

## Mythic Prostitutes, AIDS and Criminal Law

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Résumé de l'article

Trois importants cas de l'actualité légale concernant les prostituées séropositives aux États-Unis démontrent la facilité avec laquelle la méchanceté et le désespoir d'un individu peuvent être amplifiés pour condamner une catégorie entière de personnes marginalisées. Les ressources ethnographiques et épidémiologiques, complétées par la perspective subjective imaginée de ces femmes qui n'ont pas le droit de parole, sont mises au jour à travers l'analyse textuelle d'études de cas légales et provenant des médias de masse pour identifier les implications pragmatiques et éthiques de la perspective gouvernementale dans l'intervention vis-à-vis du SIDA.

## **MYTHIC PROSTITUTES, AIDS AND CRIMINAL LAW<sup>1</sup>**

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**with poems by C. Jason Dotson**

### **Introduction**

Governmental institutions in the United States have pursued AIDS prevention modeled on two distinct paradigms. The dominant paradigm, drawing from an intersection of public health and civil rights law, emphasizes universal education, universal precaution, and the treatment and protection of hiv-positive individuals. The paradigm assumes that, given culturally-appropriate educational materials, all persons are equally educable and equally willing and able to act on health knowledge in order to protect themselves. Unlike empirical data that forms the basis of educational materials regarding modes of viral transmission, such assumptions rest on ideals of human behavior, ideals which exist in uneasy relation to the well-documented gap between AIDS-related knowledge and behavior.

Virtually all large-scale AIDS research and intervention projects funded by government agencies base their philosophy and practice on the dominant

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paradigm.<sup>2</sup> These projects began in the late 1980s by focusing on the first identified risk groups (gay men, injecting drug users and their sexual partners, and prostitutes)<sup>3</sup> and continue through the century's end, focusing on women, minorities, adolescents, prisoners, patients and workers in health care settings, people living in poverty — i.e., all those once considered part of the “general population”.<sup>4</sup> By now, hiv's miraculous replicative machinery has parasitized human error, dispersing and mutating in so many kinds of bodies that the connotation of general population as a social and biological safety zone relatively free of risk has lost even its mythic power. The dominant paradigm also informs the large body of AIDS law that has been written to protect the rights of hiv-positive individuals from discrimination in the domains of work, housing and health insurance (see e.g. Webber 1997). It has strong, positive effects.

There is also a shadow paradigm guiding governmental action. Achieving importance in state legislatures and criminal justice institutions, the shadow paradigm emphasizes the criminal liability of hiv-positive individuals who put hiv-negative persons at risk of infection. Unlike civil legislation that uses epidemiological evidence to protect the infected from irrational and unwarranted fears of infection due to casual interpersonal contact, criminal legislation targets the alleged bad actors among hiv-positive people and is not always consistent with plausibility levels determined by current virological and social scientific research. Criminal legislation does not rely on the ideal assumptions of the dominant paradigm, but rather, draws emotional force from sensationalized cases that contradict those ideals. The public impetus for criminalizing hiv-positive people who do not or cannot take responsibility for informing or protecting their sexual partners has led to the widespread passage of new state laws against “intentional hiv transmission”, a new category of

2. In January of 2001, the U.S. Centers for Disease Control and Prevention (CDC) announced its strategic plan through 2005, which for the first time targets hiv-positive persons with specifically designed prevention efforts. See particularly Objective 1 (CDC 2001: 27-8).
3. Prostitutes were listed by the CDC early on as a risk group. The CDC later removed prostitutes from their array of risk groups because the organization found the concept inaccurate. Early epidemiological evidence showed that in areas of high seroprevalence among prostitutes, infections are for the most part due to the use of dirty needles to shoot drugs, rather than multiple paying sex partners, as first presumed (CDC 1987). However, the symbolic function of prostitutes — to give shape to sex-related dread — preceded epidemiological formulations of hiv and persists even after epidemiological rationalizations are removed (see note 27).
4. See Glick-Schiller (1992) for critique of ideological implications of hiv risk groups.

crime that releases prosecutors from their traditional burden of proving intention, cause, and harm in AIDS-related cases (Dalton 1993).

There are a number of laws that can be used against hiv-positive women who do sex work. Varying by state, these laws are new resources for social control. In a survey of criminal laws in process or in effect between 1986 and 1996, new laws specifically targeting hiv-positive prostitutes had been passed in state legislatures in California<sup>5</sup>, Colorado<sup>6</sup>, Florida<sup>7</sup>, Idaho<sup>8</sup>, Illinois<sup>9</sup>, Iowa<sup>10</sup>, Kentucky<sup>11</sup>, Louisiana<sup>12</sup>, Maryland<sup>13</sup>, Mississippi<sup>14</sup>, Missouri<sup>15</sup>, Nevada<sup>16</sup>, Oregon<sup>17</sup>, Pennsylvania<sup>18</sup>, Rhode Island<sup>19</sup>, South Carolina<sup>20</sup>, Tennessee<sup>21</sup>, Utah<sup>22</sup>, Virginia<sup>23</sup>, Washington State<sup>24</sup>, and West Virginia<sup>25</sup>. The Colorado, Illinois, Kentucky, Pennsylvania and Utah laws target hiv-positive patrons as well as prostitutes. In addition to laws specifically targeting prostitution, at least 66 other hiv-specific laws passed either in state houses and/or in senates between 1986 and 1996 in 34 states; over half of these make specific reference to sexual behavior.<sup>26</sup>

5. SB 1007 (1989). Cited in Anonymous (1989).
6. HB 1255 (1990). Cited in National Conference of State Legislatures (NCSL) (1995).
7. HB 153, Chapter 227 (1993). Cited in Kleindienst (1993) and NCSL (1995).
8. HB 638 Chapter 310 (1990). Cited in Bowleg (1994).
9. HB 2044 Public Act 85935 (1987). Cited in Bowleg (1994).
10. SB 2157 (1988). Cited in Bowleg (1994).
11. SB 244 (1992). Cited in NCSL (1995).
12. HB 460, Act 666 (1988). Cited in Bowleg (1994).
13. SP 719, Chapter 789 (1989). Cited in Bowleg (1994).
14. HB 4008, Public Act 471 (1988), Cited in Bowleg (1994).
15. HB 780 (1995), RSMo Section 191.651 and 567.020. Burnett, Douglas, Chief Clerk. Prefiled December 1, 1995. <http://www.house.state.mo.us/billtext/HBO780I.HTM>.
16. AB 550, Chapter 762 (1987); SB 73 (1989); SB 514, Chapter 472 (1993). Cited in NCSL (1995).
17. Existing state law (number not specified) cited in Savelle (1991).
18. HB 247 (1995). Cited in Cattabiani (1995).
19. SB 3438 (1988), Chapter 88405; HB 9075, Chapter 90169 (1990). Cited in Bowleg (1994).
20. SB 1165 (1990). Cited in Bowleg (1994).
21. HB 461, Chapter 281 (1991). Cited in NCSL (1995).
22. HB 24 (1993). Cited in NCSL (1995).
23. SB 340, Chapter 913 (1990). Cited in Bowleg (1994).
24. SB 6221, Chapter 206 (1988). Cited in Bowleg (1994).
25. HB 303 (1988); SB 423 (1993). Cited in Bowleg (1994).
26. This data has been compiled from a number of sources. In addition to a search of

In a number of states, routine arrests of prostitutes include forcing them to submit to hiv antibody tests.<sup>27</sup> Results go on public record. If hiv-positive persons are arrested for prostitution after they have been tested, more often than not they are subject to a felony rather than a misdemeanor charge.<sup>28</sup> Of the 26 hiv-positive prostitution cases in my Lexis-Nexis<sup>29</sup> sample for the decade 1986 to 1996, twenty involved women workers; two male workers; two transvestite workers; and two male clients. In the 77% of hiv-positive prostitution cases targeting women, we can assume that each of the women had sex with a number of men, all of whom were voluntary participants in sexual activities and all of whom had some determining influence on the level of hiv-risk engaged in during those activities. Yet, none (maybe one) of those men were held accountable by the law. (Of the two male clients charged, one had sex with teenage working boys and the other had sex with prostitutes of unspecified gender.)

An analysis of case reports in the news media and in legal case records reveals that while the logic and language of laws written to contain individuals who put others at risk may be applied to any person, in effect, such laws are most likely used against individuals who for one reason or another are already under the surveillance of the criminal justice system. And while such laws are in spirit neutral with respect to gender and class, the targeting by police and prosecutors of women who work as street prostitutes make them the most likely group to be affected by governmental attempts at disease-as-crime-control, i.e., to control disease as if it were crime and to control crime as if it were disease.

As in most current debates concerning sexuality and the law, today's debates about the criminalization of hiv are polarized, with most public health experts and legal scholars condemning the basic premises of criminalization as unfair and/or ineffective even as legislators and police, confident in their interpretation of popular opinion and common sense, create ever more laws and procedures

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Lexis-Nexis indices on the Web, this list draws on data from the National Conference of State Legislatures (NCSL) (1995); Hannaham (1996) and the AIDS Policy Center, Intergovernmental Health Policy Project (Bowleg 1994).

27. For discussion of these events see Alexander (1987) and Bowleg (1992, 1994).

28. Bowleg (1994) counted 11 states as having enacted related felony statutes.

29. Lexis Nexis is an electronic database that provides full text access and/or indexing and abstracts to a wide range of sources both inside and outside the United States. I search for information on intentional HIV criminalization cases in legal and media areas, collecting data in the form of newspaper and journal articles, laws, and legal transcripts.

of enforcement. The conditions that women who work as prostitutes endure, now reinforced by new laws generated by the government's shadow paradigm, render invisible the experience and intentional actions of those women most affected by the epidemic. Rendered invisible as well are the extreme social and economic conditions which intensify the epidemic's negative impact. Legal imputation of diseased dangerousness to women sex workers may numb movement toward more compassionate and pragmatic remedies.

At the same time, those who adhere to the dominant public health oriented paradigm that promotes an ideology of equality in responsibility and capability, also render invisible the differences among hiv-positive women who are brought before the bar. It is difficult to treat victims and perpetrators in a balanced way, especially when, as in the case of hiv-positive prostitutes, they are in the same body.<sup>30</sup> In a world reconfigured by a virus believed by some to act as a slow-moving gun, gender and class discrimination skews rational legal process. It is important to account for both the human vulnerabilities and the logical contradictions involved in criminalization.

The purpose of this article is to assert the significance of this area of legal and public health activism, and more particularly, to suggest ways that we might think about the relevant issues. It is not primarily directed toward policy-makers. The next two sections discuss the way in which the mythic imaginary shapes the reality of street prostitutes' lives and the laws that govern them. Included is a discussion of why poetry is used to represent the subjectivity of women whose voices have been made absent from public discourse. Those readers whose interest lies more specifically in legal and public health issues as conventionally defined may wish to skip to the First Felony (Case 1).

### **The Gap Between Identity and Subjectivity**

The targeting of women who work as prostitutes by the criminal justice system is, I believe, provoked by sexuality as a problematic site in American public discourse. A generalized sense of guilt derived from the association of sex and sin is displaced on to prostitutes as an abstract category. Displaced guilt drives a lust for retribution that functions in dynamic counterpoint to sexual incitements promoted by the goods and advertising of capitalist markets.

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30. See Kathleen Daly's (1992) analysis of the conundrums presented by women who are both victims and perpetrators for feminist criminologists.

A nexus of desire and anger magnetizes fears associated with the sexual transmission of hiv. Only a mythic logic would attempt to resolve the contradictions inherent in this cultural dynamic. Where desire crosses control, prostitutes emerge from the garish darkness of night streets, branded as hypersexual beings. At the extreme, they are imagined to be sexual zombies, robots wired for fornication. According to their mythic roles, prostitutes have only sex on their minds; they lack the ability to shape the flow of their own conduct in the world, i.e. they have no agency (cf. Giddens 1983: 55).

Mythic prostitutes work the street as unclean, unredeemable whores; this vision obscures the circumstances of real women. Tragically, the sacrificial persona of the mythic prostitute may overpower reality, motivating and legitimating the discriminatory actions of police, prosecutors and legislators, even as it drives all the ordinary, working- and middle-class men into the city from the suburbs. Epidemiologically, it may well be the suburban gentleman who infects the woman prostitute (women are more easily infected by men than vice versa<sup>31</sup>), but in a cruel twist of mythic logic, she becomes the icon of infection. She becomes a hypersexual dragoness, threatening the camouflage of normalcy<sup>32</sup> sustained by the clear ideological divide between marriage in the suburbs and sex on the streets. The denial of risk, one's own or one's nation's, is a form of psychic repression that opens the way for hiv.

The criminalization of sex workers generally, and hiv positive prostitutes particularly, calls for an examination of the relationship between gender, agency, law and violence (of disease and of representation). Phelan (1993: 10) has observed that in general "Reading the body as a sign of identity is the way men regulate the bodies of women." When the force of law focuses on the hiv-positive bodies of prostitute women, the range of symbolic meanings evoked should be part of sociolegal analysis.

We need to understand the processes by which prostitute women's agency is made inconsequential in the course of legislation, enforcement and judgment. In her discussion of why it is crucial that we understand the symbolic meanings associated with gender, Sandra Harding (1986:17) defines gender as an

31. See Padian (1990).

32. Cynthia Enloe (1989: 66f) coins the term "camouflage of normalcy" in her analysis of how U.S. army bases seem to become a normal part of local communities around the world, sustaining their sense of normalcy through ideas about masculinity and femininity.

analytical category within which humans think about and organize their social activity. Furthermore, as Allison Young (1996: 41) argues, gender is an analytic category that the criminal justice system employs to organize persons who come within its purview. The criminal justice system imposes gendered models on individuals within the system. Indeed, Young continues (1996: 41):

“gender” is used as a mode of epistemological determinism. That is, there is a continuity between the abstract epistemological categories and the concrete practices of criminal justice. What is crucial is their imposition on the subjects of criminal justice; a match between individual and “gender” is made by force. Discrimination is thus as axiomatic for criminal justice as it is for any system of representation, in which individuals are made to own an image of themselves. Images of identity can take shape through gender, race, age, health, and nation and so on....Feminist critiques of discrimination in criminology tend to locate the gap crucial to their arguments between male and female, when it lies between identity and subjectivity instead.<sup>33</sup>

The gap between identity and subjectivity is manifested in the arrest procedures of women who are identified by their gender, serostatus, profession, race, age and class. The actions of the legal-regulatory regime can be discerned in the case descriptions of women arrested, charged, and judged for bearing certain markers of identity rather than evidence of actual crimes committed.

While I had some past ethnographic research experience doing fieldwork with street prostitutes,<sup>34</sup> I had no access to the particular women in question, and thus no authentic representation of their voices. Nor did I find publication

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33. In her study of the ethnoracial reclassification of Jews in twentieth century America from non-white to white, Karen Brodtkin (1998) makes a similar conceptual distinction. What Young calls identity in the above quote, Brodtkin calls assignment, and what Young calls subjectivity, Brodtkin calls identity. Speaking of ethnoracial classification Brodtkin writes: “Assignment is about popularly held classifications and their deployment by those with national power to make them matter economically, politically, and socially to the individuals classified. We construct ethnoracial identities ourselves, but we do it within the context of ethnoracial assignment (ibid.: 3). “...The ways we construct ourselves as social actors are shaped by larger ethnoracial assignments, social contexts over which we have no direct control. Within their constraints we can be quite creative constructing ourselves as social beings, but there are limits to that creativity both with respect to individual adjustment and with respect to the kinds of political identities one can construct in any given community (ibid.: 21-22).” I believe that the process Brodtkin describes is also relevant to the assignment of criminal womanhood in the cases discussed here.

34. My experience in AIDS research and intervention began in Chicago 1988 when I was



of ethnographic materials based on interviews with other hiv-positive prostitutes. And yet, it seems crucial to bring some awareness that a gap exists between the women's identity as represented by police, prosecutors, judges and journalists, on the one hand, and their subjectivity, their sense of themselves and their situation, on the other hand.

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hired as an ethnographer in the first wave of government outreach projects funded by the National Institute of Drug Abuse (NIDA). I was assigned to a research category of persons at risk, the sex partners of injecting drug users. Although I was to discover both men and women fit this category, the operative assumption across the U.S. was that sex partners were women partners of men injectors. Prostitutes who were not drug injectors were considered part of the sex partner risk group. (Most of the prostitute women I encountered were drug injectors, however.) My job was to find women who were willing to identify themselves as sex partners and bring them to the field stations where they would be interviewed and have their blood drawn and tested for hiv. My analysis focused on the social context of risk-taking (see Kane 1991).

Like virtually all government-sponsored intervention projects, we adhered to the dominant paradigm of prevention that focused on educating and providing resources (condoms, bleach for cleaning needles, information) so as to reduce the likelihood of hiv risk, basically treating all persons as if they needed to protect themselves from infection or re-infection. It was not until 1995, when I began doing research on the shadow paradigm of criminalization, that I realized that I had indeed turned a blind eye to the problem of intentional hiv transmission. The most empirical of research — as that project certainly was — can create certain blindnesses, erasing areas of social action that from other perspectives may be perceived as crucial.

Research on intentional hiv-transmission is quite challenging for an anthropologist trained, as I am, to use ethnographic methods. My fieldwork experience in Chicago, and later Belize, Central America, provided me with a strong foundation in the way AIDS changes everyday life and professional discourses (see Kane 1993). There would be no ethnographic ground for the criminalization project, however. My sources for intentional transmission data were not persons with whom I could engage in dialogue. The settings were not scenes in which I could balance participation and observation in the midst of ongoing activity. Rather, my sources were journalists and judges whose recording of events were shaped by factors such as audience, procedure, and media that weakened the correspondence between discourse and event. In that kind of project, the research scene was a text rather than a geographical site in which people told me about their experiences. Sex research almost always involves reported speech, but text-based research is at yet another stage of removal from the risk events in question. At the mercy of serendipitous reportage, and limited by the conventions of media and court reporting, the data were nevertheless informative and evocative. See Bolton (1992) for ethnographic sex research that circumvents the reliance on reported speech and mass mediated speech.

So I was led to a provisional and problematic solution — I asked for a poet's empathic interpretation of accounts from newspapers and legal summaries to supplement reported facts. The supplement is not meant to substitute for the real women's own representation of their experiences, but rather, it is meant to provoke me, the essayist, the poet, and the readers to imagine what the subjective experience of the three women prostitutes might have been at the point of legal apprehension. As Carol Greenhouse says (personal communication 2000), "two genres are better than one when you're trying to approach the unspeakable." The poetry is meant to mediate the "scene" of the crime as constructed in public discourse; through it, we hope to change the "seen" of the crime (cf. Young 1996: 16). In this case, the "seen" refers to the general nature of this phenomena as a crime, not the particular, living women, who basically remain beyond our reach.

### The Susceptibility of Fact to Distortions of Mythic Proportions

Prostitutes may be more likely to use condoms than non-professional women. However, *all* women who engage in penetrative sex with large numbers of partners may be at high risk of hiv infection *if* condoms are not *always* used. There are some hiv-infected persons who have stated an intention to infect others, including the case of one prostitute in Lexington, Kentucky.<sup>35</sup> These extreme cases cannot by any means be taken to represent the intentions of hiv-positive persons in general, professional sex workers or otherwise. Yet the fact that such intentions can exist within the scope of human behavior has led to the public conceptualization of hiv as a weapon, and intentional transmission as a new form of (attempted) murder. The point is that myths are partially true. Myths are exaggerations of fact which draw on the power of human emotion. And exaggerations create an always-unfolding dilemma for AIDS activists. We have got to deactivate harmful myths, but we should not turn our backs on the facts.

Hypersexuality is the mythic distortion of certain categories of persons, such that their sexual behaviors are imputed to have an exaggerated dominance in character formation and symbolic import. Following this logic, female prostitutes are only discussed as sexual beings; their roles as mothers, wives, sisters, heads of households, students, performers, and entrepreneurs are usually

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35. She provoked the headline: "Ex-Lexington prostitute says she tried to transmit hiv" (Gregory 1993). For further analysis see Kane (1998: 131-147).

absent from discourse. Myths of hypersexuality invade the thinking of AIDS policy analysts. In large part, the role of AIDS activists should be to deconstruct myths, displacing exaggerations and substituting social fact. This might be simple but for the fact that exaggerations of hypersexuality are deployed by various actors in various ways such that the exaggerations themselves take on the distinctions of fact and change the course of reality. Performance can be conflated with character, the prostitutes' role at work confused with her real desires. There is no stable ground here; even the virus continually mutates.

Viewing criminologists as the creators of images of women criminals, Young draws on Roland Barthes' explication of the "reality effect" as an aesthetic central to modernist work in which the very *absence* of the thing being referred to (the signified) empowers the referent, the image doing the referring (the signifier). Paradoxically, it is the very absence of reality and all its messy contradictions that communicate the sense of realism to us (Barthes 1986: 148 cited in Young 1986: 48). With this understanding of realist conventions, Young (48) finds: "It therefore becomes less important for feminism to point out that criminology's images of Woman are not 'real' than to investigate their influence and impact as 'realistic'." In this spirit, I bring your attention to the symbolic operation of hypersexuality and situate discussion of the criminalization of hiv positive women prostitutes in the context of mythic battles.

And yet, hypersexuality is not all myth. In her work, the prostitute performs in the domain of the sexual. The myth of hypersexuality is an exaggeration of this fact that obscures the emotional distance that prostitutes usually impose between themselves and their clients. Prostitutes use the myth to their advantage, e.g., by wearing short skirts, high heels, and other accouterments of the sexual cliché to attract clients. The myth can serve positive functions for the prostitute's performance and presumably it does for male clients. The cultivation of sexy self-imagery is part of the job.

But hypersexual attribution is like racist attribution, so similar in symbolic function that they seem to intertwine almost naturally.<sup>36</sup> Both are exaggerations susceptible to hateful remark and polite suppression. The erasure of these forms of marginalizing discourse from consciousness and comment does not free us

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36. For the imageric intertwining of race and sex see, for example, bell hooks (1992). For analysis of ways in which hypersexuality is often alleged for minorities and "others" of all kinds see Bolton (1992).

from their effects. Add hiv seropositivity into the mix, and we have got a potent symbolic force feeding both popular and official attacks on those who do not fit the idealized image of the able-bodied, hetero, White, middle class and seronegative person as norm. The dominant image complex also undergirds exclusionary federal laws rooted in assumptions of otherness based on foreign or minority status. Dennis (1993) argues that assumptions that link marginality with disease make it possible to institute laws excluding hiv-positive non-citizens from immigrating into the U.S., and laws excluding hiv-positive citizens from employment in the military, Foreign Service and Job Corps. Such exclusions are inconsistent with epidemiological knowledge and most civil law on AIDS.

Such inconsistencies point to the gap between the “real” and the “imaginary” in our legal institutions. This gap can be discerned by contrasting discourses of law and epidemiology. The three cases presented here demonstrate that the law does not only ignore the intention of those it would assign to criminality; at certain points, it also ignores scientific evidence of viral transmissibility. Legislators are passing laws that ignore established scientific consensus, and the police and courts are blatantly misassigning some individuals to the new criminal categories. There is some work that is accomplished by this form of willful ignorance other than detaining the reckless or malicious along with others who are not. We need to understand what the image of the criminalized hiv-positive prostitute produces in legal and popular discourses beyond its explicit function as a legal method of AIDS prevention. I believe that analysis of cases which mark the beginning of new routines such as these can contribute to our understanding of how law interpolates itself within our subjective selves more generally. Armed with understanding, we might better reposition ourselves in relation to its authority.<sup>37</sup>

Lorraine Nencel’s (2001) concept of “gendered enclosures” theorizes the combination of social and symbolic practices that have reproduced mythic images of the prostitute throughout history, and at the same time, constrain the mobility of women in contemporary circumstances, diminishing their space for maneuvering and negotiating, robbing them of agency. Nencel’s inspiration for the concept came from eighteenth century French principles of prostitute

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37. I engage here in Elspeth Probyn’s (1993: 88) project of enriching Foucauldian analyses by drawing in the affectivity of the prostitutes’ situations into my analysis of how juridico-medical discourses name and construct particular kinds of selves. See also Foucault (1980-1988).

regulation which were focused on an enclosed milieu that would protect the general public from exposure to prostitution. Surveillance, hierarchization and compartmentalization were the founding principles used to discipline women sex workers (Corbin 1990: 9-10 cited in Nencel 2001).<sup>38</sup>

The new set of hiv laws further criminalizing prostitutes is based on a mixture of fact and myth that further restricts the space of freedom. The new laws effect an intensification of discipline, a further restriction of agency. In some cases restrictions may be justified, but in those cases, there should be some proof of a match between identity and subjectivity, between category of crime and intention, between the violence of the charge and the violence of the alleged act. There is no such demonstrable consistency in the three cases presented here. They are remarkable in the very absence of interest in the women's intent by police and courts. The cases mark significant moments in the history of punitive AIDS legislation in the United States; the first pertains to the first prosecution using the hiv-prostitution felony charge in the state of California; the second to the first hiv-prostitution case leading to quarantine in Illinois (and, to my knowledge, the first quarantine of an hiv-positive person in the United States); the third pertains to the prosecution of an hiv-positive prostitute for spitting under the Battery by Body Waste law in Indiana.

### First Felony (Case 1)

California has been in the forefront of AIDS legislation and provides a good example of how this branch of AIDS law has developed on the state level. In 1985, California law distinguished AIDS from other communicable diseases. The law prohibited compulsory AIDS testing, thereby strengthening the privacy rights of citizens.<sup>39</sup> In 1988, however, the California legislature passed several bills excluding certain groups from these privacy protections, including prostitutes<sup>40</sup>, prison inmates<sup>41</sup>, and certain criminal defendants (e.g.,

38. For another historical example of how disease-related dangerousness is associated with prostitutes see Sander Gilman (1988: 258). He suggests that the "taming" of syphilis and other sexually transmitted diseases in the 1940s left our culture with a series of images of the mortally infected and infecting patient suffering a morally repugnant disease but without a sufficiently powerful disease with which to associate the images —until AIDS. See also Fee and Fox, Ed. (1988).

39. CAL. HEALTH AND SAFETY CODE § 199.21, 199.22 (West Supp. 1992).

40. CAL. PENAL CODE § 1202.6 (West Supp. 1992).

41. CAL. PENAL CODE § 7500 (West Supp. 1992).

sexual offenders)<sup>42</sup>. Those bills specifically mandated compulsory AIDS tests for convicted prostitutes and prisoners. In 1989, California passed a strict state law making prostitution a felony punishable by up to three years in prison when committed by someone who is aware of having tested positive for hiv.<sup>43</sup>

The first prosecution of the hiv-prostitution felony charge was of a 35 year old woman from Martinez, California who was arrested after offering oral sex to an undercover police officer. She had been tested and informed of her hiv-positive status after a prior arrest. She had merely to solicit to be tried and convicted of felony prostitution (Anonymous 1991a). No one knows if she had actually transmitted the virus to anyone. The traditional evidentiary procedures of proving intent, harm and cause do not apply. According to the law's language, such a conviction should only occur when the act in question is "likely" to transmit hiv. However the transmission of hiv in cases of oral-genital sex, even without a condom, is not likely (Kingsley et al. 1987).<sup>44</sup> But note well, the defendant did nothing but verbally offer oral sex. It was her first felony conviction. She was sentenced to one-year in county jail, twice the maximum six-month term possible under the more customary misdemeanor prostitution charge.

To evoke the personal implications of disease and the law in this woman's situation, C. Jason Dotson has written a poem. The poem supplements the woman's criminal identity established in news reports with his imagined version of her subjective response to events.

Having been told "I'm sorry, but  
you're positive. You must stop working."  
She sighs and looks backwards  
towards tomorrow when the care  
of her children seemed real.

What now? "You are positive" will not  
feed, clothe nor house me or my  
children. I must work. At 35, I'm too

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42. CAL. HEALTH AND SAFETY CODE § 199.96 (West Supp. 1992).

43. SB 2847, cited in Anonymous (1989). For review of California legislative history on mandatory AIDS testing see Zinc 1992: 808-809.

44. Note that crack use may increase the risk of hiv transmission during oral sex due to the presence of open sores in the mouth resulting from using a hot pipe to administer the drug (Wallace 1997).

young and heaven knows too poor  
not to work. No, I must work

Not only is it unlawful to sell love,  
my job, it is also deadly, so they say  
or almost deadly anyway. No proof  
required of transmission while criminal law  
stumbles towards transition.

How likely am I to transmit hiv  
giving face in the front seat  
of a car? I hope you will agree  
it's a near impossibility if I sheath  
him with a condom

So, what's a working woman  
to do when the rules of evidence  
and the findings of science stand  
aside. Let's see, a jail sentence for  
almost committing the virtually impossible!

The poem highlights themes central to our understanding of the impact of criminalization. These themes are also relevant to our understanding of how ideals characteristic of the dominant prevention education paradigm play out in practice. One fundamental theme relates to the ways in which poverty may negatively affect the ability to act on health knowledge.<sup>45</sup> In the poem, the woman is presumed to not only know that she is infected, but to also know how hiv transmission can be prevented; oral sex with a condom protects her clients from risk. If one thinks these poetic presumptions are plausible, one could argue that a working hiv-positive prostitute does not pose a significant health risk; her risk of incarceration is the most salient one!

In the poem, she is a professional with an appropriately cynical view of the laws designed to control her activities. More particularly, the new hiv laws ignore her intention, her ethics, and the practical use of health knowledge in the performance of her profession. The poem highlights how the new laws exaggerate the potential consequences of her course of action for others by imperiously ignoring basic epidemiological knowledge regarding modes of transmission. The law is not accountable to her or her kind. Lawmakers are

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45. For comprehensive discussion of the impact of poverty and AIDS on women see Farmer, Connors and Simmons (1996).

not serious about AIDS prevention or they would lock up and test clients. As John Decker (1987: 86) argues, only a small percentage of prostitutes and a minuscule number of clients are ever apprehended by law enforcement authorities. Prosecuting hiv-positive prostitutes is a symbolic legal gesture that only feeds denial.

Although the 1988 California bills overrode protections against mandatory testing for prostitutes, Karin Zinc (1992) argues that they should still be protected by the Fourth Amendment to the U.S. Constitution. The Fourth Amendment provides that people have a right to be free from unreasonable searches and seizures. The basic purpose is to safeguard the privacy and security of individuals against arbitrary invasions of government officials. But since it was written, the Court has expanded the scope of government searches to allow for "special needs" situations in which the individual's privacy interests are weakened in relation to governmental interests. These special needs exceptions were first applied to searches of businesses, then to homes, and not until 1989, to individual bodies. In *Skinner v. Railway Executives Ass'n*<sup>46</sup> and *Treasury Employees v. Von Raab*<sup>47</sup>, the Court applied the special needs exception to uphold searches of an individual's body and body fluids for the presence of drugs and alcohol (Zinc 1992: 798-805). These cases involved railroad employees involved in accidents and customs officials who participated in drug interdiction or carried firearms, respectively.

The special needs exception in these cases protects the public from harm caused by government employees whose judgment may be impaired by drug or alcohol use. The possibility of harm resulting from employees in altered states of consciousness driving trains and carrying guns is reasonable, and the legal exception to Fourth Amendment rights is gender neutral. We can also assume that there will be some respect for the confidentiality of their blood test results. In contrast, blood test results of prostitutes are not kept confidential. Moreover, including them in the list of those categories of people who must lose their Fourth Amendment rights to privacy is arbitrary; current epidemiological evidence indicates that the behaviors of women who work as prostitutes that most put them in hiv-risk situations are injecting drug use or sex with injecting drug users who are their personal partners, not their clients.<sup>48</sup>

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46. *Skinner*, 489 U.S. at 606.

47. *Von Raab*, 489 U.S. at 656.

48. See Alexander (1987) for discussion of social and legal implications. In her review of the literature on women's sexual hiv risk, Nichols (1990) found no relationship between



The new hiv laws demonstrate the way in which laws which are neutral in principle get caught up and distorted by gendered inequalities, in this case, becoming part of and fortifying the gendered enclosures of street prostitutes in the U.S. Because prostitutes are already categorized as criminal, their Fourth Amendment rights are easier to set aside. Women who work as street prostitutes, being the most visible of sex workers, are most susceptible to the legal inscription of criminality and the consequent forfeiture of the privacy protections that most women and men with multiple sexual partners enjoy.

In intentional hiv transmission cases, the court has argued that defendants cannot stand behind their Fourth Amendment rights when they have harmed someone else. But those against criminalization argue that persons should not be arrested or sentenced merely because they belong to a particular group, in this case, the group of "high risk", deviantly-marked, mostly female, hiv-positive prostitutes. The AIDS and Civil Liberties Project of the American Civil Liberties Union (ACLU), for example, clearly opposes laws which single out any group for mandatory testing. And yet, the ACLU does not always stand firmly on the side of hiv-positive felony defendants. The next case presented is a more ambiguous case from Illinois, another state in the forefront of criminalizing AIDS legislation.

### **Escape from Quarantine (Case 2)**

Prosecutors allege that Felicia Horton is a known prostitute from Alton, Illinois, who has known of her infection since November 1990. On April 22, 1991 she solicited an undercover police detective, offering oral sex for \$25. She was two months pregnant, had two daughters who were two and three years old at the time, and was infected with hiv. The state's attorney said that Horton was an injection drug user who shared needles with others after learning that she was infected with hiv. Court documents filed in the case say that on at least one occasion Horton slashed her wrists and splashed blood on two people. After serving 21 days in a jail isolation cell, she was quarantined at an undisclosed state health facility under the state's criminal hiv transmission law. She was charged with attempted transmission of hiv, a felony punishable

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the number of sexual partners and seroconversion, although she did find that multiple partnering may increase women's risk for other sexual transmitted diseases, thereby increasing vulnerability to hiv infection should they be exposed. See also note 2.

by up to five years in prison. A month later, Horton escaped (Anonymous 1991b, Browning 1991, UPI 1991).

In his poem about Horton, Dotson lays out the situation from the perspective of the judge and an omniscient voice relaying disembodied social facts. Horton's voice is implied; the reader is meant to imagine how she might respond to and interact with the forces impinging on her as she listens. In the end, according to the poet's interpretation, despite all the attempts by agents of the law to control her body and her actions, all is peripheral to the sense of doom she feels emanating from the virus.

So, here you are again!  
working the streets, so  
I'm told. Are you insane?  
hiv is deadly as you know!

21 years old and pregnant, too,  
you're charged with attempted hiv  
transmission. What's a judge to do!  
No, no, no, I can't set you free!

Facing five years in a prison cell,  
but not ready for trial, she's  
quarantined, no money for bail  
no money for attorney's fees

Why would a carrier of hiv  
solicit anyone for sex?  
The whole, the healthy, can't see  
although the answer's not complex

A vicious dope fiend, a social dud  
prone to razor-blading her wrists,  
to flinging and spitting life-sapping blood  
so say the State's people at risk

Treatment and detention ordered  
the court for both body and mind  
but she slipped away and bartered  
her life for another lay with man-kind

The capture, quarantine and disappearance of Felicia Horton is carried out under the same legal regime as that which effected the arrest and sentencing of the Martinez, California woman. However, Horton's case is rendered more

difficult by past actions which mark her as a person who may be a danger to herself and to others. The crime of injecting illegal drugs is added to her crime of prostitution. To the more dubious possibility that she might infect clients through unprotected sex is added the possibility, increased by some evidence of past knowing and willful behavior of this kind, that she might infect someone by sharing her dirty needles with others without warning them of her serostatus. And unlike the woman from Martinez, there is evidence that Horton was not using her knowledge about AIDS to manage risk. On the contrary, she had reportedly slashed her wrists and attempted to infect others with her blood, a suicidal-homicidal act indicating a state of extreme desperation. This is not a case in which an individual is taken into custody for merely belonging to a group. Horton is an hiv-positive woman with a history of putting herself and others in danger.<sup>49</sup>

When the story broke in the spring of 1991, officials of the Illinois Chapter of the ACLU said that they were monitoring the case but had not reached any decision about whether to intervene (Anonymous 1991b). Her escape made their stance somewhat moot. But even so, the ACLU's ambivalence is appropriate. When we edge closer to those cases where despair reigns and malicious intent enters the realm of possibility, even the most vigilant may feel more comfortable with the exercise of state power in forms which we would otherwise find unacceptable.

### **Battery by Body Waste (Case 3)**

Contact with saliva, which may contain low levels of hiv, has never been shown to result in transmission (Levy and Greenspan 1988). Findings raise the possibility that salivary inhibitors render the virus noninfectious (Moore 1993). The presence of blood in saliva does, however, present a potential risk of transmission (Piazza et al. 1994). Despite evidence of low risk, there has been considerable concern among police and corrections officers about the dangers of arrestee and prisoner biting and spitting behavior. An extreme and early example of this concern is the case of Curtis Weeks<sup>50</sup>, an hiv-positive inmate with two prior felony convictions who was being transferred from one

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49. See Dalton (1993: 248-9) for analysis of the case of a man who splashed blood on emergency personnel who were trying to stop him from committing suicide. Dalton urges us to look beneath the surface of events.

50. *Weeks v. Scott*, 55 F.3d 1059 (5th Cir. 1995).

Texas jail to another. The events in question took place before 1989 when the Texas legislature passed a law creating an offense for intentionally exposing another person to AIDS or hiv. Gostin (1996: 93) summarizes as follows:

While being restrained, [Weeks] began cursing and complaining. He threatened the corrections officers and began tearing up the inside of the van. He then said that he was hiv-positive and that he was going to take as many people as he could with him. He then spat twice in the face of one of the officers. The spit covered the officer's glasses, nose and lips. Some spit entered his nose.

The state trial court convicted Weeks for attempted murder and he was sentenced to life in prison. His conviction was upheld in both state and federal appeals courts based on scientific evidence that it was theoretically *possible* for hiv to be transmitted through saliva. The court found it unnecessary to prove that either hiv in saliva *tends to* cause death or that hiv was present in Weeks' saliva at the time of his attack.

Nor is biting a common way to transmit hiv (Rickman and Rickman 1993). There is only one case in which health officials concluded hiv transmission resulted from a bite. In 1994, Naomi Morrison, an hiv-positive woman with an arrest history for prostitution, bit a ninety-one-year-old man named Elmer Hutto on his hand, arm, and leg while trying to rob him in West Palm Beach. The man seroconverted some weeks after the attack. Transmission is attributed to the fact that Morrison's gums were bleeding and when she tore skin from Hutto's hand, she bled into his wound (Altman 1995). She was sentenced to ten years imprisonment and ten years probation for aggravated battery, robbery and burglary of a vehicle for the attack.<sup>51</sup>

The Weeks and Morrison cases are two out of fifteen collected in my Lexis-Nexis survey of biting and spitting cases appearing in the media between 1986 and 1996, most of which involved biting police and corrections officers. State legislatures around the country have passed new laws that specifically address fears of alleged or convicted criminals who may use an actual or

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51. The initial CNN, November 24, 1994, 11: 00 nightly news report of this incident was followed with a story about a PWA in Oregon who was planning to commit suicide with friends and family by his side. This is an eerie pairing of final acts and legal involvements that reinforces and expands Watney's ([1992] 1994) observation that not far behind media representations of people with hiv or AIDS is the actual wish that all gay men and bisexuals were dead.

pretended hiv-positive serostatus as a threat against officers. IC 35-42-2-6 (c), the new Battery by Body Waste law passed by the Indiana legislature in 1996, is one such law. It says:

A person who knowingly or intentionally places blood or body fluid or waste on a law enforcement or a corrections officer identified as such and while engaged in the performance of official duties or coerces another person to place blood or another body fluid or waste on the law enforcement officer or corrections officer commits battery by body waste, a class D felony.

Then the law elaborates an increasingly harsh outline that rates hepatitis B, TB, and hiv along dimensions of knowledge of one's infection and whether or not transmission occurred. This leads up to a Class A felony if (a) the person knew or recklessly failed to know that they themselves were infected with hiv; and (b) the offense results in the transmission of hiv to the other person.

Now, we know that hiv has never been transmitted by spit. It must, then, be said that the battery by body waste law is used irrationally by scientific standards. And yet, it functions here as a charge that can be used against an hiv-positive prostitute.<sup>52</sup> This story shows how, in this particular point in epidemic history, the state of Indiana uses rather ad hoc adjustments of routine justice to manage risk of hiv transmission in the prostitution industry — or so I first thought. But in discussions with the sheriffs and legislators involved in conceiving, passing and implementing the new law, I came to understand that public health, in the usual sense, was not at issue. Rather, the point of the law was to send a message to police and corrections officers that the state government cared about them. The law is a symbolic gesture of protection for its agents, who in the course of their duties may be victims of “brown derbies” (thrown feces) and “golden showers” (thrown urine), and who may have to control drunken fighters who threaten with blood and teeth. Although the law encompasses a range of diseases, it was apparent from discussion that it was motivated by the fear of AIDS. The law serves as an added warning to arrestees and inmates not to use body fluids as weapons. John Catey, Executive Director of the Indiana Sheriff's Association, reported that as of the fall of 1996, 22 out of 66 counties had used the law, in eight cases the counties used them on more

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52. As of 1996, Indiana did not yet have a specific law targeting hiv-positive prostitutes, although the state house of representatives passed a bill in 1995 making it a class C felony for hiv-positive persons to engage in high risk activities with another person without first informing them of the hiv infection (HB 1090).

than one occasion. Apparently the hiv-felony charges may be dismissed as a result of pleading guilty on other charges; this seems to have attracted the attention of jail inmates.<sup>53</sup> In our survey of jail staff and inmates (Kane and Dotson 1997), we found that the concept of protection upon which the Battery by Body Waste Law is based appealed to inmates as well as staff, although the inmates challenged the explicit privileging of the officers. Most inmates felt that all citizens should be protected from aggressive spewing of infected body wastes.

It had not occurred to me to relate the Battery by Body Waste law to prostitution until I saw the *Indianapolis Star* headline "Prostitute with hiv goes free by mistake" (McLaren 1995: 1-2). A twenty-four-year-old hiv-positive woman named Connie Newman had been paroled after serving time for felony prostitution. Newman was rearrested, but due to a "mixup in court", she was released again on her own recognizance. On an Indianapolis stroll a few days later, police detective Kimberley Travis "freaked out" when she and her partner saw Newman was out of prison and on the stroll. Detective Travis and her partner saw her get into a car. Police do not usually arrest prostitutes unless they solicit an undercover detective, Travis explains. But officers can give out tickets for indecent solicitation if they see a suspected prostitute trying to pick up customers, so that is what they decided to do. Again, Dotson imagines the scene from the suspect's perspective:

Free again to strut and roam  
after a spate of good luck,  
recently released, going home  
got to work to make a buck

Hard times stalks the working girl  
Face and mask known to john and vice  
And still must offer her pearl  
to them, she's always on thin ice

Into the car, make the deal  
Hand or face for a price.

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53. This discussion took place at a roundtable which I organized at the annual meetings of the Midwestern Criminal Justice Association in Indianapolis in September 1996. It was entitled "Indiana's New Battery by Body Waste Law: Practical and Ethical Implications for Criminology and Public Health." Homophobia was suppressed from explanation at the time. But I surmise that it was a facilitating factor for the legislators who proposed the bill.

The shout, "Hands on the wheel!"  
"Let's split! Can't take this fall twice."

The chase does not last very long.  
"What the hell is this all about?"  
My friend is just taking me home."  
"Shut up! Turn it off and both of you get out!"

Get out of the car for what?  
What the hell have we done?  
We haven't broken any laws — hey!  
why are you unbuckling your gun?

Out of the car, you're under arrest.  
Gimme a break! Her mouth forms a kiss  
As they secure her arms, doing her best  
To catch his eye, turning she spews a mist

Scuffling and flailing and rolling around  
four or five vice and the speaking-in-tongues  
Little Miss, the john looks on startled,  
silent and too frightened to piss

Finding her voice and  
begging not to be locked up,  
citing her children being left  
alone, my god, it's a bitter cup!

Ever worry about infecting johns, their families?  
I got children to feed, I worry about myself  
And besides johns refuse condoms  
they don't worry about anyone else

Take care of your self is the name  
of the game, tricks have heard of  
hiv. I'm not trying to kill anyone  
don't lay that heavy shit on me

The court agreed with the prostitute,  
hiv transmission's unlikely just by  
giving face, but it's a felony in Indiana to  
touch an arresting officer with body waste.

The client was arrested on charges of patronizing a prostitute, recklessness with a vehicle and resisting arrest. If he cooperated in the case against Newman,

the first two charges would be dropped, he was told. The next day, he denied all involvement and said the police lied about the entire matter. The Deputy Prosecutor charged Newman with battery with body waste for allegedly spitting on officers during arrest, felony prostitution (because she has two prior prostitution convictions), and resisting arrest.

The john refused to become the victim that turns against the pro. He did not testify against the woman who was about to give him oral sex; he did not allow himself to be wielded by the punishing machinery of the state. Instead, the police recast themselves; they become the victims. Thanks to the Indiana legislators' new law, the criminal charge could be made on the police officers' behalf. The sexual nature of a prostitute's crime temporarily retreats before the threat of spewing saliva. Battery by Body Waste becomes her felonious assignment. Coercion is layered, the criminal charges outlining her identity, sequentially constructing her biography by the authority of the state.

According to the newspaper account, Newman uses the virus and her knowledge of it as a psychological weapon to instill a twinge of anxious terror in the police officers who capture her. The police officers also adapt their knowledge of AIDS to their own circumstances, entertaining a fear of the suspect's spit despite the epidemiological evidence that gives no credence to transmissibility via this substance. Confronted with such contact, scientific knowledge does not seem quite stable enough to trust. After all, science is a matter of probabilities and viral strains keep mutating. Questions of judgment remain; does Newman intend to transmit her infection, or does she know saliva can't transmit and just wants to scare and disgust the police, fighting back with whatever she's got? Should her intention matter?

Her rebellious gesture allows her some sense of agency; it allows her to exact some acknowledgement of her power. The neutral language of law is a signifier that refers to the act of spitting, but the reference is shorn of the experience of the spitter. Drawing on the facts reported in the *Indianapolis Star*, Dotson's poem imagines the unequal application of criminal law from a marginalized citizen-prostitute's point of view. He highlights Newman's presumed understanding that sexual risk is interactive. Like everyone, the prostitute's agency, her ability to conduct the stream of action that is her life, is reciprocal, relational, and unstable.<sup>54</sup> The boundaries that do or do not

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54. This analysis of self and agency draws from Anne McClintock (1994: 317).



contain her “self”, her subjectively conceived sense of identity, as well as her “self”, her physical body, emerge in the context of a social collective shaped by her children, her clients, her co-workers, and the law. Maintaining her sense of self requires her to negotiate with the hypersexualized, criminalized, and publicized image which she is forced to own every time she steps out on to the city street; a mirror that mocks her very being. The violence of representation is inextricably linked to the violence of crime.

### Reworking the Shadow Paradigm

When hypersexuality is linked to disease and death, terrorist tropes enter the imagination, legitimating and intensifying coercion. Targeting prostitutes for heightened surveillance and imprisonment magnetizes and displaces public fear. It becomes easier to ignore the dispersion of risk and responsibility among individuals in each community as well as the negligence of state institutions (e.g., the U.S. blood banks’ delay in protecting the lives of 9,000 hemophiliacs who are now either hiv-positive or deceased).<sup>55</sup> The strategy of targeting prostitutes is an exaggerated response in the one sphere of sexual behavior that is most amenable to state control. Prostitutes are by definition already incorporated into the routines of the criminal justice system and they lack the political organization and resources that it would take to dismantle this apparatus.<sup>56</sup> This situation is a prime example of what Gayle Rubin (1993) meant when she wrote about how the law uses sexuality as a vector of oppression.

But to leave things there seems too facile under the circumstances. The issue of reckless or intentional transmission of hiv presents a greater moral dilemma than other issues chosen by the vanguard fighting for sexual freedom

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55. There have been prosecutions of public officials in the blood bank industries of Canada, France, Germany and Japan. But hemophiliacs and transfusion recipients who became infected from tainted blood in the U.S. between 1982, when the CDC first warned blood suppliers of the possibility that the transmission of the pathogen causing AIDS may be blood-borne, and 1985, when hiv antibody testing procedures became available, have had little success piercing the veil of protections the courts have bestowed on the industry. Plaintiffs argue that even if the blood banks did not follow CDC recommendations to use existing tests for hepatitis as a marker for the unknown AIDS virus, at least the customers should have been *warned* that the product they were buying might kill them (see Salbu 1996 for review).

56. See, e.g., Lipetz (1980) and Kandel (1992) for description and analysis of the routine procedures of justice applied to prostitutes in Chicago and Boston, respectively.

in the U.S.<sup>57</sup> We cannot assume that hiv-positive persons who do not disclose their serostatus to sexual partners are generally reckless or malicious.<sup>58</sup> But I believe that it is fair to say that becoming infected with hiv does not necessarily transform a reckless or malicious person into a caring one. Reckless or malicious transmission of hiv from one person to another is a predictable human act involving a range of defenses and deceptions. (In my survey, the largest category of legal cases involved men in non-professional consensual sex relationships who lied about their hiv infection and refused to wear condoms with women.)<sup>59</sup> With faith in humanity, one might say that very few people will commit this act. In fact, there is scanty research on the prevalence of this behavior. What we do know is that among non-professionals, responsible condom use is not the norm, despite general knowledge of how the disease is spread.<sup>60</sup>

If one can accept that this act falls within the range of possible human behavior, and if one is willing to come to terms with the impetus for criminalization that currently dominates U.S. discourse, I believe that one may come to agree that AIDS legal scholars and activists have to become more involved in shaping emerging laws. If it can be done without compromising relationships of trust that must exist between public health workers and the people they are trying to reach (and that's a big *if*), it makes sense to prosecute malicious or reckless persons, no matter who they are. It also makes sense to encourage hiv-positive prostitutes to find alternative sources of income. Even those who are most committed to always using condoms may be confronted with condoms that break, police who harass them by poking holes in condoms, and clients who refuse to wear them. The clients, their families and all the prostitutes on the stroll basically share the same sex-linked "community" and would benefit from the abilities of hiv-positive members to withdraw from active participation.

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57. An important difference between the battle to repeal sodomy laws and that against the criminalization of intentional hiv transmission, is that sodomy between consenting adults doesn't hurt anyone.

58. See Sobo (1995) for discussion of non-disclosure among hiv-positive women.

59. The typology of criminal cases involving charges of intentional hiv transmission cases includes (from largest to smallest category): 1) consensual sex; 2) sexual assault; 3) prostitution; 4) biting and spitting; 5) arrested and incarcerated persons; 6) blood violence. See Kane (1998: 131-194) and Kane and Mason (2001) for further discussion of criminalization of intentional hiv transmission.

60. For example, see Sterk's (1999: 100-105) ethnographic discussion of condom use among street prostitutes in a U.S. city.

The intensification of police coercion is a poor substitute for compassionate remedies such as ample food, housing, childcare, and counseling and treatment for hiv disease and drug addiction. If laws against hiv-positive prostitutes are to be written, *whether or not there is an empirical link between prostitution and increased levels of hiv risk, and whether or not scholars, activists and health care workers agree with the approach*, why not fight to incorporate compassionate remedies as a first set of alternatives to incarceration? If after decent remedies to economic and health problems have been made available, and if it can be shown that hiv-positive individuals who are working as prostitutes continue to put others at risk of infection without informing them first of those risks, then it could be argued that in those cases coercive means of disease control may be justified.

If the impetus for criminalization intensifies, it will become more and more impossible to reject the validity or efficacy of forcibly removing alleged bad actors from the sexually free population. Arguments positing the sacredness of confidentiality and privacy rights for those who harm others will wear thin as those who marshal support for punitive, inconsistent laws discover and dramatize one evil example after another.<sup>61</sup> If progressive activists participate in the law-making process, perhaps we can limit the coercive force of the state so that it focuses as clearly as possible on wrongful acts associated only with specific, epidemiologically relevant behaviors.

The real risk dimension of prostitution would not be so difficult for advocates of sexual freedom to face if prostitution were legal. The prostitutes' burden of stigma is so great and the state's power so overwhelming, that any fact or law which increases the oppressive disparity is shunned. As always, the path to sexual freedom and public health ought to be rooted in social justice. If state coercion is invoked, laws must be written that mandate its use in the last instance, only *after* appropriate social support services have been offered.<sup>62</sup> Such laws must be integrated as fully as possible in substance and philosophy

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61. So far the push for criminalizing AIDS has been contained at the state level. In 1995, the U.S. Sentencing Commission, an independent agency in the judicial branch of government, decided not to change the hiv laws currently in effect. Current law does not specifically criminalize the knowing, intentional exposure of others to hiv through sex, unless it occurs in a federal jurisdiction and in the course of another crime such as aggravated assault, attempted murder, or sexual assault.

62. See Dalton's (1993: 254-5) discussion of the Fabian Bridges case as an example of the benefits of compassion over retribution. Note that Dalton believes that while the

with the body of protective laws already established to affirm the human rights of all people with hiv or AIDS. The complexity of AIDS demands new alignments, flexible approaches, and the acknowledgement that the public wants remedies for its fears as well as its diseases. If we cede ground to the forces of retribution, myths of hypersexuality will continue to focus an array of AIDS fears, bringing the U.S. citizenry a little closer to the jaws of the police state.

The polarization of debate on the criminalization of intentional hiv transmission has led to a deadlock in which certain aspects of the problems involved are highlighted and others are obscured. For example, the identities of individual prostitutes and their serostatuses are known to police, the courts, anyone who cares to look up the records, and in many cases announced to the world at large through the media. In contrast, the identities and serostatuses of clients are hidden from all, even though they are more likely to refuse to use condoms than prostitutes. While risks of transmission associated with unsafe sex are widely pronounced and wildly exaggerated in the case of sex with prostitutes, unsafe sex in the context of marriage and consensual monogamous relationships are often downplayed to the point of invisibility. Both sides of the debate focus on the effects of potentially bad acts (whether or not a significant level of risk exists in oral sex, for example, or the ramifying effects of prostitute-client transmission in their networks of intimacy). But neither side focuses much attention on the conditions that may lead to the enactment of unsafe sex by prostitutes, i.e., the underlying causes that limit women's abilities to protect themselves and others. We need to shift our inquiries and debates to the social welfare system in the United States — to delineate the ways that interpersonal and institutional, rather than individual, failure tends to lead women infected with hiv to continue selling sex and how we might remedy this failure. Rather than focus on individual culpability, our first line of legal action should address the structural violence of poverty experienced by prostitute women whether they are hiv-positive or not. If the legal-regulatory regime begins to take socioeconomic context into account, we will be able to distinguish between women like the woman charged with the first felony case in California, who was probably causing no harm and might well have been amenable to alternative employment, and women like Horton, who may have

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identification and isolation of bad actors may provide psychological comfort, he does not believe it will leave society safer in fact because hiv is too widespread to be so easily contained.

been beyond the point where she could keep herself or others from harm by the time she was arrested. Finding ways to combine public health and legal strategies that support the necessary changes hiv-positive women prostitutes must make in their lives, ways that recognize and engage with their own sense of self and agency, will also help a woman like Newman, whose response to capture was to use her infection as a weapon. Moreover, such approaches would enhance the power of prostitute women to align their best interests with those of their co-workers and clients.

Street-working women are wise to modes of transmission and prevention. They are professionals. Women with children in poverty who do sex work to survive should be encouraged to find other work—not because prostitution is inherently evil, but because it is currently a dangerous and seriously stigmatized occupation. They should be supported in their efforts with health care, housing, food, and job training, regardless of whether they are hiv positive or negative. This would engender a more respectful and fair relation between the prostitutes and the state, and would considerably decrease the level of harm associated with the AIDS epidemic.<sup>63</sup> Intensification of arrest and sentencing activities against hiv-positive prostitutes generally result in further impoverishment and physical and psychological deterioration of women and children, without significantly ameliorating hiv risk related to prostitution more generally. If such tactics are used, they should be used in a more situated, socially informed, and precise way. They should not become incorporated into the gendered enclosure that already limits prostitute women's lives.

The state insures its reality through repetition, enacting its power on the bodies of hiv-infected prostitutes. We must challenge the mechanics of these symbolic operations, not by rejecting and ignoring them, but by helping to redesign legal interventions that are ethical and pragmatic.

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63. For positive example of how a nation might accomplish this see Venema and Visser (1990).

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