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OUTING IN THE TIME OF AIDS: LEGAL AND ETHICAL CONSIDERATIONS

JOHN F. HERNANDEZ*

There is no question that the Acquired Immune Deficiency Syndrome (AIDS) pandemic has had a devastating effect on the male homosexual population of the United States.¹ In fact, at its earliest point of discovery, AIDS was perceived as a "Gay Plague" and contraction of the syndrome led to the conclusion (albeit often incorrect) that the person afflicted was homosexual.² Even today, more than a decade into the discovery of Human Immunodeficiency Virus (HIV), males who contract HIV and AIDS become the subject of speculation regarding their "true" sexuality. Allegations of bisexuality or secret homosexual lives become the fodder for tabloid newspapers and private gossip.

Despite the spread of HIV infection into the heterosexual population in the United States and elsewhere, public perception still leads the uninformed to automatically conclude that a male infected with HIV is homosexual or at least has been a practicing bisexual. Even more disturbing is the erroneous perception that a gay male is automatically perceived by many to be a "carrier" of HIV.

The implications of these assumptions take on a special significance when coupled with a practice used by some groups known as "outing." "Outing" is the making public of a homosexual's sexual orientation (which the homosexual intends or desires to keep private) by a group or person whose purpose in making such information public is to cause embarrassment, ridicule, forced acceptance or to further some political, personal or social agenda.³ Ofttimes the group wishing to out

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1. *Aids and Human Immunodeficiency Virus Infection in the United States: 1988 Update*, 33 MORTALITY & MORBIDITY WKLY. RPT., No. S-4, May 12, 1989, reprinted in MICHAEL L. CLOSEN ET AL., *AIDS: CASES AND MATERIALS* 99 (1989) [hereinafter *AIDS in the U.S.*].

2. Matt Clarke et al., *Special Report: AIDS*, NEWSWEEK, Aug. 12, 1985, at 20; Jean Seligman et al., *The AIDS Epidemic: The Search for a Cure*, NEWSWEEK, Apr. 18, 1983, at 74.

3. "Outing" has been used in a number of different contexts and recently has taken on a meaning based upon the concept described above to include the revelation of any private secret about an individual. It is based upon the concept of coming out of the closet, i.e., affirming one's homosexuality. For the purposes of this paper it will be used as defined above. Also, due

a lesbian or gay person has the arguably laudatory goal of demonstrating the hypocrisy of discriminating on the basis of sexual orientation. An example culled from the pages of the recent popular press involved the outing of Pete Williams, who served as Pentagon spokesperson during the Gulf War. Journalist and gay activist Michelangelo Signorile outed Williams in the gay publication *The Advocate*.⁴ Signorile's objective was to point out the injustice of top level quasi-military decision makers adhering to and even promoting a policy of the United States government to exclude gays and lesbians from the armed forces when the persons implementing those policies were themselves gay.⁵ Although releasing this information to the gay readers of *The Advocate* may have had *de minimis* impact, a number of mainstream publications picked up the story.⁶ In fact, the objective behind the publication in *The Advocate* was presumably the expectation that the "secret" would become sufficiently disseminated to cause Williams uneasiness and to point out the Administration's tacit acceptance of gays contrary to its official discriminatory policy.⁷ It could also be argued that by virtue of the fact that Williams had competently and successfully fulfilled his duties in a quasi-military setting, the outing of Williams demonstrated that other homosexuals could likewise function effectively in a military setting.⁸

Lesbian and gay rights advocates who favor outing have outed others because of their association with conservative, right wing idealists. The gay publication *QW* outed John Schlafly, the son of Phyllis Schlafly, in September of 1992.⁹ Phyllis Schlafly, head of the conser-

to the acceptability of this usage, quotation marks will not be used around the word in the remainder of this paper. To out someone will refer to the action of outing. Likewise, the word outer will be used to refer to the party that is outing the homosexual. Outee will be used to refer to the homosexual who is outed.

4. See generally Alexander Cockburn, *THE NATION*, Aug. 26, 1991, at 220; Michelangelo Signorile, *The Outing of Assistant Secretary of Defense Pete Williams*, *ADVOCATE*, Aug. 27, 1991, at 34.

5. See Signorile, *supra* note 4.

6. William A. Henry III, *To "Out" or Not to "Out,"* *TIME*, Aug. 19, 1991, at 17; John Cassidy, *'Outing' Claims Pentagon Victim*, *SUNDAY TIMES*, Aug. 11, 1991, at Overseas News.

7. See Cassidy, *supra* note 6.

8. In fact, the exclusion and expulsion of gays and lesbians from the military is most likely when a diminution in troop size will not have a significant negative impact on military readiness. RUTHANN ROBSON, *LESBIAN (OUT)LAW 91-99* (1992) (discussing lesbians and the military). See also Jose Zuniga, *My Life in the Military Closet*, *N.Y. TIMES*, July 11, 1993, § 6 (Magazine), at 40 (discussing a homosexual's ability to excel in a military setting and recounting the story of Mr. Zuniga, who was named Soldier of the Year in March, 1993).

9. Maer Roshan & Sean Hilditch, *Phyllis Schlafly's "Deep Dark Secret,"* *QW*, Sept. 6, 1992, at 22.

vative group Eagle Forum and a long-time opponent of gay rights, maintained the viability of her anti-gay rights position. It is interesting to note that John Schlafly, although acknowledging his homosexuality and voicing concerns regarding most overt discrimination, still essentially stood by his mother's position.¹⁰

Outing of this nature appears to do little to alter the deeply held positions of the outee and other affected parties. However, proponents justify outing based upon the promise that it demonstrates the hypocrisy of their opponents' positions and to illustrate that lesbians and gays are everywhere.¹¹

Gay activists who support the concept of outing also point out the necessity of providing appropriate role models for uninformed, perhaps isolated, younger gays and lesbians. It is contended that it is the perceived necessity to remain "in the closet" that makes outing all the more imperative. If all gay persons were known to be gay, rather than presumed to be heterosexual, "gayness" would lose its negative connotation. Unfortunately, society perceives only persons who are obviously gay¹² as constituting the gay community. Many people believe that they do not even know a gay or lesbian person¹³ when, in reality, it is very likely that persons or even family members they encounter on a regular basis are gay or lesbian.

The outing of Malcom Forbes was used in this context. The now defunct gay magazine *Outweek* outed Forbes, the well-known publisher and frequent escort of actress Elizabeth Taylor.¹⁴ Some mainstream publications felt more comfortable printing the posthumous outing story regarding Forbes because he would not be able to take the news orga-

10. Bettine Boxall, *Son of Conservative Activist Phyllis Schlafly Reveals He's Gay*, L.A. TIMES, Sept. 19, 1992, at A14.

11. Randy Shilts, *Is Outing Gays Ethical?*, N.Y. TIMES, Apr. 12, 1990, at 23; RICHARD MOHR, GAY IDEAS 11-48 (1992).

12. The general perception is presumably that men who are particularly "feminine" and women who are particularly "masculine" are homosexual. Of course, this perception is flawed. However, these people are out by virtue of their behavior rather than the behavior of another person.

13. See, e.g., Marc A. Fager, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 650-51 (1992) (Justice Powell stated that at the time of writing *Bowers* he did not know any gay people and now regrets his decision in that case).

14. Ronald F. Wick, *Out of the Closet and Into the Headlines: "Outing" and the Private Facts Tort*, 80 GEO. L.J. 413 (1991); Margaret Carlson, *Getting Nasty: How to Spread a Smear*, TIME, June 19, 1989, at 33; David Gelman et al., "Outing: An Unexpected Assault on Sexual Privacy," NEWSWEEK, Apr. 30, 1990, at 66; *Open Closets, Closed Doors*, TIME, July 8, 1991 at 47; Larry J. Sabato, *The Smearing of Tom Foley*, ROLL CALL, July 22, 1991.

nizations to court.¹⁵ The implications from the Forbes outing would be that one could be gay and be financially successful. Likewise, many other celebrities and other famous people, such as Anthony Perkins,¹⁶ have been posthumously outed.

Needless to say, not all such efforts to out have positive objectives. Tabloid publications periodically out celebrities apparently for no other purpose than to create controversy and promote sales. Actor Tom Selleck¹⁷ and country singer Randy Travis¹⁸ were both reported to be homosexuals by tabloid publications. Certain aggressive gay and lesbian political groups out persons to cause them embarrassment for leading a closeted life and to support the general proposition that "we are everywhere."¹⁹ Likewise, persons adverse to the interests of gays and lesbians may out a person to gain some political, tactical or economic advantage. The eccentric lifestyle of recently appointed Attorney General Janet Reno caused widespread speculation regarding her sexuality.²⁰ The far right has even alleged that Hillary Clinton is a lesbian.²¹ In fact, this aggressive use of outing to "punish" the closeted gay person is logically inconsistent with the proposition that homosexuality is no cause for shame.²² Representative Barney Frank (D. Mass.) threatened a mass outing of conservative Republicans if they did not stop circulating rumors regarding the sexuality of the proposed Speaker of the House, Tom Foley.²³

15. Eleanor Randolph, *The Media at Odds Over 'Outing' of Gays*, WASH. POST, July 13, 1990, at C1.

16. Mark Goodman, *One Final Mystery*, PEOPLE, Sept. 28, 1992, at 38.

17. See John Robinson, *Selleck's Straight . . . so what?*, BOSTON GLOBE, Aug. 8, 1991, at 69 (referring to Selleck winning judgment against the tabloid Globe Weekly for falsely publishing story that he is gay).

18. See *Randy Travis Denies Report*, ST. PETERSBURG TIMES, Mar. 10, 1991, at 12A (referring to Travis' denial of an article in the National Examiner stating that he is gay).

19. This could be the real motivation behind the Forbes outing. Certainly, the outing of Forbes could lead to the conclusion that he was "forced" to lead a double life in order to attain his level of success.

20. Jerry Seper, *Prosecutor Takes Rumors in Stride*, WASH. TIMES, Feb. 22, 1993, at D12; Karl Vick & David Bahl, *Stigma of A Middle-Aged, Single Woman*, ST. PETERSBURG TIMES, Feb. 17, 1993, at 1A.

21. Frank Rich, *Whose Hillary?*, N.Y. TIMES, June 13, 1993, at 70. "Predictably the first role Hillary had to play was created by political opponents and usual Men Who Don't Get It. Like every woman who challenges the male status quo . . . she was immediately rumored to be a lesbian . . ." *Id.* See also David Lauter, *Mrs. Wonk Goes to Washington*, L.A. TIMES, May 22, 1993, at 12.

22. *Matherson v. Marchello*, 473 N.Y.S.2d 998 (N.Y. App. Div. 1984) ("It cannot be said that social opprobrium of homosexuality does not remain with us today. Rightly or wrongly, many individuals still view homosexuality as immoral.") *Id.* at 1005. It could be asserted that there is still an element of punishment when gay advocates out someone. They may wish to "punish" the person for remaining closeted.

23. John P. Elwood, *Outing, Privacy, and the First Amendment*, 102 YALE L.J. 747, 748

Regardless of the motivation for the outing, the current public concern (perhaps more appropriately characterized as hysteria) regarding AIDS and the fear of HIV infection interposes new and vastly different concerns into the outing debate. The assumption that a male afflicted with the HIV infection is a homosexual can lead to a type of tacit "outing" based upon public dissemination of information regarding that person's HIV status. This is perhaps best illustrated by the circumstances surrounding the death of actor Rock Hudson. Although perceived by the public at large to be heterosexual, when Mr. Hudson publicly acknowledged he was suffering from AIDS, his "secret" homosexual life also came to the forefront.²⁴ Likewise, posthumous "outing" can occur when it is revealed that a male dies of an opportunistic infection because he was suffering from AIDS.²⁵

Some public figures have gone to great lengths to avoid disclosing their HIV status because of the stigma that would attach to them regarding their sexual orientation.²⁶ Even when a person has died of an AIDS-related illness, efforts have been made to characterize the cause of death as something other than AIDS-related because of the perceived backlash due to AIDS hysteria and homophobia. When actor Brad Davis contracted HIV he went to significant lengths to keep it secret.²⁷ Upon his death it was contended that he contracted the disease from previous intravenous (I.V.) drug use. Basketball star Magic Johnson contends he contracted HIV because of numerous, unprotected heterosexual encounters.²⁸ Tennis great Arthur Ashe claimed he possibly contracted HIV from blood transfusions during heart surgery.²⁹

n.7 (1992).

24. Gerald Clarke, *Rock: A Courageous Disclosure*, TIME, Aug. 5, 1985, at 51; David Gelman & Michael Reese, *AIDS Strikes a Star*, NEWSWEEK, Aug. 5, 1985, at 68.

25. See, e.g., *Liberace: The Gilded Showman; His Public Flamboyance Shrouded a Troubled Life*, PEOPLE, Feb. 16, 1987, at 24.

26. See, e.g., Ken Gross, *A Life Lived on the Brink*, PEOPLE, July 14, 1986, at 26 (discussing the secret life of New York attorney Roy Cohn and his continuing efforts to deny his homosexuality); J.D. Reed, *Dressed to Kill - And Die*, TIME, Apr. 9, 1990, at 81 (Although first reports indicated designer Halston had died of cancer, it was later confirmed that he had actually died of an AIDS-related illness). Efforts to conceal the true cause of death were evident throughout the entertainment and fashion industry. *Id.*

27. Tim Allis, *When Midnight Comes*, PEOPLE, Sept. 23, 1991, at 46. See also David Ansen et al., *A Lost Generation*, NEWSWEEK, Jan. 18, 1993, at 16.

28. Charles Leerhsen et al., *Magic's Message*, NEWSWEEK, Nov. 18, 1991, at 58; Laura B. Randolph, *Magic and Cookie Johnson Speak Out for First Time on Love, AIDS and Marriage*, EBONY, Apr. 1992, at 100.

29. Deborah Gregory, *A Little of This and That to Make Your Living Easier; Can We Bank on the Blood Supply?*, ESSENCE, Aug. 1992, at 32; Paul A. Witteman, *A Man of Fire and Grace; Arthur Ashe 1943-1993*, TIME, Feb. 15, 1993, at 70.

Whether explicit or tacit, the underlying message is that it is better to be an I.V. drug user, sexually irresponsible, or have a life threatening illness than it is to be homosexual. Ballet star Rudolph Nureyev was adamant about not disclosing the fact of HIV infection during his life. Even after he died, his physician would not confirm that his death was AIDS-related.³⁰

The AIDS - therefore gay - perception is mirrored by the even more detrimental gay - therefore AIDS - perception. The relationship between AIDS and outing can come into play in circumstances where the public disclosure of a person's homosexual orientation can lead to a public assumption that such person should be avoided because he is likely to be afflicted with HIV. This type of reasoning can even lead to an aggressive attempt to ferret out homosexuals because of some vague fear that they present a health threat.³¹ Gay rights opponents have used the perceived connection between homosexuality and AIDS to justify their prejudice and opposition to homosexuality.³² It has been used as a justification to retain the ban on gays in the military,³³ invalidate and prohibit anti-discrimination ordinances,³⁴ maintain sodomy laws³⁵ and otherwise legitimize differential treatment of gays.

Although gay activists may feel that the AIDS crisis justifies aggressive techniques to insure that AIDS research, treatment and related matters are adequately addressed, it is ironic that it is this very crisis which makes even the threat of outing such a powerful device. The propriety of relying upon the fear of AIDS to give outing additional political clout should certainly be questioned.

Trading off this fear of AIDS can be illustrated by the following hypothetical. Dr. Jones is a dentist in Grove View, a small, very con-

30. See Ansen, *supra* note 27, at 16.

31. This effort can even be expanded to out lesbians. The link between outing and AIDS in the context of lesbians is even more distorting. Lesbians have a lower incidence of AIDS than even that found in the mainstream heterosexual population. However, lesbians are often perceived as AIDS risks by the uninformed due to the male homosexual and AIDS incidence. Ann Japenga, *Gay Women and the Risk of AIDS: Lesbians Oppose Misperception That They're All 'Diseased'*, L.A. TIMES, Apr. 2, 1986, at 1.

32. See, e.g., Remarks of Congressman William E. Dannemeyer, Cong. Rec. H7984-H7987 (Oct. 1, 1985) reprinted in MICHAEL L. CLOSEN ET AL., AIDS CASES AND MATERIALS 76-78 (1989). Congressman Dannemeyer contends that AIDS is spread because "God intended a plan for men and women" and certain persons (i.e., homosexuals) are not acting in accordance with the plan. *Id.*

33. John T. Correll, *Gay Horizons*, AIR FORCE MAG., July, 1993, at 12.

34. UPI, Oct. 21, 1988, available in LEXIS, Nexis Library, UPI File.

35. *Bowers v. Hardwick*, 478 U.S. 186 (1986); see also ARTHUR S. LEONARD, SEXUALITY AND THE LAW 158 (1993).

servative, community located in Truman County in central Florida. Dr. Jones has been a staunch supporter of "right wing" causes that are popular in Grove View, which is located 30 miles from Orangeboro, the County Seat for Truman County. Orangeboro is a much larger, more liberal community made up primarily of persons who have moved there in response to its rapid growth and job opportunities. Orangeboro has a large and active gay and lesbian population. It also has a significant and growing AIDS population.

The Board of Commissioners for Truman County has placed a "human rights" ordinance on the ballot for the next election. The gay and lesbian community fought long and hard to get the ordinance on the ballot. It provides, among other things, that employers and landlords cannot discriminate on the basis of sexual orientation. There has been a problem in the county with gays being dismissed from their jobs and denied housing because of the fear of AIDS.

Dr. Jones spearheads a grass roots movement in Grove View named "Neighbors for Morality" to fight the ordinance. "Out Front," a militant gay and lesbian organization with members in Orangeboro, investigates Dr. Jones and finds out that he is a closeted homosexual.

"Out Front" leaders realize that outing Dr. Jones will cause Dr. Jones' patients to leave his practice and could cause financial ruin.

The fact pattern presents the question of whether the informed ("Outfront") can use the presumed ignorance of the people of Grove View to further the political cause of gays and lesbians. Assuming Dr. Jones is, in fact, gay, "Out Front" would be disseminating this information, to a large extent, to "trade" on AIDS hysteria. "Out Front's" objective of neutralizing Dr. Jones would be premised upon the fact that Dr. Jones' patients would leave his practice because they would conclude that since he is a gay man they are significantly more at risk of contracting AIDS if they use his services as a dentist.³⁶

The facts surrounding the Kimberly Bergalis case lend credence to the fears that "Out Front" would hope to generate. Ms. Bergalis was infected with HIV after a visit to her dentist, Dr. David Acer.³⁷ Dr. Acer was a closeted bisexual who had contracted the HIV infection. Upon investigation, it appears unlikely that Ms. Bergalis would have contracted HIV from Dr. Acer except that, according to personnel with-

36. Christine Gorman, *Should You Worry About Getting AIDS From Your Dentist?*, TIME, July 29, 1991, at 50.

37. Jeffery W. Cavender, *AIDS in the Health Care Setting: The Congressional Response to the Kimberly Bergalis Case*, 26 GA. L. REV. 539, 540 (1992).

in Dr. Acer's office, the doctor had failed to follow sterilization protocol. It appears the infection to Ms. Bergalis and other patients of Dr. Acer was spread as a result of using compromised equipment and instruments.³⁸

The Bergalis case caused such wide ranging fear that Congress investigated the propriety of imposing mandatory HIV testing requirements on all health care workers.³⁹ The fear health care workers, especially dentists, have with regard to being outed has taken on a new dimension. Now, not only would the dentist have to be concerned with the social implications, but also, the prospect that dissemination of such information would (except in the most enlightened communities) destroy the dentist's practice.

Merely threatening Dr. Jones with outing could be dismissed as inappropriate by purists of outing. They would contend that threatening Dr. Jones is not outing. Rather, Dr. Jones should and would be outed, with no option to "stay in the closet." His outing would be justifiable. It serves to demonstrate his hypocrisy and perhaps lead to the conclusion that other opponents are also hypocritical and should therefore be disregarded.

The conclusion that if he is homosexual he presents an HIV risk, greatly exacerbates the negative effects that outing might otherwise have on a given individual. It would appear antithetical to the objectives of a pro-homosexual rights group to use outing offensively in order to achieve a short term political goal. The "success" of the outing would be facilitated based upon an erroneous perception of the public. It is inappropriate to conclude merely because someone is a male homosexual that he is likely to be infected with HIV. However, because of the prevalence of AIDS in the homosexual community, outers should be particularly sympathetic to those with HIV infection and should have an interest in not promoting or encouraging prejudicial negative responses to persons suffering from HIV. The homosexual community ethically cannot use the fear of AIDS, based upon incorrect assumptions, to further its cause.

One should also question the propriety of using outing as a threat to coerce the intended outee into some pattern of behavior the outer believes is appropriate. This use would completely contravene the "positive" effects of outing. In fact, this use turns the "closet" into an instrument of coercion. One could also question whether the long term

38. See Gorman, *supra* note 36.

39. 137 CONG. REC. 10,331 (1991).

objectives of outing are being furthered by this type of behavior. Many persons who might otherwise be sympathetic to gay causes and gay rights might find this kind of behavior particularly offensive. Furthermore, outing of this type might cause "closeted" gays to retreat more deeply into the closet.⁴⁰

This is particularly true when the person who is outed stands a good chance of losing his means of livelihood. For example, the outing of a renowned chef could cause the chef financial disaster. In this context the AIDS/outing link is apparent. In the absence of AIDS, outing of the chef might have had some potential for adverse consequences to the chef. However, because of the fear of AIDS, outing the chef would probably cause some potential patrons to fear eating his food.⁴¹

The outing and AIDS dilemma can also be illustrated by another hypothetical which explores the issue from a different perspective. Consider the following. Bob Smith is a paramedic with the emergency rescue force in Cleveland, Ohio. Bob Smith contracts the HIV virus and ultimately AIDS. Bob applies for workers' compensation claiming that he must have been exposed to the virus while giving mouth to mouth resuscitation to an infected person. Bob is a closeted homosexual who has engaged in unsafe sex acts. In fact, the man Bob was dating for two years died of an AIDS-related, opportunistic infection four months ago. Bob's workers' compensation claim creates and fosters the hysteria that AIDS can be contracted by casual contact.

"Out Front" wants to out Bob to help quell the hysteria and to show that the chance of infection from casual contact is not significant. "Out Front" believes this is necessary to help educate the public about the reality of AIDS and how it is spread. Outing Bob may lead to a denial of his workers' compensation claim and, hence, he will not have the means to pay for needed medical treatments and to support himself.

In this scenario, the outing would serve to facilitate the societal benefit of curbing the spread of erroneous information. However, the

40. A militant British Gay and Lesbian Group known as FROCS--Faggots Rooting Out Closeted Sexuality--proposed a massive outing of political, religious, judicial, entertainment and other figures. This effort was never carried through. Rather, FROCS contended the exposure regarding the massive outing was aimed at instilling fear in the potential "outees" and demonstrating the extent to which homosexuality is still negatively perceived. Tim Rayment & Jasper Gerard, *Gays Say 'Outing' Plot Was Not a Hoax*, SUNDAY TIMES, Aug. 4, 1991, at Home News.

41. This fear, of course, is not well-founded. The possibility of getting AIDS from the chef may be nonexistent, i.e., the chef may be HIV negative. Even if the chef was HIV positive or had AIDS the chance of spreading it to patrons would be virtually nonexistent.

outing would act adversely to the interest of the outed person. It would also arguably work contrary to the larger interest of those afflicted with HIV by impeding a person from getting the financial resources which would allow him to address his HIV status.

This hypothetical, although not unrealistic,⁴² fact pattern questions whether outing is an appropriate tool to help curb public misinformation regarding AIDS. Should persons who contract HIV be able to hide behind a presumption of heterosexuality and maintain the position that their infection was acquired by non-intimate contact?⁴³ It is interesting to note that although, generally speaking, the public may assume that an HIV-infected male is homosexual, those persons so infected may go to some lengths to deny their homosexuality. Even posthumous denials may be perpetuated by the persons who succeed to the business interest of a male who died from an AIDS-related illness.⁴⁴

The scenarios above show the dangers of the "group" making the decision for the individual. It is particularly devastating for "Bob" because not only will he suffer the possible consequences of homophobia and the consequences of AIDS hysteria that he would otherwise have to endure, but he may also be sacrificed physically to further the "group's" objectives.

In the "Bob" hypothetical, one could contend that the disclosure is really only tantamount to disclosing a fraudulent workers' compensation claim with the ancillary benefit of remedying the public's false perceptions. Likewise, one could contend that the disclosure of homosexuality generally is appropriate, at least in those jurisdictions in which sodomy is illegal,⁴⁵ because it is analogous to disseminating information about the commission of a crime. The Supreme Court has indicated that the homosexual has no protected right to engage in such behavior⁴⁶ and perhaps he should be perceived as proceeding at his own risk.

The underlying irony is that outing, particularly by gay activists, can be premised upon philosophies those activists would find repugnant. When the outed person is not HIV-positive he may then be forced to make such a public claim. Dr. Jones, in the hypothetical above, may feel compelled to advertise that he and all his staff have

42. Lisa Leff & Christopher J. Georges, *Rescue Workers Confront AIDS Fear*, WASH. POST, July 20, 1987, at A1.

43. One of the reasons why outing can be an effective tool for personal or perhaps even social change is that it can call into question a presumption of heterosexuality.

44. See Reed, *supra* note 26.

45. See, e.g., GA. CODE ANN. § 16-6-2 (Michie 1990).

46. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

been tested for HIV and shown to be negative. It is unlikely that gay activists would want to encourage this kind of behavior.

There is unquestionably a greater possibility that a male afflicted with HIV is homosexual or at least a practicing bisexual as opposed to strictly heterosexual.⁴⁷ However, this somewhat greater likelihood should not lead to the conclusion that every male afflicted with HIV is homosexual. Furthermore, the link between male homosexuality and HIV infection does not justify the conclusion that any particular homosexual male is likely to be infected with HIV. There should be no allowance for the assumption that a male homosexual presents an undue health threat in any profession or calling. Even if the person were to be HIV positive, he would present no viable threat to the health of others. HIV is not contagious by casual contact and as long as those in the health care professions are following universal precautions there is virtually no chance of infecting a patient.⁴⁸ Outing a homosexual to gain some perceived benefit to the outer, particularly in these times, can present negative consequences to the individual that far outweigh any incidental benefit to society. The pre-AIDS social costs of being labeled a homosexual are now greatly magnified. Even enlightened parents would have an immediate concern regarding their son's HIV status were they to suddenly find out he was gay. The ethic of outing must consider the implications that this information has on a society that may not be only homophobic but also HIV and AIDS phobic. The burdens for any particular individual to bear under these circumstances may be too great.

We should consider whether groups or individuals who engage in this behavior should be called upon to compensate "outing victims." Currently, the law provides little opportunity for recovery under these circumstances.⁴⁹

In certain circumstances, if the outing is incorrect, i.e., the person outed is not homosexual, there is some possibility the outed party could maintain a cause of action in libel or slander.⁵⁰ If the person outed is even arguably a "public figure" and his homosexuality is known within the homosexual community, it appears unlikely that current law will afford him any remedy.⁵¹ There is no precedent regarding the person

47. See *AIDS in the U.S.*, *supra* note 1.

48. Gerald H. Friedman & Robert S. Klein, "Transmission of the Human Immunodeficiency Virus," *NEW ENG. J. MED.*, Oct. 29, 1987, at 1125-35.

49. See *Wick*, *supra* note 14.

50. See *Moricoli v. Schwartz*, 361 N.E.2d 74 (Ill. App. Ct. 1977).

51. See *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665 (Cal. Ct. App. 1984).

who is not a public figure and whose homosexuality is not known even within the gay community.

In order to fit within conventional concepts of tort law and be afforded a remedy, the outee would have to demonstrate that homosexuality is "highly offensive to a reasonable person and not of legitimate concern to the public."⁵² Rather than serving any cathartic purpose, the outing would force the outee to argue that his sexual orientation is "highly offensive."⁵³

If the outing causes the outee to lose a contractual right or prospect for business there is some possibility the outee can maintain a cause of action if the outing is deemed to be "improper."⁵⁴ There is very little guidance as to what should be considered "improper;" this standard begs the question.

Perhaps all outing should be deemed improper. However, there are competing interests of the public's right to know and the Constitutional rights afforded to the outer(s) under the First Amendment's guarantee of free speech. Given the potentially dire consequences that can ensue from outing, in light of the AIDS/homosexuality link, the courts and society will be called upon to "judge" the appropriateness of this behavior and determine which party is to pay the costs associated with being outed.⁵⁵

CONCLUSION

The public's tendency to link homosexuality with AIDS creates additional concerns with regard to the practice of outing. The individual

52. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

53. See Wick, *supra* note 14.

54. To determine whether the outing was actionable a court would perhaps look at the following factors:

- (a) the nature of the actor's [outer's] conduct,
- (b) the actor's [outer's] motive,
- (c) the interest of the other [the outee] with which the actor's [the outer's] conduct interferes,
- (d) the interests sought to be advanced by the actor [outer],
- (e) the social interests in protecting the freedom of action of the actor [outer] and the contractual interests of the other [outee],
- (f) the proximity or remoteness of the actor's [outer's] conduct to the interference and
- (g) the relations between the parties.

RESTATEMENT (SECOND) OF TORTS § 767 (1977).

55. The possible procedural and substantive law obstacles that may act to preclude a cause of action for outing are beyond the purview of this paper. Suffice it to say that, if this behavior is or does become actionable, there would need to be determinations regarding burdens of proof, the extent to which the information was already known, the necessity of proving damages and possible defenses.

outed may be called upon not only to lose whatever benefits may ensue from a presumption of heterosexuality, but also may now have to suffer from a presumption of HIV infection and the misperception that he is a health threat. The outed person may be viewed as unacceptable to certain portions of society not only because he is viewed as "morally" deficient but also because he is perceived as a contagious pariah.

The propriety of outing must be re-evaluated in light of the costs to the individuals so affected. We should question whether the legal system should provide such persons a means of recourse and, if so, under what circumstances.

