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# AIDS, Politics, and Civil Liberties

by Steve Kirschbaum

## A Review of *Private Acts, Social Consequences*

By Ronald Bayer

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The advent of AIDS represents a turning point for medical science. At a time when both the medical profession and the general public had come to view epidemics of infectious disease as things of the past, AIDS has revealed the limitations of modern medicine and has shattered a great deal of its attendant mythology. While scientific knowledge of AIDS has progressed, many unanswered questions about the disease remain. This situation presents challenges for public health going much further and having implications much deeper than simply seeking a cure for the disease. Indeed, AIDS has raised new philosophical problems which go to the heart of how we live our lives, both individually and collectively. Among these are civil liberties questions and concerns, such as control over one's body, freedom of association and the right to privacy of one's medical records.

In *Private Acts, Social Consequences: AIDS and the Politics of Public Health* (New York: The Free Press, 1989), Ronald Bayer explores how far the state can and should be permitted to go in dealing with the spread of AIDS. Bayer, an associate professor at the Columbia University School of Public Health, chronicles the political events which have emerged in this country as the state, through various governmental entities, has struggled with its duty to protect public health. In the name of this responsibility, the state has at times threatened to impose new coercive measures restricting individual liberties. He takes us behind the scenes where proposals such as mass mandatory testing, broad-scale isolation or quarantine, antisodomy laws, and the barring of children with HIV from

schools, are made and sometimes implemented.

Bayer's attempts to provide the political and social context for the situations and issues he explores are not always

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successful. While he is apparently concerned about protecting civil liberties, he too often sees these as being in conflict with the public health proposals he supports rather than as an integral part of them. His analysis would have been more cogent had he provided us with a conceptual framework of civil liberties principles applicable to the serious issues raised by AIDS. Such a framework is set out in a policy statement adopted by the American Civil Liberties Union (ACLU) entitled "Communicable Diseases and AIDS:"

The ACLU's policy recognizes the inherent tension that exists between public health requirements and civil liberties standards. While the former emphasize the welfare of the community and require minimal justification for actions which infringe individual rights, the latter start with opposition to state actions which infringe individual rights and require compelling justification for any infringement. Though it acknowledges that state action may be justified in instances in which the danger to the public from a communicable disease is especially serious, the policy emphasizes the importance of public health strategies which are rational, effective, and intrude minimally on civil liberties. Thus, state

action in carrying out public health decisions involving AIDS must be based on the most current and comprehensive scientific evidence available. The factors to be considered before an action is taken include the gravity of the harm; the means of viral transmission, the efficiency of transmission, and the likelihood of the behavior which enhances transmission; the degree of intrusion and duration of the proposed public health measure; the effectiveness of the proposed measure; the availability of less restrictive alternatives; and the presence of strict confidentiality safeguards for all sensitive, personal information held by public health departments.

The ACLU opposes any public health measure which is implemented simply to diminish public fear of a communicable disease. Its policy recognizes that rational thinking about AIDS is often prevented or impaired by perceived issues of personal morality usually centered around sexual conduct or intravenous use of illegal drugs, the two predominant ways in which the AIDS virus appears to be transmitted. It requires that fear and moral judgments never be used to justify discrimination against people with AIDS or those perceived as exposed to the virus. These principles result in an explicit call for an end to the exploitation of the AIDS crisis as a means of denying civil rights to gay men and others in groups disproportionately affected by the disease.

If we read the ACLU's policy as a kind of preface to *Private Acts*, we can then critically analyze Bayer's chronicle of the significant events which have directly determined how much liberty and freedom we are to have or to give up. His recounting of the war waged by the City of San Francisco to close the gay baths (in the chapter entitled "Sex and the Bathhouses") illustrates both the merits and the weaknesses of the book. If AIDS has pushed us further than any public health threat in modern times to look carefully at the civil liberties issues

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presented by public health policy, the bathhouse controversy is the premier example. Here the battle lines were vividly drawn, with dread and suspicion too often the defining parameters. Across these lines, civil liberties collided head-on into an age-old puritanical squeamishness about gay culture. While it is true that the baths were often the site of high-risk sexual activity, much of the public health rhetoric justifying coercive state action reflects society's inability to accept the validity of gay institutions, sexuality and lifestyles.

As Bayer notes, in the 1970's the baths became an important symbol of self-confident gay consciousness. The challenge for public health officials in deal-

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ing with the bathhouses was to enlist the cooperation and participation of the gay community rather than to provoke its resistance. This was no easy task, particularly given public health's legacy of coercive state intervention to control venereal disease and the stormy tension inherent in its relationship to the gay and civil liberties groups that had entered the fray. The battle to close the bathhouses began to pick up energy in mid-1983. Bayer's account of this episode is interesting and engaging, but his analysis is weak and at times misleading. I believe this is because he does not work from a clearly formulated body of civil liberties principles.

Initially, San Francisco Mayor Dianne Feinstein and the city's director of the Department of Health, Dr. Mervyn Silverman, represented the opposing views. Feinstein called for immediately closing the bathhouses, while Silverman believed that closure was unjustified on public health grounds, would be politically unacceptable, and would represent an unwarranted restriction of civil liberties. One gay activist went further, viewing the pressure on the gay community to shut the baths as the quid pro quo in a political bargain with a homophobic society for moral recognition. The National Gay Task Force acknowledged the

high risks involved in anonymous sex with multiple partners, but condemned regulation of the baths by the state. It saw closure as a symbolic act that would give the public a false sense of security that the AIDS epidemic was under control. A gay magazine warned of the dangers of "well-intentioned evils" inflicted "in the name of public health," and answered those who argued that where serious public health concerns are raised, civil liberties can be addressed later, stating "Where civil liberties are concerned, very often there is no 'later'." Bayer appears to be on the side of closure, though his position is never justified by civil liberties principles. Instead, he casts those who oppose his view as showing "a radical, almost asocial individualism." As one of the characters in Albert Camus' novel *The Plague* comments in a similar debate: "You'll soon be talking about the interests of the general public. But public welfare is merely the sum total of the private welfare of each of us." Unfortunately, it is precisely this point that Bayer never satisfactorily addresses.

Eventually, Silverman changed his position and was the city's political force in the move to close down fourteen sex establishments. Bayer reports that Silverman was first told by the city attorney that such a move would never withstand judicial scrutiny on public health grounds. We are told that when a report from the Centers for Disease Control minimized the significance of the baths in transmitting AIDS, Silverman pushed to modify the report (through protests to the supervisor of the research sociologist who wrote it). Without comment, Bayer informs us that Silverman was "successful in wresting a new analysis, with conclusions that were more compatible with the effort to justify the regulation of the bathhouses." To build his case, which was ultimately unsuccessful in court, Silverman placed the baths and sex clubs under surveillance.

In all of this, not a word is heard from Bayer objecting to these "sex spies" as some called them. He doesn't point out the irony of using state intrusion to collect data that would justify on civil liberties grounds further state intrusion in closing the baths. He doesn't even criticize Silverman's use of political muscle to "wrest a new analysis" from the CDC to justify governmental intervention. Instead, Bayer concludes that Silverman's course was "prudent, if modest." Thus, Silverman's error, if it existed at all, would have been back in the early days

when he opposed Feinstein on principles of individual rights. Bayer regretfully observes that by limiting the power of the state on the basis of principle rather than pragmatic concerns, Silverman lost a chance for the health department to shape the "culture" of sexual behavior within the context of the AIDS epidemic. This disappointing conclusion is surprising in light of the many references in the book to civil liberties. The problem may well stem from Bayer's failure to develop a consistent framework of civil liberties principles.

Finally, Bayer's book suffers from the method by which he answers the questions he raises. Too often, he restricts the "politics" of his subtitle to a recounting of political battles without regard for the ideological and cultural underpinnings about which these battles are fought. Thinking through these issues is difficult because many situations involving AIDS have civil liberties implications which may not be readily apparent. Moreover, traditional legal approaches may not be helpful in uncovering the subtle levels on which violations of individual rights occur. If we're to reveal the core issues of the AIDS crisis, we need to develop creative ways of penetrating obscure legal tests and social predispositions. The methodology used by the new black legal scholarship in its inquires into civil rights is instructive. For example, Charles Lawrence, in his article entitled "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (*Stanford Law Review*, vol. 39 January 1987), uses both Freudian theory and cognitive psy-

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Fear and moral judgment should never be used to justify discrimination against people with AIDS.

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chology to question the legal tests requiring proof of conscious or intentional motivation before discriminatory behavior can become actionable in court under the equal protection provision of the Fourteenth Amendment. He challenges this doctrine on the grounds that it ignores how the human mind works, since unconscious racism can be just as harmful as clearly intentional varieties.

## 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.

### Scrutinizing the Individual:

#### What are the Limits of a Community's Right to Know?

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.)