AIDS AND THE SEXUALITY OF LAW:

ironic jurisprudence

JOE ROLLINS

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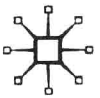

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This book is dedicated to the Garner sisters, those indomitable women who taught me that irony is also a strategy for survival.

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

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.

Since I moved to New York I have benefited from the advice, friendship, and intellectual stimulation of Mary Bushnell, Patricia Clough, Alyson Cole, Paisley Currah, Hester Eisenstein, Ziva Flamhaft, Andrew Hacker, Peter Hegarty, Robert Kaplan, Lenny Markovitz, Lisa Jean Moore, Victoria Pitts, Patricia Rachal, Donald Scott, Alisa Solomon, and Burt Zwiebach. Anthony Wahl is a patient and encouraging editor, and I am very thankful that he took on this project. It has been a pleasure to work with Sonia Wilson and Laurie Prendergast at the production stage. The gracious insights of two anonymous reviewers were especially helpful and this is a much better book thanks to their efforts, but I alone am responsible for its content.

It is also very satisfying to express my gratitude to the people who, over the past few years, supplied me with other pleasures that are essential to my sanity and productivity: friendship, humor, food, wine, and baseball (just to name a few). Without these people, I would have succumbed to the paralysis of irony and frustration long before this book was finished: Joseph Durando, Aaron and Stephanie Ellison, Jeffrey Faustman, Frank McQuarry, Sheila Meyer, Nina Rollins, and Sami Rollins. Across time and distance, there is always Christine Kaufman. And as always, I would be lost without my lover, Parviez Hosseini.

Contents

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.

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