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An economy of protection: agency, responsibility and the criminalization of HIV



Maria Jansson

Department of Political Science, Stockholm University, SE-106 91 Stockholm, Sweden

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ABSTRACT

This article analyzes the protection logic that legitimizes criminalization and investigates how this logic affects gender and state-citizen relations. Viewing criminalization as a political response to the challenge HIV poses to the post-Cold War security state, the article examines the intersection between protection as a pretext for controlling vulnerable groups and criminalization as a way to withdraw protection. The article analyzes the constructions of those in need of protection (referents) and the providers of protection according to HIV-specific state laws and media reports of arrests and prosecutions, and it shows that the requirements for being considered worthy of protection are highly gendered. The article argues that laws and the media construct the idea that a popular demand for protection exists and that criminalization practices are produced as the supply needed to meet this demand.

And I'm angry when the newspapers call us "victims" and sound alarms that "it" [AIDS] might soon spread to the "general population." And I want to scream "Who the fuck am I?"

Queer Manifesto, 1990

Introduction

The quote above from the Queer Manifesto expresses anger over queers being constructed as "victims" of HIV and questions who belongs to the "general population". In doing so, the quote probes the notions of who is eligible for protection. Who is constructed as worthy of protection when the "victims" are also constructed as a threat to the "general population"? When the Manifesto was written, HIV was undergoing a securitization process constructing the epidemic as a threat to both national and international security (Elbe, 2011; Sjöstedt, 2011). However, much has happened since then. As antiretroviral therapy (ART) has made HIV treatable if not curable and lessened the risk of transmission, the public debate has taken on a more moderate tone, and HIV as a political problem has shifted out of emergency mode. Despite all of these changes, the highly criticized practice of criminalizing HIV remains.

Criminalization refers to arrests and prosecution for nondisclosure, exposure or transmission under specific laws or under criminal codes such as assault and battery, reckless endangerment, and attempted murder (Lehman et al., 2014). Such legal measures serve to construct

HIV-positive individuals as villains, as a threat: "A person...who tests positive for...HIV is...infectious to others through the exchange of body fluids...and under these circumstances is a danger to the public" (AR Code, 2016, §20-15-905). Criminalization as such (Sykes, Hoppe, & Maziarka, 2016; Weait, 2007) as well as the stereotyped media representations of the "criminals"¹ have, as previous research has shown, contributed to stigmatization of male homosexuals, injecting drug users, black men, and women to whom inappropriate sexual behavior is attributed. However, the laws also produce constructions of who is eligible for protection from the perceived threat and who is responsible for providing protection and how. Constructions of the protected and the protector are the focus of this article.

This article departs from the suggestion that criminalization is undertaken by a post-Cold War security state that depends on a rhetoric of security and protection for its legitimacy. Accordingly, the way that the logic of protection is constructed serves both to legitimize state authority and to organize state-citizen relations. The protection provided by the security state is symbolically modeled on prevailing ideas about a gender order in which the husband/father is the protector of "his" women and children. This means that the subjection of women to men's authority as well as the subjection of citizens to state authority is legitimized through the idea of a contract, where obedience is exchanged for protection (Young, 2003). One way to understand the protection logic and the relations it produces is to study the forms of agency and responsibility ascribed to the parties involved. Feminist analyses of

E-mail address: maria.jansson@statsvet.su.se.

¹ See, e.g., Lupton, 1994; Watney, 1997; Shevory, 2004; Persson & Newman, 2008; McKay et al., 2011; Persson, 2014 for discussion about media representations of people living with HIV.

protection have shown that being constructed as vulnerable and in need of protection includes being deprived of agency.² This article will investigate and problematize this assumption in the context of the criminalization of HIV, where vulnerability is not necessarily connected to being worthy of protection.

The overarching aim of this article is to analyze the protection logic that legitimizes criminalization in a context where HIV is no longer considered an acute threat to security. Further, the article will investigate how the protection logic informing criminalization constructs gender and state-citizen relations. This will be done by analyzing HIV-specific state laws and recent media reports of arrests and prosecutions to answer the following questions: Who is eligible for protection in the name of the “public”? Who and by what means should this protection be provided? What agency and responsibility are ascribed to the protector and the protected, respectively? How are the protected and the protector gendered? The article argues that criminalization of HIV produces a discourse of demand and supply – an economy – of protection, and thus stages its own legitimacy.

After a section on previous research and a presentation of the theoretical and methodological framework, four empirical sections present different categories of victims. The empirical sections are followed by a discussion summarizing the results for the construction of the protector and protected. Finally, the conclusion will outline the protection logic and how it serves to legitimize criminalization.

Criminalization and protection

US state laws criminalizing the spread of and exposure to HIV were mostly established during the early years of the epidemic, before ART treatment. During this period, the fear among politicians that the epidemic would spread from minority populations to majority populations underpinned decisions to pass HIV-specific laws (Sykes, Hoppe, & Maziarka, 2016). Institutional drivers for passing such laws include the *Ryan White Act* (1990), which provides federal funding of last resort care and, at the outset, required states to certify that criminal laws were adequate to prosecute individuals who knowingly exposed another person to HIV (Baldwin, 2005; Brier, 2009; Hoppe, 2015; Lehman et al., 2014). Today, 32 states have HIV-specific criminal laws (Sykes, Hoppe, & Maziarka, 2016).³ These laws address nondisclosure to sexual and needle-sharing partners, blood or tissue donation, prostitution, and biting, spitting or throwing bodily fluids, with the knowledge of being HIV positive (Lehman et al., 2014).

Public health scholars and organizations representing people living with HIV, along with federal authorities and the UNAIDS, have called for the elimination or modernization of HIV laws (NHAS, 2010; Sykes, Hoppe, & Maziarka, 2016; UNAIDS, 2012). Criminalization is criticized for being an inefficient and blunt way to prevent HIV. It has been shown to act as a disincentive to testing and seeking care, and it is criticized for failing to acknowledge the complexity of behavior that may or may not lead to transmission and for stigmatizing HIV-positive individuals (for an overview, see Mykhalovskiy, 2015). Studies of who is convicted for HIV-related crimes display racial bias and the overrepresentation of vulnerable groups, such as homeless people and sex workers. There are also indications that heterosexual women are over-represented (Adam et al., 2012; Barber & Lichtenstein, 2015; Hoppe, 2015). Feminist research on HIV in Western liberal democracies has made major contributions to the knowledge of the conditions of women living with HIV and the constructions of women and women's sexuality in relation to HIV.⁴ Within the research on criminalization, feminist legal scholars

have problematized the issue of consent (Mathen & Plaxton, 2011; MacKinnon & Crompton, 2012; Loutfy et al., 2014), while questions about how criminalization as such produces gender relations has not yet been discussed.

The political responses to HIV, including criminalization, have been explained in terms of path dependency, i.e., how the responses to HIV are modeled on the way epidemics and disease have been handled previously (Baldwin, 2005). Scholars have further analyzed criminalization in relation to theories about risk society. Matthew Weait argues that criminalization builds on the “security values that inform criminal law” (Weait, 2007: 149) while it plays out in a risk society characterized by anxiety because people cannot foresee threats, yet they expect protection (Weait, 2007; see also Franklin, 2003). The security context of HIV/AIDS is, however, not limited to a general idea of security informing criminal law, as HIV has also been constructed as a threat to national and international security. HIV underwent an international securitization process during the late 1980s and 1990s and was the first health issue to be discussed in the UN Security Council in 2000 (see, e.g., Elbe, 2011, McInnes & Rushton, 2013). Research has traced this process, noting the involvement of both national and international actors (Fourie, 2015; McInnes & Rushton, 2013; Sjøstedt, 2011). However, as efficient treatment has increased survival and the rates of new individuals being diagnosed with HIV have dropped in western democracies, HIV as a political issue has shifted out of the political emergency mode both internationally and in western democracies such as the US (Hoppe, 2015; Ingram, 2013).⁵

It has been argued that the changed macrosecuritization context after the end of the Cold War paved the way for securitizing new problems, such as health (Harrington, 2011). Further, the introduction of the human security discourse strengthened the links between international and national security. Human security has, according to Paul Amar (2013), been used to legitimize domestic surveillance⁶ of certain unruly groups, such as the poor and the queer, in the name of protection and as part of an international security agenda. This has been further emphasized by the war on terror doctrine, which explicitly argues that the threat may be both external and internal (Buzan, 2006; Young, 2003).

According to criminalization theory, being criminalized means being subjected to the disciplining and punishing aspects of the law but also “excluded from legal protection” (Cacho, 2012: 5; see also Esperitu, 2003). While security state theories focus on how the policing of “unruly” groups is legitimized by a protection logic, criminalization theory departs from criminalization as the withdrawal of protection from vulnerable groups and problematizes the effects of such policy. This article aims to primarily understand the relation between the protector and the protected, but as the introductory quote from the Queer Manifesto poignantly illustrates, it is a thin line between the construction of victims and that of threat for people living with HIV. Thus, asking questions about who is eligible for protection necessarily includes investigating the conditions for eligibility and the circumstances under which protection is withdrawn (see also Wendt & Eduards, 2010).

A note on materials and methods

As stated above, the security state rests on a rhetoric of security and protection for its legitimacy. Thus, tracing the elements of security narratives provides an avenue for understanding how legitimacy is produced. Therefore, state laws and media reports have been read to

(footnote continued)

Zivi, 2005; Doyal, Nadoo, & Wilton, 2006; Nack, 2008; Higgins, Hoffman, & Dworkin, 2010; Ahmed, 2013.

⁵ A handful of studies have looked into the development of international securitization after the phase of exceptional policy (Ingram, 2013; Jansson, 2016; Rushton, 2010).

⁶ See, e.g., Hoppe, 2013 and Watney, 1997 for discussions about HIV as a pretext for surveillance and biopolitical control.

² See, e.g., Tickner, 2001; Stiehm, 1982, 2010, Young, 2003; Eduards, 2007; Sjöberg, 2007; Wendt & Eduards, 2010; Åse, 2015.

³ The CDC refers to a 2011 mapping, where criminal laws specifically addressing HIV were found in 33 states (CDC, 2017), while the Center for HIV Law and Policy (2017) has listed 34 states and two territories with HIV-specific misdemeanor or felony laws in 2017.

⁴ Many scholars have contributed to this field, see e.g., Sobo, 1995; Dworkin, 2006;

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