1987

Legal Challenge of AIDS, The A Symposium on AIDS: Foreword

Arthur S. Leonard
New York Law School

Recommended Citation
12 Nova. L. Rev. 961 (1987-1988)

Forward: The Legal Challenge of AIDS

Arthur S. Leonard*

The sudden outbreak of Acquired Immune Deficiency Syndrome (AIDS) during the first half of the 1980s has generated major challenges to our system of government and law. This medical syndrome, caused by a strange virus of a type only recently identified as capable of causing illness in humans,[1] presents major obstacles to the development of effective vaccines and treatments. The virus is apparently transmissible through direct blood or semen exchange but not through casual contact. The consequences of infection appear quite severe: some large but indeterminate percentage of those infected will probably get sick, and almost all of those who develop the most serious form of the syndrome may eventually die from it.[2]

Given these facts, the pressures on public officials, employers, health care workers and others are quite severe. AIDS arises at a time when some public health laws are antiquated, based on factual premises either no longer supported by contemporary scientific understand-

* Professor of Law, New York Law School. B.S., Cornell University (Industrial & Labor Relations), 1974; J.D. Harvard University, 1977.

1. Human Immunodeficiency Virus (HIV), isolated by French researchers from the blood of AIDS patients in 1983, is a retrovirus which infects the body by incorporating its genetic material with the nucleus of host cells. Few retroviruses cause illness in humans, leading some to assert that HIV may not by itself be the cause of AIDS. *See* Duesberg, *Retroviruses as Carcinogens and Pathogens: Expectations and Realities*, CANCER RESEARCH, Mar. 1, 1987 (arguing that HIV cannot be the cause of AIDS); *see also* Leishman, *AIDS and Syphilis*, ATLANTIC MONTHLY, Jan. 1988 (noting the possible implication of syphilis as an important factor in the AIDS epidemic). Even if HIV is eventually shown not to be the cause, or at least to require the existence of co-factors, the epidemiology of the disease (pattern of those who have developed AIDS) supports the assertion that a bloodborne agent which is not casually transmissible is the cause.

2. Although some predict that AIDS will prove 100% fatal in the absence of a cure, some patients have been living with the disease for significant periods of time. N.Y. CITY DEP'T HEALTH, AIDS SURVEILLANCE UPDATE (Dec. 31, 1987) indicated that of 21 cases dating from before 1979 known to that unit, 14 were known dead, but 7 had apparently survived 9 years. The small numbers involved may indicate the results are atypical, or it may be that the Unit is merely not aware of deaths among the remaining 7. As to more recent cases, of 163 cases diagnosed during the first half of 1982 in the city of New York, 12% were still alive at the end of 1987.

ing or most specifically not relevant to bloodborne infections which are not casually transmissable.[3] AIDS also arises at a time when the mass public, whose elected representatives must grapple with the epidemic and whose employers must deal with genuine manifestations of fear in the workplace, is not ideally knowledgeable about biology. AIDS mainly afflicts gay men and persons addicted to intravenously-administered drugs,[4] and a disproportionate number of those affected are members of racial and ethnic minorities;[5] none of these affected groups are exactly favored by society with great beneficence and solicitude. These factors complicate the governmental and legal challenge of AIDS.

What can be done to contain the spread of this insidious new virus? Should government mandate the testing of large portions of the population and segregate the infected from the uninfected, either by confinement or exclusion from workplaces, schools, or public accommodations? Of what relevance is the accuracy or inaccuracy of the available tests for infection, or the cost of the procedures which would be necessary to implement such policies?[6]

AIDS has appeared after decades of expanding recognition for constitutional protection of individual rights in this country.[7] Can the policies used to attack earlier epidemics of infectious disease be applied today without violating those principles, and, if not, which must bend

---

3. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985).

4. In the City of New York, as of the end of 1987, 62% of men diagnosed with AIDS since the start of the epidemic were classified as having had "sex with men" as their primary risk factor for infection; an additional 5% had "sex with men" and IV use. IV drug users who did not have "sex with men" constituted 28% of the male totals. 60% of the women diagnosed with AIDS had been IV drug users, and an additional 22% were classified as "sex partner of man at risk."

5. In the city of New York, as of the end of 1987, 44% of reported diagnosed cases of AIDS had occurred among whites, 31% among blacks, and 32% among Hispanics. When one looks only at the figures for women, the white proportion shrinks to 17%. Among mothers of children born with AIDS, 59% were black and 33% were Hispanic.

6. For a discussion of traditional public health strategies considered in regards to AIDS, *see* Gostin, *Traditional Public Health Strategies*, in AIDS AND THE LAW 47-65 (H. Dalton & S. Burris ed. 1987).

7. Not always and inevitably expanding, however; *see* Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (holding Georgia sodomy statute does not violate constitutional privacy rights as applied to consenting adult homosexuals in private); *but see* Watkins v. U. S. Army, 837 F.2d 1428 (9th Cir. 1988) (holding sexual orientation a suspect classification and that military regulations excluding all homosexuals from service violate equal protection clause).

first: the constitutional protections or the aggressive public health measures? If millions are infected, is it rational to contemplate a public health strategy embracing widespread testing and segregation of the infected?

Many assert that the only feasible public health strategy is intensive public education about how the virus is and is not transmitted.[8] Such a strategy raises new issues for government and law. Can government engage in public education promoting safer sexual practices over the opposition of groups which condemn many of the essential features of such education, such as barrier contraceptives or homosexual activity?[9] Will the traditional legislative and judicial restrictiveness about sexually explicit speech stand in the way of effective public education? Do the first amendment principles worked out by the Supreme Court in its obscenity cases over the past several decades have to be rethought in the context of a public health message?

AIDS also poses severe challenges to the entire structure of health care and public assistance in the United States. For perhaps the first time, large numbers of well-educated and assertive middle and upper-middle class white men (many of whom have a homosexual orientation) are confronting the public welfare system as desperate petitioners, and their articulate outrage at the petty bureaucracy and inadequate services they encounter force society to confront an issue long avoided: our stingy and demeaning public benefits system, with its lengthy waiting periods, arcane eligibility rules, and inability to respond flexibly to new phenomena without time-consuming legislative processes, administrative rulemaking, or court orders through litigated challenges. Perhaps

---

8. *E.g.*, Aiken, *Education as Prevention*, in AIDS AND THE LAW: A GUIDE FOR THE PUBLIC Ch. 7 (1987); Closen, Connor, Kaufman & Wojcik, *AIDS: Texting Democracy — Irrational Responses to the Public Health Crisis and the Need for Privacy in Serologic Testing*, 19 JOHN MARSHALL L. REV. 835 (1986); Comment, *A Legal Guide for the Education of Legislators Facing the Inevitable Question: AIDS: The Problem is Real — What Do We Do?*, 13 J. CONTEMP. L. 121 (1987); Merritt, *Communicable Diseases and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739 (1986); Mohr, *AIDS: What to Do — And What Not to Do*, 5 PHIL. & PUB. POL'Y No. 4, 6 (Fall 1985).

9. Late in 1987, dissension was reported within the Roman Catholic Church between the Conference of Bishops and several conservative church leaders, including Cardinal John O'Connor of New York, over whether Catholic schools should mention condoms in providing instruction on AIDS to students. Cardinal O'Connor, who opposed mentioning condoms, is a member of the President's Commission on the Human Immunodeficiency Virus. *See, e.g.*, Steinfels, *Catholic Bishops Refuse to Rescind AIDS Policy*, N.Y. Times, March 26, 1988 at 6, col. 1.

the adoption of a regulation designating a medical diagnosis of full-blown AIDS as presumptively disabling for purposes of disability insurance,[10] or the adoption by the Food and Drug Administration of new streamlined procedures to make available experimental treatments for life-threatening diseases[11] are harbingers of how this particular confrontation will advance.

With the serological tests to detect antibodies to HIV, the battleline is drawn for the future of private insurance in this country. As more tests become available to pinpoint genetic, anatomical and physiological predictors of morbidity and mortality, the insurance industry will be eager to incorporate such tests into the underwriting process. How we handle the issue of "screening for AIDS" may set the precedent for a variety of tests in the future. The industry's sometimes panicked reaction to AIDS may undermine the traditional practice of not individually underwriting members of groups, and may also lead to serious proposals for a national health insurance scheme to supplant a private insurance system which excludes from coverage those who need coverage the most.[12]

The fear of a fatal disease underlies many of the legal challenges of AIDS. The refusal of persons to work with a fellow employee who has AIDS, the refusal of court officers to escort a prisoner suspected of harboring the virus, parents keeping their children home from school upon word that a child with AIDS may be in the classroom, nations imposing testing requirements before issuing visas or admitting immigrants, all present significant challenges to the ability of the legal system to cope with a new medical phenomenon. It is a system full of decisionmakers who have no particular qualifications to determine medical facts, but who must determine medical facts in order to resolve legal controversies.[13]

---

10. 20 C.F.R. § 416.934(K) (1987).

11. *See* Bishop, *Desperate Lives, Unknown Risks*, 7 CAL. LAW. 44 (September 1987) (discussion of access to experimental drugs for AIDS); Comment, *The Right of Privacy in Choosing Medical Treatment: Should Terminally Ill Persons Have Access to Drugs Not Yet Approved by the Food and Drug Administration?*, 20 J. MARSHALL L. REV. 693 (Summer 1987).

12. For opposing perspectives on these questions, *see* Schatz, *The AIDS Insurance Crisis: Underwriting or Overreaching?*, 100 HARV. L. REV. 1782 (1987) and Clifford & Iuculano, *AIDS and Insurance: The Rationale for AIDS-Related Testing*, 100 HARV. L. REV. 1806 (1987). This symposium contributes to the debate; *see* Terl, Emerging Issues of AIDS and Insurance, 12 NOVA L. REV. 1293 (1988).

13. *See* D. Fox, *Physicians versus Lawyers: A Conflict of Cultures*, in AIDS

Legislators must determine medical facts in order to set policies on how to contain the virus and how to deal with the infected. Public administrators and private sector managers must determine medical facts in order to implement the generalized commands of public health and handicap discrimination laws. Judges must determine medical facts in order to run their courtrooms in a fair and orderly way[14] and to decide hard, emotion-laden controversies.[15]

A good example of these problems is found in a recent decision by a New York state trial judge.[16] A husband who had secretly engaged in homosexual activity over the years was concerned that he might have been infected by HIV, so he took the antibody tests. Testing negative, he told his wife for the first time about his homosexual activities but assured her that he was uninfected. Suing for divorce, she added a claim for compensatory damages for "severe AIDS phobia" which she alleged had been induced by her husband's confession. In order to deal intelligently with this complaint, the judge had to be conversant with the meaning of HIV antibody tests (and the psychological impact attached to test results) as well as the epidemiology of AIDS. The judge commented: "To allow this claim to stand would amount to the opening of a Pandora's Box. . . . Any person who had a blood transfusion within the last eight years would have to disclose this fact to their prospective or current spouse or risk a damage action for 'AIDS phobia' since such a transfusion may have resulted in an exposure to the AIDS

AND THE LAW 210-17 (H. Dalton & S. Burris ed. 1987), for a particularly stimulating discussion of the problems encountered when doctors and lawyers must interact to resolve legal controversies.

14. An example of undue compromise between fear and medical facts is the set of Guidelines promulgated by New York State Chief Administrative Judge Albert Rosenblatt for dealing with persons suspected of being infected with HIV when they appear as parties or witnesses in New York State courts. The Guidelines authorize court officers to wear gloves, suggest asking the infected individuals to forego a personal court appearance, and generally seem to recognize risks of transmission which public health officials testifying before the Office of Court Administration had stated did not exist. *See New York State Authorizes Use of Protective Apparel*, 3 AIDS POLICY & LAW No. 1, January 27, 1988, at 4.

15. As an example of judicial deference to irrational administrative decision-making, *see* Doe v. Coughlin, 71 N.Y.2d 48, 523 N.Y.S. 2d 782 (1987) (prison had rational basis to refuse to allow prisoner with AIDS to participate in Family Reunion Program with his wife, even though wife was informed of his disease and couple indicated knowledge about prevention of HIV transmission).

16. Doe v. Doe, NYLJ, Aug. 19, 1987, at 11, col. 6 (N.Y. Sup. Ct. Kings Co., Rigler, J.).

virus. The law can be stretched only so far."[17]

In addition to requiring the legal system to become conversant with information on the frontiers of medical science, AIDS has also pushed the system to begin confronting the reality of nontraditional lifestyles in America. In New York City, the housing courts are struggling to accommodate a system which officially recognizes only traditional heterosexual marriages as bestowing survivorship rights to rent-regulated apartments to a reality where unmarried life partners of persons with AIDS face evictions from scarce affordable apartments.[18] In California, the unemployment compensation system has determined that the unmarried life partner of a person with AIDS should be eligible in the same way as a spouse to receive benefits when he or she leaves a job to care for their partner.[19] And in many states, courts are struggling to resolve fierce disputes over the rights of persons infected with HIV to have continuing contact with their children.[20]

There is little relevant precedent for most of the controversies relating to AIDS,[21] so legislators and courts must make a special effort to achieve an understanding of scientific concepts necessary to deal with these problems intelligently. Reflexive reactions based on the system's past responses to diseases such as polio or tuberculosis are not adequate to the situation. AIDS has its own peculiar epidemiology which requires its own particular approach, whether the issue is parental rights or public health measures. This symposium, one of several devoted to

---

17. *Id.*, at 12, col. 1.

18. *See* Two Assoc. v. Brown, 131 Misc. 2d 986, 502 N.Y.S.2d 604 (N.Y. Sup. Ct. 1986), *rev'd*, 127 A.D.2d 173, 513 N.Y.S. 2d 967 (1987).

19. Matter of Anonymous, Case No. SF-24774 (Cal. Unemployment Ins. App. Bd.) (Mason, ALJ). For more information about this case, contact Lesbian Rights Project, 1370 Mission St., San Francisco, CA 94110.

20. *See*, Doe v. Roe, NYLJ, March 16, 1988, p. 7, col. 1 (N.Y. Sup. Ct., N.Y. Co., Glen, J.) (refusing to order HIV antibody test of father "rumored to have AIDS" in visitation dispute).

21. As of the first half of 1988, one of the few legal issues surrounding AIDS which seems well settled is that persons with AIDS (and probably those with ARC or who are infected with HIV) will be considered handicapped individuals under the federal Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq., and thus entitled to participation (whether as employees or clients) in programs receiving federal financial assistance. *See* Chalk v. U.S. District Court, 840 F.2d 701, (9th Cir. 1988), amplifying order reported at 832 F.2d 1158 (9th Cir. 1987) (unanimously ordering preliminary injunctive relief on behalf of high school teacher with AIDS who had been denied classroom teaching assignment). Similar holdings seem likely under state and local handicap discrimination laws.

AIDS legal issues,[22] is intended to shed further light on the facts and the debates over policy, while incorporating the insights of many of those on the front lines of legal battles over AIDS. While there has been a flood of articles and student notes and comments about AIDS legal issues over the past five years,[23] there remains much to discuss, not just because many areas remain unsettled but also because much of the existing literature by law teachers and students lacks the special insight practitioners (of law, public health, medicine, and public administration) can bring to the debate. This symposium is unusual for bringing together views from many such diverse sources, and for raising conceptual issues thus far overlooked.

Among the contributors are principal enforcement officers of local AIDS discrimination ordinances,[24] public health officials,[25] medical researchers and practitioners,[26] and legal practitioners who have litigated AIDS-related issues.[27] There are also more traditional articles by academic legal scholars on important AIDS-related legal questions which still await definitive answers.[28] Beginning the discussion is a short piece by Nova Law School's distinguished young Dean, Roger I. Abrams, an

---

22. *See Law, Social Policy, and Contagious Disease: A Symposium on Acquired Immune Deficiency Syndrome (AIDS)*, 14 HOFSTRA L. REV. No. 1 (1986); *see also* AIDS AND THE LAW: A GUIDE FOR THE PUBLIC (Dalton & Burris 1987) (anthology growing from full-day symposium on AIDS held at Yale Law School in February 1986). The Ohio State Law Journal is also preparing a symposium on AIDS for publication during 1988.

23. The author of this forward maintains a computer database of law journal articles relating to AIDS; as of April 1988, the bibliography covered 22 pages of text.

24. Schulman, *AIDS Discrimination: Its Nature, Function and Meaning*, 12 NOVA L. REV. (1988); Nickens, *AIDS, Race and the Law: The Social Construction of Disease*, 12 NOVA L. REV. 1181 (1988).

25. Konigsberg & Barerra, *Local Public Health Perspectives on the Acquired Immune Deficiency Syndrome (AIDS) Epidemic*, 12 NOVA L. REV. 1143 (1988); Wright, *AIDS: A Brief Overview*, 12 NOVA L. REV. 973 (1988).

26. Schram, *AIDS Prevention — Too Little, Too Late*, 12 NOVA L. REV. (1988); Tramont, *AIDS in Perspective*, 12 NOVA L. REV. 1255 (1988).

27. Terl, *Emerging Issues of AIDS and Insurance*, 12 NOVA L. REV. 1293 (1988); Earl, *Meeting the AIDS Epidemic in the Courtroom: Practical Suggestions in Litigating Your First AIDS Case*, 12 NOVA L. REV. 1205 (1988).

28. Rothstein, *Children With AIDS: A Need for a Clear Policy and Procedure for Public Education*, 12 NOVA L. REV. 1261 (1988); Jarvis, *AIDS: The International Perspective*, 12 NOVA L. REV. 979 (1988); Joseph, *Civil Liberties in the Crucible: An Essay on AIDS and the Future of Freedom in America*, 12 NOVA L. REV. 1083 (1988).

authority on labor and employment law.[29]

Symposia such as this one are especially valuable for providing a vehicle to explore a wide variety of issues with a common informational core. The reader of this symposium will come away with a thorough grounding in the relevant medical and legal issues, better prepared to consider the awesome challenges AIDS presents as we approach the twenty-first century.

29. Abrams, *The AIDS Agenda*, 12 NOVA L. REV. 969 (1988).