Forward: The Legal Challenge of Aids

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Abstract

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KEYWORDS: AIDS, challenge, legal
In Memory of Dan Bradley

The editors had asked my help in getting Dan Bradley to write a piece for this edition about his battle with AIDS. In September I called Dan and he, as was his style, insisted first on talking about me, my wife Jacque, and our children. We had visited with Dan in Coconut Grove shortly after he learned he was ill, and even then, he wanted to speak of us, not himself.

Finally I got Dan to talk about writing for the Review. But he told me he could neither write, nor even dictate or be interviewed because his regimen of medication left him weak, and often, to his high standard, incoherent. Nevertheless, he was hopeful that by Christmas he might be improved enough to do something for the Review.

In January, Dan died.

He was a wonderful man. I knew him for twenty years. When we first met he was a legal services lawyer helping migrant workers. Ultimately he became the President of the Legal Services Corporation, trying to insure that poor people throughout the country had access to lawyers. That concern for others was his hallmark and his legacy. He suffered the indignities of experimental medicine because he felt his experience might show the way to save others. Maybe Dan did teach the doctors something. I hope so. But one thing is for sure. He taught me and many others the importance of kindness, selflessness, and compassion. Thanks Dan, you live on in our memories and in this volume.

Bruce S. Rogow

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Forward: The Legal Challenge of AIDS

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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 factural premises either no longer supported by contemporary scientific understand-

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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 DEPT. 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 3. 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 transmissible.\(^3\) 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 AIDS in the workplace, is not ideally knowledgeable about biology. AIDS mainly afflicts gay men and persons addicted to intravenously-administered drugs,\(^4\) and a disproportionately 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

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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 2% 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.
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).
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First: 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. 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? 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 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 articulate 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 stings 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


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

With the serological tests to detect antibodies to HIV, the battle-line 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.

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.

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 and to decide hard, emotion-laden controversies.

A good example of these problems is found in a recent decision by a New York state trial judge. 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 his 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 virus.'

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 Rozell 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 no 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).


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).
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virus. The law can be stretched only so far."

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. 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. 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. There is little relevant precedent for most of the controversies relating to AIDS, so legislators and courts must make a special effort to achieve an understanding of scientific concepts necessary to deal with these problems intelligently. Reflective 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 AIDS legal issues, 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, 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, public health officials, medical researchers and practitioners, and legal practitioners who have litigated AIDS-related issues. There are also more traditional articles by academic legal scholars on important AIDS-related legal questions which still await definitive answers. Beginning the discussion is a short piece by Nova Law School's distinguished young Dean, Roger I. Abrams, an


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authority on labor and employment law.\textsuperscript{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.

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**The AIDS Agenda**

Roger L. Abrams\textsuperscript{*}

We are about to experience a terrible catastrophe. The AIDS epidemic will inflict a devastating blow on this country.\textsuperscript{4} Scientists tell us that there is little we can do to avoid this fate.\textsuperscript{8} Indeed, it is a frightening prospect.

Even if we cannot prevent AIDS or cure its consequences, there are things we must do to prepare ourselves for its onslaught. All of us will be affected in one way or another\textsuperscript{2} and, while we cannot totally insulate ourselves from its impact, we can act to mitigate our losses. The frightening predictions from the medical science community compel our immediate action to prepare as best we can for the foreseeable social consequences of the disease.

Some might choose to ignore this forecast of doom. After all, most of us remember the swine flu scare that turned out to be a false prophecy.\textsuperscript{7} But we have already witnessed the impact of AIDS.\textsuperscript{8} We know


1. "By the end of 1991, an estimated 170,000 cases of AIDS will have occurred with 179,000 deaths within the decade since the disease was first recognized." Surgeon General's General Report in Acquired Immune Deficiency Syndrome at 6 (1987). Many millions of Americans will die before the spread of the disease is halted.

2. Medical researchers explain that AIDS is potentially incurable by virtue of how the disease works in the body: AIDS invades the body and kills the white blood cells, known as T-helper cells that are primarily responsible for preventing infectious diseases. Consequently, diseases that rarely afflict people with healthy, functioning defense systems prove fatal to people infected with HIV. . . . No treatment permanently reverses the suppression of the immune system; no vaccine prevents infection.

3. Based on current projection of loss of life, few extended families will be unscathed by the disease. It is clearly foreseeable that someone you know will die from AIDS. As Professor Robert Jarvis explains in "Global Impact of AIDS," 12 Nova L. Rev. 979, the worldwide effect of the epidemic will be dreadful.

4. See Wecht, The Swine Flu Immunization Program: Scientific Venture or Po-