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AIDS and the Law, A Guide for the Public [Book Review]

Margalynne J. Armstrong

Santa Clara University School of Law, marmstrong@scu.edu

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BOOK REVIEW

AIDS AND THE LAW, A GUIDE FOR THE PUBLIC, edited by Harlon L. Dalton, Scott Burris and the Yale AIDS Law Project. New Haven, Conn.: Yale University Press. 1987. Pp. xvii + 382. Hardbound. \$22.50. Softbound. \$7.95.

*Reviewed by Margalynne Armstrong**

The Acquired Immune Deficiency Syndrome (AIDS) epidemic challenges America's attorneys and lawmakers to fashion rational and compassionate rules which protect public health without compromising civil rights. AIDS patients and others infected with the Human Immunodeficiency Virus (HIV) too often find that they must turn to our courts for access to education, housing and employment.¹ The twenty essays which comprise *AIDS and the Law, A Guide for The Public*² examine how the law affects the lives of AIDS patients.

Compiled by the Yale AIDS Law Project, *AIDS and the Law* presents articles by legal and medical scholars and practitioners in a format similar to that of a law review symposium.³ The book is organized into six parts, each presenting several articles related to a specific issue. The book's first two articles provide historical and medical background about AIDS. Dr. June Osborn's essay *The*

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* Visiting Assistant Professor, Santa Clara University School of Law; B.A., 1977, Earlham College; J.D., 1981, University of California, Berkeley School of Law.

1. It has not been scientifically confirmed that all persons whose blood contains antibodies for the HIV virus will develop the symptoms of AIDS or AIDS-related complex (ARC). However, people infected with the HIV (seropositive patients) face many of the same legal problems encountered by AIDS patients. See GOSTIN, *Traditional Public Health Strategies*, in AIDS AND THE LAW, A GUIDE FOR THE PUBLIC 47-65 (H. Dalton, S. Burris, and the Yale AIDS Law Project eds. 1987).

2. AIDS AND THE LAW, A GUIDE FOR THE PUBLIC (H. Dalton, S. Burris, and the Yale AIDS Law Project eds. 1987) [hereinafter AIDS AND THE LAW].

3. The Yale AIDS Law Project consists of members of the Yale Law School community and was formed specifically to produce the book. Professor Harlon H. Dalton and Mr. Scott Burris served as the project's Editors-in-Chief.

AIDS Epidemic: Discovery of a New Disease recounts how physicians identified the first AIDS cases in the United States in 1981.⁴ The article mentions that medical researchers in the United States and Paris competed to be the first credited with isolating the AIDS virus. Dr. Richard Green's article *The Transmission of AIDS* is a clear presentation of medical facts and emphasizes that casual contact does not transmit the HIV.⁵ This essay is useful to attorneys who need to refer to or present a concise factual statement about the extremely limited circumstances under which AIDS can be transmitted.⁶ The book is further organized according to broad social policy areas including: (1) government responses to AIDS; (2) private responses to AIDS; (3) AIDS and health care; and (4) AIDS in institutions.

The volume is intended as a resource for anyone in need of information about the legal issues presented by the AIDS epidemic. A number of the articles provide information about the legal system and applicable substantive law for uninitiated readers. Exploration of the legal complexities raised by AIDS follows these explanations. Much of the book is presented as a survey of the law even though each chapter focuses only on a narrow area or on the issues faced by distinct groups, such as school children, intravenous drug abusers, and gays and lesbians. This survey approach is necessary because the statutory and case law about AIDS issues is quite volatile. It is difficult to compile an up-to-date treatise on AIDS law in the face of a constant stream of litigation, legislation and administrative proposals concerning the disease. Advances in medical understanding of the disease itself also present problems of obsolescence. Portions of the discussions found in the chapters titled *Traditional Public Health Strategies*,⁷ *Insurance*,⁸ and *The Transmission of AIDS*,⁹ which discuss the probability of HIV infected persons developing AIDS, should be revised to incorporate data from recent studies about the

4. Osborne, *The AIDS Epidemic: Discovery of a New Disease*, in AIDS AND THE LAW, *supra* note 2, at 17-27. For a detailed examination of the introduction and dissemination of AIDS in the United States, see R. SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE AND THE AIDS EPIDEMIC 53-112 (1987).

5. Green, *The Transmission of AIDS*, in AIDS AND THE LAW, *supra* note 2, at 28-36.

6. For example, an attorney representing an AIDS patient can cite the article in briefs or memoranda or attach a copy of the article to pleadings requesting issuance of a T.R.O..

7. Gostin, *Traditional Public Health Strategies*, in AIDS AND THE LAW, *supra* note 2, at 47.

8. Scherzer, *Insurance*, in AIDS AND THE LAW, *supra* note 2, at 185.

9. Green, *The Transmission of AIDS*, in AIDS AND THE LAW, *supra* note 2, at 191.

likelihood that people who test seropositive will eventually develop the disease.¹⁰

A number of the articles in *AIDS and the Law* examine the tensions between civil liberty interests and public health concerns. Larry Gostin's article *Traditional Public Health Strategies*¹¹ points out that AIDS has created an unprecedented situation for public health authorities. Mr. Gostin notes that in the past, public health approaches to communicable disease have included both isolation and quarantine of patients.¹² Advances in medical knowledge about the spread of the disease in conjunction with constitutional constraints now invalidate any governmental isolation of AIDS patients to control the disease in the general population.¹³ Although this and other essays in the volume examine the civil rights which are threatened by some governmental and private proposals to combat AIDS,¹⁴ most of the essays do not address the civil rights arguments that AIDS patients' advocates encounter from their opponents.

People infected with HIV and people who wish to avoid contact with them call for protection of their civil rights in attempting to influence the government's course of action regarding AIDS. Perceived threats to the right to a safe school or workplace are often more readily understood by a public concerned about AIDS than are the civil rights of an AIDS patient. The authors tend to address only

10. A highly regarded study of the long term effects of HIV infection indicates that only twenty-two percent of the study's participants showed no symptoms of AIDS or ARC six and a half years after infection with the virus. Shilts, *More S.F. Gay Men Facing Up to AIDS Test*, S.F. Chronicle, Jan. 25, 1988, at 4, col 3.

11. Gostin, *Traditional Public Health Strategies*, in AIDS AND THE LAW, *supra* note 2, at 31.

12. Gostin, *Traditional Public Health Strategies*, in AIDS AND THE LAW, *supra* note 2, at 48-54. Isolation separates infected persons from the general population during the period of communicability. Quarantine is the detention of persons who display no symptoms of illness but have been exposed to a communicable disease. Quarantine is imposed for the longest usual incubation period. *Id.* at 59.

13. But see discussions of the use of isolation in the military (chapter 16) and prisons (chapter 17). Judicial review of military regulations which affect civil rights is more deferential than comparable review of laws governing civilians. "Within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). Prisoners are also subject to greater restrictions of their civil rights than the public. *Pell v. Procunier*, 417 U.S. 817, 823 (1973). Both prisons and the military have isolated AIDS patients. Rivera, *The Military*, in AIDS AND THE LAW, *supra* note 2, at 221; Vaid, *Prisons*, in AIDS AND THE LAW, *supra* note 2, at 235.

14. Mr. Gostin's article discusses the constitutional implications of government-imposed isolation of AIDS patients. The legislatures of Texas and Colorado considered but defeated isolation proposals. Gostin, *Traditional Public Health Strategies*, in AIDS AND THE LAW, *supra* note 2, at 61.

two basic arguments: one relies on the mistaken perception that AIDS is easily communicable and the other is based on medical science's inability to guarantee that there is no risk of contracting AIDS through casual contact.¹⁵ No essay in the book sufficiently examines the legal arguments propounded by the school boards, parents, landlords, health care workers, and prison guards who contend that AIDS patients have no right to share their environments.¹⁶ An understanding of both sides' positions is a useful tool for advocates in the legal disputes involving AIDS. Despite the discussions of recent court victories for AIDS patients' rights,¹⁷ AIDS patients' advocates must further contemplate and anticipate the opposing viewpoint. The United States Supreme Court has not yet decided whether HIV positive persons who do not show AIDS symptoms are protected by the Rehabilitation Act of 1973.¹⁸ This act is now considered to be an important source of protection for school children and state workers with AIDS.¹⁹ Advocates for seropositive patients will most certainly encounter arguments that their clients, who have not yet evidenced symptoms of AIDS, are not handicapped and are therefore unprotected from discrimination. These attorneys must fully understand such arguments against their clients in order to effectively rebut such contentions.

Professor Jane Harris Aiken's essay *Education as Prevention*²⁰ is one of the most thought provoking pieces in the book. The essay examines political forces that have shaped one area of AIDS law and

15. See, e.g., *District 27 Community School Bd. v. Board of Educ.*, 130 Misc. 2d 398, 502 N.Y.S.2d 325 (1986).

16. For example, professionals whose work could expose them to contact with blood might argue that they are entitled to choose the risks they wish to encounter. See Rubinowitz & Shapo, *Confronting the AIDS Challenge*, NAT'L L.J., March 7, 1988, at 13. Institutions may contend that the presence of AIDS patients could subject them to competing potential liabilities (confidentiality of the patient versus the need for institutional workers to know when they should take precautions). Landlords could assert that their property value will decline due to public aversion to living where an AIDS patient once lived.

17. Most of these victories have involved the right of children with AIDS to attend public schools. See Kass, *School Children with AIDS*, in AIDS AND THE LAW, *supra* note 2, at 66-80.

18. *School Bd. of Nassau County, Fla. v. Arline*, 107 S. Ct. 1123, 1128 n.7 (1987). In *Arline* the United States Supreme Court determined that tuberculosis patients who suffer physical impairment are protected under the Rehabilitation Act. The Court specifically reversed judgment on whether the seropositive patient falls within the act's ambit.

19. *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376 (1987). See generally *Good News for AIDS Victims, Refugees*, 73 A.B.A.J., May 1, 1987, at 50. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (West Supp. 1988) prohibits a federally funded state program from discriminating against a handicapped individual solely because of his or her handicap.

20. Aiken, *Education as Prevention*, in AIDS AND THE LAW, *supra* note 2, at 90.

exposes the tortured legal analysis underpinning "community review" requirements for federal AIDS education funds.²¹ Professor Aiken shows how the goal of reducing the spread of the disease is all too often subservient to the government's "interest" in not offending people. Professor Aiken succinctly contrasts the competing interests involved when she writes that these sensibilities should not be allowed to hold up the dissemination of information when "the cost of not offending someone is someone else's death."²²

Aids and the Law presents interesting discussion of issues that can arise in AIDS related litigation, but the discussion is not limited to those issues. The essay *Physicians Versus Lawyers*²³ contains a fascinating discussion of the legal and medical professions' conflicting views of risk and risk assessment. Mark Scherzer's article, *Insurance*, examines the tensions presented when society highly values progress in the treatment of disease but relies upon private insurance to pay for most health care.²⁴ Mr. Scherzer's article also discusses the insurance industry's attempts to avoid issuing insurance policies to people who might contract AIDS, by requiring that blood tests for the HIV antibody be taken before issuance of a policy.

The volume espouses creative approaches for protecting the interests of AIDS patients. For example, Professor Aiken proposes that governmental action which compromises AIDS patients' constitutionally protected rights should be challenged when the state has not tried the "less restrictive alternative" of AIDS education.²⁵ Attorney Urvashi Vaid proposes that prison officials might avoid political constraints which limit the effectiveness of AIDS information presented to prisoners by bringing in health care professionals from outside the prisons.²⁶

Throughout the book, difficult issues are met with both realistic

21. The Center for Disease Control administered the distribution of \$15 million in federal funds for state and local AIDS education in 1986. Agencies applying for the funds were required to comply with numerous conditions, including the establishment of local review boards to consider the explicitness of AIDS education literature. See Aiken, *Education as Prevention*, in AIDS AND THE LAW, *supra* note 2, at 98-100 and accompanying footnotes.

22. Aiken, *Education as Prevention*, in AIDS AND THE LAW, *supra* note 2, at 100. It should be noted that since the publication of the book, some progress has been made towards a nationwide educational effort. The United States government has announced plans to mail an informational brochure to all American households. *U.S. to Mail Out AIDS Booklet*, N.Y. Times, Jan. 28, 1988, at 16, col. 6.

23. Fox, *Physicians versus Lawyers: A Conflict of Cultures* in AIDS AND THE LAW, *supra* note 2, at 210-17.

24. Scherzer, *Insurance*, in AIDS AND THE LAW, *supra* note 2, at 185-200.

25. Aiken, *Education as Prevention*, in AIDS AND THE LAW, *supra* note 2, at 103.

26. Vaid, *Prisons*, in AIDS AND THE LAW, *supra* note 2, at 249.

and visionary solutions. The authors directly confront the limitations posed by political reality, but they clearly believe that our society can combat the spread of AIDS without violating human rights and dignity. *AIDS and the Law* is an admirable achievement which proposes that our legal system meet the challenges raised by AIDS without sacrificing due process or public safety. This book should serve as a valuable and important resource.