Social Science & Medicine 101 (2014) 139–147

Contents lists available at ScienceDirect

Social Science & Medicine

journal homepage: www.elsevier.com/locate/socscimed

From sickness to badness: The criminalization of HIV in Michigan

Trevor Hoppe [a,b,*]

[a] University of Michigan, Department of Sociology, 500 South State Street, Room 3001, LSA Building, Ann Arbor, MI 48109, USA
[b] University of Michigan, Department of Women's Studies, 204 South State Street, Ann Arbor, MI 48109, USA

ARTICLE INFO

Article history:
Available online 16 November 2013

Keywords:
USA
Social control
HIV/AIDS
Criminalization
Medicalization
Public health
Sociology of law

ABSTRACT

Sociological approaches to the social control of sickness have tended to focus on medicalization or the process through which social phenomena come to be regulated by medicine. Much less is known about how social problems historically understood as medical come to be governed by the criminal law, or what I term the "criminalization of sickness." Thirty three US states have enacted criminal statutes that require all HIV-positive individuals to disclose their infection before engaging in a wide range of sexual practices. Drawing on evidence from 58 felony nondisclosure convictions in Michigan (95% of all convictions between 1992 and 2010), I argue that the enforcement of the state's HIV disclosure law is not driven by medical concerns or public health considerations. Rather, it reflects pervasive moralizing narratives that frame HIV as a moral infection requiring interdiction and punishment.

Introduction

> Calling it a crime "akin to murder," Kalamazoo County Circuit Court Judge Philip D. Schaefer ordered a Kalamazoo man to spend nine months in jail for failing to tell his sexual partners he was HIV-positive. "Quite frankly there isn't a sentence long enough that I could give you that would be justice," Schaefer told [the defendant]. "You have signed a death warrant for another human being. God forbid that you ever do it again"
>
> Ricks 2004.

While conceptual approaches to theorizing social control have varied over time (for a review, see Meier, 1982), sociologists have a longstanding interest in understanding how categories of sickness are produced, regulated, and controlled. Indeed, medical sociologists coined one of their signature concepts, "medicalization," in order to describe the process through which social phenomena come to be regulated by medical authorities. Yet, while sociologists have acknowledged that medicalization could be "bidirectional and partial" (Conrad, 2005:3), most research has centered on what was viewed as the usual direction of change: from badness to sickness (Conrad & Schneider 1980/1992). Much less is known about how phenomena historically controlled by medical authorities come to be governed by the criminal law, or what I term in this paper "the criminalization of sickness."

In order to conceptualize this process, I draw on a variety of sociological literature. In the first section, I review the literature on the social control of sickness. The bulk of this work has followed in the tradition of Conrad (1975; 1979; 1992), whose groundbreaking research highlights the processes by which medical authorities come to regulate and control ever-greater domains of social life. While these insights into social control have helped to describe and analyze a wide range of social problems, I argue that they have tended to bracket analyses of how problems historically defined as medical come to be regulated by other institutions and forms of authority – including criminal law. I then review the literature on criminal laws prohibiting HIV-positive people from having sex without first disclosing their HIV-positive status. While reports suggest the reach of such laws is increasing (Bernard & Nyambe, 2012), few empirical studies have examined their application.

In the second section, I report findings from an original analysis of 58 Michigan trial court cases in which defendants are convicted under the felony nondisclosure statute. Drawing on trial court transcripts, newspaper reports concerning those proceedings, and court records associated with cases convicted between 1992 (the year in which the first defendant was convicted) and 2010, I argue that legal actors employ moralizing narratives of HIV infection that serve to construct HIV as a form of badness deserving of legal intervention and, thus, social control. Because HIV-specific criminal laws deal with a problem that is conventionally understood as medical (a virus), many have presumed that such laws reflect a societal interest in promoting the public's health. However, I argue

* University of Michigan, Department of Women's Studies, 204 South State Street, Ann Arbor, MI 48109, USA.
E-mail address: thoppe@umich.edu.

0277-9536/$ – see front matter © 2013 Elsevier Ltd. All rights reserved.
http://dx.doi.org/10.1016/j.socscimed.2013.11.007

that Michigan's HIV disclosure law was not intended to promote public health; rather, it reflects the perception of the virus as a moral infection requiring regulation and punishment.

As I show, while the HIV epidemic has changed dramatically since the late 1980s when many HIV disclosure statutes were enacted, the way these cases are argued in Michigan courts has not reflected the transformations in medicine and HIV prevention. My analysis suggests that HIV disclosure laws continue to be used not to enhance public health but to control and punish populations deemed deviant.

The social control of sickness: from "medicalization" to "criminalization"

Conrad (1979, 1992) and Conrad and Schneider (1980/1992) have explained how medicine and its practitioners come to govern types of non-conformity once viewed as crime or sin. Conrad's theory of medical social control became encapsulated within the well-known concept, "medicalization," which was informed by both Zola's (1972) argument that medicine has come to supplant religion as the major institution of social control, as well as Freidson's (1970) pioneering work analyzing how medical professionals came to define categories of deviance as illness in order to diagnose increasing numbers of individuals as sick. In his analysis of the development of the medical category "hyperkinesis," Conrad (1975) coined the term medicalization in order to explain this very process.

Conrad and Schneider's (1980/ 1992) original conceptualization describes medicalization in either/or terms, framing it as the process through which "categories of deviant behavior become defined as medical rather than moral problems" (p. 17). More recently, Conrad (2005) updated their approach by arguing that medicalization can be "bidirectional and partial" (p. 5). Anspach (2011:xxii) expands on this to suggest that "ideas about bad behavior… continue to exist in popular culture alongside the medical model." Bosk (2013) argues that, while children with behavioral disorder diagnoses undergo partial medicalization, this does not protect them from criminalization. Thus, by titling this paper "from sickness to badness," I am not suggesting that these states are mutually exclusive; rather, I am pointing to a case in which criminal justice authorities are claiming jurisdiction over a phenomenon conventionally understood in medical terms (e.g. a virus).

In this paper, I build on these contributions by examining what Timmermans and Gabe (2002) describe as the "medico-legal borderland" — or, sites of overlapping jurisdiction between medicine and the law where, at times, authorities "vie for hegemony in an attempt to redraw the borders to their advantage" (p. 507). Citing Abbott's (1988) influential work on competition for professional jurisdiction, Timmermans and Gabe call for greater attention to the intersection of medicine and crime in order to better explicate the complexities of social control. In the next section, I turn to the literature on the use of the criminal law to control sickness in order to further conceptualize this particular borderland.

The criminalization of sickness

Sociolegal scholars have a longstanding interest in analyzing how deviance becomes labeled as crime and controlled by criminal justice authorities (for a review, see Jenness, 2004). Describing this transition as a "moral passage," Gusfield (1967:187) argues that "What is attacked as criminal today may be seen as sick next year and fought over as possibly legitimate by the next generation." Recent studies have examined how social movements (Jenness & Grattet, 2005) and moral panics (Jenkins, 1998) can contribute to the construction of categories of crime and criminalization more generally.

This paper builds on these insights by examining how criminal justice comes to control phenomena historically defined as medical. This is not entirely novel. For example, Schneider (1978) describes historical tensions in punitive and medical approaches to defining and controlling alcohol intoxication. A wide array of sociologists has similarly analyzed punitive approaches to the crimino-legal control of mental illness, which have become particularly problematic in an era of deinstitutionalization and mass incarceration (see, for example, Erickson & Erickson, 2008; Link, Andrews, & Cullen, 1992; Pescosolido, Monahan, Link, Stueve, & Kikuzawa, 1999). Although sociologists have attended to the criminalization of sickness, these efforts resemble medical sociology's focus on phenomena sometimes referred to as "existential problems" whose etiologies are more readily understood as socially constructed. How "organic diseases" such as HIV come to be regulated by the criminal law is not yet well understood.

In organizing this paper in terms of "criminalization," I aim to avoid confusion with the use of civil law procedures (such as quarantine and forced treatment) to control disease. There is a vast public health law literature examining the use of civil procedures for controlling disease (see, for example, Bayer & Dupuis, 1995). For a discussion of the differences between civil and criminal law for controlling sickness, see Gostin (2001:224–5). While criminal laws regulating infectious diseases do not make infection itself a crime, they do impose restrictions on the freedoms of those infected that are not imposed on others. Moreover, they codify forms of punishment for those infected who breach normative behavioral guidelines. To the extent that the criminal law is applied to only those who are infected, it is appropriate to refer to this process as the "criminalization of sickness."

The criminalization of HIV in the United States

Laws in 33 states presently have HIV-specific criminal statutes on the books (Center for Disease Control and Prevention 2013). Nondisclosure prosecutions have also been reported in additional states under statutes not specific to HIV, such as attempted murder. None of the HIV-specific criminal laws requires that the complainant in the case contract HIV and most prohibit even no or low risk sexual contact (such as oral sex or the sharing of sex toys) without disclosure (Center for HIV Law & Policy, 2010). The majority of such laws in the US were enacted during the mid-1980s and early 1990s in the context of high AIDS-related mortality, a general panic about its transmission, and before life-saving medications known as antiretrovirals (ARVs) were introduced in 1996 (Burris, Dalton, Miller, & the Yale AIDS Law Project, 1993; Galletly & Pinkerton, 2006). While comprehensive national data on the enforcement of such laws do not exist, advocacy groups report that over 1000 HIV-positive defendants have been prosecuted under HIV-specific criminal statutes; Michigan is reported to have the fourth highest number of prosecutions of any country or territory in the world (Bernard & Nyambe, 2012).

Public debates over criminal HIV disclosure laws have focused on atypical defendants accused of infecting multiple partners who are understood to be particularly vulnerable, such as the case against Nushawn Williams, a black man accused in New York of infecting nine, mostly white women and girls. Shevory (2004) argues that the media spectacle surrounding Williams' case reflected social anxieties not just about HIV, but also about race and crime more generally. Paralleling Metzl's (2010) argument that the diagnosis of schizophrenia became a tool for medical control of black men, Shevory argues that Williams' criminal case proved to be an occasion to shore up social values by linking anxieties about a deadly disease to deep-seated fears of black male sexuality and masculinity.