

Introductory Essay

Socio-Legal Dynamics of AIDS: Constructing Identities, Protecting Boundaries Amidst Crisis*

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In 1990, a graduate student and professor presented a paper on opposing forces engaged in strategic AIDS litigation at the annual meeting of a social science discipline. The panel was organized by the law and society section of the association and included a number of participants devoted to socio-legal studies. After the presentation was completed, the chair of the panel thanked them and introduced the next talk by saying: "We turn now to a subject matter of national scope, an issue with the potential to affect the lives of all of us – drug testing in the workplace."

I was one of the two presenters. At first, I was surprised to hear this comment because the late 1980s represent a benchmark of national media and policy focus on AIDS, particularly in the United States. Specifically, the death of Rock Hudson in July of 1985 revived media attention and shifted focus to the threat HIV posed for the "general public." This expanded coverage peaked in the spring of 1987 when President Ronald Reagan and Vice President George Bush spoke out on the AIDS epidemic. This peak, one of three in the 1980s, marks heterosexualization of AIDS by the mass media (Cook & Colby 1992).

Regarding policy, 1989 represents the peak of state legislative action related to HIV/AIDS in the United States with 149 HIV/AIDS laws enacted

* These essays and articles are intended to contribute to socio-legal studies, particularly the strand of scholarship focusing on law and mobilization. Equally important, they bring law into sociocultural inquiry of AIDS, particularly the AIDS literature focusing on struggles over identities and boundaries. The extent to which the essays and articles contribute, and bridge these fields of inquiry is due, in no small part, to the ideas and critiques provided by external reviewers. Specifically, I thank those who have decided to remain anonymous and the following who have agreed to be revealed: Peter Aggleton, Taunya Banks, Lisa Bower, Kitty Calavita, Sara Cobb, Susan Coutin, Julie Feinsilver, Vincent Gil, David Goldberg, Richard Herrell, Kevin Johnson, Stephanie Kane, Joseph Kelly, Alfonso Morales, Calvin Morrill, Ruthann Robson, Nancy Scheper-Hughes, Anne Schneider, Jo Shaw, Mark Tushnet, Marjorie Zatz.

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(AIDS Policy Center 1993, ix). And, in 1990, the AIDS Litigation Project, based at Harvard's School of Public Health, released its findings of 469 cases of HIV-related litigation in the United States (Gostin 1990a, 1990b). Lawrence Gostin, the head of the project, indicated that AIDS litigation was impacting most of the major institutions of the nation, and raising legal issues related to many "cherished" constitutional principles, including privacy, freedom of speech, and liberty (1990a, 1991).

While AIDS was an issue of "national scope" by 1990 and a source of considerable socio-legal dynamics, it was not one that the senior generation of socio-legal scholars embraced. Moreover, gay and lesbian scholarship, an interdisciplinary field of action research that did embrace the subject matter of AIDS from the beginning (see Blumenfeld & Raymond 1993; Cruikshank 1992; Crimp 1987b), is not integrated with socio-legal studies. However, generational evolution coupled with the multiplication of social identities associated with HIV infection is bringing socio-legal inquiry of AIDS to the table.

Unlike the senior generation of socio-legal scholars, individuals who have defined their scholarly interests in the last decade are embracing AIDS as an issue of their time. In addition to the popular identification of AIDS with gays and gays claiming identification with AIDS and its scholarship, the subject of AIDS is expanding to other populations, notably women.¹ With women interested in issues of women strongly represented in the socio-legal community, the web of interconnectedness between social and intellectual subjects is becoming more dense and, consequently, socio-legal inquiry of AIDS is likely to intensify.² This special issue of *Law & Policy* symbolizes these forces of epistemological transformation and the related coming out of socio-legal inquiry of AIDS.

AIDS, as social crisis, sparks mobilization. In western societies, particularly the United States, the instruments of law and legal discourse are invoked as forces mobilized in response to crisis events to reestablish order, and to reorder established practices and idea structures. The longstanding interest of socio-legal scholars in law and mobilization³ undergirds two themes emerging from the articles of the special issue. Specifically, crisis events threaten boundaries, including the walls of privacy secured by individuals and groups, as well as the turf accumulated by social institutions. Also, crisis events evoke the (re)construction of identities, carving people into the "uninfected public," "innocent victims," and those who are the "agents of infection." The essays and articles of the special issue illuminate how law shapes and is shaped by struggles over boundaries and identities precipitated by crisis.

I. CRISIS, MOBILIZATION, AND LAW

Lethal epidemics are, in part, a product of institutional crisis. This perspective does not deny the significance of viruses, bacteria, infections, routes of

transmission, and the realities of illness. However, it does draw attention to the social and cultural politics of disease scares (see Fox 1992; Sontag 1990; Crimp 1987b; McClain 1988; Brandt 1987; Briggs 1961), including the role of social institutions (see generally Perrow 1986), and professional discourses (see generally March & Olsen 1984) in shaping the prevalence and distribution of infectious diseases.

Specific to the AIDS epidemic, scholars and investigative reporters have pointed to institutional failures related to the isolation of the virus, HIV, and public health strategies to cope with infection. For example, Randy Shilts (1987), an investigative reporter, documents bureaucratic turf battles, professional competition, and funding problems that delayed identification of the viral agent, HIV. Perrow and Guillen (1990), organizational theorists, explain the epidemic of AIDS in New York City as a product of the strong tendency of complex organizations to fail routinely when confronted with crisis events. A panel of the National Academy of Sciences concluded that the epidemic of AIDS in inner cities of the United States is, in part, a product of structural characteristics of the U.S. health care system, particularly its weaknesses "organizationally and economically in those places where the affected populations are concentrated" (Jonsen & Stryker 1993, 7).

Gerald Oppenheimer (1992), an historian, focuses on the professional discourse of epidemiology. Specifically, he depicts ways the professional paradigm of epidemiology incorporates social and cultural ideas in isolating explanatory variables of disease transmission, and how the discourse of epidemiology (re)communicates these ideas as "well-grounded scientific statements." Using this framework, he is able to explain how the Centers for Disease Control prematurely identified AIDS as a gay disease, and follows how this error shaped early prevention policy and set the tone of public responsiveness to the disease.

With AIDS reaching epidemic proportions, a second wave of institutional crisis is revealed. The material interests of major institutions are threatened. For example, client confidentiality rules of blood banks are disputed (Sapolsky & Boswell 1992), and insurance companies are forced to defend their strategies for excluding coverage to meet "fiduciary duties" to their existing insurees (Mohr 1988). Also, the reputational standing of professions is called into question. For example, the legitimacy of the medical sciences rests, in part, on a promise to protect modern western societies against the scourge of plagues and lethal epidemics (Sontag 1990). As such crisis events break out within and across institutional spheres, law is invoked to restore bureaucratic turf and bolster professional reputations, and to relocate turf and reputations (Musheno, Gregware & Drass 1991).

Group mobilization ensues as identities are "flushed out" by illness, and as fear of contagion, coupled with institutional actions, breaks communities of people into categorical identities (see Goldstein 1991; Sontag 1990; Ross 1988) – the uninfected "general public," "innocent victims" (e.g., children who are HIV infected), and carriers of contagion (e.g., "homosexuals,"

"IV-drug users"). With identities revealed and associated with contagion, some see law as a threat and, therefore, avoidance of law represents a strategic response to the identity crises surrounding the AIDS epidemic.⁴ Yet, for others, the availability of legal resources coupled with the internalization of the discourse of law, particularly rights talk (see Merry 1990), stimulate and frame group struggles to recast identities or reclaim private space (Stoddard & Rieman 1991; Hollibaugh, Karp & Taylor 1988). And, with regard to gay activism, some who witnessed the physical and social carnage of AIDS turned to "new" forms of mobilization, combining direct actions with cultural counter-messages to confront repression and stigma (Gamson 1989; Crimp 1987). Before describing how the authors treat a range of struggles over identities and boundaries, I provide additional context by highlighting social mobilization and legal activities related to AIDS in the United States, the general site of most of the research reported in the special issue.

The HIV epidemic, unlike earlier disease scares, has generated a tremendous volume of litigation. As of August of 1994, over two thousand HIV-related cases have been published. Many of these cases involve claims-making activities related to the authority and autonomy of major social institutions, including schools, the health care system, prisons, blood banks, insurance companies, and the military (Gostin 1990a, 1990b). They invoke claims making about established issues of social control, including the boundaries of prison administrative authority over inmate populations (Dubler & Sidel 1991), and bring law to bear on post-modern techniques of surveillance, particularly the testing of bodily fluids, and regimes for reporting such invasive tests (see Bayer 1991; Mitchell 1988).

These cases also reveal crumbling boundaries between public and private spheres as intimate personal relationships involving family members and sexual partners become parties to conflict and the subject matter of major litigation. With AIDS litigation expanding in so many directions, an array of constitutional principles are raised, including issues of privacy, liberty, and freedom of speech (Burriss et al. 1993). And, with so much at stake, networks of litigators have formed and devised routinized systems of information sharing, including electronic and print newsletters.

The volume of cases, the complexity of issues raised, and the mobilization of litigators throughout the United States are markers of a significant intersection between AIDS and law. The judiciary in the United States has responded to these claims making activities, and consequently, HIV litigation has emerged as a significant "case congregation."⁵

In addition to mobilizing law and other institutions, the social crisis of AIDS has mobilized communities of people. Established social movements, focusing on instrumental goals and the centrality of the state to achieving them, have brought their networks of influence and professional staffs to bear on crisis events related to AIDS. In particular, the civil rights, disability rights, and gay rights movements in the United States have been at

the epicenter of crisis events, representing the interests of people living with HIV/AIDS (PWAs), and attempting to defeat the popular construction of PWAs as carriers of contagion (Blumenfeld & Raymond 1993, 320–61; Padgug & Oppenheimer 1992).

“New” social movement activity has emerged as well in response to the stigma of infection and the epidemiological construction of “risk groups.” Combining cultural politics with street actions, groups like ACT-UP have formed open communities of PWAs, their lovers, and friends to confront the stigma of AIDS and its producers, including religion and the mass media (Cruikshank 1992, 166–96; Gamson 1989; Crimp 1987).

Moreover, injection drug users (IDUs), highly stigmatized and unorganized prior to the social crisis of AIDS, have begun to form local communities, devise agendas, and assert new identities (Broadhead & Heckathorn 1994; Hall 1992; De Jarlais, Abdul-Quader & Tress 1991; Friedman & Casriel 1988). Their organizational activities represent unanticipated outcomes of state surveillance and prevention programs, as well as emerging alliances with outreach workers funded originally by the state. Rights talk is rarely the prevailing discourse of those engaged in “new” social movements, and despite the irony of the state’s role in precipitating the mobilization of IDUs, neither ACT-UP nor local networks of IDUs see the state as the focal point of their activities.

II. CONSTRUCTION OF IDENTITIES, PROTECTION OF BOUNDARIES

An early crisis event in the United States, the dispute over whether gay bathhouses should be closed in major cities, is the focus of John Brigham’s essay. It is a dispute that revealed fissures within the gay community, and signaled early in the epidemic that the gay community would have a stake in the institutional politics of public health that emerged with AIDS.

Brigham is interested in the “terrain” of the controversy more than the validity of competing claims. He focuses on this crisis event to tease out the social identity of the gay community and to establish that gay identity was constituted significantly through rights when AIDS became the defining issue of gay activism.

Brigham views the internal divisiveness of the gay community and the failure of rights to define conclusively the bathhouse controversy a sign of community strength rather than weakness. Focusing particularly on San Francisco, he shows how gay business interests appropriated rights in order to hide material interests and to mobilize gays, who were imbued with rights consciousness from the earlier confluence of gay liberation with civil rights movements, to their side. Other gay activists, already centered on the devastation of AIDS, formed alliances with doctors and public health officials to close the bathhouses in order to “stop the killing.” Brigham shows that their campaign demystified the rights claims of the opposition and encour-

aged a prevention movement that has remained significantly in the hands of the gay community. The defeat of the rights-centered opposition broke down the community's dependency on the state to define its social identity, and the defeat enhanced the ability of the organized gay community to devise its own modes of social control to cope with the epidemic. Gays in San Francisco were able to relocate their identity in community and to protect their community's boundaries amidst crisis.

Outside of urban gay communities in the United States, fear of contagion became attached to already stigmatized identities, particularly the socially constructed categories of "homosexuals" and needle-using drug "addicts." When the institution of public health defined risk in terms of groups and officially designated "homosexuals" and "IV-drug users" as epidemiological categories, the popular discourse of AIDS translated gays and injection drug users into carriers of contagion. Jane Aiken and Michael Musheno trace the importation of this popular discourse into the courts and analyze how it was refracted through strategic litigation led by an alliance of gay and civil rights lawyers.

Focusing on the surge of AIDS litigation in the 1980s, they find that individuals, often PWAs, routinely pressed claims against stronger defendants, usually institutional parties with stakes in AIDS policy. And, as have-nots, PWAs lost routinely. However, when the authors identify individual plaintiffs more precisely, they find that gay men, highly stigmatized in society, won with considerable frequency, as did children living with HIV, an infected population treated popularly as "innocent victims." Their article focuses on why these have-nots, particularly gay men, were able to prevail over institutional parties in the formative years of AIDS litigation in the United States.

Aiken and Musheno's analysis reveals the role of gay-rights lawyers in developing supporting networks that cut across the spectrum of gay activism of the 1980s, and in forming alliances with other rights organizations. And, they show how these lawyers devised a culturally sensitive strategy that stretched the meaning of disability to include people with HIV. Recognizing the power of law to shape popular consciousness, gay-rights lawyers blunted attempts to legitimate the popular identity of gays as carriers and, instead, folded gay and other PWAs into a legal identity already in possession of a substantial array of legal rights and entitlements.

These rights and entitlements are not in place in England and Wales, the sites of Petra Wilson's research. Focusing on the workplace, she establishes that no congregation of AIDS cases exists in these jurisdictions. Moreover, Wilson asserts that the few legal provisions in place that directly address HIV and AIDS, coupled with relevant provisions in employment law, are weighted heavily toward the protection of the uninfected public and have constructed PWAs as "viral vectors." Fear of contagion, evoked by co-workers or customers, may provide sufficient legal grounds for dismissing employees who are presumed to be HIV positive.

Wilson brings the legal construction of viral vectors alive by focusing on five cases of workplace discrimination that she uncovered through extensive field research. Interested in PWAs seeking legal advice, she engaged in participant observation of an AIDS service organization and conducted interviews with professionals working in other AIDS advice organizations. The cases show that even as people seek legal advice, their personal identities are violated and, once revealed, they are recast with stigmatized identities associated with viral contagion. Moreover, her cases depict the multitude of strategies used by management and coworkers to rid worksites of people stigmatized by this process. For example, John was a supermarket worker who confided in management about his HIV-positive diagnosis and soon after found himself reassigned to the freezer storage room while fighting bouts of pneumonia.

Wilson concludes that legal professionals have little chance to break these practices as long as law reinforces a popular discourse that positions PWAs as carriers of contagion. While fully cognizant of the subtle ways law bolsters social and cultural hierarchies, she encourages her colleagues in the profession to engage in the construction of a positive body of law that grants PWAs concrete rights to employment. If successful, such a campaign would eliminate law as a source of legitimation for these workplace practices.

In the United States, the concern about PWAs as viral vectors is reflected in the growing body of criminal cases and criminal statutes related to AIDS. While fear of infection is insufficient grounds for terminating jobs and shutting PWAs out of housing, the specter of prostitutes and injection drug users (IDUs) as carriers of contagion is evident in the body of criminal cases and statutes. On the surface, these cases and statutes focus on a well-grounded concern – intentional transmission. However, in her essay, Stephanie Kane raises serious questions about the meaning of “intentional” transmission, and about the influences of community boundaries and social identities on who is likely to be prosecuted for these offenses.

Her essay focuses on a case of transmission hidden from law and embedded in a community seeking to maintain its cultural boundaries in pluralistic America. Specifically, the story she tells is of a Tantric Buddhist teacher who continued to practice unsafe sex with a student, even after the teacher knew of his exposure to HIV. The story traces forward the dispute that erupted over these actions and how the Buddhist community managed the dispute without resort to state law.

Kane’s interpretation of this case is facilitated by her notion of the “atmosphere of risk,” or judgments and actions that dampen the power of scientific knowledge about HIV transmission to affect risk behavior. Applying this construct to the arena of case processing, she establishes the difficulties of applying abstract legal categories to ferret out differences between denial of risk (an everyday occurrence), and malicious intent. And, through the case of the Buddhist teacher, she simulates the courtroom

spectacles that would ensue were traditional criminal statutes invoked to sanction intentional transmission of HIV.

However, she expresses doubt about the benefit of such spectacles should they become routine events. She expects that eventually states will rely on the construction of HIV-specific statutes that do away with the problem of proving intent. And, by juxtaposing the case of the Buddhist teacher with the ongoing prosecution of street prostitutes for transmission of HIV, she argues that criminalization of AIDS in the United States is being shaped by surveillance practices that target people with marginalized identities.

Peter Gregware analyzes the early criminalization of AIDS in the United States by focusing on the published criminal cases rendered between 1985 and 1989 in which PWAs were parties to a claim or AIDS was a central issue before the courts. Rather than focusing on legal doctrine, he is interested in whether and how cultural subjectivity and professional discourses shape judicial reasoning in these cases. To uncover the significance of cultural subjectivity, he focuses on the importation of popular discourse about AIDS and PWAs. Regarding professional discourses, he focuses on medical testimony and rights talk.

The individuals facing the state in these cases are extremely marginalized, often convicted felons, prostitutes, or injection drug users. Some appeal to the mercy of the court because of illness, while others claim that they are being too harshly treated because of their status. Many are simply defending themselves against criminal charges. These defendants win occasionally, eliciting sympathy and judicial deference to medical evidence as in a case where an indictment is dismissed because the defendant was terminally ill with AIDS.

However, they lose with much greater frequency. And, when they do lose, judges express anxieties and (re)project stereotypic imagery embedded in the popular discourse of AIDS. Also, in these cases, medical testimony is invoked to bolster the plight of the crime victim over the claims of the criminal defendant. Interpreting his findings, Gregware concludes that the early criminalization of AIDS follows the historical pattern of increasing state surveillance over people with highly marginalized identities whose otherness marks them as viral vectors threatening the "mainstream" public.

III. CONCLUSION

These studies reveal the permeable quality of legal discourse. Moral discourse about AIDS, bubbling up from the popular culture, shapes legal reasoning, particularly when PWAs are highly marginalized and unorganized. The tendency of judges, much like some legislators and religious leaders, to blame PWAs for their condition and view them as carriers of contagion, threatening the "mainstream" population, is evident in Gregware's and in Aiken and Musheno's analyses of the published opinions regarding the criminally accused and convicted.

At the same time, litigators engaged in strategic litigation use a variety of images, popularized originally in the media, to win legal protection for PWAs. As Aiken and Musheno show, children with HIV/AIDS, portrayed as "innocent victims" in the media (see Hallett & Cannella 1994), received early support from gay and civil rights litigators who recognized the power of this imagery to affect judicial reasoning about whether and under what conditions to grant rights protections to PWAs.

Like much of the scholarship on legal mobilization, these studies focus on whether and how law matters. It is the cultural significance of legal mobilization that is most evident in these studies. Brigham points out that legal mobilization around rights is one of a competing set of visions being pursued by gay activists to cope with AIDS crisis events while advancing community identity. He sees rights mobilization as a defensive strategy and reflective of a community uncertain about its identity in the larger society. While viewing legal mobilization as more integrated with other, gay political strategies, Aiken and Musheno focus on the cultural significance of rights mobilization as well. Specifically, they uncover a litigation strategy focused substantially on transforming the popular identity of PWAs through law. And, Wilson calls for parallel legal mobilization to counter the legal identity of PWAs in England and Wales as viral vectors.

Finally, the essays and articles provide several perspectives of rights mobilization as severely bounded activity. The studies point out that corporate and state institutions are mobilized by crisis as well, and use law to counter expansionist efforts undertaken by PWAs. For example, Gregware shows that correctional institutions (re)secure or expand the boundaries of their discretionary authority through litigation as inmate PWAs initiate claims to change the conditions of confinement.

Aiken and Musheno conclude that the repositioning of PWAs as people with disabilities is unlikely to transform the identities of PWAs who are injection drug users (IDUs). IDUs are individuals in hiding from law rather than a group with a legal consciousness and resources to mobilize through law. Kane depicts yet another form of law averseness that narrows the scope of legal mobilization. Nondisclosure of seropositivity is linked to the management of boundaries by a religious group trying to maintain a certain public identity at variance with their in-group identity. Counter-mobilization of institutions through law, individual avoidance of law, and group averseness to law reveal that law operates routinely to control or reproduce the social order amidst the AIDS crisis.

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NOTES

1. While the first diagnosed case of AIDS in a woman was recorded in 1982, the gender construction of AIDS as male, as well as the sexual construction of AIDS as "homosexual," diverted policy and scholarly attention away from women and AIDS throughout much of the 1980s. The 1990s is marked by growing activism among women with AIDS and a rapidly expanding literature about women and AIDS. One body of scholarship on women and HIV is activist oriented and uses dramatic means to break the public policy silence (see Meredith 1992; Ports 1987). Also, because of the extremely high prevalence of HIV infection among women in the third world, the scholarship on women and AIDS is distinctly global (for an overview, consult Reid & Bailey 1993). The global scholarship on mobilization of women gives attention to the grass-roots, public health movements emerging in response to the social and cultural dynamics of the HIV epidemic (see Heise 1993). In the United States, pediatric AIDS is gaining significant attention because of the clash of reproductive freedoms with state interests in surveillance and intervention (for an overview, see Bayer 1991).
2. The annual meetings of the Law and Society Association (LSA) represent the largest gatherings of socio-legal studies. Regarding these meetings, the first panel on AIDS was formed in 1990. In 1991, LSA collaborated with other socio-legal organizations to hold a global meeting in Amsterdam. A number of international working groups were formed to develop panels and encourage collaboration on substantive and theoretical issues of importance to the field. A Working Group on the Socio-legal Dynamics of HIV/AIDS was among those organized. Two panel sessions were held in Amsterdam, and the first paper focusing explicitly on women and HIV was presented at the Amsterdam Meeting. Full panels have been formed for each subsequent LSA meeting. At the 1994 meeting, four of the five papers presented were authored by women, and two of these papers dealt explicitly with women, law, and AIDS.
3. A significant strand of this literature focuses on civil rights movements (e.g., Scheingold 1974; Handler 1978), includes the interpretations of people engaged in or affected directly by these movements (e.g., Bell 1987; Williams 1991), and is convergent with the perspective of other interdisciplinary fields of study, including social problems (e.g., Piven & Cloward 1977). More recently, this scholarship has included attention to more localized struggles (e.g., Olson 1984), and the reasons why people do not act on civil rights (e.g., Bumiller 1988). All of the scholarship raises questions about whether and how rights-based mobilization matters. Post-modern scholarship has shifted away from the analysis of law and mobilization, concentrating instead on individual acts of resistance (e.g., Ewick & Silbey 1992; Sarat 1990; Merry 1990). The shift away from law and mobilization to legal consciousness and individual acts of defiance has generated controversy in the field (see Handler 1992).
4. Prostitutes and injection drug users (IDUs) attempt to avoid law and yet, are the target of intensive surveillance by law enforcement authorities. Recognition of the high prevalence of HIV-positive IDUs has generated new forms of surveillance, including state-sponsored "outreach" to IDUs. Studies focusing on the outreach programs prompted by the AIDS epidemic include: Broadhead & Margolis (1993); Kane & Mason (1992); and Des Jarlais, Friedman & Hopkins (1985).
5. Galanter refers to a case congregation as
 a group of cases that are seen as a defined set that share common features, that are shaped by a common history, that are subject to shared contingencies, and that lean in to a common future. (1990, 372)

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