

# 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 Clozen 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 Scheppelle. (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). "Tearrooms 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 *Bebringer* 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. Closten 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., *Oncala 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 Scheppelle. (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). "Irvine 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 ommissive "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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