

The Case of Jack: What are the Limits of a Community's Right to Know?

Scrutinizing The Individual: What Are The Limits Of A Community's Right To Know?

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You are the owner of a family-style restaurant in Wheatfield, Kansas, a town of 2,000 people located approximately 250 miles from the nearest metropolitan area. You have seven or eight regular employees, including a man who has just returned from the latest of several recent visits to an urban medical center. Over the past six months Jack has lost weight, become appreciably weaker, and always seems to have a bad cold. In the ten years Jack has worked for you, he has lived by himself; indeed, some townspeople have

found it remarkable that he doesn't have a girlfriend. He is a model employee, and in fact a number of his recipes are local favorites. Jack is the one you trust to run business when you are away or ill. But now there's talk about his health, speculation regarding his visits to the medical center. What kind of health problem does he have? Why does he need to go so far to receive medical care? Is he trying to hide something?

Neighbors begin to ask questions, and it turns out you're the one who has known Jack the longest. Clearly, people are becoming afraid, and they want you to find out more about him. When Jack returned from his last hospital visit, he told you that he has AIDS. He shared what the doctors said about AIDS treatment and transmission and revealed that his own prospects were uncertain. He will have to make additional trips to the hospital, so he'll be needing more time off work. You aren't sure that financially you can continue to support Jack if he's unable to work at the usual level.

Last night someone tacked a message on the restaurant's front door, saying, "We won't eat infected food!" What will you do?

(Following are two commentaries on this case study.)

Traditional legal theories may actually obscure the subtle ways in which violations of individual rights occur.

In this respect, Private Acts would have benefited from a closer look at the subtle meanings given to AIDS and their impact on civil liberties. Work such as Susan Sontag's on illness provides a starting point for this kind of inquiry. In her 1978 book, *Illness as Metaphor*, Sontag pointed out the repressive uses of illness as a metaphor in our culture. She drew upon medical and psychiatric sources, ancient texts, art, and literature to explore the depths of, and ultimately to free us from damaging metaphoric thought about illness. Sontag extended her discussion of illness in the context of the AIDS crisis, and in 1988 published *AIDS and its Metaphors*. This book confronts the meanings we give to AIDS much as Lawrence confronts racism in his essay. Sontag argues that AIDS, with its greater capacity to create spoiled identity, has replaced cancer as the stigmatizing disease in the United States. And she makes a larger point: "It seems that societies need to have one illness which becomes identified with evil and attaches blame to its 'victims' but it is hard to be obsessed with more than one' Her study explores the "dual metaphoric genealogy" of AIDS. "As a microprocess, it is described as cancer is an invasion. When the focus is transmission of the disease, an older metaphor, reminiscent of syphilis, is

invoked: pollution." Viewing AIDS in this way can't help but contribute to discrimination and civil liberties violations. It is particularly dangerous since it occurs on an almost unconscious level. Bayer's work would have been more richly textured had it included material along these lines.

Private Acts is worthwhile for the background information it provides and the questions it raises, though not always for the answers it provides. Read it but do so with some basic civil liberties principles in mind. Think also about how our society looks at AIDS and treats people ill with the disease, because it is "politics" on this level that you won't find in Bayer's book.

Privacy, Confidentiality, and AIDS

by Barry L. Can

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Part I

What should a restaurant owner do when he or she discovers that an employee has AIDS? A moral answer to this question depends on several factors: What action or set of actions promotes the greatest well-being or interest for all parties affected? What are the motivations of the restaurant owner? Would anyone be unjustly affected by whatever action is taken?

In general, unjust treatment of an individual to promote the interests of other parties is wrong, but there are conceivable circumstances where the interests of other parties would be so adversely affected that the injustice might be excusable. This is not to say, however, that it would be right to violate the rights of another simply to enhance the interests of others whose well-being is not jeopardized.

Part II

These general remarks are of little help without more knowledge about AIDS and the situation of the restaurant owner. On the face of it, the restaurant owner ought not to do anything differently than what he or she has been doing upon discovery that an employee has AIDS. To see that this is so, consider whether the restaurant owner should take any action upon discovering that an employee has a mosquito bite. The point is that the inclination to suggest that the restaurant owner do anything at all rests upon assumptions one has about AIDS. Thus, knowledge of AIDS, its effects, its transmission, etc., is crucial to evaluating any course of action the restaurant owner might take.

Similarly, if the restaurant owner has other employees with AIDS, knows it, and has done nothing about it, then there is no moral reason why he or she ought to take action in this case. Again, the point is that the inclination to suggest that the restaurant owner do anything at all rests upon assumptions one has about the situation of the restaurant owner.

First of all, then, it is known that AIDS can be transmitted only through sexual activity or direct blood transfusion. It is thus virtually impossible for any employee or patron of the restaurant to contract AIDS from Jack. I say "virtually impossible" because there are imaginable, but

extremely unlikely circumstances where the employee could transmit AIDS to others. However, these circumstances have nothing to do with his job duties. His work as a restaurant employee presents no greater danger to the public than his walking down a street.

This being the case, the restaurant owner is not obliged to fire Jack out of concern for his or his customers' health. And it is difficult to imagine any additional circumstances that would require the owner to fire Jack, who is described as a model employee.

Part III

Still, the owner might be justified in firing Jack, even if not required to do so. After all, the townspeople seem aware that Jack has AIDS and are worried about it. There is potential here for the restaurant's business to fall off, thereby hurting the owner directly and employees indirectly. The sign tacked to the restaurant door - "We won't eat infected food!" - suggests that there is at least one person in this small town who is threatened by Jack's illness and may be roused to further action against Jack or the restaurant.

Jack, however, presents no threat to the interests of the townspeople. The townspeople wrongly believe that he presents a threat to their interests, and because of this, his employer's business is threatened. But Jack is not responsible for this threat. Some people might wish to blame him because they suspect that he is a homosexual and condemn homosexual practices. But the facts are: (1) no one (with the possible exception of Jack) knows how he contracted AIDS, and (2) his illness presents no threat to the restaurant patrons. Thus no one can justifiably fault Jack for any potential harm that might befall the restaurant. Any harm that befalls the restaurant would be the fault of those who choose not to patronize it, not the fault of Jack. Therefore, even though the restaurant owner might suffer harm from retaining Jack, Jack's illness does not provide him with a justifiable reason for letting Jack go.

Does this mean that the restaurant owner is obliged not to fire Jack? The answer here depends upon the motives of the owner. The progress and treatment of Jack's illness may interfere with his ability to perform his job as usual. His increasing absences from work may interfere with the financial well-being of the business. Here, though Jack is not necessarily to blame for the situation, his decision is to seek medical treatment, and he must face the possible consequences of that decision. If Jack has disability insurance, he may be entitled to compensation if his illness forces him to leave work. But whether he does or doesn't, the restaurant owner would be justified in letting Jack go when Jack becomes incapable of attending to his job duties. It is important to note that in this case Jack would be let go not because he has AIDS but because he cannot perform his job duties as expected. Whether or not Jack may be let go thus depends upon (1) the facts surrounding the situation, and (2) the motives of the restaurant owner in addressing those facts. If the owner has the proper motives, then Jack may be let go; if not, he may not.

Part IV

There are some other moral problems here. Townspeople apparently expect the restaurant owner to report to them about Jack's condition. Jack may wish not to have his condition made public. If so, then again, inasmuch as his condition poses no threat to the townspeople, the restaurant owner is under no obligation to tell them about Jack's condition, even if they expect

him to. In fact, if the restaurant owner has promised to keep his conversations with Jack confidential, he is obliged to do so. It might even be argued that information about a person's health is confidential regardless of whether or not a promise has been made. In any event, if townspeople want to know, they can make their own inquiries. The restaurant owner need not lie to the townspeople; he need only say that Jack's condition does not constitute a threat to community health and that Jack prefers that he say no more about it. That's the truth, and a lack of further knowledge harms no one.

Part V

The considerations above carve out the area within which a moral decision must be reached. Jack ought not to be fired from his job because he has AIDS; the concerns of townspeople need not be addressed because they are baseless; Jack is not entitled to keep his job if his visits to the hospital interfere with his capacity to perform his job duties, but he is entitled to keep the nature of his condition to himself.

Two points are worth mentioning here. The first is that federal law regards AIDS as a handicap and that therefore it is against the law to fire Jack from his position because he has AIDS. While morality can and often does conflict with law, the two reinforce each other here. Second, people's concerns ought to be addressed even when they are baseless. In this case, however, if their concerns can be addressed only by violating Jack's confidences or privacy, then because their concerns are baseless, his confidences or privacy override their concerns. Were their concerns not baseless, were Jack behaving in some way that did endanger others, his privacy or confidences might be violable.

Within these confines there is still room for solutions that address more fully the interests of all those concerned. The restaurant owner would do well to let Jack know, first, that Jack has a job as long as he can perform it reliably; second, that he will always respect Jack's confidences; and third, that some people are becoming afraid. Jack could choose, under these circumstances, to allow his condition to become public knowledge. Such a decision might enable the development of a public information campaign. Jack might offer to quit in exchange for various options that the restaurant owner could offer, for example, that Jack receives a percentage of profits for each dish served that is based on one of his recipes. The owner could offer to help Jack financially even if Jack becomes incapable of performing his job duties. One should note, however, that these options are all supererogatory, that is, neither Jack nor the restaurant owner is obliged to make such offers.

Part VI

Morality thus requires that in considering whether or not to fire Jack and whether or not to reveal Jack's condition to the restaurant patrons, the restaurant owner concern himself with several questions. First, does Jack pose any harm to the community? Second, is any harm that might befall the restaurant genuinely attributable to Jack? Third, are the owner's motives in whatever he does based upon Jack's performance or Jack's illness? And fourth, are interests promoted only minimally and at the expense of an injustice to anyone? As developed above, the answers to these questions determine the parameters within which a moral decision must be reached.

AIDS: A Matter of Balance

by Frank Murphy

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The relevant facts are: (1) You own a family-style restaurant in a small Kansas town and you retain seven or eight regular employees; (2) One of the employees acknowledges that he has AIDS; (3) The employee's physical symptoms and his absence from work for medical treatment indicate that he not only tests positive for the AIDS virus but is actively affected; (4) The townspeople have noticed the employee's lifestyle, which presumably raises the suspicion that he is homosexual, plus the physical changes in him, the combined effect of which is to suggest AIDS; (5) At least one member of the community has issued a direct threat to the viability of the restaurant: "We won't eat infected food" On these facts, the principal issue is whether the restaurant owner must bear the risk of economic loss - for himself and for the people he employs - occasioned, however irrationally, by the presence of an AIDS-affected individual in the workplace. More simply, may the employer discharge the employee?

Historically, either employer or employee in the absence of a contract between them could terminate the relationship at will. The employer could discharge for no good reason or for none at all; correspondingly, the employee could quit anytime he or she chose.

The last decade has seen the "employment at will" doctrine erode. Most, if not all, of the erosion has limited the employer's right to discharge while leaving the employee free to leave at any time. The right to discharge is restrained in part by laws designed to protect people from discrimination based on age, sex, race, religious practice or physical handicap.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. Sec. 794 (West Supp. 1988) says that "(n)o otherwise qualified individual with handicaps ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency ... An "individual with handicaps" is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment" 29 U.S.C.A. Sec. 706(8Xb) (West Supp. 1988). A "physical or mental impairment" includes "any physiological disorder ... affecting one or more of the following body systems: ... respiratory ... heme and lymphatic ... skin ..." 34 C.F.R. Sec. 104.3(jX2XiXA) (1987). "Major life activities" encompass "caring for one's, self, performing manual tasks, talking, seeing, hearing, speaking, breathing, learning and working" Id. Sec. 104.3(jX2Xii). The protection of the law extends only to those "otherwise qualified."

This case study does not say whether the restaurant in question receives federal financial assistance, which is the trigger for applying the protection of the federal law. Even assuming, however, that the restaurant does not receive such assistance, and assuming therefore that the restaurant owner is not bound by its provisions, one relevant case is worth considering: *School Board of Nassau County v. Arline*, 107 S. Ct. 1123 (1987). In *Arline*, the plaintiff was a schoolteacher discharged from employment because of her recurring tuberculosis and concern about contagion. The United States Supreme Court held that a person with a contagious

disease may be an "otherwise handicapped person" and therefore protected by the Rehabilitation Act. The Court said that the purpose of the statute was to ensure that handicapped persons were not denied jobs or benefits "because of the prejudicial attitudes of others." Arline, 107 S. Ct. at 1129. In reaching its conclusion, the Supreme Court also considered and rejected the school board's argument that it was not discharging the employee because of her handicap, but because of the effect that handicap had on others. The distinction could not be "used to justify discriminatory treatment" 107 S. Ct. 1127.

The decision in Arline strongly indicates that the protection of the 1973 Rehabilitation Act does apply to AIDS affected individuals. The decision may also be instructive in construing Kansas legislation which clearly does apply to this Kansas restaurant: the Kansas Act Against Discrimination, K.S.A. Sec. 44-1001, Section 44-1009 of which says that it is unlawful for an employer "because of race, religion, color, sex, physical handicap, national origin or ancestry of any person to refuse to hire or employ, or to bar or to discharge from employment such person or to otherwise discriminate against such person in compensation or in terms, conditions, or privileges of employment; or to limit, segregate, separate, classify or make any distinction in regards to employees; or to follow any employment procedure or practice which, in fact, results in discrimination, segregation or separation without a valid business motive."

The Kansas Act, unlike the federal Rehabilitation Act, does not admit the existence of physical handicaps merely because a person is "regarded as having such an impairment". The omission would probably make it difficult for a person infected by the AIDS virus but showing no symptoms of illness to claim protection of the law. However, it is probable that a person suffering from either active AIDS (i.e., subject to opportunistic infections, so-called because they would not normally invade the human body except for the opportunity created by the weakened immune system) or AIDS-related complex (i.e., subject to minor symptoms such as fatigue, night sweats, enlarged lymph nodes etc., but still functioning near normal limits) would be protected by the Kansas Statute.

On these facts, the Kansas Act Against Discrimination should apply, given the employee's reduced physical health and his increased time away from the job. The owner might argue, however, that he wanted to discharge the employee not because he had AIDS but because, having AIDS, the employee was losing too much time from the job and was unable to perform the services required of him. The Kansas Statute gives some support for this argument by referring to "valid business motive". However, the owner should be advised that the argument approaches sophistry. If the natural and unavoidable consequence of AIDS is time away from work, is it not discrimination to discharge based on that consequence?

The owner almost certainly faces a discrimination charge if he discharges the AIDS-affected employee. This conclusion is even stronger if the owner provides group health or life insurance for his employees. In that event, Section 510 of the Employee Retirement Income Security Act (ERISA) makes it unlawful for any person "to ... discharge ... a participant ... for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan ..." In other words, the owner cannot fire the employee to get him out of the plan or off the insurance policy, even though leaving him with coverage may later on lead to an increased premium.

The facts in this case study do not suggest unrest among the Jack's co-workers. If they did have concerns, the owner might be powerless to address them: (1) There is no substantial risk of infection in this workplace and neither Section 7 of the National Labor Relations Act, which permits workers to "engage in ... concerted activities for the purpose of ... mutual aid or protection" nor the Occupational Safety and Health Act, would appear useful as the "excuse" to terminate; (2) Taking the common sense step of speaking to his employees to allay their fears might violate the affected worker's privacy. The general rule is that "one who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public" Restatement of Torts, (Second), Section 652 D.

CONCLUSION

The law in this area protects the worker with AIDS. He cannot be discharged if the discharge may be characterized as discriminatory. His situation may not be discussed openly for fear of violating his right to privacy. He may not be removed from the company's life or health insurance to avoid an increased premium. The owner of the restaurant must bear the risk of economic loss caused by his presence on the job.

At a glance, it appears that this result disproportionately values the interest of the single AIDS-affected worker and devalues the interests of the owner and other employees. Examined more closely, this view is arguably incorrect for the following reasons:

- (1) The result is what it is because in this situation AIDS is no threat to anyone. To the extent there are fears, they are unreasonable.
- (2) For the sake of one restaurant, its owner and employees, it is not socially responsible to perpetuate a system which irrationally discriminates against disadvantaged persons.
- (3) The threatened economic loss to this restaurant can be avoided if the townspeople understand AIDS, including how it is communicated and how it is not communicated. Business people are well-positioned to take a leadership role in educating their friends, neighbors, and customers. Because of their standing in the community, they can have an impact on those around them; because they have an economic incentive, they may be expected to do so.

This case suggests how important it is to keep our balance when thinking about AIDS. The basic issue is not simply weighing the owner's business worries against Jack's personal well-being. Instead, we must do our best to foster a social environment free of baseless fear and bias. It is in this greater balance that the owner's economic concerns weigh lightly.