday ideological engagement, and thus ensure an ideology's vitality and potency.[23]

This is both good news and bad, and clearly, there is powerful potential in recognizing that contradictions coexist, that they are not only inevitable but useful, and that if an ability to perceive and articulate oppositional forces is necessary to maintain ideology, then those forces also contain constructive destabilizing possibilities. The rigidity and damaging effects of our current sexual epistemology are neither inevitable nor eternal.

The legality that Ewick and Silbey detail shows that American legal consciousness is held in place through centripetal and centrifugal forces that, contradictory as they apparently are, ought to inspire more gracious doubt. When Rorty tells us that he cannot, "imagine a culture that socialized its youth in such a way as to make them continually dubious about their own processes of socialization," one has to stop and wonder if he is being ironic because, as Ewick and Silbey point out, we do it all the time.[24] The stories we tell of our lives, the vocabularies we use, and the meanings we produce are not only endless successions of changing certainties, but contradictory and negational certainties that coexist simultaneously. They are ironic and productive, critical and liberal, essentialist and constructed, contradictory and coherent; logic, linearity, consistency, and order are the socially constructed illusions. Some might argue that embracing such instability will result in political paralysis, but there are certainly other options. Challenging our assumptions about ourselves and what we think we know can also inspire humility and caution, qualities that are too often set aside in our haste to find certainty. Relying on irony as a jurisprudential strategy does not obviate or undermine the

social, political, or institutional potency of the law; in fact, the effect is quite the contrary.

The stories told in this book are part of a larger constellation of credibility struggles at work not only in legal discourse, but also in wider political domains. The AIDS crisis precipitated intense contests of meaning that fundamentally altered the ways we think about sexuality, disease, health, politics, and medicine. The ironies of public life have become frighteningly pronounced again in the aftermath of September 11, 2001. The immediate rush to reestablish the certainty of American national identity, virtue, and righteousness—however tenuous—precipitated by the events of that day, signals the same ironic tendencies highlighted in these pages. To find evidence, we need look little farther than the outcry over Susan Sontag's observation in *The New Yorker* that the public was not being asked to bear the burden of reality.[25] In that moment, even suggesting that American motivations and actions might be reevaluated triggered a discursive backlash that has had the effect of silencing opposition to innumerable policies. Here again, a dominant discursive community forcefully reestablished itself and relegated the slightest political doubts to the realm of shame, ignominy, and silence: Another closet was erected and the silencing effects have been durable. But, irony is transideological and its effects are not necessarily pernicious. If law in particular, and politics, more generally, are ironic, then the fact that both require discursive communities and ironic negations should inspire optimism. We are never stuck in a single discursive space with a static range of interpretive possibilities. Because irony always leaves us all a way out, it is also a strategy for survival.

Notes

Introduction

1. Written by Ron Nyswaner and directed by Jonathan Demme.
2. See Paula Treichler. (1999). *How to Have Theory in an Epidemic: Cultural Chronicles of AIDS*. Durham: Duke University Press, 145. For a useful discussion of the film's negotiation of race and masculinity, see Brian Carr. (2000). "*Philadelphia* and Brotherly Love." 6:4 *GLQ* 5.
3. As Carol J. Clover makes clear, trials are like movies and movies are like trials. See (2000). "Law and the Order of Popular Culture." In Austin Sarat and Thomas R. Kearns, eds. (2000). *Law in the Domains of Culture*. Ann Arbor: University of Michigan Press, 99.
4. I am borrowing here from Hayden White. (1973). *Metahistory: The Historical Imagination in Nineteenth-Century Europe*. Baltimore: The Johns Hopkins University Press, 31–37. According to White's categorization, metonymy establishes relationships of equivalence, synecdoche is reductionist, and irony is negational. These ideas are discussed more fully in Chapter 1.
5. See Michael Closen et al. (1989). *AIDS: Cases and Materials*. Houston: The John Marshall Publishing Co., 177–262; Steven Epstein. (1996). *Impure Science: AIDS, Activism, and the Politics of Knowledge*. Berkeley: University of California Press; Randy Shilts. (1988). *And the Band Played On: Politics, People, and the AIDS Epidemic*. New York: St. Martin's Press; Simon Watney. (1987). *Policing Desire: Pornography, AIDS, and the Media*. Minneapolis: University of Minnesota Press; Simon Watney and Erica Carter, eds. (1989). *Taking Liberties: AIDS and Cultural Politics*. London: Serpent's Tail.
6. See Eve Kosofsky Sedgwick. (1990). *Epistemology of the Closet*. Berkeley: University of California Press.
7. This hierarchy is articulated by Gayle Rubin. See (1984). "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality." In Henry

Abelove et al. (1993). *The Lesbian and Gay Studies Reader*. New York: Routledge.

8. A noteworthy treatment of the subject can be found in Philip A. Thomas and Martin Moerings. (1994). *AIDS in Prison*. Brookfield: Dartmouth University Press.
9. Gay men are represented in these case materials, but their numbers are relatively few and they have usually brought their cases to court seeking redress for discrimination because they were HIV positive or assumed to be. Unlike cases involving inmates or recipients of blood products they are not here because they are trying to identify and impose liability upon someone who infected them with the virus or because they are seeking protection from a potential but unspecified threat.
10. An important analysis of race and HIV/AIDS can be found in Cathy Cohen. (1999). *The Boundaries of Blackness: AIDS and the Breakdown of Black Politics*. Chicago: University of Chicago Press. A useful volume committed to women and AIDS is Beth E. Schneider and Nancy E. Stoller. (1995). *Women Resisting AIDS*. Philadelphia: Temple University Press; Nancy E. Stoller. (1998). *Lessons from the Damned: Queers, Whores, and Junkies Respond to AIDS*. New York: Routledge, gives voice to people with HIV who are frequently overlooked.
11. For a useful discussion of social facts and law, see H. N. Hirsch. (1992). *A Theory of Liberty: The Constitution and Minorities*. New York: Routledge, 77–79. Also see Mark Kelman. (1981). "Interpretive Construction in the Substantive Criminal Law." 33 (April) *Stanford Law Review* 591.
12. See Joe Rollins. (2002). "AIDS, Law, and the Rhetoric of Sexuality." 36:1 *Law & Society Review* 161.
13. See Cases on page 221 at the end of this book.
14. See Treichler, *How to Have Theory*. See also Kriss A. Drass, Peter R. Gregware, and Michael C. Musheno. (1997). "Social, Cultural, and Temporal Dynamics of the AIDS Case Congregation: Early Years of the Epidemic." 31:2 *Law & Society Review* 267; Michael C. Musheno, Peter R. Gregware, and Kriss A. Drass. (1991). "Court Management of AIDS Disputes: A Sociolegal Analysis." 1 *Law and Social Inquiry* 737, American Bar Foundation.
15. One of the more notable examples is Patricia Williams. (1991). *The Alchemy of Race and Rights: Diary of a Law Professor*. Cambridge: Harvard University Press.

16. *Bowers v. Hardwick* is the one of the more obvious examples. See Janet Halley. (1993). "Reasoning about Sodomy: Act and Identity in and after *Bowers v. Hardwick*." 79 *Virginia Law Review* 1721. For another nuanced analysis of *Bowers* see Kendall Thomas. (1993). "The Eclipse of Reason: A Rhetorical Reading of *Bowers v. Hardwick*." 79 *Virginia Law Review* 1805.
17. For evidence of this claim we need look no farther than the media and Bush administration outcry over the comments of Bill Maher and Susan Sontag after the events of September 11, 2001.
18. One of the most insightful analyses in this area is Martha Fineman. (1995). *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies*. New York: Routledge.
19. Illustratively, one absent case that operates at the intersection of law and science in very interesting ways, *Institute Pasteur v. United States* 814 F.2d 624 (1987), arose from the dispute between Dr. Montagnier and Dr. Gallo over the discovery of and patent rights to the HIV virus. Although we might certainly examine that case for absences and silence, it says little about sexuality.
20. See Lee Edelman. (1993). "Tearooms and Sympathy, or, The Epistemology of the Water Closet." In Henry Abelove et al. (1993) *The Lesbian and Gay Studies Reader*. New York: Routledge.
21. This echoes (1987). *Science in Action: How to Follow Scientists and Engineers through Society*. Cambridge: Harvard University Press. The concept is explained in more detail in Chapter 1.
22. See Janet Halley. (1993). "The Construction of Heterosexuality." In Michael Warner, ed. (1993). *Fear of a Queer Planet: Queer Politics and Social Theory*. Minneapolis: University of Minnesota Press.
23. See Michel Foucault. (1979). *Discipline and Punish: The Birth of the Prison*. New York: Vintage Books.
24. Of particular note are legal issues surrounding the rights of transgender people. See Paisley Currah and Shannon Minter. (2000). "Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People." 7 *William and Mary Journal of Women and Law* 37.
25. See Dennis Altman. (1987). *AIDS in the Mind of America*. New York: Anchor Books/Doubleday; Steven Epstein, *Impure Science;* Elizabeth Fee and Daniel M. Fox. (1988). *AIDS: The Burdens of History*. Berkeley: University of California Press; Randy Shilts, *And the Band Played On*.

26. Illustratively, see *Kinzie v. Dallas County Hospital* Civil Action No. 3:99-CV-2825L (involving transfusion of HIV into a four-year-old child); *Roe v. City of New York* 232 F. Supp. 2d 240 (2002) (involving the arrest of a heroin-addicted 21-year-old man and his participation in a needle-exchange program); *Irons v. Transcor Am* Civil Action No. 01-4328 U.S. Dist. Ct. for the Eastern District of Pennsylvania (January 9, 2002) (concerning medical treatment for an arrestee with HIV); *Williams v. United States* No 4:01 CV 23 U.S. Dist. Ct. for the Western District of Michigan, Southern Division (January 16, 2001) (lawsuit originating from misdiagnosis and treatment for HIV in a patient who was, in fact, seronegative).

Chapter 1

1. See Dennis Altman. (1987). *AIDS in the Mind of America*. New York: Anchor Books/Doubleday; Douglas Crimp, ed. (1988). *AIDS: Cultural Analysis/Cultural Activism*. Cambridge: Massachusetts Institute of Technology Press; Steven Epstein. (1996). *Impure Science: AIDS, Activism, and the Politics of Knowledge*. Berkeley: University of California Press; Cindy Patton. (1986). *Sex and Germs: The Politics of AIDS*. Boston: South End Press; Cindy Patton. (1990). *Inventing AIDS*. New York: Routledge; Paula Treichler. (1999). *How to Have Theory in an Epidemic: Cultural Chronicles of AIDS*. Durham: Duke University Press; Simon Watney. (1987). *Policing Desire: Pornography, AIDS and the Media*. Minneapolis: University of Minnesota Press.
2. See Treichler, *How to Have Theory*, 1.
3. Ibid., 11.
4. For an excellent model of this approach, see Martha Merrill Umphrey. (1999). "The Dialogics of Legal Meaning: Spectacular Trials, the Unwritten Law, and Narratives of Criminal Responsibility." 22 *Law & Society Review* 393, 396.
5. See Patricia Ewick and Susan S. Silbey. (1998). *The Common Place of Law: Stories from Everyday Life*. Chicago: University of Chicago Press, 38–39.
6. Ibid., 39.
7. Ibid., 41.
8. See, e.g., Penelope Canan, Gloria Satterfield, Laurie Larson, and Martin Kretzmann. (1990). "Political Claims, Legal Derailment, and the Context of Disputes." 24:4 *Law and Society Review* 921; Mary Ann Glendon. (1991). *Rights Talk: The Impoverishment of Political*

Discourse. New York: Free Press; Lynn Mather and Barbara Yngvesson. (1980–1981). "Language, Audience, and the Transformation of Disputes." 15:3–4 *Law & Society Review* 775; Sally Engel Merry. (1990). *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans*. Chicago: University of Chicago Press.

9. See, e.g., Richard Delgado. (1989). "Storytelling for Oppositionists and Others: A Plea for Narrative." 87 *Michigan Law Review* 2411; William N. Eskridge, Jr. (1997). "A Jurisprudence of Coming Out: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law." 106:8 *Yale Law Journal* 2411; Catharine A. MacKinnon. (1993). *Only Words*. Cambridge: Harvard University Press; Mari J. Matsuda. (1987). "Looking to the Bottom: Critical Legal Studies and Reparations." 22 *Harvard Civil Rights–Civil Liberties Law Review* 323; Kim Scheppele. (1992). "Just the Facts Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth." 37 *New York Law School Law Review* 123.
10. See Peter Brooks. (1996). "Storytelling Without Fear? Confession in Law and Literature." In Peter Brooks and Paul Gewirtz. (1996). *Law's Stories: Narrative and Rhetoric in the Law*. New Haven: Yale University Press; Richard Delgado, "Storytelling for Oppositionists and Others"; Patricia Ewick and Susan S. Silbey, *The Common Place of Law*; Mari J. Matsuda, "Looking to the Bottom"; Matsuda. (1993). *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*. Boulder: Westview Press; Martha Minow. (1996). "Stories in Law." In Brooks and Gewirtz, *Law's Stories*, 24; Kendall Thomas. (1993). "The Eclipse of Reason: A Rhetorical Reading of *Bowers v. Hardwick*." 79 *Virginia Law Review* 1805.
11. For an excellent overview, see Margaret E. Montoya. (2000). "Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse." 5 *Michigan Journal of Race and Law* 847; see also Barbara Yngvesson. (1997). "Negotiating Motherhood: Identity and Difference in 'Open' Adoptions." 31:1 *Law & Society Review* 31; Kendall Thomas, "The Eclipse of Reason."
12. See Paul Gewirtz. (1996). "Narrative and Rhetoric in the Law." In Peter Brooks and Paul Gewirtz, eds., *Law's Stories*, 13. Usefully, Kenji Yoshino summarizes this trend in legal scholarship by articulating three different frameworks for understanding the relationship between law and literature. The foundationalist thesis, which he illustrates with the work of Richard Posner, sees law and literature as separate, distinct, and generally unrelated. The position can be

summarized succinctly: literature persuades while law coerces. The antifoundationalist position, exemplified by Stanley Fish and Roberto Unger, casts the distinctions between the two as real, but recognizes as well that both are the products of historical achievements that can be done and undone in much the same way. In this view, the need for and uses of the distinction collapses. He refers to the third position, the one Yoshino finds most useful, as unstable synthesis. This third approach, attributable to Owen Fiss, sees some distinction between law and literature but without relying on driving an immanent distinction between them. Kenji Yoshino. (1996). "Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays." 96 *Columbia Law Review* 1753, 1758.

13. See Martha Nussbaum. (1999). "The Professor of Parody." *New Republic*, February, 37.
14. *Lawrence et al. v. Texas* No. 02-102. Argued March 26, 2003–Decided June 26, 2003; *Bowers v. Hardwick* 478 U.S. 186 (1986).
15. Richard A. Posner. (1992). *Sex and Reason*. Cambridge: Harvard University Press; Thomas J. Philipson and Richard A. Posner. (1993). *Private Choices and Public Health: The AIDS Epidemic in an Economic Perspective*. Cambridge: Harvard University Press.
16. I am thinking here of Mark Kelman. (1981). "Interpretive Construction in the Substantive Criminal Law." 33 (April) *Stanford Law Review* 591.
17. See Nancy Levit. (1989). "Listening to Tribal Legends: An Essay on Law and the Scientific Method." 58 *Fordham Law Review* 263.
18. See Austin Sarat and Thomas R. Kearns. (2000). "The Cultural Lives of Law," in Austin Sarat and Thomas R. Kearns, eds. (2000). *Law in the Domains of Culture*. Ann Arbor: University of Michigan Press, 8–9.
19. See, e.g., Harvard Law Review. (1995). "Confronting the New Challenges of Scientific Evidence." 108 *Harvard Law Review* 1481; Dean M. Hashimoto. (1997). "Science as Mythology in Constitutional Law." 76 *Oregon Law Review* 111; Nancy Levit, "Listening to Tribal Legends"; Gregory M. Matoesian. (2001). *Law and the Language of Identity: Discourse in the William Kennedy Smith Rape Trial*. Oxford: Oxford University Press; Joseph Sanders. (2001). "Complex Litigation at the Millennium: *Kumho* and How We Know." 64 *Law and Contemporary Problems* 373; Edward J. Imwinkelried. (2000). "Evaluating the Reliability of Nonscientific Expert Testimony: A Partial Answer to the Questions Left Unresolved by *Kumho Tire Co. v. Carmichael*." 52 *Maine Law*

Review 19; an especially useful overview of the literature is David S. Caudill. (2002). "Scientific Narratives: An Introduction." 14 *Cardozo Studies in Law and Literature* 253.

20. See Brian Leiter. (1997). "The Epistemology of Admissibility: Why Even Good Philosophy of Science Would Not Make for Good Philosophy of Evidence." 1997 *Brigham Young University Law Review* 803, 803. "In its 1923 decision in *Frye v. United States*, the United States Court of Appeals for the District of Columbia set out what was, for seventy years, the most influential test for the admissibility of scientific evidence in federal court. In *Frye*, the question was whether the results of a lie detector test were admissible on behalf of the defense. The Court of Appeals agreed with the trial court that such evidence was inadmissible, famously holding that scientific evidence 'must be sufficiently established to have gained general acceptance in the particular field in which it belongs.' In 1993, the United States Supreme Court ended *Frye*'s reign of influence with its decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, holding that Federal Rule of Evidence 702, governing the admissibility of scientific evidence, did not codify *Frye*'s 'general acceptance' test. The court went on to say that the key question was whether any proffered piece of evidence constituted 'scientific knowledge' within the meaning of the Rule. The Court then enumerated a nonexclusive list of factors for courts to consider in assessing whether proffered evidence constitutes 'scientific knowledge.'" Federal Rule of Evidence 702 states, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."
21. Harvard Law Review. (2000). "Navigating Uncertainty: Gatekeeping in the Absence of Hard Science." 113 *Harvard Law Review* 1467, 1468.
22. Ibid., footnote 6.
23. An important discussion and example of this process is Gregory M. Matoesian, *Law and the Language of Identity*.
24. For an excellent discussion of this tension, see Sanford Levinson. (1996). "The Rhetoric of the Judicial Opinion." In Brooks and Gewirtz, *Law's Stories* 187.
25. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993), 593–594.

26. The passage comes from Justice Breyer in *Kumho Tire*, and is quoted in Edward J. Imwinkelried, "Evaluating the Reliability of Nonscientific Expert Testimony."
27. Ibid., 40.
28. Heidi Li Feldman. (1995). "Science and Uncertainty in Mass Exposure Litigation." 74 *Texas Law Review* 1, 38.
29. Ibid., emphasis in original.
30. Ibid., 42.
31. Sanders, "Complex Litigation at the Millennium," 374.
32. Ibid., 391.
33. See Joseph Rouse. (1996). *Engaging Science: How to Understand Its Practices Philosophically*. Ithaca: Cornell University Press.
34. Sanders, "Complex Litigation," 391.
35. Ibid., 395.
36. Ibid., 393.
37. See Hashimoto, "Science as Mythology," 110 and 125.
38. Rosemary J. Coombe. (1999). "The Law and Late Modern Culture: Reflections on Between Facts and Norms from the Perspective of Critical Cultural Legal Studies." 76 *Denver University Law Review* 1029.
39. See Yoshino, "Suspect Symbols," 1769.
40. This argument was made very persuasively by James B. White. (1985). "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life." 52 *University of Chicago Law Review* 684.
41. See Mariana Valverde. (2002). "Justice as Irony: A Queer Ethical Experiment." 14 *Cardozo Studies in Law and Literature* 85, 85–86.
42. I borrow this quotation from Linda Hutcheon. (1995). *Irony's Edge: The Theory and Politics of Irony*. New York: Routledge.
43. Harlon Dalton makes this point about Daniel Farber and Suzanna Sherry's treatment of legal storytelling in Brooks and Gewirtz, *Law's Stories*, "Farber and Sherry are so possessed of the systematizing impulse and so hungry for 'intellectual coherence' that they round off many of the most interesting corners in the legal academy" (59). For a more general discussion intended to systematize irony, see Wayne C. Booth. (1974). *A Rhetoric of Irony*. Chicago: University of Chicago Press. For a useful and entertaining exchange on the subject, see Stanley Fish. (1983). "Short People Got No Reason to Live: Reading Irony." 113:1 *Daedalus* 193.
44. See Hutcheon, *Irony's Edge*, 10, emphasis in original, citations omitted.

45. See Hayden V. White. (1973). *Metahistory: The Historical Imagination in Nineteenth-Century Europe*. Baltimore: The Johns Hopkins University Press, 38.
46. See Fish, "Short People."
47. White, *Metahistory*, 34, emphasis in original.
48. Ibid., 37.
49. Hutcheon, *Irony's Edge*, 23.
50. See Michel Foucault. (1978). *History of Sexuality: Volume 1*. New York: Vintage Press, 8.
51. Ibid., 8, 11, 27, 32–33, 137–47.
52. Eve Kosofsky Sedgwick. (1990). *Epistemology of the Closet*. Berkeley: University of California Press, 22.
53. Foucault, *History of Sexuality*, 27.
54. Janet Halley. (1993). "Reasoning About Sodomy: Act and Identity in and after *Bowers v. Hardwick*." 79 *Virginia Law Review* 1721, 1722, emphasis in original.
55. Foucault, *History of Sexuality*, 32–33.
56. Ibid., 69. Foucault's treatments of confession are useful here, from *History of Sexuality*, 57–63. See also, *Discipline and Punish*, 38.
57. Foucault, *History of Sexuality*, 143.
58. See, e.g., John D'Emilio. (1983). *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970*. Chicago: University of Chicago Press; George Chauncey Jr. (1994). *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890–1940*. New York: Basic Books; Jonathan Ned Katz. (1976). *Gay American History: Lesbians and Gay Men in the U. S. A*. New York: Thomas Y. Corwell; Jonathan Ned Katz. (1995). *The Invention of Heterosexuality*. New York: Dutton; Martin Duberman, Martha Vicinus, and George Chauncey Jr., eds. (1989). *Hidden from History: Reclaiming the Gay and Lesbian Past*. New York: New American Library; David M. Halperin. (1989). *One Hundred Years of Homosexuality: And Other Essays on Greek Love*. New York: Routledge.
59. Foucault, *History of Sexuality* 159. See, Gayle Rubin. (1984). "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality." In Henry Abelove et al. (1993). *The Lesbian and Gay Studies Reader*. New York: Routledge.
60. Rubin, "Thinking Sex," 13.
61. See Donna Haraway. (1992). "The Promises of Monsters: A Regenerative Politics for Inappropriate/d Others." In Lawrence

Grossberg et al., eds. (1992). *Cultural Studies*. New York: Routledge, 295.

62. Martha McCaughey. (1996). "Perverting Evolutionary Narratives of Heterosexual Masculinity, Or, Getting Rid of the Heterosexual Bug." 3 *GLQ* 261, 262.
63. See Epstein, *Impure Science*.
64. Latour and Woolgar define agnosticism as follows: "If facts are constructed through operations designed to effect the dropping of modalities which qualify a given statement, and, more importantly, if reality is the consequence rather than the cause of this construction, this means that a scientist's activity is directed, not toward 'reality,' but toward these operations on statements. The sum total of these operations is the agnostic field." Bruno Latour and Steve Woolgar. (1979). *Laboratory Life: The Construction of Scientific Facts*. Princeton: Princeton University Press, 237.
65. H. N. Hirsch. (1992). *A Theory of Liberty: The Constitution and Minorities*. New York: Routledge.
66. See Richard Mohr. (1998). *Gays/Justice: A Study of Ethics, Society, and Law*. New York: Columbia University Press. Some might argue that a right to privacy, whatever that might mean constitutionally, excludes the state from our intimate lives, *especially* in matters involving intimate association and reproductive choice, despite the fact that marriage, child custody, adoption, divorce, tax laws, and a host of other privacy issues invoke extensive state involvement.
67. See Morris Kaplan. (1997). *Sexual Justice: Democratic Citizenship and the Politics of Desire*. New York: Routledge.
68. David A. J. Richards. (1998). *Women Gays, and the Constitution: The Grounds for Feminism and Gay Rights in Culture and Law*. Chicago: University of Chicago Press.
69. See Janet Halley. (1993). "The Construction of Heterosexuality." In Michael Warner, ed. (1993). *Fear of a Queer Planet: Queer Politics and Social Theory*. Minneapolis: University of Minnesota Press. See also, "Reasoning about Sodomy," 1721.
70. For a useful overview of these perspectives, see Steven Seidman. (1993). "Identity and Politics in a 'Postmodern' Gay Culture: Some Historical and Conceptual Notes." In Michael Warner, ed. *Fear of a Queer Planet*. For an empirical analysis of the relationship between sexual identity and queer politics, see Joe Rollins and H. N. Hirsch. (2003). "Sexual Identities and Political Engagements: A Queer Survey." 10:3 *Social Politics* (November).

71. See Epstein, *Impure Science*.
72. For a useful discussion of this debate, see Edward Stein, ed. (1990). *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy*. New York: Garland Press.
73. Defining gay conservatism is an unusual task, and might include a discussion of Log Cabin Republicans, the writings of Bruce Bawer or Michelangelo Signorille, or numerous other individuals. For an illustrative overview, see Larry Kramer. (1997). "Gay Culture, Redefined." *New York Times*, Oct. 12: A18, col. 2.
74. Susan Sontag. (1988). *AIDS and its Metaphors*. New York: Farrar, Straus, & Giroux.
75. See Treichler, *How to Have Theory*.
76. Rubin, "Thinking Sex."
77. Douglas Crimp, ed. (1988). *AIDS: Cultural Analysis/Cultural Activism*. Cambridge: Massachusetts Institute of Technology Press; Jan Zita Grover. (1988). "AIDS: Keywords." In Crimp, ed., *AIDS: Cultural Analysis/Cultural Activism*; Cindy Patton. (1986). *Sex and Germs: The Politics of AIDS*. Boston: South End Press, and (1990). *Inventing AIDS*. New York: Routledge; Sontag, *AIDS and its Metaphors*; Treichler, *How to Have Theory*; Simon Watney. (1987). *Policing Desire: Pornography, AIDS, and the Media*. Minneapolis: University of Minnesota Press, and (1994). *Practices of Freedom: Selected Writings on HIV/AIDS*. Durham: Duke University Press; Watney and Erica Carter, eds. (1989). *Taking Liberties: AIDS and Cultural Politics*. London: Serpent's Tail.
78. This phrase is from Eve Kosofsky Sedgwick. (1993). "The Privilege of Unknowing," In *Tendencies*. Durham: Duke University Press.
79. See e.g., Chandler Burr. (1996). *A Separate Creation: The Search for the Biological Origins of Sexual Orientation*. New York: Hyperion; Dean Hamer and Peter Copeland. (1994). *The Science of Desire: The Search for the Gay Gene and the Biology of Behavior*. New York: Simon & Schuster; Edward Stein. (1999). *The Mismeasure of Desire: The Science, Theory, and Ethics of Sexual Orientation (Ideologies of Desire)*. Oxford: Oxford University Press.
80. See Richard Rorty. (1989). *Contingency, Irony, and Solidarity*. New York: Cambridge University Press, xv, for a definition of "final vocabulary."
81. Sedgwick, *Epistemology of the Closet*, 22.
82. See Sedgwick, "Privilege of Unknowing," 23–24.
83. Sedgwick, *Epistemology of the Closet*, 7–8.

84. Sedgwick, "Privilege of Unknowing," 23. For an insightful discussion of state power and its relationship to queer theory, see Lisa Duggan. (1994). "Queering the State." 39 *Social Text* 1.
85. See Hirsch, *A Theory of Liberty*.
86. For a useful discussion of sexuality, science, and constructivism, see Chandler Burr, *A Separate Creation*. See also Peter Hegarty. (1997). "Materializing the Hypothalamus: A Performative Account of the 'Gay Brain.'" 7:3 *Feminism and Psychology* 355; Lisa Jean Moore. (2002). "Extracting Men from Semen: Masculinity in Scientific Representations of Sperm." 73:20 *Social Text* 135.
87. See, T. J. Williams, M. E. Pepitone, S. E. Christensen, M. C. Bradley, A. D. Huberman, N. J. Breedlove, T. J. Breedlove, C. L. Jordan, and S. M. Breedlove. (2000). "Finger-Length Ratios and Sexual Orientation." 404 *Nature* 455.
88. Ian Haney-Lopez. (1996). *White by Law: The Legal Construction of Race*. New York: New York University Press, 7.
89. Martha Merrill Umphrey, "The Dialogics of Legal Meaning," 420.
90. See Lee Edelman. (1993). "Tearooms and Sympathy, or, The Epistemology of the Water Closet." In Henry Abelove et al. (1993) *The Lesbian and Gay Studies Reader*. New York: Routledge.

Chapter 2

1. Donald C. Dilworth. (1996). "HIV-Infected Hemophiliacs Consider Settlement Offer. (In re Factor VIII or IX Concentrate Blood Products Litigation)." 32 *Trial* 85.
2. This process also resembles the shifts in footing in the William Kennedy Smith Rape trial, whereby Smith slid back and forth between his role as defendant and his expert position as a doctor. See Gregory M. Matoesian. (2001). *Law and the Language of Identity: Discourse in the William Kennedy Smith Rape Trial*. Oxford: Oxford University Press, especially chapter 6.
3. See Jan Zita Grover. (1988). "AIDS: Keywords." In Douglas Crimp, ed. (1988). *AIDS: Cultural Analysis/Cultural Activism*. Cambridge: Massachusetts Institute of Technology Press.
4. See Paula Treichler. (1999). *How to Have Theory in an Epidemic: Cultural Chronicles of AIDS*. Durham: Duke University Press, 23.
5. See Steven Epstein. (1996). *Impure Science: AIDS, Activism, and the Politics of Knowledge*. Berkeley: University of California Press; Treichler, *How to Have Theory*.

6. For an overview, see Eric A. Feldman and Ronald Bayer. (1999). *Blood Feuds: AIDS, Blood, and the Politics of Medical Disaster*. New York: Oxford University Press; Peter B. Kunin. (1991). "Transfusion-Related AIDS Litigation: Permitting Limited Discovery from Blood Donors in Single Donor Cases." 76 *Cornell Law Review* 927; Ann Marie LoGerfo. (1992). "Protecting Donor Privacy in AIDS Related Blood Bank Litigation—*Doe v. Puget Sound Blood Center*, 117 Wash. 2d 772, 819 P.2d." 67 *Washington Law Review* 981.
7. *Leckelt v. Board of Commissioners of Hospital District No. 1* 909 F.2d 820 (1990); *Marcella v. Brandywine Hospital* 47 F.3d 618 (1995); *Coleman v. American Red Cross* 979 F.2d 1135 (1992); *Marchica v. Long Island Railroad Co*. 31 F.3d 1197 (1994).
8. *Leckelt v. Board of Commissioners of Hospital District No. 1* 714 F. Supp. 1377 (1989), 1379.
9. Ibid., 1380–1381.
10. Ibid., 1381.
11. Ibid., 1382.
12. Ibid., 1382.
13. Ibid., 1383.
14. Ibid., 1383.
15. Ibid., 1383.
16. *Leckelt v. Board of Commissioners of Hospital District No. 1* 909 F.2d 820 (1990), 827.
17. Ibid., 833.
18. The decision drew some commentary from legal scholars, ranging from the balanced to the extreme. See L. A. Vash. (1991). "Comment: *Leckelt v. Board of Commissioners of Hospital District No. 1*: Forced Disclosure for HIV Infected Health Care Workers." 65 *Tulane Law Review* 1722. Vash argues that the case provided little guidance for health care workers litigating under the Rehabilitation Act; Vallori K. Hard. (1993). "Mandatory Disclosure of AIDS Status by Health Care Workers." 21 *Western State University Law Review* 295. The author concludes with this paragraph:

> Life is the most precious thing on Earth. To cavalierly relegate death from a transmitted disease to the realm of "acceptable risk," when that transmission can easily be avoided with the modification of a few careers and incomes, is to devalue life. The decision whether to follow a course which may risk that life is the province of the one whose life

> is in question. When the choice is between death on the one hand, and limitation of income and social standing on the other, the words of the Court in *Behringer* ring true: "The ultimate risk to the patient is so absolute-so devastating-that it is untenable to argue against informed consent.

For a thoughtful overview and useful bibliographic resource, see Marc. E. Elovitz. (1996). "Whose Privacy Is It Anyway? Why the Debate on Restricting Health Care Workers with HIV Should End: A Response to Professor Closen." 41 *New York Law School Law Review* 141.

19. *Marcella*, 47 F.3d, 619.
20. Ibid.
21. Ibid., 620.
22. Ibid., 620.
23. Ibid., 620. The opinion indicates that the donor failed to identify himself as a member of a high-risk group and it is entirely plausible that his identity formation was partially an attempt to assuage his own fears about being infected. Characterizing his attempts to give blood as "persistent," however, suggests determination and possibly an intention to infect others with HIV-a far less plausible interpretation of events.
24. Ibid., 625. The meaning of victimization has been particularly problematic among gay men with HIV. Rejecting the "victim" designation and the powerlessness it implies has been an important strategy in the gay community. See Steven Epstein, *Impure Science* 205–207.
25. Ibid., 626.
26. Ibid., 620, footnote 2. The case is, in important ways, an investigation of a blood donor's sexual history and identity. He seems throughout to have avoided identifying himself as homosexual-perhaps sincerely, perhaps to avoid adopting a stigmatized identity, perhaps to avoid admitting to himself the possibility that he might be HIV positive. The donor's emotional and affective needs are, however, irrelevant to the opinion. The identity, fears, and future of "Donor X" remain a mystery to the reader.
27. *Coleman v. American Red Cross* 23 F.3d 1091 (1994), 1098.
28. *Coleman v. American Red Cross* 979 F.2d 1135 (1992), 1136.
29. *Coleman v. American Red Cross* 130 F.R.D. 360 (1990), 363.
30. *Coleman* 23 F.3d, 1094.
31. Ibid., 1096.
32. *Coleman* 979 F.2d, 1137.
33. *Coleman* 23 F.3d,1098.

34. *Coleman* 979 F.2d, 1139.
35. These are the opening lines from *Marchica* 31 F.3d, 1199.
36. Ibid., 1200.
37. Ibid., 1200.
38. Ibid., 1206.
39. Ibid., 1206.
40. See Lee Edelman. (1993). "Tearooms and Sympathy, Or, The Epistemology of the Water Closet." In Henry Abelove et al. (1993). *The Lesbian and Gay Studies Reader*. New York: Routledge, 571. For another important discussion of bodies and regulation, see Victoria Pitts. (2000). "Visibly Queer: Body Technologies and Sexual Politics." 41:3 *The Sociological Quarterly* 443.
41. For a rich discussion of the moral panic surrounding AIDS, see Barry Adam. (1989). "The State, Public Policy, and AIDS Discourse." 13 *Contemporary Crises* 1.
42. See Bruno Latour. (1987). *Science in Action: How to Follow Scientists and Engineers through Society*. Cambridge: Harvard University Press. Latour defines an actant as "whoever and whatever is represented" in the competitive exchanges between scientists, 44.
43. See Alan Hyde. (2001). *Bodies of Law*. Princeton: Princeton University Press.
44. Paula Treichler makes this point exceptionally well in *How to Have Theory*.
45. This tendency has been established throughout the history of AIDS. For notable discussions, see Treichler, *How to Have Theory*; Beth E. Schneider and Nancy E. Stoller, eds. (1995). *Women Resisting AIDS: Strategies of Empowerment*. Philadelphia: Temple University Press; Simon Watney. (1981). *Policing Desire: Pornography, AIDS, and the Media*. Minneapolis: University of Minnesota Press.
46. See Alan M. Dershowitz. (1996). "Life is Not a Dramatic Narrative." In Peter Brooks and Paul Gewirtz. (1996). *Law's Stories: Narrative and Rhetoric in the Law*. New Haven: Yale University Press.

Chapter 3

1. See Ronald Bayer. (1991). *Private Acts, Social Consequences*. New York: The New Press; Randy Shilts. (1988). *And the Band Played On*. New York: St. Martin's Press.

2. Sara Miles. (1995). "And the Bathhouse Plays On." 24 (July/August) *Out* 87; see also, Michael Warner. (1999). *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life.* New York: The Free Press.
3. This purification was articulated early on in a seminal article by Mary McIntosh. (1968). "The Homosexual Role." Reprinted in Peter M. Nardi and Beth E. Schneider. (1998). *Social Perspectives in Lesbian and Gay Studies: A Reader*. New York: Routledge.
4. New HIV infection rates continue to increase each year and women and people of color are the groups most frequently affected. See Centers for Disease Control and Prevention. (2001). *HIV/AIDS Surveillance Report* 13:1.
5. See Kenji Yoshino. (1996). "Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays." 96 *Columbia Law Review* 1753.
6. See Michel Foucault. (1978). *History of Sexuality: Volume 1*. New York: Vintage Press, 27–28.
7. See Barry Adam. (1989). "The State, Public Policy and AIDS Discourse." 13 *Contemporary Crises* 1; Mark Barnes. (1988). "AIDS and Mr. Korematsu: Minorities at Times of Crisis." 7 *St. Louis Public Law Review* 35; Michael L. Closen et al. (1989). *AIDS: Cases and Materials*. Houston: The John Marshall Publishing Company; Comment. (1984–1985). "Current Topics in Law and Policy, Fear Itself: AIDS, Herpes, and Public Health Decisions." 3 *Yale Law and Policy Review* 479; Nan D. Hunter and William B. Rubenstein. (1992). *AIDS Agenda: Emerging Issues in Civil Rights*. New York: The New Press; Michael Kirby. (1989). "AIDS and Law." 118 *Daedalus* 101; Ann Marie LoGerfo. (1991). "Protecting Donor Privacy in AIDS Related Blood Bank Litigation—*Doe v. Puget Sound Blood Center*," 117 *Wash. 2d* 772, 819 P.2d 370 (1991) 67 *Washington Law Review* 981; Deborah Merritt. (1986). "Communicable Disease and Constitutional Law: Controlling AIDS." 61 *New York University Law Review* 739; Note. (1986). "The Constitutional Rights of AIDS Carriers." 99 *Harvard Law Review* 1274; Note. (1990). "AIDS and Rape: The Constitutional Dimensions of Mandatory Testing of Sex Offenders," 76 *Cornell Law Review* 238; Note. (1991). "Transfusion-Related AIDS Litigation: Permitting Limited Discovery From Blood Donors in Single Donor Cases," 76 *Cornell Law Review* 927.
8. See Anne Schneider and Helen Ingramm. (1993). "Social Construction of Target Populations: Implications for Politics and Policy."

87 *American Political Science Review* 334 (arguing that effective policy analysis must take into account the social construction of the population toward which policy is directed); for an application of social constructionist theory to AIDS and public policy, see Mark C. Donovan. (1996). "The Politics of Deservedness: The Ryan White Act and the Social Constructions of People with AIDS." In Stella Z. Theodolou, ed. (1996). *AIDS: The Politics and Policy of Disease*. Upper Saddle River: Prentice Hall.

9. The distinction between identity construction and behavior patterns has been theorized and explored at length elsewhere. Some notable works in this area include: George Chauncey. (1994). *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World 1890–1940*. New York: Basic Books; Gilbert Herdt. (1981). *Guardians of the Flutes: Idioms of Masculinity*. Chicago: University of Chicago Press; David M. Halperin. (1990). *One Hundred Years of Homosexuality*. New York: Routledge; Tomás Almaguer. (1993). "Chicano Men: A Cartography of Homosexual Identity and Behavior." In Henry Abelove et al., eds. (1993). *The Lesbian and Gay Studies Reader*. New York: Routledge.
10. See Janet Halley. (1993). "The Construction of Heterosexuality." In Michael Warner, ed. (1993). *Fear of a Queer Planet: Queer Politics and Social Theory*. Minneapolis: University of Minnesota Press, 85, for an excellent treatment of the homo–hetero binarism in legal discourse, especially regarding equal protection analysis.
11. Martha Merrill Umphrey. (1995). "The Trouble With Harry Thaw." 62 *Radical History Review* 8.
12. *Bamon Corp v. City of Dayton* 923 F.2d 470 (1991); *Berg v. Health and Hospital Corporation of Marion County, Indiana* 865 F.2d 797 (1989); *Doe v. City of Minneapolis* 898 F.2d 612 (1990); *Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware* 10 F.3d 123 (1993).
13. Delaware Adult Entertainment Establishments Act, Del. Code, Ann. tit. 24, 1601–1635; Marion County General Ordinance No. 5-1985(A); Dayton's Revised Code of General Ordinances, Sections 136.08-9; Minneapolis, Minnesota, Code of Ordinances, 219. 500–530.
14. *Bamon*, 472.
15. *Doe*, 614.
16. *Bamon*, 471.

17. *Berg*, 806.
18. *Mitchell*, 128.
19. See *Barnes v. Glen Theatre, Inc*. 111 S.Ct. 2456 (1991); *Schad v. Borough of Mt. Ephraim* 101 S.Ct. 2176 (1981); *Erznoznik v. City of Jacksonville* 95 S.Ct. 2268 (1975).
20. *Barnes*, 2463.
21. *Young v. American Mini Theatres, Inc*. 427 U.S. 50 (1976), 70–71.
22. New York City suffered through an extended period of debate over such issues with Rudolph Giuliani as Mayor. For an insightful discussion of the era, see Warner, *The Trouble with Normal*, 149–193.
23. *Mitchell*, 130.
24. In *Young,* 84–88, Justice Stewart's dissent argues that the statute at issue in that case is not content neutral because it classifies theaters based upon the content of the films shown. Thus, the specious neutrality of content-based classification of theatres has not gone unnoticed at the level of the Supreme Court. This same argument appears more forcefully in Justice Brennan's dissent in *City of Renton v. Playtime Theaters Inc.* 475 U.S. 41 (1986), 55–65.
25. The judges in each case make specific references to HIV as the secondary effect of pornography. In *Bamon*, 473; in *Berg*, 799; in *Doe*, 614; and in *Mitchell*, 129.
26. *Doe*, 621–622.
27. Ibid., 617. See also, *City of Renton*; *Ward v. Rock Against Racism* 491 U.S. 781 (1989).
28. *Doe*, 802.
29. *Berg*, 802.
30. *Mitchell*, 140.
31. *Berg*, citing the statute in question. This citation is thick with constructions of AIDS. Stopping the "spread" of a "deadly disease" with "no known cure" implies that AIDS was previously confined to a natural (homosexual) population that is irrevocably doomed; see Jan Zita Grover. (1988). "AIDS: Keywords." In Douglas Crimp, ed. (1988). *AIDS: Cultural Analysis/Cultural Activism*. Cambridge: Massachusetts Institute of Technology Press.
32. *Berg*, 804.
33. *Mitchell*, "The express purpose of the open-booth amendment was to prevent high-risk sexual contact. Adult Books therefore asked the Commission to rule that booths equipped with doors that would conceal a patron's head, arms and torso but expose his legs

would comply with the new open-booth requirement. [*sic*] The Secretary . . . notified Adult Books . . . that 'Dutch doors,' saloon style swinging doors, and doors with a 24-inch plexiglass panel at the bottom are not 'open to an adjacent public room,' as the text of the open-booth amendment requires."

34. *Mitchell*, 143.
35. *Berg*, 799.
36. Ibid., 800.
37. Ibid., 799, footnote 3.
38. *Doe*, 614.
39. *Mitchell*, 140.
40. Ibid.,141.
41. See Jan Zita Grover, "AIDS: Keywords," 17 for an analysis of this rhetorical removal of people with AIDS from an ostensibly "general public."
42. *Berg*, 799.
43. *Mitchell*, 143.
44. This component appears in *Berg*, 803, and in *Mitchell*, 143.
45. *Berg*, 799.
46. That the government should seek to protect sex workers from HIV is never suggested. As noted in much sociolegal discourse, sex workers are rhetorically deprived of their status as citizens and instead are constructed primarily as vectors of disease. For more detailed analysis of this construction and its attendant policy ramifications, see Cindy Patton. (1990). *Inventing AIDS*. New York: Routledge; Beth E. Schneider and Nancy E. Stoller, eds. (1995). *Women Resisting AIDS: Strategies of Empowerment*. Philadelphia: Temple University Press; Allan M. Brandt. (1987). *No Magic Bullet: A Social History of Venereal Disease in the United States since 1880*. New York: Oxford U. Press.
47. *Doe*, 614.
48. See Michel Foucault, *Discipline and Punish*, 200:

> Bentham's Panopticon is the architectural figure of this composition. We know the principle on which it was based: at the periphery, an annular building; at the centre, a tower; this tower is pierced with wide windows that open onto the inner side of the ring; the peripheric building is divided into cells, each of which extends the whole width of the building; they have two windows, one on the inside, corresponding to the windows

> of the tower, the other, on the outside, allows the light to cross the cell from one end to the other. All that is needed, then, is to place a supervisor in a central tower and to shut up in each cell a madman, a patient, a condemned man, a worker or a schoolboy.... The panoptic mechanism arranges spatial unities that make it possible to see constantly and to recognize immediately.... Visibility is a trap.

49. Ibid., 201.
50. *Mitchell*, 143, creative pronoun usage in original.
51. Minnesota Statutes Annotated 609.293 (1987).
52. For Delaware, see 11 De. C. 1953, s1342 et. seq; in Indiana, see Title 35, Article 45, Chapter 4 Sec. 2; in Minnesota see statute 1976 '609.32; and in Ohio, Title XXIX, Chapter 2907.25 et. seq.
53. See Gayle Rubin. (1984). "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality." In Henry Abelove et al. eds. *The Lesbian and Gay Studies Reader*. New York: Routledge, 13.
54. This phrase comes from Simon Watney. (1987). *Policing Desire: Pornography, AIDS, and the Media*. Minneapolis: University of Minnesota Press.
55. Eve Kosofsky Sedgwick. (1990). *Epistemology of the Closet*. Berkeley: University of California Press, 1.
56. Ibid., 3.
57. See Foucault, *The History of Sexuality*.
58. Judith Butler. (1990). *Gender Trouble: Feminism and the Subversion of Identity*. New York: Routledge, 2.
59. See George Chauncey, *Gay New York,* for an application and demonstration of this process and its use of Sedgwick's thesis.
60. See Rubin, "Thinking Sex."
61. Ibid., 14.
62. Ibid., 14.
63. For a discussion of social role adoption, see William DuBay. (1987). *Gay Identity: The Self Under Ban*. Jefferson: McFarland & Co.
64. Studies of the linkages between identity construction and propensity for engaging in high-risk sexual behaviors indicate that ego-dystonic homosexuality may be correlated with high-risk sexual behavior. See Gregory M. Herek and Beverly Greene. (1995). *AIDS, Identity, and Community: The HIV Epidemic and Lesbians and Gay Men*. Thousand Oaks, Ca.: Sage.

65. *Doe*, 619. (According to his testimony, Campbell defined "pseudo-sex" as oral or masturbatory. This distinction inexplicably designates "real" sex as anal intercourse.)
66. Ibid., 619.
67. Ibid., 619.
68. This point has been made effectively elsewhere. See Mariana Valverde. (2002). "Justice as Irony: A Queer Ethical Experiment." 14 *Cardozo Studies in Law and Literature* 85, 99.
69. *Doe*, 622.
70. Ibid., 622, emphasis added.
71. Credit for this observation must be given to my friend and colleague, Madelyn Detloff.
72. See supra note 53 and accompanying text.
73. See Laud Humphreys. (1970). *Tea-Room Trade: Impersonal Sex in Public Places*. Chicago: Aldine Pub. Co.
74. As Jan Zita Grover argues, the bisexual has been constructed as the true bugaboo of AIDS. The fluidity of his (male pronoun intentional) sexuality is perceived as the reason HIV is transported across the invisible barrier between hetero- and homosexuality; see "AIDS: Keywords."

Chapter 4

1. For information about prison HIV policies in the first decade of AIDS, see J. Diamond. (1994). "HIV Testing in Prison: What's the Controversy." 344 *The Lancet* 1605; Theodore Hammett et al. (1995). *Issues and Practices: 1994 Update: HIV/AIDS and STD's in Correctional Facilities*. U.S. Department of Justice: Office of Justice Programs; Ronald L. Braithwaite, Theodore M. Hammett, and Robert M. Mayberry. (1996). *Prisons and AIDS: A Public Health Challenge*. San Francisco: Jossey-Bass Publishers. The *New York Times* regularly calls attention to HIV in prisons. See, e.g., Tamar Lewin. (2001). "Little Sympathy or Remedy for Inmates Who Are Raped." Apr. 15, A1, col. 4; Linda Greenhouse. (2000). "Justices Allow Segregation of Inmates with H.I.V." Jan. 19: A19, col. 1; Sheryl Gay Stolberg. "Behind Bars, New Effort to Care for the Dying." Apr. 1: A1, col. 1. For information regarding policies and seroprevalence, see Peter Brien. (1995). *HIV in Prisons and Jails, 1993*. Bureau of Justice Statistics Bulletin, Aug. It should be noted that state prisons contain

far more prisoners than federal institutions. According to a 1996 GAO report, there were 95,162 prisoners in federal custody at fiscal year-end 1994 and 960,039 in state institutions during the same period (GAO 1996: 24–25).

2. For a useful overview of these issues, see Donald F. Sabo, Terry A. Kupers, and Willie London, eds. (1991). *Prison Masculinities*. Philadelphia: Temple University Press.
3. See Michel Foucault. (1979). *Discipline and Punish: The Birth of the Prison*. New York: Vintage Books, 28.
4. That statute states: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C., section 1983.
5. A. Allise Burris. (1992). "Qualifying Immunity in Section 1983 and Bivens Actions." 71 *Texas Law Review* 123.
6. Ibid.
7. Michael S. Vaughn. (1995). "Section 1983 Civil Liability of Prison Officials for Denying and Delaying Medication and Drugs to Prison Inmates." 11 *Issues in Law and Medicine* 1.
8. See *Campbell v. Beto* 460 F.2d 765 (1972).
9. *Runnels v. Rosendale* 449 F.2d 733 (1974).
10. *Estelle v. Gamble* 429 U.S. 97 (1976).
11. Ibid., 106.
12. See Brian Saccenti. (2000). "Comment: Preventing Summary Judgment Against Inmates Who Have Been Sexually Assaulted by Showing that the Risk Was Obvious." 59 *Maryland Law Review* 642, 651.
13. Human Rights Watch. (2001). *No Escape: Male Rape in U.S. Prisons*. New York: Human Rights Watch, 11.
14. *Farmer v. Brennan* 511 U.S. 825 (1994).
15. See Saccenti, "Comment," 661–62, citations omitted.
16. *Glick v. Henderson* 855 F.2d 536 (1988), 538.
17. Ibid., 538.
18. Ibid., 538–539.
19. Ibid., 539.

20. Ibid., 539–540.
21. See Human Rights Watch, *No Escape*; and Sabo et al., *Prison Masculinities*.
22. See *Dunn v. White* 880 F.2d 1188 (1989).
23. Ibid., 1190.
24. Ibid., 1195.
25. Ibid., 1195.
26. Ibid., 1195–1196.
27. Ibid., 1196.
28. Ibid., 1196.
29. Ibid., 1199.
30. *Harris v. Thigpen* 941 F.2d 1495 (1991).
31. Theodore Hammett. (1998). *Update 1998: AIDS in Correctional Facilities 1*. National Institute of Justice: Issues and Practices.
32. See *Harris*, 1503.
33. Paula Treichler demonstrates the ways in which women have been constructed as "inefficient transmitters" of HIV, a rhetorical move that reinforces the perception of AIDS as a distinctly male problem while overlooking the danger it presents to women. See (1999). *How to Have Theory in an Epidemic: Cultural Chronicles of AIDS*. Durham: Duke University Press, 239–240.
34. *Harris*, 1515. This passage is cited from the district court's opinion in the case at 727 F.Supp. 1572.
35. Ibid., 1520.
36. *U.S. v. Moore* 846 F.2d 1163 (1988), 1164–1165.
37. Ibid., 1165.
38. *Moore*, 1165.
39. *New York Times*. (1987). June 25: A18, col. 6; National Desk.
40. Ibid.
41. Courts have held that in appropriate circumstances a part of the body may be a dangerous weapon. See *United States v. Parman* 461 F.2d 1203, 1204 n.1 (D.C. Cir. 1971) ("indictment charged assault with a deadly weapon, the deadly weapon being 'biting with teeth' "); *State v. Born* 280 Minn. 306, 159 N.W. 2d 283 (1968) ("fists or feet in certain circumstances may be dangerous weapons when used to inflict injury"), *Moore*, 1166–1167.
42. *Moore*, 1167.
43. Ibid., 1167.
44. Ibid., 1167.

45. See *U.S. v. Sturgis* 48 F.3d 784 (1995), 785.
46. Ibid., 786.
47. Ibid., 788.
48. *Weeks v. Scott* 55 F.3d 1059(1995), 1061.
49. Ibid., 1064.
50. Cited in Ibid., 1062.
51. Ibid., 1063.
52. *Weeks v. State* 834 S.W. 2d 559 (1992), 562.
53. Ibid., 562.
54. Ibid., 563.
55. Ibid., 563.
56. Ibid., 564.
57. Ibid., 564.
58. Joseph F. Sullivan (1990). "AIDS-Infected Prisoner Receives 25 Years for Biting a Jail Guard." *New York Times*. May 19: A25, col. 2.
59. *Young v. Quinlan* 960 F.2d 351 (1992), 353; also see Human Rights Watch, *No Escape*, 63–75.
60. *Young*, 362.
61. Ibid., 354.
62. Ibid., 354.
63. Ibid., 354.
64. Ibid., 356.
65. In *LaMarca v. Turner* 662 F.Supp. 647 (1987), plaintiffs were granted $201,500 in damages and injunctive relief after being gang raped at Glades Correctional Institution; in *Redman v. County of San Diego* 942 F.2d 1435 (1991), the Ninth Circuit reversed the directed verdict of the district court, instead finding that a reasonable jury could have concluded that prison officials acted with deliberate indifference after a small, eighteen-year-old inmate was raped by his cellmate and others. See Human Rights Watch, *No Escape*, 157, and note 40, 377.
66. See John Scalia. (1997). *Prisoner Petitions in the Federal Courts, 1980–96*. U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics. NCJ-164615.
67. For a useful analysis of the politics of prisons, see Marc Mauer. (1999). *Race to Incarcerate*. New York: The New Press.
68. See Sara Polonsky et al. (1994). "HIV Prevention in Prisons and Jails: Obstacles and Opportunities." 109:5 (Sept.–Oct.) *Public Health Reports* 615, 622, note 56.

69. Earlier Supreme Court decisions involving same-sex sexual harassment, rape, and sexual orientation illustrate the point. See, e.g., *Oncale v. Sundowner Offshore Services* 523 U.S. 75 (1998); *Michael M. v. Superior Court of Sonoma County* 450 U.S. 464 (1981); *Boy Scouts of America v. James Dale* 530 U.S. 640 (2000). See also, Susan Brownmiller. (1975). *Against Our Will: Men, Women, and Rape*. New York: Simon and Schuster.
70. See Helen Eigenberg. (1989). "Male Rape: An Empirical Examination of Correctional Officers' Attitudes toward Rape in Prison." 69:2 *The Prison Journal* 39.
71. Human Rights Watch, *No Escape* 63–75.
72. See Eve Kosofsky Sedgwick. (1993). *Tendencies*. Durham: Duke University Press, 24; Catherine A. MacKinnon. (1982). "Feminism, Marxism, Method, and the State: An Agenda for Theory." *Signs* 7, 515; see also Kim Lane Scheppele. (1991). "The Reasonable Woman." 1 *The Responsive Community*. 4; Susan Brownmiller, *Against Our Will*. For an extensive treatment of male rape and racial politics in the prison setting, see William F. Pinar. (2001). *The Gender of Racial Politics and Violence in America: Lynching, Prison Rape, and the Crisis of Masculinity*. New York: Peter Lang.
73. See Eigenberg, "Male Rape," 42.
74. Alice M. Propper. "Love, Marriage, and Father–Son Relationships Among Male Prisoners." 69:2 *The Prison Journal* 57.
75. See ibid., 58.
76. Ibid.
77. See Human Rights Watch, *No Escape* 70–71.
78. Quoted in ibid., 3.
79. See Nancy Mahon. (1996). "New York Inmates' HIV Risk Behaviors: The Implications for Prevention Policy and Programs." 86:9 *American Journal of Public Health* 1211, 1213.
80. Ibid., 1213.
81. Ibid., 1213–1214.
82. See Philip A. Thomas and Martin Moerings. (1994). *AIDS in Prison*. Brookfield: Dartmouth University Press.
83. *Dunn*, 1195–1196.
84. Gabi E. Kupfer. (2000). "Margaret's Missing Voice: Using Poetry to Explore Untold Stories in the Law." 21 *Women's Rights Law Reports* 177–180. I am grateful to Michael Feuer for bringing this work to my attention.

Chapter 5

1. These are largely contests between one-shotters and repeat players. See Marc Galanter. (1974). "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." 9:1 *Law & Society Review* 95.
2. See Steven Epstein. (1996). *Impure Science: AIDS, Activism, and the Politics of Knowledge*. Berkeley: University of California Press, 205–207.
3. *Chalk v. Orange County Superintendent of Schools* 840 F.2d 701 (1988).
4. *School Board of Nassau County v. Arline* 480 U.S. 273 (1987). In this case, the Supreme Court ruled that communicable diseases were covered under section 504 of the Rehabilitation Act, protecting individuals from discrimination. The Court left its determination open, however, with respect to HIV and AIDS: "This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered solely on the basis of contagiousness, a handicapped person as defined by the Act," 282, note 7.
5. Dianne Klein. (1987). "Emotional Welcome for AIDS Teacher; Tears, Hugs Mark Return to School." *Los Angeles Times*, Nov. 24: Part 2: 1, col. 1.
6. Jane Applegate. "Teacher with AIDS Reveals His Identity." *Los Angeles Times*, Aug. 19: Metro, Part 2: 4, col. 1.
7. Lanie Jones. (1987). "Teacher's Exile by AIDS Looms as Test of Law." *Los Angeles Times*, Sept. 20: Metro, Part 2: 1, col. 1.
8. *Chalk*, 707, footnote 9, citations omitted.
9. *Chalk*, 707, footnote 10.
10. See Mark A. Stein. (1987). "Judges Hint at Backing Teacher in AIDS Case." *Los Angeles Times*, Nov. 11: Metro, Part 2: 1, col. 6; Jane Applegate. (1987). "Teacher with AIDS Can Return to Class." *Los Angeles Times*, Nov. 19: Part 1: 2, col. 1.
11. *Chalk*, 707–708, citations omitted.
12. See *Thomas v. Atascadero Unified School District* 662 F. Supp. 376 (1987); *Ray v. School District of DeSoto County* 666 F. Supp. 1524 (1987); *District 27 Community School Board v. Board of Education* 130 Misc. 2d 398 (1986); a fourth supporting case involved

hepatitis B, *New York State Association of Retarded Children v. Carey* 612 F.2d 644 (1979).

13. *Chalk*, 709.
14. Ibid., 712.
15. Kim Murphy. (1987). "AIDS Victim's Bid to Resume Teaching is Denied by Judge." *Los Angeles Times*, Sept. 9: Metro, Part 2: 1, col. 5.
16. Ibid.
17. *Chalk*, 709.
18. Ibid., 711.
19. *Chalk*, 711, footnote 14.
20. John Spano. (1988). "Teacher with AIDS Given $35,000 to Settle Lawsuit." *Los Angeles Times*, May 6: Metro, Part 2: 3, col. 1.
21. See Klein, "Emotional Welcome for AIDS Teacher."
22. Ibid.
23. Rebecca Leung. (1988). "High Life; Teacher Dares to Look Ahead: AIDS Victim Shows Hope, Optimism, Prompting High Praise from Students." *Los Angeles Times*, Orange County Edition, May 14: Part 9: 4, col. 1.
24. David Reyes. (1990). "Teacher Left an Indelible Mark, Associates Say." *Los Angeles Times*, Oct. 4: Metro, Part B: 1, col. 5.
25. *Los Angeles Times*. (1987). "Judges Must Confront AIDS Facts." Oct. 4: Metro, Part 2: 22, col. 1.
26. *Barlow v. Ground*, 943 F.2d 1132 (1991), 1134.
27. *Los Angeles Times*, San Diego County Edition. (1986). "Judge Upholds Blood Test for Victim of AIDS." Oct. 11: Metro, Part 2: 6, col. 4.
28. *Los Angeles Times*, San Diego County Edition. (1987). "San Diego County Digest: San Diego Policeman Bitten at Rally Sues Gay; Countersuit Filed." June 10: Metro, Part 2: 3.
29. *Barlow*, 1134.
30. Ibid., 1137.
31. *Schmerber v. California* 384 U.S. 757 (1966).
32. Ibid., 1138.
33. Ibid., 1138.
34. Jim Schachter. (1986). "Judge OKs AIDS Test of Man Who Bit Officers." *Los Angeles Times*, Aug. 21: Metro Part 2: 1, col. 1.
35. *Los Angeles Times*, San Diego County Edition. (1988). "Jury Begins Talks in Gay Marcher Case: Accused of Biting Officers During Tussle with Fundamentalists." Oct. 25: Metro, Part 2: 4, col. 1.

36. *Los Angeles Times*. (1988). "Gay Marcher Acquitted in Police-Biting Case." Oct. 26: Metro, Part 2: 2, col. 1.
37. *Barlow*, 1134.
38. See Schachter, "Judge OKs AIDS Test."
39. Philip Hager. (1987). "Court Backs Barring of Involuntary AIDS Test." *Los Angeles Times*, May 28: Metro, Part 2: 1, col. 1.
40. *Los Angeles Times*, "Jury Begins Talks in Gay Marcher's Case."
41. *Los Angeles Times*, "Gay Marcher Acquitted."
42. *Los Angeles Times*, "Judge Upholds Blood Test."
43. *Doe v. City of New York* 15 F.3d 264 (1994).
44. Jacques Steinberg. (1992). "Delta Settles Complaint of Bias." *New York Times*, Aug. 7: B2, col. 5.
45. *Doe v. The City of New York* 825 F.Supp. 36 (1993), 37.
46. Ibid., 38.
47. *Doe* 15 F.3d 264 (1994), 267.
48. Ibid., 268.
49. Ibid., 268.
50. Ibid., 269.
51. Mary B. W. Tabor. (1994). "Court Backs Privacy Right Over H.I.V." *New York Times*, Feb. 1: B: 3, col. 6; Patricia Cohen. (1994). "Privacy for AIDS Patients." *Newsday*, Feb. 1, 16.
52. *Barlow*, 1137.
53. *Chalk*, 706, citations omitted.
54. In *Barlow* 943 F.2d, 1134; in *Doe* 15 F.3d at 265.
55. Vincent Chalk's sexual orientation was public at the time of his case as made apparent in a *Los Angeles Times* article about his victory; see Klein, "AIDS Teacher Returns." Moreover, his obituary in 1990 listed his "life partner, John Woesner" among the list of his surviving relatives; see Jim Newton and Catherine Gewirtz. (1990). "Irivine Teacher in Key AIDS Case Dies at 45; Civil Rights: Vincent Chalk's Lawsuit Against the County Education Department Brought a Landmark Ruling Protecting the Job Security of Patients in Government Jobs." *Los Angeles Times*, Orange County Edition. Oct. 3: B1, col. 5.
56. See Michel Foucault. (1979). *Discipline and Punish: The Birth of the Prison*. New York: Vintage Books, 75.
57. See Mariana Valverde. (2002). "Justice as Irony: A Queer Ethical Experiment." 14 *Cardozo Studies in Law and Literature* 85, 96.

Chapter 6

1. Louis Michael Seidman provides a lovely illustration of such endless regression in "Some Stories About Confessions and Confessions About Stories." In Peter Brooks and Paul Gewirtz eds. (1996). *Law's Stories: Narrative and Rhetoric in the Law*. New Haven: Yale University Press, 162.
2. Elaine Scarry. (1996). "Speech Acts in Criminal Cases." In *Law's Stories*, 167.
3. I borrow this ironic conclusion from Stanley Fish. (1983). "Short People Got No Reason to Live: Reading Irony." 113:1 *Daedalus* 213, 191. For other inspirational resistance to this type of "systematizing impulse" see, e.g., Harlon Dalton. (1996). "Storytelling on Its Own Terms." In *Law's Stories*, 59.
4. See Linda Hutcheon. (1995). *Irony's Edge: The Theory and Politics of Irony*. New York: Routledge.
5. One need only recall the initial furor and staying power of Laud Humphreys. (1970). *Tearoom Trade: Impersonal Sex in Public Places*. Chicago: Aldine Publishing Co. See also Michael Warner. (1999). *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life*. New York: The Free Press.
6. The one possible exception to this could be *Doe v. City of New York* (1994). While that case may be read as driven by the airline's fear of hiring a potentially infectious employee, it might also be persuasively read as the story of an airline that was trying to avoid the health insurance liabilities associated with Doe's declining health.
7. Or, with particular emphasis on science and the Supreme Court, the jurisprudential chain invokes *Frye v. United States* 293 F. 1013 (D.C. Cir. 1923), *Daubert v. Merrell Dow Pharmaceuticals, Inc*. 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael* 526 U.S. 137 (1999). Literature exploring the intersection of law and science is growing rapidly. See, e.g., Heidi Li Feldman. (1995). "Science and Uncertainty in Mass Exposure Litigation." 74 *Texas Law Review* 1; Edward J. Imwinkelried. (2000). "Evaluating the Reliability of Nonscientific Expert Testimony: A Partial Answer to the Questions Left Unresolved by *Kumho Tire Co. v. Carmichael*." 52 *Maine Law Review* 19; Joseph Sanders. (2001). "Complex Litigation at the Millennium: *Kumho* and How We Know." 64 *Law and Contemporary Problems* 373.

8. A notable exception is Margaret E. Montoya. (2000). "Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy, and Discourse." 5 *Michigan Journal of Race and Law* 847.
9. See, e.g., Paul C. Giannelli and Edward J. Imwinkelried. (1999). *Scientific Evidence*. Charlottesville: Lexis Law Publishing; See also *Scientific Testimony: An Online Journal* (http://www.scientific.org); Frank Tuerkheimer. (2001). "The *Daubert* Case and Its Aftermath: A Shot-Gun Wedding of Technology and Law in the Supreme Court." 51 *Syracuse Law Review* 803. The number of media reports exploring ballistics, fingerprinting, handwriting analysis, and DNA, is vast, and seems to have been magnified by the O. J. Simpson trial. For an illustrative sampling of the debates, see Editorial. (1994). "Scientific Claims: The Courts Drift in Seas of Contradiction; Judges Seek Guidelines in an Era of High Technology and Highly Paid Experts." *Los Angeles Times*, Sept. 5: Metro, B 6, col. 1; Andy Newman. (2001). "Judge Rules Fingerprints Cannot Be Called a Match." *New York Times*, Jan. 11, A14, col. 5; Akhil Reed Amar. (2002). "A Search for Justice in Our Genes." *New York Times*, May 7: A31, col. 2.
10. Fish, "Short People," 188.
11. Bruno Latour and Steve Woolgar. (1979). *Laboratory Life: The Construction of Scientific Facts*. Princeton: Princeton University Press, 176–177.
12. Fish, "Short People," 190.
13. I am thinking here as much of Justice Scalia's assertive invocation of a "kulturkampf" in *Romer v. Evans* 517 U.S. 620 (1996) and his vitriolic dissent in *Lawrence et al. v. Texas* No. 02-102, as much as I am of Justice Ginsberg's omissive "I dissent" in *Bush v. Gore* 531 U.S. 98 (2000). In their own ways, each case became a contest between the known and the unknown, and it was the unknown that set the terms of the debate. Scientific advances have failed to demonstrate whether and how sexual minorities ought to be included within the American definition of citizenship.
14. Richard Rorty. (1989). *Contingency, Irony, and Solidarity*. New York: Cambridge University Press, xv.
15. Ibid., 198.
16. Ibid., 87.
17. Ibid., 89.

18. See Ibid., 89–90.
19. Dennis Altman explores this possibility at length. See Altman. (1971). *Homosexual Oppression and Liberation*. New York: New York University Press, especially Chapter 7, "Conclusion: The End of the Homosexual?" Also see Joshua Gamson. (1996). "Must Identity Movements Self-Distruct? A Queer Dilemma." In Steven Seidman, ed. (1996). *Queer Theory/Sociology*. Cambridge, MA: Blackwell.
20. For a discussion of the invisibility of regulation, its production, and effects, see Michel Foucault. (1979). *Discipline and Punish: The Birth of the Prison*. New York: Vintage Books; see also Barbara Yngvesson. (1997). "Negotiating Motherhood: Identity and Difference in 'Open' Adoptions." 31:1 *Law & Society Review* 31.
21. See Eve Kosofsky Sedgwick. (1990). *Epistemology of the Closet*. Durham: Duke University Press, 1.
22. See Martha Merrill Umphrey. (1995). "The Trouble with Harry Thaw." 62 *Radical History Review* 8.
23. Ewick and Silbey, *The Common Place of Law*, 226.
24. See Richard Rorty. (1989). *Contingency, Irony, and Solidarity*. New York: Cambridge University Press, 87.
25. See Susan Sontag. (2001). "Comment: Tuesday and After." *The New Yorker*, Sept. 24, 32. Bill Maher's redefinition of cowardice aroused similarly passionate indignation.

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