"RUGGED VAGINAS" AND "VULNERABLE RECTUMS": THE SEXUAL IDENTITY, EPIDEMIOLOGY, AND LAW OF THE GLOBAL HIV EPIDEMIC

AZIZA AHMED*

Abstract

AIDS remains amongst the leading causes of death globally. Identity is the primary mode of understanding HIV and organizing in response to the HIV epidemic. In this Article, I examine how epidemiology and human rights activism co-produce ideas of identity and risk. I call this the "identity/risk narrative": the commonsense understanding about an identity group's HIV risk. For example, epidemiology offers the biological narrative of risk: anal sex and the weak rectal lining make men who have sex with men more vulnerable to HIV;

while the fragility of a woman's vaginal wall provides a biological foundation for women's vulnerability. These biological narratives underpin rights-claiming in international human rights institutions: many women's rights activists and gay rights activists rely on these biological ideas of risk to define their groups and demand legal and policy change. The corresponding legal projects emanate from identity driven projects.

While acknowledging identity's potential as an organizational force, this Article argues that we must critically interrogate our reliance on identity politics in building movements to respond to the HIV epidemic. Through telling the history of gender organizing in the context of the international HIV epidemic and international human rights law, this Article encourages HIV-movement lawyers and activists to remain vigilant about the downsides of identity politics so that we can remain responsive to the most marginalized communities. In other words, we must be attuned to the downsides of identity politics, even as it may feel like a necessary mode of activist engagement, in order to protect people and issues that are left out of identity-based movements and strengthen the response to HIV and AIDS.

I conclude this Article by offering strategies to minimize the downsides of identity-based legal advocacy through shifting the mode of legal advocacy around HIV. By remaining vigilant about destabilizing identity, taking a consequentialist approach, and remaining focused on the background rules, advocacy can remain agile and responsive to the impact of HIV.

"According to the latest (2008) WHO and UNAIDS global estimates, women comprise 50% of people living with HIV. In sub-Saharan Africa, women constitute 60% of people living with HIV. In other regions, men having sex with men (MSM), injecting drug users (IDU), sex workers and their clients are among those most-at-risk for HIV, but the proportion of women living with HIV has been increasing in the last 10 years."[1]

— World Health Organization, 2012

INTRODUCTION

AIDS remains amongst the leading causes of death globally.[2] The quotation above, set into circulation by the World Health Organization, reproduces the grammar of the HIV epidemic: risk, vulnerability, and population. Quotations like this one manage our understanding of HIV, describing who will contract HIV and who is most deserving of our attention. Consequences follow: funding is allocated and resources are divvied. In a world with purportedly finite resources for human survival, we resort to cost-benefit analysis—some people have to die for others to survive. Or perhaps more accurately, some *types* of people have to die for other *types* of people to survive.[3]

As groups must compete for resources, identity becomes the primary mode of understanding, managing, and responding to the HIV epidemic. I define identity as a series of core representations that become commonsense knowledge about a given group. These

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1   *Gender Inequalities and HIV*, WORLD HEALTH ORGANIZATION, http://www.who.int/gender/hiv_aids/en/ (last visited May 10, 2013).

2   Michele Sidibe, *AIDS Is Not Over*, 380 THE LANCET 2058, 2058 (2012). The impact of HIV varies by group. In the United States HIV is the third leading cause of death amongst African American women aged 35–44, *see Leading Causes of Death by Age Group*, CENTERS FOR DISEASE CONTROL, http://www.cdc.gov/women/lcod/2009/09_black_women.pdf (last visited June 27, 2013), and globally for women aged 15–49 AIDS is the leading cause of death. *See Statistics: Women and HIV/AIDS*, AMFAR, http://www.amfar.org/About-HIV-and-AIDS/Facts-and-Stats/Statistics-Women-and-HIV-AIDS/ (last updated Dec. 2012). Fourty-eight percent of all people who have died of HIV since the beginning of the epidemic have been men who have sex with men. *See HIV Among Gay and Bisexual Men*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/risk/gender/msm/facts/index.html (last visited July 1, 2013).

3   Examples of cost-benefit analysis of HIV include: *Cost-Benefit Analysis of HIV Workplace Programmes in Zambia*, USAID, http://pdf.usaid.gov/pdf_docs/PNADK430.pdf; Steven D. Pinkerton, David R. Holtgrave, & Frederick R. Bloom, *Cost-Effectiveness of Post-Exposure Prophylaxis Following Sexual Exposure to HIV*, 12 AIDS 1067 (1998); Andrew Creese et al., *Cost-Effectiveness of HIV/AIDS Interventions in Africa: A Systematic Review of the Evidence*, 359 THE LANCET 1635, 1635–42 (2002).

representations collectively shift and recompose.[4] Existing identity narratives, epidemiology, and through international human rights activism co-produce[5] ideas of identity and risk.[6] I refer to this phenomenon as the identity/risk narrative. For example, epidemiology offers the biological narrative of risk: anal sex and the weak rectal lining make men who have sex with men more vulnerable to HIV; while the fragility of women's vaginal wall provides a biological foundation for women's vulnerability. These biological narratives underpin rights-claiming in international human rights institutions: many women's rights activists and gay rights activists rely on these biological ideas of risk to define their groups and demand legal and policy change. The corresponding legal projects emanate from identity driven projects. For example, building out of women's rights activism, the women's rights agenda in regard to HIV is to alter laws that subordinate women, including property laws and laws on violence against women. Building off of the gay rights movement, the gay rights agenda in HIV is to alter laws that subordinate sexually diverse practices, including sodomy laws.

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4   Joshua Gamson, *Must Identity Movements Self-Destruct? A Queer Dilemma*, 42 Soc. Probs. 390, 390–407 (1995). Scholars have long thought through definitions of identity and the role of identity politics in social movements. Martha Minow describes the need to acknowledge that "the cultural, gender, racial, and ethnic identities of a person are not simply intrinsic to that person, but depend upon that person's self-understanding in conjunction with communal understanding." Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97, 98 (1991) [hereinafter Minow, *Identities*]. Minow also offers the following helpful definition of identity politics: "By identity politics, I mean the mobilization around gender, racial, and similar group-based categories in order to shape or alter the exercise of power to benefit group members." Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 648 (1996) [hereinafter Minow, *Not Only for Myself*].

5   Here I use the terminology of co-production as it is used in science and technology studies ("STS"). Sheila Jasanoff articulates co-production as a means of studying "how knowledge-making is incorporated into practices of state-making, or of governance more broadly, and, in reverse, how practices of governance influence the making and use of knowledge . . . . Knowledge, in particular, is seen as crystallizing in certain ontological states—organizational, material, embodied—that become objects of study in their own right." On the issue of science in particular Jasanoff states that "science, in the co-productionist framework, is understood as neither a simple reflection of the truth about nature nor an epiphenomenon of social and political interests." *See* Sheila Jasanoff, *The Idiom of Co-production*, *in* STATES OF KNOWLEDGE: THE CO-PRODUCTION OF SCIENCE AND SOCIAL ORDER 3 (Sheila Jasanoff ed., 2004).

6   Steven Epstein terms a similar inquiry the "biopolitical paradigm." Epstein defines "biopolitical paradigm" as the "frameworks of ideas, standards, formal procedures, and unarticulated understandings that specify how concerns about health, medicine, and the body are made the simultaneous focus of biomedicine and state policy." STEVEN EPSTEIN, INCLUSION: THE POLITICS OF DIFFERENCE IN MEDICAL RESEARCH 17 (2007) [hereinafter EPSTEIN, INCLUSION]; *see also* PAULA TREICHLER, HOW TO HAVE A THEORY IN AN EPIDEMIC 15–39 (1999). Treichler's book discusses HIV as an "epidemic of signification" highlighting how HIV is constructed through languages and discourses of medicine and science. Her book examines the Discover magazine image as an example.

In producing the identity/risk narrative, communities and individuals come to both represent themselves and understand themselves.[7] In this sense, identity itself becomes a mode of governance as individuals regulate their own identity performance to match that of their group. This Article examines the formation and operation of three identities—women, sex workers, and gay men—in the context of legal advocacy on HIV and human rights.

While acknowledging identity's potential as an organizational force, this Article argues that we must critically interrogate our reliance on identity politics in building movements to respond to the HIV epidemic. Through telling the history of gender organizing in the context of the international HIV epidemic and international human rights law, this Article encourages HIV-movement lawyers and activists to remain vigilant about the downsides of identity politics so that we can remain responsive to the most marginalized communities. In other words, we must be attuned to the downsides of identity politics, even as it may feel like a necessary mode of activist engagement, in order to protect people and issues that are left out of identity-based movements.

Part I of this Article begins with the Global Fund for HIV/AIDS, TB, and Malaria Gender Strategy ("Gender Strategy") that highlights the formation of and the role of identity politics in HIV governance. The Gender Strategy was eventually split into two strategies: one on "gender equality" addressing men and women and a second on "sexual orientation and gender identity" pertaining to gender and sexuality understood more broadly than male/female.[8] The bifurcated strategy represents an outcome of the identity/risk narrative. A close examination of the Gender Strategy demonstrates how identity has itself become a mode of governance of the self, of the performance of identity, and of knowledge production.

Part II provides a genealogy of how gender and sexuality identity politics exist in the form that we see them today in HIV legal advocacy. I situate the spread of identity-based

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7   See Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1731 (1993) [hereinafter Halley, *Reasoning About Sodomy*] ("The legal interpellation or hailing of subjects engages us in generating not only how we present ourselves to others, but how we imagine ourselves as persons. It is inextricably material *and* symbolic because it materially reconfigures the *polis* by rearranging how people imagine and present themselves in political engagements."); *see also* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 8 (1990) ("The suggestion that feminism can seek wider representation for a subject that it constructs has the ironic consequence that feminist goals risk failure by refusing to take account of the constitutive powers of their own representational claims.").

8   See GLOBAL FUND FOR HIV/AIDS, TB, & MALARIA, GLOBAL FUND GENDER EQUALITY STRATEGY (2008) [hereinafter GENDER EQUALITY STRATEGY]; GLOBAL FUND FOR HIV/AIDS, TB, AND MALARIA, GLOBAL FUND STRATEGY IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITIES (2010) [hereinafter SOGI STRATEGY].

knowledge in HIV international legal advocacy inside the resurgence of a neo-formalist legal reasoning about rights and citizenship reinforced, amongst other legal transformations, by the rise of human rights.[9] I begin with the rise of the global women's rights movement and feminist engagement in international law. I highlight two main conflicts inside the global women's rights movements that appear repeatedly in international law and human rights advocacy: dominance feminism versus sex-positive feminism and the stabilization of sex and gender versus gender constructivism. Each of these conflicts represents the production of a new (and often conflicting) stream of knowledge about gender and sexuality.

Part III resituates the history of identity politics around gender, sex, and sexuality within the spread of and response to HIV. With the rise of HIV, new players, including gay men and sex workers, came into the international human rights legal arena. They sought to utilize international law to address HIV/AIDS. The gay men's health response to HIV in the United States laid a foundation for gay identity politics in international human rights.[10] Simultaneously, sex worker rights groups coalesced in Europe and the United States and formulated an identity with which to participate in the international human rights regime to claim rights and demand protection from the state. Bringing together Part III and Part IV, I show how the construction of biological vulnerability to the HIV epidemic underpins the formation of competing HIV identities upon the existing feminist legal terrain.[11]

Part IV examines some of the consequences of identity-based activism in international human rights law for the response to HIV: it masks our understanding of HIV transmission, excludes individuals who do not fit neatly into identity-demarcated territory, and deradicalizes HIV activism.

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9   Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT 19, 66 (David Trubeck & Alvaro Santos eds., 2006) [hereinafter Kennedy, *Three Globalizations*]; *see also* David Kennedy, *The "Rule of Law," Political Choices and Development Common Sense*, in THE NEW LAW AND ECONOMIC DEVELOPMENT 95 (2006).

10   Many scholars have discussed HIV as a galvanizing force for gay activism and identity formation. *See, e.g.*, LEO BERSANI, IS THE RECTUM A GRAVE?: AND OTHER ESSAYS 31 (2009); William A. Henry III, *An Identity Forged in Flames*, TIME, Aug. 3, 1992.

11   This Article primarily focuses on identity-based activism around HIV and does not focus on treatment activism and the forms it has taken. There is overlap between treatment activism and identity activism in HIV. For more on the history of treatment activism in particular, see RAYMOND A. SMITH & PATRICIA D. SIPLON, DRUGS INTO BODIES: GLOBAL AIDS TREATMENT ACTIVISM (2006). I also do not look specifically at the identity-based movement of people living with HIV/AIDS ("PLWHA"), although PLWHA constitute a large and important constituency in HIV activism. In the context of this Article I understand PLWHA as players in and encompassed by the identity-based activism I describe in this Article.

Part V examines how legal advocates might address the challenges of identity-based legal advocacy in HIV. I propose that by remaining vigilant about destabilizing identity, taking a consequentialist approach, and remaining focused on the background rules, advocacy can remain agile and responsive to the impact of HIV.

This Article does not question the remarkable progress or the strategic decisions made by HIV activists in the face of a deadly epidemic occurring in the contexts of political and economic adversity. Rather, the Article suggests a brief pause for reflection: How did the identity politics we see in HIV today come to be? How have science and identity co-produced one another through the response to HIV, and what is the role of international legal advocacy? How do identity-based social movements produce some of the very challenges they seek to address? How do social movements constitute the subjectivities they wish to deconstruct, and aid in the production and constitution of some of the very normative ideologies that we seek to dismantle? And finally, how are the boundaries of these identities policed—who is left out and what are the public health consequences of exclusion from identity movements?[12]

I. An Example of the Identity/Risk Narrative: Global Fund Gender Strategy

The Gender Strategy of The Global Fund for HIV/AIDS, TB, and Malaria ("The Global Fund") provides a vivid example of how identity/risk narratives take root in human rights and rise through global HIV governance to shape ideas of risk and vulnerability that have an eventual impact on public health programming.

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12   Several scholars have asked related questions. This Article builds and expands on these critical interrogations of identity politics. *See* Wendy Brown, *Revaluing Critique: A Response to Kenneth Baynes*, 28 POL. THEORY 469, 471–72 (2000); *see also* BERSANI, *supra* note 10. Bersani asks a similar question of "gay culture" in the context of the HIV epidemic: "This raises interesting and difficult questions. Is the community mobilized by a specific crisis destined to disappear with the end of the crisis? Or is its historically precise formation the opportunity to define a gay culture perhaps already there but that might have remained invisible if there hadn't been a community to make it more visible?" Critical race scholars have long asked how to both advance the cause of people of color and avoid reinscribing categories. *See, e.g.*, Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, *in* CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT 117 (Kimberlé Crenshaw et al. eds., 1995). The need for a "post-identity" understanding of the relationship between the individual and state and society institutions has been explored in Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008). *See also* Adrienne Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695 (1996); Minow, *Not Only for Myself*, *supra* note 4, at 647–48; *see generally* DAN DANIELSON & KAREN ENGLE, AFTER IDENTITY (1995).

Founded in 2002, The Global Fund is the main financier of programs to fight AIDS, TB, and malaria, with approximately $22.6 billion for approximately 1000 programs in 150 countries.[13] The Global Fund strategic plan articulates a commitment to human rights. The human rights-based approach to development provides a crucial channel through which identity-based expertise finds its way into HIV governance.[14] Human rights offers a framework for implementing development projects by providing core values that emanate from human rights treaties, including but not limited to transparency, participation, and equality.[15] Participation facilitates the engagement of identity-based activism inside of governance institutions that use a rights-based approach. To effectively and credibly participate as a representative of an identity group in HIV governance, institutions must have knowledge about biological and social risk and vulnerability of one's identity group reproducing the identity/risk narrative.

In 2007, at the urging of non-governmental organizations, the Global Fund decided to develop the now titled Global Fund for HIV, TB, and Malaria Gender Strategy ("Gender Strategy"). This initial gender strategy was intended to be inclusive of issues facing women and girls as well as "sexual minorities."[16] Advocacy groups were unhappy with the collapse of all gender issues into one strategy. In response, the Global Fund split the strategy into two smaller strategies comprising the larger Gender Strategy. The first is the Global Fund Gender Equality Strategy ("GF-GE"). The second is the Global Fund Strategy in Relation to Sexual Orientation and Gender Identities ("GF-SOGI"). [17] The SOGI strategy was a

13   THE GLOBAL FUND, A PRIVATE SECTOR GUIDE TO GLOBAL FUND, *available at* http://www.gbchealth.org/system/documents/category_4/374/Private%20Sector%20Guide%20to%20Global%20Fund-July%202012.pdf?1347293290.

14   David Kennedy, *Challenging Expert Rule: The Politics of Global Governance,* 5 SYDNEY L. REV. 27 (2005) (discussing the role of legal expertise).

15   *Human Rights-Based Approaches*, UNITED NATIONS DEVELOPMENT GROUP, http://www.undg.org/index.cfm?P=221 (last visited Apr. 26, 2013).

16   GENDER EQUALITY STRATEGY, *supra* note 8, at 4. *See also* TECHNICAL EVALUATION REFERENCE GROUP, THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, SUMMARY PAPER ON STUDY AREA 1 ORGANIZATIONAL EFFICIENCY & EFFECTIVENESS (2007); Andy Seale et al., *Partnership, Sex, and Marginalization: Moving the Global Fund Sexual Orientation and Gender Identities Agenda,* 12 HEALTH & HUM. RIGHTS 127 (2010), *available at* http://www.hhrjournal.org/index.php/hhr/article/viewArticle/210/304.

17   In 2007 the Board of the Global Fund recognized the importance of addressing gender and approved the development of the gender strategy. *See* GLOBAL FUND FOR HIV/AIDS, TB, AND MALARIA, SCALING UP A GENDER-SENSITIVE RESPONSE TO HIV/AIDS, TUBERCULOSIS, AND MALARIA (2007). In 2008 the Global Fund board approved the Gender Equality strategy focusing largely on women and girls. In 2009 the board approved a strategy focusing on Sexual Orientation and Gender Identity. *See* GLOBAL FUND FOR HIV/AIDS, TB, AND MALARIA, 18TH BOARD MEETING, BOARD DECISION POINTS (2008); GLOBAL FUND FOR HIV/AIDS, TB, AND MALARIA

complement to the Gender Equality strategy.[18]

By examining the Gender Strategy, I set the stage for the historical inquiry that follows: How did the identity/risk narratives come to exist the way we see them today? How did narratives of risk and vulnerability in the context of gender become irreconcilable such that women/men and "sexual minorities" could not be discussed or understood in one gender strategy?

Figure One: The Two Covers of the Global Fund Gender Strategy[19]

19TH BOARD MEETING, BOARD DECISION POINTS (2009).

18   Seale, *supra* note 16, at 127–28. In his description of the Global Fund Gender Strategies, Seale and his co-authors suggest that the split was a positive move. "The move to include sexual minorities in a new organizational understanding of gender was positive and promised to facilitate the brokering of some common ground in a policy debate around gender issues that had, at that time, become somewhat divisive, with different interest groups working globally, presenting different perspectives on their understandings of gender, HIV-related risk, stigma, and discrimination." *Id.*

19   Reprinted with permission of the Global Fund.

The split gender strategy is an artifact of the effect of the advocacy processes co-producing knowledge about the epidemiology and the identity of HIV and groups. In other words, the split gender strategy is an artifact of the identity/risk narrative inside of global governance institutions. Further, the existence of two strategies tells a story of how identity-based advocates seek to stabilize a particular set of narratives around HIV risk and vulnerability to prioritize their own population's issues.[20]

The very covers of the document speak to the bifurcated understanding of gender that plays out within the strategies. The sixteen images on the cover portray the people for whom the strategy claims to work. In the GF-GE strategy document, four of these images are of men and the remaining twelve are of women. One of the men is wrapped in a rainbow flag presumably to indicate that he identifies as lesbian, gay, bisexual, or transgender (LGBT). Of the twelve images of women, nine have their heads covered signaling tradition and culture. Of the pairs of two, one is a mother and a daughter, one appears to be a heterosexual couple, and the remaining two images are of same-sex couples, including a set of men and a set of women. In the photo of two women in which one is kissing the other, they are both wearing hijab. In only two of the images, one man and one woman, appear to be White or of European descent. There are two children in the photos and both appear to be girls.[21]

The GF-SOGI contains the same sixteen rectangles with twenty-two people. It is a distinctly different set of people. Ten people appear to be White or of European descent. One person stands in front of a rainbow colored flag. None of the paired photos show differently gendered people together and there are no children. The photos show an array of gender performances that elude categorization: several of the images may belong to transgender individuals, and several of the individuals are androgynous. All intimacy depicted in the photos occurs vis-à-vis a kiss on the cheek including the one photo shared between the strategies: a man who is kissing another on the cheek.[22]

The distinct covers portray parallel understandings of gender, sex, and sexuality as they operate alongside each other in HIV governance. One cover presents the world as primarily heterosexual while the other presents the world comprised of diverse sexualities

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20   ANNELISE RILES, THE NETWORK INSIDE OUT 3 (2000). Riles offers the definition of a "network" as a "set of institutions, knowledge practices, and artifacts thereof that internally generate the effects of their own reality by reflecting on themselves." In her study Riles examines the UN Women's Conference as one "effect of a certain aesthetic of information of which the world of NGOs, nation-states, international institutions and networks" produce.

21   *See* cover of the GENDER EQUALITY STRATEGY, *supra* Fig. One.

22   *See* cover of SOGI STRATEGY, *supra* Fig. One.

and an array of gender performance. Race and attire signal tradition and culture, while Whiteness seems to imply the escape from tradition. Children have space only in the largely heterosexual presentation of the world.

Like the images on the cover of the strategy documents, the text inside represents a division of gender, sex, and sexuality produced by identity politics in HIV governance.

Each strategy roots itself in a different human rights or development framework. The GF-GE strategy roots itself in the Convention on the Elimination of Discrimination Against Women (CEDAW) and cites to the International Conference on Population and Development Platform for Action, the Beijing Programme of Action, and Millennium Development (MDG) Goal 3 on Gender Equality and Women's Empowerment.[23] The international agreements grounding the GF-GE strategy represent and reproduce heteronormative and binary ideas of sex.[24] By contrast, GF-SOGI guidelines draw their legal normative force from the Yogyakarta principles oriented towards sexual rights.[25] Identity-based epidemiology framed in human rights claims and biology co-produce the existence of identity categories.

The rationales for the strategies are also different, if not competing. Each strategy derives its rationale from the narratives of biological vulnerability that underpin the relevant group's identity formation in HIV advocacy. For example, in a section titled "Rationale" the GF-GE document immediately highlights that "both biological and social differences make women and girls, men and boys vulnerable to different health risks, engage in different health-seeking behavior and comply differently with treatment."[26] By

23   GENDER EQUALITY STRATEGY, *supra* note 8, at 5.

24   *See* Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. No. 46, U.N. Doc. A/34/46, at 193 (Sept. 3, 1981), *available at* http://www1.umn.edu/humanrts/instree/e1cedaw.htm [hereinafter CEDAW]. For example, Article 16 states: "1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage . . . ." By contrast, the Yogyakarata Principles state: "Rights of Participation in cultural and Family life: Principles 24 to 26 address the rights of persons to participate in family life, public affairs and the cultural life of their community, without discrimination based on sexual orientation or gender identity." INTERNATIONAL COMMISSION OF JURISTS, THE YOGYAKARTA PRINCIPLES 7 (2007), *available at* http://www.rfsl.se/public/yogyakarta_principles.pdf [hereinafter YOGYAKARTA PRINCIPLES].

25   SOGI STRATEGY, *supra* note 8, at 5. Drafted in 2006, the Yogyakarta Principles are "principles on the application of human rights to sexual orientation and gender identity." The Yokyakara principles were written by "human rights experts." *See* YOGYAKARTA PRINCIPLES, *supra* note 24.

26   GENDER EQUALITY STRATEGY, *supra* note 8, at 5.

comparison, the GF-SOGI strategy states that in its "Part 1: Rationale" that "HIV/AIDS disproportionately impacts men who have sex with men, transgender peoples, and female, male, and transgender people sex workers [sic]."[27]

The definitions of gender are also different in the two strategies. The GF-GE strategy offers the following definition of gender:

> Gender refers to the array of socially constructed roles and relationships, personality traits, attitudes, behaviors, values, relative power and influence that society ascribes to the two sexes on a different basis. Whereas biological sex is determined by genetic and anatomical characteristics, gender is an acquired identity that is learned, changes over time and varies widely within and across cultures, religions, class and ethnicity. *Gender is relational and refers not simply to women and men but to the relationship between and among them.*[28]

By contrast, in the GF-SOGI strategy gender refers:

> To the array of socially constructed roles and relationships, personality traits, attitudes, behaviors, values, relative power and influence ascribed by society. Whereas biological sex is determined by genetic and anatomical characteristics, gender is an acquired identity (e.g. male, female, transgender people) that is relational, learned, changes over time, and varies widely within and across cultures, religion, class, and ethnicity.[29]

Unlike the GF-GE strategy, which mentions the term sexual orientation only once, the GF-SOGI strategy also offers definitions for sexual orientation and sexual minorities: "Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender (e.g. heterosexual) or the same gender (e.g., homosexual) or more than one gender (e.g., bisexual)."[30]

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27   SOGI STRATEGY, *supra* note 8, at 5.

28   GENDER EQUALITY STRATEGY, *supra* note 8, at 16 (emphasis added).

29   SOGI STRATEGY, *supra* note 8, at 29.

30   *Id.*

Women's rights organizations identify patriarchy as the key subordinating force while MSM and gay rights organizations put heteronormativity in that role. Epidemiological data shape the production of these gender categories.[31] The Global Fund is simply one example of many in which identity, epidemiology, and rights co-produce each other.[32]

Figure Two: Co-Production: Human Rights, Identity, and Epidemiology

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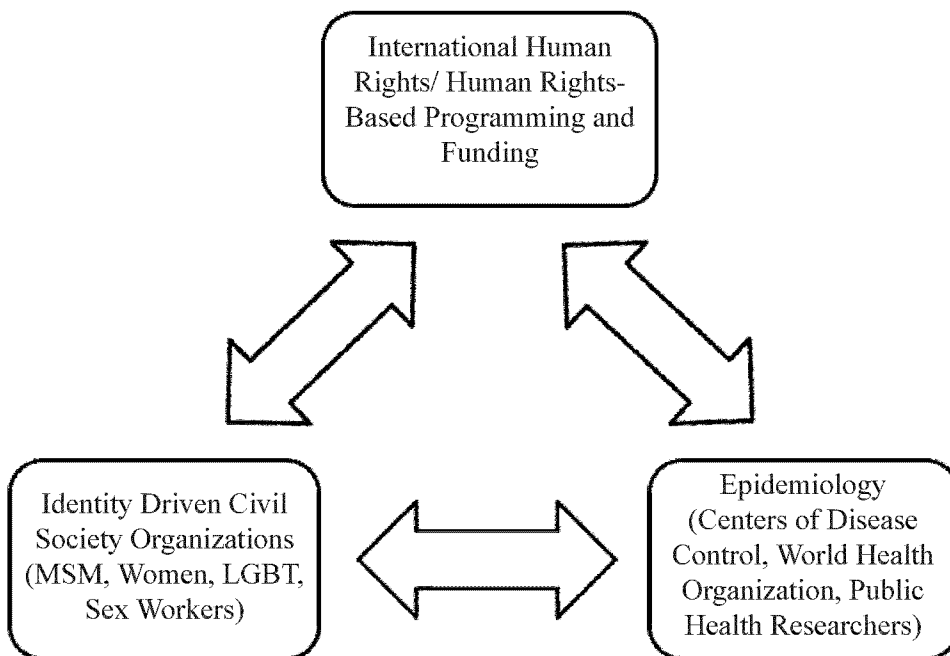
31   For examples of epidemiological literature reproducing these categories, see R. Doerner et al., *Sexual Mixing and HIV Risk Among Ethnic Minority MSM in Britain*, 16 AIDS BEHAV. 2033 (2012); Kate Shannon et al., *Gender Inequity Norms Are Associated with Increased Male-Perpetrated Rape and Sexual Risks for HIV Infection in Botswana and Swaziland*, 7 PLoS One 1 (2012); Patrick S. Sullivan et al., *Successes and Challenges of HIV Prevention in Men Who Have Sex With Men*, 380 THE LANCET 388 (2012).

32   *See, e.g., Gender Inequalities and HIV,* WORLD HEALTH ORGANIZATION, http://www.who.int/gender/ hiv_aids/en/ (last visited May 14, 2013); *Men Who Have Sex with Men and HIV Policies in Developing Countries,* PANOS, http://panos.org.uk/resources/men-who-have-sex-with-me-and-hiv-policies-in-developing -countries/ (last visited June 27, 2013); HIV POLICY WORKING GROUP ON MSM AND OTHER SEXUAL MINORITIES, RECOMMENDATIONS FOR PEPFAR FIELD GUIDANCE ON HIV PROGRAMMING FOR MSM SUBMITTED TO THE OFFICE OF THE GLOBAL AIDS COORDINATOR ON MAY 5, 2010, *available at* http://www.msmgf.org/files/msmgf//Advocacy/ PEPFAR_Guidance_Recs.pdf.

II. Identity Politics in HIV and Human Rights: The Third Globalization

We can trace current knowledge of sex, gender, sexuality, and HIV through a genealogy of women's rights activism at the international level. A global women's *human rights* movement began in the 1960s.[33] The women's rights movement was one of many identity-based struggles inside of what Duncan Kennedy describes as the Third Globalization, in which an "identity/rights complex" that was distinctly American in character began to emerge globally.[34] Human rights became central to the contemporary understanding of law in the context of modern ideals of "democracy, rights, rule of law and pragmatism."[35]

Through developing funding mechanisms, galvanizing U.S. support for global women's rights, and lobbying for dedicated foreign assistance for women's rights, U.S. feminists drove the movement that would eventually become the global women's rights movement as we see it today. Further, U.S. feminist theoretical modes of analysis and assessment (for better or worse) became the groundwork for much of the future engagement on gender, sex, and sexuality in international human rights. The foundation laid by feminists plays an important role in the post-HIV engagement of gender, sex, and sexuality activists in the international arena.

A. Feminism in the Third Globalization: United Nations (UN) Decade on Women from 1975–1985

The UN Decade on Women began with the First World Conference on Women, held in Mexico City in 1975.[36] In the years leading up to the conference, a growing patchwork

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33　A much larger international feminist engagement existed long beforehand. *See generally* JEAN QUATAERT, ADVOCATING DIGNITY: HUMAN RIGHTS MOBILIZATIONS IN GLOBAL POLITICS (2010). Here, however, I seek to distinguish between national level civil rights activism or non-rights-oriented global advocacy and advocacy in the centralized human rights arena vis-à-vis UN bodies.

34　Kennedy, *Three Globalizations, supra* note 9, at 20, 68. Kennedy parallels human rights to what he terms the "legal core" of each preceding period. In the first globalization—Classical Legal Thought from 1850–1914—law was understood "as a system of spheres" facilitating the autonomy for public and private actors. In the second globalization—the Social 1900–1969—law became a purposive activity: "a regulatory mechanism that could and should facilitate the evolution of social life in accordance with . . . perceived social interdependence at every level . . . ." *Id.*

35　*Id.* at 21.

36　World Conference of the International Women's Year, Mexico City, Mex., June 19–July 2, 1975, *Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace*, U.N. Doc. E/Conf.66/34 (July 2, 1975).

of feminist organizations came together under the goal of reshaping the international legal order as it pertained to women. For example, established in 1974, Isis International sought to achieve "women's human rights and facilitating networking and information sharing of women's movements in the global south."[37] WIN NEWS, launched in 1975, served as a conduit for national women's rights organizing globally as third world women and first world women sought to outline a global women's rights agenda for the World Conference on Women held in Mexico City in 1975.[38] This international feminist organizing largely rooted itself in second-wave feminist ideas of "woman" as a stable category and sought women's equality through decreasing women's subordination to men.[39]

B. Two Feminist Conflicts on Gender, Sex, and Sexuality

To suggest that the international women's movement successfully operated as one cohesive social movement would be incorrect.[40] Often feminist agendas at the international level were in direct conflict with one another. Two major feminist conflicts emerged and continue to structure feminist engagement, alongside gender and sexuality activism, at the level of international human rights in the 1990s and 2000s. These fissures of the women's

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37　*ISIS Women, Who We Are*, ISIS INTERNATIONAL, http://www.isiswomen.org/index.php?option=com_conten t&view=article&id=1372&Itemid=41 (last visited Aug. 4, 2012) ("ISIS International Feminist Network: 'The IFN's purpose is to mobilize support and solidarity among women on an international scale.'"); *see also* The ISIS COLLECTIVE ANNUAL REPORT 11 (1982), Radcliffe Schlesinger Archives MC 503 Box 23.

38　PEGGY ANTROBUS, THE GLOBAL WOMEN'S MOVEMENT 37 (2004). *See also* Fran Hosken, *Toward a Definition of Women's Human Rights*, 3 HUM. RTS. Q. 1 (1981).

39　Karen Engle, *International Human Rights and Feminisms: When Discourses Keep Meeting, in* INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 47, 59 (2005):

> The liberal inclusion form of the third world feminist critique is structurally indistinguishable from early feminist doctrinal inclusion arguments. Those who deploy the third world feminist liberal inclusion approach focus on third world, or non-Western, women rather than claiming to attend to all women. Still, they aim to interpret and deploy existing law to achieve their strategic aims.

40　A key point of tension in the international women's human rights movement was between first-world and third-world feminists. The primary difference between first- and third-world feminist agendas was the latter's concern with economic inequalities produced by the diffusion of the neoliberal "capitalist model of development," promoted largely by the World Bank and the International Monetary Fund. As such, for third-world feminists gender inequality was one category in a broader analysis of class inequalities perpetuated by the legacy of colonialism and the new international development agenda. However, first-world feminists, primarily American feminists, often did not consider these wider third-world concerns in setting global feminist agendas. *See* Engle, *supra* note 39, at 59; Vasuki Nessiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 HARV. WOMEN'S L.J. 189 (1993).

movement, and the theoretical and analytic frames that underpin feminist disagreement, provide the contours of future alliances and splits in global movements concerned with gender, sex, and sexuality.

1. Feminist Conflict One: Sexuality and Agency—Sexual Subordination (Dominance) Feminism vs. Sex-Positive Feminism

The first feminist conflict split feminist activists on the grounds of women's agency with regard to sexuality: between a sex-subordination frame and a sex-positive frame. The sex-subordination framing limits agency in heterosexual sex, and prostitution epitomizes women's sexual subordination. Sex-positive feminists, splitting from sex-subordination feminists during the sex wars, moved towards seeing the possibility of agency in women's sexual relationships with men.[41] The largely heterosexual framing of international feminist engagement was due, in part, to its emergence from concerns on reproductive rights.

Reproductive rights organizing at the UN began in response to UN population policies.[42] The UN system began to "adopt policies aimed at controlling fertility" between 1962 and 1972. The broader U.S. women's movement in its various permutations was already an active part of the UN Decade on Women. However, reproductive rights activists were not active during the conferences on population and development despite favorable decisions in the U.S. Supreme Court on issues of abortion and family planning. This dramatically shifted in the 1980s as reproductive rights activists turned to international forums, building on the momentum of the UN Decade for Women in an attempt to challenge the increased conservative politics of the Reagan administration internationally which by 1984 led to the Mexico City Policy (also known as the Global Gag Rule) which further restricted U.S. funding for abortion.[43] Between 1984 and 1994, activism by the women's rights community

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41   See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

42   Jason Finkle & Barbara Crane, *The Politics of Bucharest: Population, Development, and New International Economic Order*, 1 POPULATION AND DEV. REV. 87, 88 (1975). Finkle and Crane document that support for population policies came from many countries including the United States and India, "who felt that rapid population growth was a serious impediment to development and that population and family planning programs were urgently needed. This view was met with considerable opposition from Catholic, Socialist, and African nations." *Id.* at 102. By the 1970s the United States government was already the largest donor on population related programs. *Id.* at 102–03.

43   Jason Finkle & Barbara Crane, *Ideology and Politics at Mexico City: The United States at the 1984 International Conference on Population*, POPULATION AND DEV. REV. 87, 88 (1985) at 1–2, 9–12, 17. Finkle and Crane describe how pressure from the U.N. Fund for Population Activities and the U.N. Population Division

led to one of the most often cited victories of the global reproductive rights movement: the International Conference on Population and Development (ICPD) at Cairo, now known as the Cairo Conference.[44] The Cairo Conference was a meeting place for women's rights activists working on a range of issues from access to abortion to coercive sterilization. The primary agenda for women's rights organizations was to ensure that women's empowerment and education were the central mechanisms through which population programs would be channeled, transforming them into reproductive health and rights interventions. The feminist project challenged population advocates and experts who wanted to retain a focus on population programs.[45] At the conference itself, the International Women's Health Coalition and the Women's Environment and Development Organization (WEDO) led a person-strong Women's Caucus. Advocates attended the NGO forum occurring in parallel with the Cairo conference and advocating for the inclusion of women's empowerment with government delegations. Due to the influence of women's rights organizations, the women's rights activists were also appearing on official country delegations, and prime ministers from two countries, Norway and Pakistan, spoke of women's empowerment as central to addressing the population crisis.[46] The hard work paid off: unlike the Bucharest Conference and Mexico City Conference before it, the third conference on population and

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led governments to reconvene in 1984 and revisit the 1974 plan. By then the geopolitical landscape had shifted with United States social conservatism and the rise of neoliberalism. The United States government's position at the population conference epitomized this shift. Rather than push for programming to slow population growth, the United States issued a statement that "population growth is, of itself, a neutral phenomenon." Most controversially, the United States pushed for policies (that came to be known as the Global Gag Rule or Mexico City Policy) going beyond the existing mandate that United States dollars could not be used for abortion funding. This shift in the United States government's position was the outcome of active political mobilization of the "right-to-life" movement to ensure that the delegation sent to Mexico City was a "pro-life" delegation. Senator James L. Buckley was chosen as head of the United States delegation because of "his acceptability of right to life groups." There were no population experts in the entire delegation—this is crucial as the political project amongst population experts had shifted from population control to a broader focus on the need for voluntary family planning and access to safe abortion. The delegation, at the behest of the conservative Reagan administration, was catering not only specifically to the pro-life lobby groups in the United States but also trying to demonstrate its responsiveness to the conservative agenda within the U.S.

44   MINDY ROSEMAN & LAURA REICHENBACH, REPRODUCTIVE HEALTH AND HUMAN RIGHTS: THE WAY FORWARD (2011).

45   Shara Neidell, *Women's Empowerment as a Public Problem: A Case Study of the 1994 International Conference on Population and Development*, 17 POPULATION RES. & POL'Y REV. 247, 249 (1998). Boston Women's Health Book Collective also played a key role in mobilizing decentralized groups on the issue of women's health and reproductive rights. Boston Women's Health Book Collective, Radcliffe Schlesinger Archives MC 503 Box 73.

46   Neidell, *supra* note 45, at 251.

development emerged with Platform for Action with an explicit women's rights message:

> *Empowerment and status of women*: The empowerment of women and improvement of their status are important ends in themselves and are essential for the achievement of sustainable development. The objectives are: to achieve equality and equity between men and women and enable women to realize their full potential; to involve women fully in policy and decision-making processes and in all aspects of economic, political and cultural life as active decision-makers, participants and beneficiaries; and to ensure that all women, as well as men, receive the education required to meet their basic human needs and to exercise their human rights. Recommended actions include, among others, establishing mechanisms for women's equal participation and equitable representation at all levels of the political process and public life; promoting women's education, skill development and employment; and eliminating all practices that discriminate against women, including those in the workplace and those affecting access to credit, control over property and social security. Countries should take full measures to eliminate all forms of exploitation, abuse, harassment and violence against women, adolescents and girls. In addition, development interventions should take better account of the multiple demands on women's time, with greater investments made in measures to lessen the burden of domestic responsibilities, and with attention to laws, programmes and policies which will enable employees of both sexes to harmonize their family and work responsibilities.[47]

Feminists celebrated the resulting ICPD Cairo Platform for Action as a victory.

Despite these gains, some feminists continued to be unsatisfied with the ICPD outcomes.[48] Sex-positive feminists who saw the potential for agency in women's sexuality noted the distinct absence of the idea of sexual rights in the context of the new Programme for Action ("PfA").[49] For sex-positive feminists, sexuality was core to understanding

47   International Conference on Population and Development Program of Action, Cairo, Egypt, Sept. 5–13, 1994, *Programme of Action*, Ch. IV, U.N. Doc. A/CONF.171/13/Rev.1.

48   Sonia Correa & Susan Jolly, *Development's Encounter with Sexuality: Essentialism and Beyond, in* DEVELOPMENT WITH A BODY: SEXUALITY, HUMAN RIGHTS AND DEVELOPMENT 25 (Andrea Cornwall et al., eds., 2008).

49   Sonia Correa et al., *Thinking Beyond ICPD + 10: Where Should Our Movement Be Going?*, 13 REPROD. HEALTH MATTERS 109, 110 (2005):

women's capacity for agency in sexual and reproductive health services and in their sexual relationships. Sexuality had been on the table for negotiations at the ICPD conference, but delegations in Cairo from Islamic and Catholic countries kept sexuality bracketed during the negotiations process. In the end, the only manifestation of sexuality in the document was with regard to heterosexual relations.[50]

For these sex-positive feminists, negotiating language on sexuality and sexual rights became a key goal of the Fourth World Conference on Women in the 1995 Platform for Action ("Beijing PfA"). Feminists were partially successful in getting sexuality into the PfA. The word "sexuality" appears ten times in the final Platform for Action. Here is one example:

> The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences.[51]

Sex-positive feminists claimed the Beijing PfA as a victory and marked it as the first time an international consensus document recognized both sex and reproduction.[52]

> From a more detached and slightly critical view of the Cairo and Beijing processes, the final documents were far from perfect[:] . . . three major gaps . . . were identified. First was the failure to provide for access to safe, legal abortion as a basic human right. Second was the very limited way sexual rights were defined and not even named in these documents, even though we did make some progress. And third, the problem of resources and the failure of these documents to address the larger questions of privatization, market forces, debt burden, militarization, and all of the macro-economic and macro-political forces that have impeded making sexual and reproductive health and rights more than words.

50   Sex-positive feminists sought to understand the language of sexuality as broadly as possible. *See, e.g.,* Rosalind Petchesky & Rhonda Copelon, *Sex, Gender, and Power, in* SEX, GENDER, AND POWER IN FRAMING THE SEXUAL SUBJECT 84 (Richard Parker ed., 1995) ("Yet, while there is no explicit reference to sexual rights for gays, lesbians, or unmarried persons (or anyone else, for that matter), neither does paragraph 7.2 expressly limit its principle of self-determination, safety, and satisfaction in sexual life to heterosexuals, married couples, or adults.").

51   Fourth World Conference on Women: Action for Equality, Development and Peace, Beijing, China, Sept. 15, 1995, *Beijing Declaration and Platform of Action,* U.N. Docs. A/CONF.177/20 & A/CONF.177/20/Add.1 [hereinafter *Beijing Declaration*].

52   Petchesky & Copelon, *supra* note 50, at 85.

Advocacy based in dominance feminist modes of understanding sexuality did not disappear, however. Rather, dominance feminist understandings of women's sexuality retained two strongholds. First, despite a push towards a more complicated understanding of sexuality, much feminist organizing in the context of sexual and reproductive health relied on the idea that women's choices were constrained due to patriarchy, and women's interpersonal relationships with men were core to this lack of reproductive agency. This understanding of women's sexual relationships with men retains saliency in reproductive rights circles as well as in the women's rights/HIV movement.

Second, the feminist anti-trafficking movement resting largely on dominance feminist framings of sexuality has seen success, albeit unevenly, in international human rights and legal advocacy.[53] Anti-trafficking advocacy reproduced the "sex wars" internationally often pitting sex-positive feminists against abolitionist feminists. The latter group found pornography to be emblematic of women's sexual subordination, resulting in a series of U.S. and international legal strategies to ban pornography, sex work, and trafficking with the end goal of ending women's subordination.

As sex-positive feminism and dominance feminism developed separate strongholds (with considerable overlap in the context of reproductive rights activism) they laid an important foundation for later gender, sex, and sexuality activism in the context of HIV (see Table One).

2. Feminist Conflict Two: The Stabilization of Sex and Gender vs. Gender Constructivism

The second point of conflict in international feminist approaches to law and development is the stability of "woman" as a category. This has important resonance in later HIV advocacy when we see that some groups of women are pushed out of the concretized understandings of women inside of international development.[54]

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53   ANNE GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 64 (2010); Janie Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655 (2010). For example, CEDAW article 6 states that "parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women." CEDAW, *supra* note 24, at 193.

54   Brenda Cossman, *Gender Performance, Sexual Subjects and International Law*, 15 CAN. J.L. & JURISPRUDENCE 281 (2002).

The focus on "Women in Development" (WID) also emerged from the momentum of the 1970s UN Decade on Women. Actions by the United States and British Commonwealth exemplified the WID focus. In 1973, the United States passed the Foreign Assistance Act Percy Amendment requiring U.S. bilateral aid to "integrate women into the economies of developing countries."[55] In 1974, the United States Agency for International Development (USAID) established its Women in Development office. In the international human rights arena, the 1979 CEDAW noted women's equality as a priority: "[T]he Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women."[56]

Early critiques that Women and Development did not take on broader ideas of gender led to a terminology shift to "Gender and Development" to be more inclusive of men and women.[57] This conception of gender was narrow in its male/female understanding of gender. In other words, the conception of gender was largely about men and women and largely heterosexual.

WID and GAD set the stage for the "mainstreaming of gender," the idea that all development and human rights projects should consider gender. Gender mainstreaming first appeared in the Forward Looking Strategies for the Advance of Women, adopted in the Third World Conference on Women in 1985.[58] By the 1995 Beijing Conference on Women, the term "gender mainstreaming" was fully integrated into the Platform for Action[59] and had been "taken up" by the U.N. Commission on the Status of Women, the U.N. Secretary General, and then by the U.N. Economic and Social Council.[60]

> Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including

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55   22 U.S.C. 2151k §113 (1973).

56   CEDAW, *supra* note 24, at 193.

57   Hillary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1, 2 (2005).

58   *Id.* at 3.

59   *Beijing Declaration, supra* note 51 ("Many Governments have enacted legislation to promote equality between women and men and have established national machineries to ensure the mainstreaming of gender perspectives in all spheres of society. International agencies have focused greater attention on women's status and roles.").

60   Charlesworth, *supra* note 57, at 1.

legislation, policies or programs, in all areas and at all levels. It is a strategy
for making women's as well as men's concerns and experiences an integral
dimension of the design, implementation, monitoring, and evaluation of
policies and programmes in all political, economic, and societal spheres
so that women and men benefit equally and inequality is not perpetuated.
The ultimate goal is to achieve gender equality.[61]

At its most basic level, gender mainstreaming pushed for formal equality in human
rights and development institutions, i.e., more representation of women in the treaty bodies,
the enactment of laws that provide for formal equality for women relative to men, and a
greater focus on women in development with a first step being sex-disaggregated data to
better understand the current status of women.[62] The movement towards formal equality
rested on the assumption that women are a clearly defined group.

However, some feminists critiqued the stability of the category of "woman," resisting
the idea that woman was a self-evident category based in biology. As Brenda Cossman
argues:

In international law, to the extent that feminist scholarship and activism has
have succeeded in getting gender on the agenda at all, the understanding
of gender and its relationship to sex remains fairly traditional. Gender is
the social meaning given to biological differences of sex. In this, sex, then,
continues to operate as the biological and natural differences of male and
female bodies.[63]

The category "woman" not only undermines more complicated understandings of the
relationship between biology, sex, and gender, but its reification as a self-evident group
produces "marginalized subjects" and "gender outlaws"[64] in the context of international
law.[65] Gender outlaws are described by Cossman as "the queer subject, the drag queen, the

61   Rep. of the Economic and Social Council (ECOSOC), Sept. 18, 1997, U.N. Doc. A/52/3; GAOR, 52d
Sess., Supp. No. 3 (1997).

62   *Id.*

63   Cossman, *supra* note 54.

64   *Id.* at 282.

65   The queer feminist critique comes largely from Judith Butler's notion of gender and performativity not as
a "singular act, but a repetition and ritual, which achieves its effects through its naturalization in the context of
a body, understood, in part, as culturally sustained temporal duration." BUTLER, *supra* note 7, at xv.

bull dyke, the cross dresser, the transsexual, the transgendered, the sex worker and the S/M dominatrix."[66] This conflict represents the second feminist conflict (see Table One).

3. Two Feminist Conflicts and Their Corresponding Ideas About Women

The two feminist conflicts described above produced different ideas about women, sex, gender, and sexuality that took hold in international law.[67]

Table One: Feminist Ideas about Women's Bodies and Women's Agency

Feminist Conflict One	Dominance Feminism	Sex-Positive
Key Ideas	Women's lack of agency in heterosexual sex Sex work = trafficking	Women may have agency in heterosexual sex Sex work can be a source of agency, sex work can be work

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66   Cossman, *supra* note 54, at 282, 289 (2002). Cossman asserts a particular universality to these gender outlaws: "Inevitably, some will object that these are quintessentially Western identities, of little or no concern to the post colonial subject. This objection is typically deployed as a delegitimizing move, intended to culturally triumph any discussion of these marginalized sexualities as decadent and western, as corrupting and corrosive influences of a westernized modernity. But, these gender outlaws, and their discursively produced erotically charged bodies are as cross cultural as their constituting categories of sex and gender." Cossman notes that the Special Rapporteur's report on Violence Against Women does however take a much more constructivist position on gender. *See also* Ali Miller, *Fighting Over the Figure of Gender*, 31 PACE L. REV. 837 (2012); Mindy Jane Roseman & Alice Miller, *Normalizing Sex and Its Discontents: Establishing Sexual Rights in International Law*, 34 HARV. J.L. & GENDER 327 (2011); Dianne Otto, *International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry*, *in* A RESEARCH COMPANION TO FEMINIST LEGAL THEORY (Margaret Davies & Vanessa Munro eds., 2013).

67   *See also* Dianne Otto, *Lost in Translation: Re–scripting the Sexed Subjects of International Human Rights Law*, *in* INTERNATIONAL LAW AND ITS OTHERS 318–56 (A. Orford ed., 2006).

Feminist Conflict Two	Sex Stabilization (Gender = Woman)	Gender as a Construct
Key Ideas	Gender = Woman Dominance feminism is primary activist framing Heterosexuality structures understanding of sexuality	Gender = Array of Genders Activists draw on sex-positive feminism, queer, and LGBT framings Heterosexuality is one of several ways of imagining sexuality

These two feminist conflicts are central to understanding the engagement of new groups concerned with gender, sex, and sexuality in the international legal arena, e.g., sex workers and gay men. First, the feminist conflicts set the terrain upon which gay men and sex workers would build their own gender, sex, and sexuality legal advocacy strategies. Second, the conflicts within feminism laid the groundwork for parallel conflicts amongst sex workers and gay men.

III. Shifting Terrain: HIV/AIDS and the Return to Biology

A. HIV/AIDS in the United States:[68] Identity, Epidemiology, and Risk

The early construction by epidemiologists in the United States of HIV as impacting

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68 The United States was and remains the dominant influence on gender, sex, and sexuality projects globally, largely through dispersal of aid monies. This enormous transfer of financial resources serves as a conduit for exporting U.S. battles on sex, gender, and sexuality globally. The 2003 Bush administration passed the Leadership Act on HIV/AIDS, TB, and Malaria, also known as President's Emergency Plan for AIDS Relief (PEPFAR), dedicating $15 billion toward preventing and treating the spread of HIV, in combination with the millions of dollars directed towards anti-trafficking programs and the historic United States government position as the largest funder of population and reproductive health programs. *See* United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108–25, 117 Stat. 711 (2003) (current version at 22 U.S.C.A. §§7601–7604 (West 2010)); *see also* U.S. Department of State, *U.S. Government Anti-Trafficking in Persons Project Funding (Fiscal Year 2009), available at* http://www.state.gov/j/tip/rls/fs/2010/144670.htm; Preeti Patel et al., *Tracking Official Development Assistance for Reproductive Health in Conflict-Affected Countries*, 6 PLoS MED. 1 (2009). See, for example, Günter Frankenberg, *"In the Beginning of All the World was America": AIDS Policy and Law in West Germany*, 23 N.Y.U. J. INT'L L. & POL. 1079 (1990–1991), discussing the initial influence of the United States on the West German response to HIV.

primarily "homosexuals,"[69] and the early HIV designations of Gay Related Immunity Disorder (GRID)[70] and Gay Compromise Syndrome,[71] determined HIV's destiny as embedded in the identity politics of sex, sexuality, and gender.[72] As the epidemic continued, identity and risk were conflated; a review of early epidemiological and popular media articles about the HIV epidemic reveals slippage between anal sex and being "gay" or "homosexual" as a risk factor—one describing an act (anal sex) and the latter two as reference to an identity or person.[73] For example, in 1982 the Centers for Disease Control (CDC) stated that most cases of HIV had one of several identifiable "risk factors," naming "male homosexuality" as one of them.[74]

Epidemiology played a key role in the consolidation of gay identity politics in HIV as epidemiologists isolated and promoted anal sex as the key mode of transmission of HIV amongst gay men. As gay activism shifted from sexual liberation to HIV, gay men increasingly understood themselves as a subordinated group.[75] Like patriarchy for feminists,

69   Centers for Disease Control, Pneumocystis Pneumonia—Los Angeles, MORTALITY & MORBIDITY WKY. REP., June 5, 1981, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/june_5.htm ("In the period October 1980–May 1981, 5 young men, all active homosexuals, were treated for biopsy-confirmed *Pneumocystis carinii* pneumonia at 3 different hospitals in Los Angeles, California."); *see* Centers for Disease Control, Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS)—United States, MORTALITY & MORBIDITY WKY. REP., Sept. 24, 1982, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00001163. htm [hereinafter *MMWR*, Sept. 24, 1982] ("Approximately 75% of AIDS cases occurred among homosexual or bisexual males, among whom the reported prevalence of intravenous drug abuse was 12%. Among the 20% of known heterosexual cases (males and females), the prevalence of intravenous drug abuse was about 60%. Haitians residing in the United States constituted 6.1% of all cases (2), and 50% of the cases in which both homosexual activity and intravenous drug abuse were denied. Among the 14 AIDS cases involving males under 60 years old who were not homosexuals, intravenous drug abusers, or Haitians, two (14%) had hemophilia A.").

70   *See* Lawrence Altman, *New Homosexual Disorder Worries Health Officials*, N.Y. TIMES, May 11, 1982.

71   George Owald et al., *Attempted Immune Stimulation in 'Gay Compromise Syndrome'*, 382 BRIT. MED. J. 1082 (1982).

72   Gay Men's Health Crisis, Records 1975–1978, 1982–1999 (on file with the New York Public Library Humanities and Social Sciences Library Manuscripts and Archives Division).

73   Altman, *supra* note 70. Altman highlights that scientists are calling the disorder G.R.I.D.—Gay Related Immunity Disorder.

74   *MMWR* Sept. 24, 1982, *supra* note 69 ("Only a small percentage of cases have none of the identified risk factors (male homosexuality, intravenous drug abuse, Haitian origin, and perhaps hemophilia A). To avoid a reporting bias, physicians should report cases regardless of the absence of these factors.").

75   The United States government's response is now notorious, as federal and state officials ignored the epidemic and the impact it was having as HIV spread from one marginalized group to another. The early

gay men understood heteronormativity to be the subordinating force.[76] It kept gay men in the closet and thwarted the ability to access much needed sexual health education and services.[77] Together the construction of HIV as a gay disease, the epidemiological risk factors of anal sex and homosexuality, and gay men's activism coalesced into a gay men's health movement.[78] New organizations including the Gay Men's Health Crisis responded by providing life-saving services while advocating for gay men's health needs.[79] Identity-based organizing became the primary mode of activist response to the HIV epidemic.

Alongside its stigmatizing effect on gay men, the construction of HIV as a "gay disease" had another downside: despite the fact that women could contract HIV, they were not being readily detected as having the illness.[80] Early discourses of women's biological vulnerability suggested that women were less susceptible to contracting HIV. This is exemplified by an illustration of the skin in the rectum, the urethra, and the vagina in a 1985 *Discover* magazine article. Next to the image of the rectum reads "the vulnerable rectum," outlining that the skin of the rectum is fragile and easily invaded. The image of the vagina is labeled: "the rugged vagina." The accompanying text suggests that vaginal walls are resistant to the HIV virus as they are composed of "plate-like squamous cells that resist rupture" and are designed to withstand trauma. [81]

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examples are plenty: the blatant disregard by the Reagan administration of the HIV epidemic, the extreme measures taken against the gay community under the auspices of public health, a lack of investment in access to treatment, the stigmatization of people living with HIV, and the detainment of HIV-positive Haitians in Guantanamo. *See* George Annas, *Detention of HIV-Positive Haitians at Guantanamo*, 329 NEW ENG. J. MED. 589 (1993); Allen White, *Reagan's AIDS Legacy/Silence Equals Death*, SFGATE.COM, http://www.sfgate.com/opinion/openforum/article/Reagan-s-AIDS-Legacy-Silence-equals-death-2751030.php (last visited August 5, 2013).

76   Some have argued that the AIDS response in industrialized countries occurred largely from community activists and organizations. Jonathan Mann et al., *Toward a New Health Strategy to Control the HIV/AIDS Pandemic*, 22 J.L. MED. & ETHICS 44 (1994).

77   JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 28–30 (2006).

78   *See* early flyer from Individual Gay Men's Health Clubs of America, *What Every Gay Man Should Know About AIDS*, 1985 (from Collections of the Smithsonian's National Museum of American History, Division of Medicine and Science).

79   Mann et al., *supra* note 76, at 44–45.

80   *See Losing the Battle, Highlighting the Shifting Epidemic to Women*, TIME, Aug. 3, 1992 (from Collections of the Smithsonian's National Museum of American History, Division of Medicine and Science) (discussing the growing awareness of women's risk of contracting HIV); *see also* TREICHLER, *supra* note 6, at 18.

81   John Langone, *AIDS*, DISCOVER, Dec. 1985, at 6 (from Collections of the Smithsonian's National Museum of American History, Division of Medicine and Science). *See also* TREICHLER, *supra* note 6, at 18.

Feminists understood the lack of awareness and interest in women's vulnerability to HIV as the product of women's ongoing subordination in the context of the medical establishment. Despite frequently working together for HIV-related activism and providing support, [82] some feminists understood gay men to be implicated in what Linda Singer called the "gay male hegemony":

> The earlier discussion focused on the way in which conditions of sexual epidemic have been exploited as an occasion for recirculating homophobic discourse, which, in this case, especially targets gay men. But the centrality that the AIDS crisis now occupies in the public consciousness is an indication that gay men are no longer exclusively positioned as victims or pariahs, but have also come to occupy a central role in determining how the AIDS crisis is being represented, and what strategies are being used to cope with it. Safe sex techniques began as a local discourse within the gay community. Their current level of cultural circulation is testimony to the gay community's success in promoting a local product to the status of national prominence. The effect of this gay male hegemony has been a figuration of the dimensions and issues considered under the rubric of epidemic . . . one effect of this hegemony is that although increasing numbers of women are suffering from the disease, most of the literature tends to ignore this fact. [83]

The idea of the gay male hegemony resonated with a broader bio-political battle that had been ongoing inside of medical and scientific research since the late 1960s: the activism by feminists and racial minorities to include women's and minority bodies in medical research as research subjects. [84] This activism relied on the argument that the "white male body" upon which scientific research was conducted did not reveal medical distinctions complicated by race and sex. [85] Activists sought that women and minority bodies be included as research subjects in order to learn more about how HIV and AIDS-defining

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82   It is common to hear women who were infected early in the HIV epidemic discuss seeking and receiving support from support groups of largely gay men. *See, e.g.*, Jeff Berry, *One-on-One with Dawn Averitt Bridge*, POSITIVELY AWARE, July 2009, *available at* http://positivelyaware.com/2009/09_04/dawn_averitt_bridge. shtml; Mary Fisher & Dawn Averitt Bridge, *Leading Ladies*, POZ, Mar. 2010, at 34, *available at* http://www. thewellproject.org/en_US/Tools/PressReleases/POZ_interview_Dawn_Averitt_Bridge_Mary_Fisher.pdf.

83   LINDA SINGER, EROTIC WELFARE: SEXUAL THEORY AND POLITICS IN THE AGE OF EPIDEMIC 83 (1993).

84   EPSTEIN, INCLUSION, *supra* note 6, at 17. Epstein is careful to highlight the difference between the activist claim of exclusion and the reality that racial minorities had long been serving as research subjects.

85   STEVEN EPSTEIN, IMPURE SCIENCE: AIDS, ACTIVISM, AND THE POLITICS OF KNOWLEDGE 40–41 (1996).

illnesses would be experienced by people of color and women differently. Sociologist Steven Epstein describes how feminist and race-based activism to deconstruct socially constructed differences between men and women and racial groups were flipped with this new form of activism. *Feminist activists were now rooting difference in biology; race activists were doing the same*:[86]

> Medically relevant biological difference findings by sex, like the corresponding difference findings by race, are both cause and consequences of the inclusion-and-difference paradigm. On one hand, advocates of change used early reports of such differences as one rationale for their proposed inclusionary reports; and on the other hand, the establishment of new inclusionary policies and procedures for subgroup comparisons has resulted in the proliferation of difference findings.[87]

The biological underpinnings of "difference" activism by advocates for women and racial minorities creates the need to examine what Epstein calls "biopolitical citizenship," or the desire for political participation in the context of "biomedical technologies and authorities reproducing and transforming practices of social stratification and exclusion— as well as the role of others in resisting those authorities."[88]

Legal advocacy also became a forum to enact a politics of difference. For example, women's rights activists mobilized a legal strategy based on biological difference in order to remedy the ongoing challenge of women's HIV infections not being detected by physicians.[89] This was largely due to the absence of cervical cancer, pelvic inflammatory disease, and other female specific manifestations of HIV on the list of AIDS-defining

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86   Steven Epstein, *Bodily Differences and Collective Identities: The Politics of Gender and Race in Biomedical Research in the U.S.*, 10 BODY & SOC'Y 183, 194 (2004).

87   EPSTEIN, INCLUSION, *supra* note 6, at 234. Epstein also points out that "reports of biological difference by race have sparked a heated medical and public controversy about 'racial profiling' but no corresponding debate seems to have arisen as yet with regard to biological differences by sex."

88   EPSTEIN, INCLUSION, *supra* note 6, at 21.

89   Traditional public health scholarship has long grappled with the relationship between epidemiology and law. David Fidler, *Global Health Jurisprudence: A Time of Reckoning*, 96 GEO. L.J. 393, 401 (2008) ("Engaging in surveillance and intervention to protect population health requires action to flow through two filters that shape the body of public health law. The first filter is epidemiology . . . . The second filter involves the basic legal frameworks that allocate jurisdiction over the powers required to engage in surveillance and intervention.").

illnesses by the CDC.[90] The CDC resisted changing their list of AIDS-defining illnesses.[91] This changed in 1990 when litigation and advocacy caused the CDC to shift positions. Having an AIDS-defining illness was necessary to receive AIDS-related social services, thus the exclusion of female-specific AIDS defining illnesses resulted in the exclusion of women from both treatment and social security benefits. Activists argued that ignoring female-specific identifiers of HIV in the list of AIDS defining illness women were unable to receive related services. In 1993, in response to HIV activists and evidence, the CDC changed their definition to include invasive cervical cancer.[92] In 1994 the World Health Organization, citing to the CDC, included invasive cervical cancer as an AIDS defining illness and implicitly recommended that all countries follow suit.[93] Correctly understood as a feminist victory, HIV-positive women would now be more likely to be diagnosed and receive medical treatment and social services with the corollary effect of highlighting differences between men and women.[94]

Advocacy strategies for women and gay men rooted vulnerability to HIV in both biological and social subordination. In other words, feminists argued that women were left out of the HIV response because of a sex-subordination frame: women were being ignored by the male medical establishment with the related outcome of obscuring biological indicators of HIV. Further, feminists argued that women's vulnerability was a product of patriarchy, created by male violence against women and unequal power relations in sexual relationships. Gay AIDS activists, on the other hand, saw normative heterosexuality to be the subordinating power. Epidemiological and scientific data supported the claims of

90   Theresa McGovern, S.P. v. Sullivan: *The Effort to Broaden the Social Security Administrations Definition of AIDS*, 21 FORDHAM URB. L.J. 1083, 1091–1093 (1994); *see also* M. Maiman et al., *Cervical Cancer as an AIDS Defining Illness*, 89 OBSTETRICS AND GYNECOLOGY 76, 76–80 (1997). I am indebted to Terry McGovern for providing additional details with regard to these key historical moments.

91   McGovern, *supra* note 90, at 1094; Interview by Sarah Shulman with Terry McGovern, HIV Officer at the Ford Foundation, at ACT-UP Oral History Project in New York, 37–42 (May 25, 2007); *see also* TREICHLER, *supra* note 6, at 97.

92   CENTERS FOR DISEASE CONTROL, 1993 REVISED CLASSIFICATION SYSTEM FOR HIV INFECTION AND EXPANDED SURVEILLANCE CASE DEFINITION FOR AIDS AMONG ADOLESCENTS AND ADULTS (1993), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00018871.htm. The CDC also added pulmonary tuberculosis and recurrent pneumonia as advocated by activists. McGovern, *supra* note 90, at 1094.

93   World Health Organization, *WHO Case Definitions in AIDS Surveillance in Adults and Adolescents*, 69 WKLY. EPIDEMIOLOGICAL REC. 274 (1994).

94   The turn towards the idea of difference in biology and in litigation related to HIV ran counter to the rise of constructivist perspective inside of feminist and gender studies, best represented by Judith Butler's *Gender Trouble*. BUTLER, *supra* note 7.

activists of both women and gay men. By this time, feminist advocacy made its mark on epidemiology. Far from the "rugged vagina," HIV science began to suggest that the vaginal wall, amongst other surface areas exposed to the virus during sex, may actually be vulnerable to contracting HIV.[95] In the resource-constrained world of HIV in which sexual politics and subordination were seen as central to the spread of HIV in vulnerable communities, women's and gay men's subordination was quickly becoming competing advocacy agendas. Further, feminists often understood gay men who were leading the HIV movement as part of the patriarchal structure.[96] The interaction of epidemiology and advocacy claiming were actively co-producing identity.[97]

B.   Globalizing the Identity/Risk Narrative

By 1985 AIDS was documented in fifty-one countries. By 1987 this number had risen to 127 countries. Mortality and morbidity associated with HIV crippled communities and countries. Between 1990 and 1997 the number of people living with HIV tripled from ten

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95   *See, e.g.*, Florian Hladik & Thomas J. Hope, *HIV Infection of the Genital Mucosa in Women*, 6 CURRENT HIV/AIDS REPORTS 20 (2009). Understandings of women's vulnerability to HIV has shifted; *see also, e.g.*, *Women and the Biology of HIV Transmission*, CATIE.CA (2009), http://www.catie.ca/fact-sheets/epidemiology/women-and-biology-hiv-transmission (last visited June 28, 2013) ("Many researchers at first thought that the chance of acquiring HIV sexually through the female genital tract was quite low. However, a lot of the studies did not account for various biological and social risk factors that can make a woman more susceptible to HIV. This means that the probability of sexually transmitting and acquiring HIV in the 'real world' may be a lot higher than has been estimated."); *Women's Biological Susceptibility to HIV*, CAN. AIDS SOC'Y (Apr. 2012),   http://www.cdnaids.ca/files.nsf/pages/15womensbio/$file/Women%E2%80%99s%20Biological%20 Susceptibility%20to%20HIV.pdf ("Increased surface area of the body parts (cervix, vagina and possibly the uterus) where HIV transmission can happen (compared to the areas of the penis, the foreskin, urethra and small tears on the head of the penis, where transmission can happen in men).").

96   Calls also began to emerge for race-specific HIV interventions that often divided, like the dominant narratives of HIV and vulnerability, on sex-versus-sexuality lines. For example, Black women's vulnerability is often tied to exposure through formerly incarcerated Black men. This narrative brings in race and class alongside ideas of women as subordinated. Black MSM, whose rates of HIV have skyrocketed, identified racism and homophobia as driving factors in HIV vulnerability. This perception that women's subordinated status was perpetuated by male hegemony was heightened with the public conversation of male bisexuality, gay men as representative of patriarchy, and the alleged Black man on the "down low" (secretly having sex with other men) who was placing his Black female partner at risk for contracting HIV. Meanwhile, Black gay men were also organizing in response to these accusations, highlighting homophobia in the Black community as a key factor as an ability in Black men's ability to live as openly gay and therefore at lower risk for HIV. Russell Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1467 (2009).

97   The turn to biology was also present in litigation on sexual orientation at the time. *See* Halley, *Reasoning About Sodomy*, *supra* note 7.

to thirty million.[98]

Globally, the HIV epidemic produced similar anxieties around transmission as in the United States. Many countries considered or turned to coercive ends to control the epidemic, including mandatory testing and quarantines.[99] Extreme public health measures targeted specific identity-based populations: gay men, sex workers, and drug users became the focal points of HIV interventions. These policy and programmatic approaches prompted a reaction from the international human rights community. The health and human rights movement founded by Jonathan Mann, the first Director of the WHO Global Program on AIDS, propelled resistance to the coercive public health measures implemented by governments.[100] By providing a framework and vocabulary for resistance, the health and human rights movement galvanized activists to resist coercion in the public health response to HIV.

As the human rights movement grew, international human rights became the formal legal arena in which, like other social movements, HIV activists began to channel their energy and resources. Activists sought to ensure that human rights treaties protected the interests of their own communities in the growing number of international treaties, declarations, and commitments that were addressing the HIV epidemic.

Feminists (both dominance and sex-positive feminists), the international gay rights movement, and the sex worker movement constituted crucial identity-based activist groups that engaged this international human rights legal arena. As is often the case with identity groups, these organizations did not fall cleanly in a single category. Some of the most vulnerable men who have sex with men are sex workers, some of the sex workers are transgender, and some women are sex workers or engage in transactional sex. In Part IV, I demonstrate how the formation of these identity categories masks these complexities.

Narratives of biological risk and difference underlie the social mobilization of women, sex workers, and gay men in HIV and human rights. Two such narratives played a large

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98   UNAIDS, WORLD AIDS DAY REPORT: HOW TO GET TO ZERO: FASTER. SMARTER. BETTER. 6 (2011), *available at* http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/jc2216_worldaidsday_report_2011_en.pdf.

99   Kathleen M. Sullivan & Martha A. Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. Rev. 139 (1998); *see also* Wendy Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985).

100   Jonathan Mann, *Protecting Human Rights is Essential for Promoting Health*, 312 BRIT. MED. J. 924 (1996).

role in laying the foundation for HIV organizing and provided a naturalizing impulse: the idea that for women the vaginal wall is vulnerable to HIV,[101] and for gay men anal sex is a particularly vulnerable form of penetrative sex. As was the case in U.S. feminist activism on HIV, international women's rights activists found that male dominance over women was a root cause of HIV. Marriage, violence against women, and rape were social factors that propelled forward women's vulnerability to contracting HIV.[102] As with prior women's rights advocacy, feminists saw the law as a patriarchal force that sustained these inequalities. Gay men's vulnerability was due to the dominance of heteronormative culture often represented by sodomy laws. The gay men's narrative holds that gay men are vulnerable to HIV because of a closeted, unsafe lifestyle partly forced upon them by heterosexuality. In turn, it is the subordination of gay men by heterosexual culture that is (in part) driving the gay male HIV epidemic. For women and gay men, the turn towards biological difference attaches itself to identity narratives. Stemming from research on these identity groups, epidemiological narratives of risk co-produced identity. Rights claiming furthered the identity/risk narrative while group expertise rooted itself in knowing one's own identity/risk narrative.

1. "Gay Rights Are Human Rights and Human Rights Are Gay Rights":[103] LGBT Identity/Risk Narrative

Although women's rights activists made vast progress with regard to shifting reproductive paradigms away from population control, prior feminist advocacy largely failed to produce results with regard to sexual rights. LGBT activism set out to remedy the lack of focus on sexual rights and sexuality partly with the support of pro-sex feminists.[104] While it would be incorrect to suggest that all LGBT organizing at the international stage is rooted to HIV, LGBT organizing at the international level was catapulted forward by HIV.

101   For a description of how women's vulnerability to HIV came to be understood as a product of biological vulnerability and social factors, see Jenny A. Higgins et al., *Rethinking Gender, Heterosexual Men, and Women's Vulnerability to HIV/AIDS*, 100 AM. J. PUB. HEALTH 435 (2010). The authors discuss the limitations of this framing.

102   See, for example, PHYSICIANS FOR HUMAN RIGHTS, AN EPIDEMIC OF INEQUALITY: WOMEN'S RIGHTS AND HIV/ AIDS IN BOTSWANA AND SWAZILAND (2007), *available at* https://s3.amazonaws.com/PHR_Reports/botswana-swaziland-report.pdf.

103   Secretary of State Hillary Clinton, *Address on the Human Rights of LGBT People: "Free and Equal in Dignity and Rights,"* HUMANRIGHTS.GOV (Dec. 6. 2011), http://www.humanrights.gov/2011/12/06/human-rights-geneva/.

104   Mindy Jane Roseman & Alice Miller, *Normalizing Sex and Its Discontents: Establishing Sexual Rights in International Law*, 34 HARV. J.L. & GENDER 326 (2011).

A major victory for a sexual orientation-specific human rights campaign was the decision *Toonen v. Australia* in the Human Rights Committee of the International Covenant on Civil and Political Rights (ICCPR). Nicholas Toonen was a gay HIV activist and the "leading member" of the Tasmanian Gay Law Reform Group (TGLRG) who was challenging Sections 122(a) and (c) and 123 of the Tasmanian Criminal Code, which "criminalized various forms of sexual contacts between men."[105] In *Toonen*, the Human Rights Committee of the International Covenant on Civil and Political Rights, acknowledging a broad range of international and domestic actors' concerns for "gay and lesbian rights," found that the Tasmanian statute criminalizing sexual contact was in fact a violation of several articles of the ICCPR, including the right to privacy.[106] Most importantly, the *Toonen* decision validated the idea that "sexual orientation" was a category that was subsumed in "other status" under Article 26 for the purposes of the covenant.[107] HIV played an important role in the outcome of the decision and arguments presented to the Committee. Tasmania argued that the sodomy laws were in place to prevent HIV and offered public health arguments to suggest that sodomy laws drove individuals to the risk of infection underground.[108]

105   Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

106   *Id.* ("In response to the Tasmanian authorities' argument that moral considerations must be taken into account when dealing with the right to privacy, the author notes that Australia is a pluralistic and multi-cultural society whose citizens have different and at times conflicting moral codes. In these circumstances it must be the proper role of criminal laws to entrench these different codes as little as possible; in so far as some values must be entrenched in criminal codes, these values should relate to human dignity and diversity.").

107   Article 26 of the International Covenant on Civil and Political Rights reads: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

108   *Toonen*, Communication No. 488/1992 ("While the State party acknowledges that the impugned provisions constitute an arbitrary interference with Mr. Toonen's privacy, the Tasmanian authorities submit that the challenged laws are justified on public health and moral grounds, as they are intended in part to prevent the spread of HIV/AIDS in Tasmania, and because, in the absence of specific limitation clauses in article 17, moral issues must be deemed a matter for domestic decision. As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Australian Government observes that statutes criminalizing homosexual activity tend to impede public health programmes 'by driving underground many of the people at the risk of infection.' Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.").

Inclusion into "other status" became a minoritizing politics of difference: it stabilized the idea of LGBT by attempting to claim an LGBT-specific identity and injury. [109] This had a broad ripple effect. First, it began a trajectory of rights claiming on the basis of sexual orientation that was distinct from efforts done on the grounds of the sex-stabilized category of women. Second, *Toonen* forwarded the idea that there was a group of individuals that fit neatly into "LGBT" in the context of human rights. Third, in participating in this new international legal identity of the LGBT person, LGBT groups began to move away from queer understandings of sexuality that were both challenging the universality of the gay identity and seeking to resist identity politics. [110] A similar set of questions arose in LGBT advocacy as had in earlier feminist activism: Was there a gay universal? Is LGBT a stable identity? Were the newly protected category of "sexual orientation" fluid, where would boundaries be demarcated? Or, like the problem of woman=gender, were we going to see an exclusion of "gender outlaws" from normative LGBT organizing? [111] The liberal international mode of lawmaking seemed to be producing the need for these injured identities but was simultaneously resistant to complexity. The committee for the CEDAW was the most resistant to a more complicated understanding of gender, consistently returning to the idea that gender and woman are synonymous. [112] Gay men were, in Cossman's terms, "gender outlaws."

Epidemiology furthered tensions in analytic and identity-based modes of understanding sex and gender. Biological differences between men and women produced difference narratives between women and gay men. This is illustrated in a 1995 publication of the Royal Tropical Institute, South Africa AIDS Dissemination Service, and the World

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109   EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 1 (1991); *see also* Halley, *Reasoning About Sodomy, supra* note 7; Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability,* 46 STAN. L. REV. 503 (1993) [hereinafter Halley, *Sexual Orientation*].

110   Aeyal Gross, *Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law,* 21 LEIDEN J. INT'L L. 237 (2008); Katherine Franke, *Dating the State—The Moral Hazards of Winning Gay Rights,* 44 COLUM. HUM. RTS. L. REV. 2 (2012).

111   Katherine Franke outlines the three main ways international gay rights activism can be understood: 1) a push forward by human rights activists and scholars to "secure human rights protections for subordinated, oppressed, tortured, and murdered sexual minorities around the globe"; 2) through a post-colonial critique offered most notably by Joseph Massad (this critique utilizes a post-colonial frame to critique the "gay international" for colonial and imperial impulses); and 3) finally, a middle category of activists acknowledge "the ever-present risk of imperial effects, if not aims, when undertaking rights work in an international milieu, while at the same time recognizing the important and positive work that rights-based advocacy can bring about." These three perspectives, like the three conflicts in the historical trajectory of women's rights, were often in tension with one another. Franke, *supra* note 110.

112   Miller, *supra* note 66, at 858–59.

Health Organization in which a section titled "Physiological Vulnerability" describes the vulnerability of women and men to HIV:

> Researchers estimate that women's risk of HIV infection from unprotected sex is at least twice that of men. Semen, which has high concentrations of virus, remains in the vaginal canal a relatively long time. Women are more exposed through the extensive surface area of mucous membrane in the vagina and on the cervix through which the virus may pass. In men, the equivalent area is smaller, mainly the entrance to the urethra in a circumcised man plus, in an uncircumcised man, the delicate skin under the foreskin.[113]

Biology, specifically the vulnerability of the vaginal wall and cervix, was the foundation for the construction of a narrative of women's vulnerability; patriarchy, men on the down low,[114] and violence against women were identified as core drivers of women's increasing numbers in HIV.[115] Feminists and HIV agencies branded this as the "feminization of HIV." Dominance feminist understandings of gender offered women's legal equality as the way out of HIV. A parallel move occurred for gay men whose international level activism stayed on course with what began in the United States. Like women, gay men grounded their identity struggle in biology: vulnerability to HIV began with anal sex and the vulnerability of the rectal lining. Heteronormativity produced stigma and discrimination against gay men that underpinned the ability of gay men to see HIV testing, information, education, and services.

While gay rights organizations successfully foregrounded identity as a means of intervening in the HIV epidemic, both activists and epidemiologists noted the need to shift towards "acts" rather than identity. In 1994, public health scholars coined the term "Men Who Have Sex With Men" (MSM), a public health nomenclature for:

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113   ROYAL TROPICAL INSTITUTE, SOUTH AFRICA AIDS INFORMATION DISSEMINATION SERVICE, AND WORLD HEALTH ORGANIZATION, FACING HIV, AIDS, STDS: A GENDER BASED RESPONSE 10 (1995).

114   Robinson, *supra* note 96, at 1467.

115   As an example, see UNAIDS Press Release: "Gender inequality and social injustice exacerbates the biological vulnerability of women and girls to HIV . . . . Gender inequality is a key driver of the HIV epidemic. Women can face barriers in accessing HIV prevention, treatment and care services due to limited decision-making power, lack of control over financial resources, restricted mobility and child-care responsibilities. Often, violence and the threat of violence hamper women's ability to protect themselves from HIV infection and/or to assert healthy sexual decision making." *Ways to Improve Women's Health in the HIV Context,* UNAIDS (July 24, 2012), http://www.unaids.org/en/resources/presscentre/featurestories/2012/july/20120724investmentgender/.

[M]en who self-identify as gay, bisexual or the local equivalents, male-to-female transgender individuals and other men who regularly or occasionally have sex with men. The term MSM is used to refer to individuals born male who have sex with others who are biologically male, with the understanding of the possible conflation of very distinct groups (based on sexual orientation, gender identity and participation in sexual communities, age, social class, and culture).[116]

In turn, while MSM was an attempt escape from identity, it too reconstituted a particular grouping evidenced in the above quote. MSM drew the line firmly: only Male-to-Female (M-to-F) transgender individuals counted; Female-to-Male (F-to-M) individuals were left out of the definition. The definition of MSM accounted for people that identify as men who are biologically men, women who are or were once biologically men, or people who were gender variant but were biologically men. Biology became central to MSM, and anal sex became the core risky behavior of MSM.

The desire to capture individuals in epidemiological data by sexual act alone had downsides. First, there was the exclusion of others who have anal sex including F-to-M trans people and women.[117] Second, some scholars suggest that MSM became code for racial minorities and men in developing countries, while the term "gay" signals White gay men.[118] And finally, there were empirical consequences: the inability to tease apart act, identity, and gender performance obscured data collection in trans communities.[119]

Further, MSM slowly became an identity category through which to mobilize and organize in international human rights spheres, claim rights, and gain the support or collaboration of LGBT organizations in the Global North. Biological vulnerability of MSM became the platform on which MSM began to assert human rights, in turn reinscribing the identity category of MSM. For example, the Pan American Health Organization Blueprint for the Provision of Comprehensive Care to MSM in Latin America and the Caribbean,

116   Carlos Caceres et al., *Sexual Diversity, Social Inclusion and HIV/AIDS*, 22 AIDS S45–S55 (2008).

117   For a discussion of terminology and epidemiology, see Rebecca M. Young & Ilan H. Meyer, *The Trouble With "MSM" and "WSW": Erasure of the Sexual-Minority Person in Public Health Discourse*, 95 AM. J. PUB. HEALTH 1144 (2005) (dating the term to 1994). Note that the term "MSM" is often defined in some ways that may be distinguished from the biologically oriented frame.

118   *Id.*

119   L. A. Sausa et al., *Policy Recommendations for Inclusive Data Collection of Trans People in HIV Prevention, Care & Services*, CTR. OF EXCELLENCE FOR TRANSGENDER HIV PREVENTION: UNIV. OF CAL., S.F. (2009), http://transhealth.ucsf.edu/trans?page=lib-data-collection.

published in 2009, states: "Governments, at all levels, can play a unique role in supporting human rights by addressing the rights of MSM and other sexual minorities in public policy, and by committing to more equitable health care funding that supports appropriate and safe services for MSM communities."[120]

Co-producing the identity/risk narrative of MSM, epidemiological research validated the human rights assertions of MSM. A 2009 study published in PLoS medicine, utilizing a "cross-sectional anonymous probe" and "non-probability sampling alongside multivariate regression," assessed "the human rights contexts among MSM and to link individual level rights abrogation to HIV biological outcomes in the African context." The study finds that high levels of "stigma, discrimination and human rights abuses that these men face in their everyday lives, including being denied housing and healthcare, being afraid to walk down the streets of one's community, or being afraid to seek health care services."[121]

The study concludes that:

> MSM are a high-risk group for HIV infection and human rights abuses in Malawi, Namibia, and Botswana. Concurrency of sexual partnerships with partners of both genders may play important roles in HIV spread in these populations. Further epidemiologic and evaluative research is needed to assess the contribution of MSM to southern Africa's HIV epidemics and how best to mitigate this. These countries should initiate and adequately fund evidence-based and targeted HIV prevention programs for MSM.[122]

A close reading of human rights and epidemiology complicates the simple understanding of MSM as only an act. Instead, it has transformed into an identity group. Aiding the confluence of act and identity is rights claiming, which requires an injured identity in order to be protected by the state. And in turn, despite efforts to move from identity to sexual act and biological configuration, MSM activism in part reproduces gay rights activism. Ironically, it does so in a less inclusive form based on the immediate biological demarcations of the MSM category.

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120   Pan Am. Health Org., Blueprint for the Provision of Comprehensive Care to Gay Men and Other Men Who Have Sex with Men (MSM) in Latin America and the Caribbean 8 (2009), *available at* http://new.paho.org/hq/dmdocuments/2010/Blueprint%20MSM%20Final%20ENGLISH.pdf.

121   Stefan Baral et al., *HIV Prevalence, Risks for HIV Infection, and Human Rights Among Men Who Have Sex with Men (MSM) in Malawi, Namibia, and Botswana*, 4 PLoS ONE 1, 6 (2009).

122   *Id.* at 1.

The interpellation of MSM occurs also through participation of experts in global HIV governance that requires the ongoing performance of the identity. To be a successful expert MSM representative, one must self-identify as an MSM, be able to speak to stigma and discrimination MSM face, and know the epidemiological data about MSM. In turn, MSM becomes a mode of governance generating its own effects through self-reflection and advocacy.[123] An expert on MSM issues is one who can articulate both the identity drive and biologically based concerns MSM face.

The limitations of the LGBT frame and the paradoxically reductionist/biological grounding of the MSM frame alongside its Western/LGBT roots required activists to search for a more comprehensive category. This was necessary for group survival in the international human rights arena—human rights requires the claiming of an injury based on identity. The limitations of LGBT and MSM gave way to a new category: Sexual Orientation and Gender Identity (SOGI).[124] In 2007, SOGI was formalized in the Yogyakarta Principles. The Principles outline human rights pertaining to sexual orientation and gender identity. The rise of SOGI brings us back to the Global Fund as an example in which the 2007 Sexual Orientation and Gender Identity framing became an overarching category under which a range of identities were represented in the Fund's work on gender. The guidelines distinguished their definition of gender from the definition of gender offered by the GF-GE strategy.

Table Two: Definitions of Gender in the Global Fund Gender Strategy

Global Fund Gender Equality Strategy	Global Fund Sexual Orientation and Gender Identity
Definition of Gender Gender refers to the array of socially constructed roles and relationships, personality traits, attitudes, behaviors, values, relative power and influence that society ascribes to the two sexes on a differential basis.	Definition of Gender Sex refers to the biological (genetic and anatomical) characteristics that define humans as female, male, transsexual, or intersex.

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123   ANNELISE RILES, *supra* note 20, at 3.

124   For a greater discussion of SOGI, see Miller, *supra* note 66. Steven Epstein dates the origination of the term SOGI to 2002. *See* Steven Epstein, *Sexualizing Governance and Medicalizing Identities: The Emergence of 'State-Centered' LGBT Health Politics in the United States*, 6(2) SEXUALITIES 152 (2003).

Global Fund Gender Equality Strategy	Global Fund Sexual Orientation and Gender Identity
Whereas biological sex is determined by genetic and anatomical characteristics, gender is an acquired identity that is learned, changes over time, and varies widely within and across cultures. *Gender is relational and refers not simply to women or men but to the relationship between them.*	Gender refers to the array of socially constructed roles and relationships, personality traits, attitudes, behaviors, values, relative power and influence ascribed by society. Whereas biological sex is determined by genetic and anatomical characteristics, *gender is an acquired identity (e.g. male, female, transgender people) that is relational, learned, changes over time, and varies widely within and across cultures, religions, class and ethnicity.*

The definitions of gender and the text of the Global Funder Gender Strategies represent the analytic tensions between feminism and broader understandings of sexuality as represented by SOGI. First, the differing definitions of gender indicate the alienation of a male/female mode of conceptualizing sex and gender. In the gender equality guidance document, this male/female analytic translates into dominance feminism where men's dominant relationship over women explains much of the transmission of HIV to women. On the other hand, the SOGI definition of gender, unlike the Gender Equality definition, enables men to be the victims of the HIV epidemic. Here we begin to see deep and perhaps irreconcilable differences in the analytic frameworks of LGBT/MSM/SOGI and feminist activists.

Second, although not readily apparent by the excerpted text, sex workers are almost entirely left out of the gender equality strategy, appearing only once in the annex. By contrast, sex work is mentioned thirty-nine times in the SOGI strategy. To understand why sex workers have been excluded from the gender equality strategy and instead find themselves aligned with SOGI activists vis-à-vis the Global Fund (and other human rights-oriented gender processes), we must turn to the history of sex worker organizing in international human rights.

2. "Our Lives Matter": [125] Sex Workers and the Identity/Risk Narrative

As with women's rights and gay rights, the sex worker movement in HIV emerged out of a pre-existing sex work movement. The response to HIV, however, both produced and sharpened advocacy goals of the sex worker movement with regard to the epidemic. Three dynamics played an important role in producing the need for a sex worker-specific movement in the context of HIV. First, there was a need to combat the stigmatization of sex workers with HIV by highlighting the vulnerability and victimhood of sex workers to HIV. Second, abolitionist feminists alienated sex workers through active promotion of laws and policies undermining sex worker activism in HIV. Third, sex worker programming became a catch-all for HIV programs working with trans individuals, MSM, and women who self-identified as sex workers.

a. The (Incomplete) Shift from Vector to Vulnerable

Sex worker organizing predates the HIV epidemic. Gail Pheterson extensively documented the history of global sex work organizing in *A Vindication for the Rights of Whores*.[126] Pheterson identifies the 1973 founding of COYOTE by Margo St. James in San Francisco as a crucial moment of sex worker organizing. In 1979 Margo St. James and Pricilla Alexander formed the National Task Force on Prostitution (NTFP). In the mid-1970s French prostitutes also began to organize into the French Collective of Prostitutes, and in 1975 PLAN (Prostitution Laws are Nonsense) was formed in the United Kingdom. The 1980s saw the birth of organizations in Berlin, Frankfurt, Italy, Switzerland, and Canada.[127] In 1987 the first National Conference of Prostitutes was held in Brazil under the leadership of Gabriela Silva Leite, a sex worker and founder of the National Association of Prostitutes.[128] HIV generally posed a challenge in sex worker organizing. Pheterson reports that sex workers felt that aligning sex worker and HIV activism would reinforce "distorted portrayal of all hookers as sick and stoned."[129] As such the first World Whores Congress occurred in 1985 with little mention of HIV, but by the second World Whores

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125 ANNA-LOUISE CRAGO, OUR LIVES MATTER: SEX WORKERS UNITE FOR HEALTH AND RIGHTS (2008), *available at* http://ccasa.org/wp-content/themes/skeleton/documents/Our-Lives-Matter.pdf.

126 Pheterson uses the word "prostitute." I use "sex worker" to remain consistent with the terminology throughout the Article.

127 GAIL PHETERSON, A VINDICATION OF THE RIGHTS OF WHORES 4–8 (1989).

128 *Id.* at 7.

129 *Id.* at 33–35.

Congress in 1986 HIV was central to the sex work agenda.[130] While Brazil was active in the World Whores Congress, sex worker projects largely represented the Global North. In 1988 sex workers began mobilizing globally with specific regard to HIV, and the Fourth World Conference on AIDS the same year featured a panel on sex workers' rights. The global sex worker movement formalized their engagement with international HIV advocacy with the 1990 founding of the Network of Sex Work Projects (NSWP). NWSP included Surinamese and Colombian sex workers at the outset and added a greater number of sex workers from the Global South. The creation of the NSWP was an important shift in the context of HIV, as it coalesced a sex work agenda in the context of HIV organizing and brought organizations from the Global North and Global South together.

NSWP and sex worker organizing in the context of HIV responds to the historic stigmatization of sex workers exacerbated by HIV discourse. Early in the epidemic, sex workers were labeled as "vectors" of HIV transmission, often based on the idea that sex workers were spreading HIV from one man to the other (and eventually to his innocent wife).[131] This became the epidemiological place of sex workers in the HIV epidemic despite being presumably exposed to HIV through similar biological channels as other vulnerable groups. Public health laws reflected this conceptualization of sex workers' role in the spread of HIV. Around the world, national and local-level laws were passed in an attempt to mandate HIV tests, allow for the detention of HIV positive sex workers, and physically mark sex workers as HIV positive. Sex workers began to mobilize to combat these laws, often by drawing on existing sex worker networks. The sex worker response was galvanized by the growth of the health and human rights movement that situated itself in opposition to coercive public health approaches.

Epidemiology on sex work went through a similar transition, with studies of sex workers as vectors giving way to studies of sex workers as vulnerable to the HIV epidemic. A new strand of epidemiological research presents sex workers as vulnerable to, rather than vectors of, the HIV epidemic. For example, in an article published in Social Science and Medicine,[132] Kate Shannon and colleagues utilize "participatory action research" and later

130   *Id.* at 34–35, 49–50.

131   *See* Edward Morse et al., *The Male Street Prostitute: A Vector for Transmission of HIV Infection into the Heterosexual World*, 32 SOC. SCI. & MED. 535 (1991); *see also* Catherine Pirkle, Riswana Soundardjee & Artuso Stella, *Female Sex Workers in China: Vectors of Disease?*, 34 SEXUALLY TRANSMITTED DISEASES 695 (2007) (a critique of focusing on female sex workers as "vectors" of the HIV/AIDS epidemic in the Chinese context).

132   Kate Shannon et al., *Social and Structural Violence and Power Relations in Mitigating HIV Risk of Drug-Using Women in Survival Sex Work*, 66 SOC. SCI. & MED. 911 (2008).

"thematic and content analysis" to highlight the violence faced by sex workers in shaping the "HIV risk environment" they face:

> Alarmingly high rates of assault and victimization of street-level sex workers have been described across the globe . . . . In order to reconceptualize a public health response beyond individual-level approaches, we need to consider how the "lived experiences" of sex workers are mediated by and respond to structural and social level violence and power relations in the negotiation of sex work transactions.[133]

Drawing on similar narratives of vulnerability of women and MSM (groups to which sex workers may also belong) allows sex workers to highlight the role of the state in betraying protection for sex workers or in perpetuating violence against sex workers, and by highlighting the power dynamics that may exist between clients and sex workers, sex workers have been partially successful in advocating that they not be seen as vectors but rather victims of the HIV epidemic.

The epidemiological data ground and provide support for legal rights claiming. In turn, through rights claiming, sex workers further demarcate and stabilize their own identity. For example, a group of sexual rights and sex work organizations in India submitted to the Universal Periodic Review Process of the Human Rights Council:

> Violence and discrimination faced by sex workers arise not only from the law, but also from societal stigma attached to their identities as "fallen" women engaged in an "immoral" profession. Stigma is one of the major factors why sex workers are unable to access public services, healthcare, education, and other basic human rights and face discrimination.[134]

In the context of HIV, like with women and gay men, rights claiming and epidemiology co-produce the sex work identity/risk narrative.

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133   *Id.* at 912.

134   CREATING RESOURCES FOR EMPOWERMENT AND ACTION (CREA) ET AL., UPR SUBMISSION ON HARMFUL EFFECTS OF CRIMINALISATION OF SEX WORK ON SEX WORKERS' HUMAN RIGHTS IN INDIA 6 (2012), *available at* http:// lib.ohchr.org/HRBodies/UPR/Documents/session13/IN/JS4_UPR_IND_S13_2012_JointSubmission4_E.pdf.

b. Alienation of Sex Workers by Abolitionists/Dominance Feminists

An important dynamic in creating a sex worker-specific identity/risk narrative was the alienation of sex workers from dominance feminist narratives of risk and vulnerability. This particular feminist narrative does not adequately provide for agency in sexuality, denying sex workers to be agents in life and work. Instead, dominance feminists, and in turn abolitionist feminists, see all sex work as trafficking. Trafficking as a paradigm has not had broad impact inside of public health literature on HIV. The initial vector status of sex workers did not leave room for the dominance feminist intervention requiring sex workers to be victims. The epidemiologist frame of public health made sex workers agents.

Abolitionist feminists actively worked to import their understanding of women's sexuality into HIV laws, policies, and programs during the Bush administration. These alliances produced shifts both at the level of U.S. funding for HIV and AIDS as well as UN Guidance on Sex Work.[135]

One of the most successful instances of abolitionist victory in structuring ideas of sex and agency in sex work came with the 2003 Leadership Act on HIV/AIDS, TB, and Malaria, also known as President's Emergency Plan for AIDS Relief (PEPFAR), dedicating fifteen billion dollars toward preventing and treating the spread of HIV.[136] Resonating from the first feminist conflict, abolitionist feminists were successful in inserting the language from the TVPA into the Leadership Act. This language, known as the anti-prostitution loyalty oath, (APLO) states that:

> (e) LIMITATION—No funds made available to carry out this Act, or any amendment made by this Act, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.

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135   I have detailed this further in Aziza Ahmed, *Feminism, Power, and Sex Work in the Context of HIV/AIDS: Consequences for Women's Health*, 34 HARV. J.L. & GENDER 225 (2011).

136   United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108–25, 117 Stat. 711 (2003) (current version at 22 U.S.C.A. §§7601–7604 (West 2010)). The Leadership Act was understood to be an attempt by the Bush administration to soften the view of the President through a grand gesture of humanitarianism as a counterweight to the War on Terror. The eventual manifestation of the Leadership Act reveals a politically conservative project: the Act mandated abstinence-only education in HIV prevention programs, condoms were vilified as an ineffective method of preventing the spread of HIV, and there was a ban on funding syringe-exchange programs in keeping with the domestic-conservative agenda against needle-exchange programs. *See* Penelope Saunders, *Prohibiting Sex Work Projects, Restricting Women's Rights: The International Impact of the 2003 U.S. Global AIDS Act*, 7 HEALTH & HUM. RTS. 179, 182 (2004).

> (f) LIMITATION—No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

Abolitionist feminists took on the task of monitoring projects funded through PEPFAR and maintaining advocacy efforts to push implementation of the APLO. While potentially well intentioned, this surveillance by abolitionist feminists had negative consequences for sex workers whose primary access to health programs came via sex worker projects. In Svay Pak, Cambodia, feminist abolitionists acting as watchdogs of the U.S. government reported the Lotus Club, a Doctors Without Borders (MSF) project, to the U.S. government for not involving the police (presumably to arrest those purchasing sex). The Lotus Club, whose primary purpose was as a health program for sex workers, did not engage with the police because of the harassment of sex workers by the police. A feminist abolitionist testified against the MSF project for their lack of police engagement to the House Committee on International Relations, resulting in a loss of funding for the project and, in turn, the closure of the Lotus Club.[137] Because the Lotus Club was the only public health program that served this group of adult and young sex workers, the closure of the program meant that sex workers were no longer able to access these necessary health services.

The monitoring and engagement of U.S. abolitionist feminists also took place at the United Nations. Historically, the UN Joint Programme on HIV/AIDS (UNAIDS) had taken the position that decriminalization of sex work enables a better HIV response. This position is maintained partly due to the advocacy of sex work organizations, public health and harm reduction organizations, human rights activists, and sex-positive feminists (these are not always distinct categories). Many of these organizations work under the rubric of a broader human rights-based approach to HIV/AIDS.

In 2002, UNAIDS issued a Technical Update that encouraged decriminalizing sex work.[138] Other key organizations, including the World Health Organization, Global Coalition on Women and AIDS, and the Office of the High Commissioner on Human

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137   Joanna Busza, *Having the Rug Pulled from Under Your Feet: One Project's Experience of the US Policy Reversal on Sex Work*, 21 HEALTH POL'Y & PLAN 329 (2006).

138   UNAIDS, SEX WORK AND HIV/AIDS: UNAIDS TECHNICAL UPDATE 10, 15 (2002), *available at* http://data.unaids.org/publications/IRC-pub02/jc705-sexwork-tu_en.pdf.

Rights, followed suit, including a call for decriminalization of sex work in various policy and advisory documents.[139] One could argue that by 2006 decriminalizing sex work was a key recommendation by UN agencies to improve the HIV response. However, in 2006 abolitionist feminists began to intervene at UN meetings such as the Global Consultation on Sex Work and HIV/AIDS in Rio de Janeiro. Despite resistance from sex workers and their allies in the health and human rights movement, the abolitionist feminist presence in Rio and sustained advocacy after the meeting resulted in new UN guidance that was a retreat from earlier positions on decriminalization.[140]

These abolitionist feminist interventions were in opposition to both pro-sex feminist positions and served to alienate sex workers from the dominance feminist mode of activism.[141]

c. The Limitations of Female Subordination Analytic for Sex Work

Sex-positive feminists emerged in the 1980s as allies of sex workers (in fact, some were sex workers themselves), forging new linkages between sex workers and feminist organizations. In the context of HIV, however, often even in its sex-positive form, feminism remains an analytic frame that often constrains the ability of sex workers to organize across genders. The male/female analytic of feminism that persists even in the sex-positive mode of feminism offers the lens of patriarchy as a means of understanding and organizing challenges arising for sex workers and vulnerability in the context of HIV. However, the active presence of MSM and trans individuals in sex worker organizing left this community in need of a more inclusive framework. Thus, while sex-positive feminism provided room for friendship and allies, feminism's reliance on female subordination did not provide an ideal model of sex worker subordination based on sex worker identity. Feminism itself seemed to hide some of the harms experienced by sex workers, particularly

139　*See* Avni Amin, Violence Against Women and HIV/AIDS: Critical Intersections—Violence Against Sex Workers and HIV Prevention 1 (2005), *available at* http://www.who.int/gender/documents/sexworkers.pdf; Office of the High Commissioner for Human Rights and UNAIDS, International Guidelines on HIV/AIDS and Human Rights 30 (2006), *available at* http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf.

140　UNAIDS, UNAIDS Guidance Note on HIV and Sex Work 5 (2009), *available at* http://data.unaids.org/pub/BaseDocument/2009/jc1696_guidance_note_hiv_and_sexworken.pdf. UNAIDS has now gone back to its prior position supporting decriminalization. *See* UNAIDS, UNAIDS Guidance Note on HIV and Sex Work 3 (2012), *available at* http://www.aidsdatahub.org/dmdocuments/UNAIDS_guidance_note_on_hiv_and_SW.pdf.

141　*See* Meena Seshu & Laxmi Murthy, *No Sex Work Please—We're Feminists!* (2012) (prepared for the Association of Women in Development) (on file with author).

transgender and MSM sex workers who did not consistently factor into feminist concerns for sex workers.[142] The feminist reliance on a female/male subordination scheme was too limiting for a sex work community that embraced a range of sexes, genders, and sexualities that had complicated emotional relationships with clients.

We can continue to use the Global Fund Gender Strategy as an example of this. As stated, the GF-SOGI framework contains the term "sex work" thirty-nine times. In the gender equality strategy, the term "sex work" appears once in the annex.[143] Because the women's subordination frame denies agency, sex workers are excluded from a women's rights framing of HIV vulnerability, omitted from the GF-GE strategy and relegated to SOGI. The alienation of sex workers by dominance feminist analytics that deny them agency pushes sex workers out of the gender equality paradigm that underpins much work on women and HIV.

IV. Consequences for the HIV and AIDS Programmatic and Policy

In this section of the Article, I seek to interrogate the consequences of co-production on our understanding of the HIV epidemic and the populations it impacts. Co-production explains how rights, identity, and epidemiology interact to produce knowledge about the epidemic as it underpins the identity/risk paradigm. To understand the consequences of identity-based organizing in the way that we see it inside of HIV governance institutions today, I turn to Eve Sedgwick and Janet Halley's idea of universalizing/minoritizing ("u/m") tendencies alongside Steven Epstein's idea of the inclusion-difference paradigm.[144] I identify these consequences through an examination of how the stabilization of identity through biological narratives of risk and vulnerability makes people and issues invisible. In turn, as identity groups demarcate their boundaries, individuals and groups alongside ideas

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142　This is not to suggest that some feminists do not work on behalf of trans and MSM populations. For an example of a women's rights organization working on issues of trans women's health, see POSITIVE WOMEN'S NETWORK, http://www.pwn-usa.org/ (last visited June 28, 2013).

143　GENDER EQUALITY STRATEGY, *supra* note 8, at 19.

144　Sedgwick and Halley write from within queer theory while Epstein works within the literature of science and technology studies. The u/m frame offers a way to examine the impasse of essentialism versus social construction that sexuality and gender activism often finds itself. Epstein's inclusion and difference frame allows us to interrogate the consequences of biology becoming a foundation for political participation and citizenship. While acknowledging that at different moments varied strategies and understandings of biopolitical citizenship, biological claims of difference, and genetic predispositions may carry strategic weight or multiple truths, we can examine the consequences of HIV activism and identity-based organizing by applying the lenses of u/m and inclusion and difference. Halley, *Reasoning About Sodomy*, *supra* note 7; Halley, *Sexual Orientation*, *supra* note 109; Sedgwick, *supra* note 109, at 1; EPSTEIN, INCLUSION, *supra* note 6, at 17.

about HIV risk fall off of legal and public health agendas.

A. Consequence One: Decreased Knowledge of Women's Sexuality in the Context of HIV

Knowledge about HIV transmission, risk, and vulnerability is lost as identity/risk narratives standardize. This is perhaps most clearly illustrated by the feminist reframing of HIV vulnerability as an issue of women's subordination, which has masked some of the complexities of sexuality.

First, it is clear that there has been a silencing of knowledge about women's sexuality in the context of HIV. Jennifer Higgins and colleagues argue that the lack of information about women and HIV has grown due to the use of a "vulnerability paradigm" that rests on assumptions of women's heterosexual vulnerability to HIV.[145] Women's vulnerability to HIV is understood as created by patriarchy as well as women's inability to refuse sex and negotiate condom use. As articulated by Susan Jolly in the context of literature on HIV and development:

> [T]he emphasis on violence and gender inequality as the causes of unsafe sex gives only gives half the picture. There's an underlying idea here that men have total power in sex while women are just trying to impose damage limitation while we lie back and think of England or some other appropriate patriotic love object (and that women only ever have unsafe sex because we lack power to negotiate with male partners, never due to our own desires). Do women really have no desire, agency or room for manoeuvre? Do women have no pleasure or hope of pleasure in sex?[146]

The current understanding of HIV transmission and women is based on the dominance feminist view that women's vulnerability to HIV is due to men's power over women.

Legal scholars also express critique of the current modes of feminist legal theorizing as it relates to feminist legal projects. Katherine Franke articulates two critiques of feminist legal theory that together enrich our understanding of the mode of feminist organizing in law and public health related to HIV. First, connected to the critiques waged by Higgins and Jolly, Franke tells us that feminist legal theorizing has been limited in its scope to

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145   Higgins et al., *supra* note 101. Higgins does not use the terminology of dominance feminism.

146   SUSIE JOLLY, INST. FOR DEV. STUD., WORKING PAPER 283, WHY THE DEVELOPMENT INDUSTRY SHOULD GET OVER ITS OBSESSION WITH BAD SEX AND START THINKING ABOUT PLEASURE 10–11 (2007).

understand women's desire and pleasure in sex. Feminists have become good, Franke says, at theorizing "no" rather than theorizing "yes." Feminist legal theory has become a tool to understand sexual subordination but has been minimally deployed (if at all) in a positive incorporation of women's sexuality. Second, Franke highlights the centrality of repronormativity, or women's role as mothers, in feminist legal theorizing. The idea of repronormativity enables the ability to see a second and corresponding limitation of the dominance feminist framing of women's sexuality. Women's heterosexual narratives, a product of repronormativity, are based on vaginal-penile sex as the principle mode of women's biological vulnerability.[147]

Because of emphasis on theorizing "no," in legal scholarship and the emphasis on women's vulnerability in the context of public health, we miss forms of sexual vulnerability to HIV for women. For example, how much does anal sex contribute to women's vulnerability?[148] Women's use or nonuse of condoms provides another example of how dominance feminist narratives mask complexities of women's sexuality. Lack of condom usage in relationships has often been attributed to women's inability to negotiate safe sex due to a lack of power between women relative to men. In turn there is little known or theorized about women's own desires not to use condoms due to reduction of pleasure or multiple sexual partners. Because of the strength of the dominance feminist perspective there has been little discussion amongst feminists challenging the sexual vulnerability narrative of women's rights activists in HIV.

B. Consequence Two: Limited Awareness of Men-Who-Have-Sex-With Women (also Known as Heterosexual Men)

Heterosexual men are typically left out of the list of vulnerable populations to HIV partly due to the success of feminist projects in constructing heterosexual sex as a site of vulnerability for women but not for men. Heterosexual men are often the only group that is not explicitly listed amongst vulnerable populations. This is evidenced by the list of vulnerable individuals in the Global Fund Gender Strategy, which does not include men who have sex with women. Further, and problematically, the vulnerability model assumes that only women seek to prevent HIV transmission. As articulated by Higgins and colleagues:

147   Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 199 (2001).

148   *See, e.g.*, Lara Misegades et al., *Anal Intercourse Among Young Low-Income Women in California: An Overlooked Risk Factor for HIV?* 15 AIDS 534 (2001); Michael Gross et al., *Anal Sex Among HIV-Seronegative Women at High Risk of HIV Exposure*, 24 J. AIDS 393 (2000).

Emerging data show that in many settings women are almost as likely as men to bring HIV into the partnership. An analysis of the nationally representative demographic and health survey samples for Burkina Faso, Cameroon, Ghana, Kenya, and Tanzania found that in 30% to 40% of couples with 1 or both partners infected with HIV, the woman was positive and the man negative, even though relatively few women reported having outside partners . . . .

However, in the largest epidemics in the world, the dominant HIV epidemiology does not take the form of a few men infecting a large pool of women. Data suggest instead that heterosexual women and men are infecting each other at far more similar rates than the paradigm has suggested. We are even more dismayed, then, that the vulnerability model considers only heterosexual women to be vulnerable to and socially disadvantaged by the disease.[149]

In turn, the complex range of sexual and personal interactions of men are also often misunderstood or undertheorized. There is little known about the pressures faced by men to provide pleasure to partners through non-use of condoms, men's desire to prevent HIV transmission to female partners, or men's inability to engage in conversations about sex. Feminist interventions built out of women's social vulnerability to HIV in a dominance feminist frame often do not take into account and ignore men's vulnerability in the process.[150]

C. Consequence Three: Transactional Sex Is Left Off the Agenda

The stabilization of sex work as an identity, despite its success in moving forward a sex worker agenda, also produces real and discursive boundaries that hide non-sex-worker-identified individuals. Transactional sex serves as an example. Existing at the margins of sex work, transactional sex occurs when individuals transact sex for money, but also food,

149   Higgins et al., *supra* note 101, at 435–45; *see also* JOLLY, *supra* note 146, at 10–11 (highlighting the emphasis on male perpetrators and predators perpetuates ideas of a monolithic third-world man who oppresses third-world women).

150   Martha Fineman argues that instead of an identity-based legal reform project we should instead focus on the construction of a new liberal subject "based on an appreciation of the human condition in order to effectively displace the rhetoric of personal responsibility, small government, and condemnation of state intervention." Martha Fineman, *Feminism, Masculinities, and Multiple Identities*, 13 NEV. L.J. 101, 102 (2013). This analytic mode would move us further from identity projects and towards examining relationships between individuals, state, and societal institutions. *Id.* at 119.

services, clothing, and other material goods. An example could be a woman who maintains herself financially partly through a series of sexual exchange networks. This might be out of material desire or out of the need to survive. Importantly, individuals transacting sex may not consider themselves sex workers.

As sex work became an identity, as sex workers claimed rights, and as science demarcated the specific risk factors facing a sex worker, individuals engaging in transactional sex did not make it on the agenda. This has programmatic implications as projects and programs root inside of sex worker organizations and is framed as sex worker issues. In turn, HIV projects and programs spend little time on transactional sex despite its omnipresence amongst many groups highly likely to contract HIV. Most programming on transactional sex occurs under the assumption that the person transacting sex is being exploited, but not all people engaged in transactional sex may experience it as exploitative. While this resonates with dominance feminist understandings of women's risk to HIV, this framing does not adequately capture the complex experience and understandings of individuals engaged in transactional sex.

Because transactional sex lacks an associated identity community, it has largely fallen off the radar for groups interested in sexuality, sex, gender, and HIV.

D. Consequence Four: Transgender Individuals Are Lost in the HIV Response

Transgender individuals, particularly female-to-male trans individuals, have become invisible in the context of the HIV epidemic. This is partly due to the MSM nomenclature that, as discussed, roots itself in biological ideas of sex. The category MSM became the lens through which public health practitioners, scientists, and activists understood the epidemic. As stated, MSM draws the biological line firmly: only M-to-F transgender individuals counted, while F-to-M individuals were left out of the definition.[151] The exclusion produced by this form of categorization and the biological turn has had an impact on available data for the trans community in which a complicated interplay of gender, identity, and biology was not captured by the term MSM.[152] In the United States, for example, there is

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151   Caceres et al., *supra* note 116, at S45–S55.

152   A graphic illustration of this is a recent protest photo of the Positive Women's Network based in Oakland, California, where activists hold a sign that reads, "Trans women are not MSM." (Photograph on file with author). The organization has defined itself as HIV-positive women and includes trans women in their community. *See also* POSITIVE WOMEN'S NETWORK, *supra* note 142.

no national surveillance data on transgender HIV prevalence.[153] What little data there is at a local level suggests very high HIV prevalence amongst transgender people, particularly racial and ethnic minorities. The result of the limited definition of MSM and inadequate data collection produces confusion amongst epidemiologists as well as a stunted ability to accurately design public health programs for transgender individuals.[154]

E. A Cautionary Consequence: Deradicalization Through Identity Expertise

The final consequence focuses not on a neglected population or issue but on HIV activism and legal advocacy at large.

The rise of the human rights-based approach in HIV governance that enables identity-based expertise through participatory mechanisms has a potential downside: the deradicalization of activist movements. From its earliest moments of resistance, HIV activists have shown incredible innovation and activism. Treatment literacy, mobilization around health, strategic litigation, protests, and die-ins are only some of the tools created or utilized by activists to demand responses to the HIV epidemic. As the mode of activist engagement becomes professionalized, the radical activism that marked the early part of the HIV epidemic is tempered and professionalized, legitimating and reinforcing rather than challenging HIV governance institutions.

Deradicalization might also occur through the performance of participation without a true meaningful engagement of activist groups and affected communities of individuals. In other words, while identity organizations find themselves at decision-making bodies, they are not necessarily more likely to enjoy greater influence over the redistribution of resources necessary to impact the HIV epidemic. Instead, the group's presence simply serves to legitimate the decisions of the governance body.[155] Organizations of women living with HIV, for example, responded to the co-optation of their identity group by shifting calls from "greater participation" of women living with HIV in law and policy projects to the

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153   Jeffrey H. Herbst et al., *Estimating HIV Prevalence and Risk Behaviors of Transgender Persons in the United States: A Systematic Review*, 12 AIDS & BEHAV. 1, 1 (2007).

154   CENTER OF EXCELLENCE FOR TRANSGENDER HEALTH, RECOMMENDATIONS FOR INCLUSIVE DATA COLLECTION OF TRANS PEOPLE IN HIV PREVENTION, CARE, AND SERVICES, http://transhealth.ucsf.edu/trans?page=lib-data-collection (last visited Aug. 5, 2012).

155   Crenshaw, *supra* note 12. Crenshaw notes the difficulty of social movements in both resisting and engaging in liberalism. "For blacks, the task at hand is to devise ways to wage ideological and political struggle while minimizing the costs of engaging in an inherently legitimating struggle."

"meaningful involvement" of women living with HIV in decision-making bodies.[156]

Further, participatory mechanisms that designate identity experts who speak in the mode of identity/risk often mask intra-group tension and disagreement. The engagement of women's rights activists in the role of "gender expert" masks these tensions. The Global Fund Gender Strategy provides one example of this contested terrain in HIV governance. While in the case of the Gender Strategy the outcome of tension resulted in two documents, where bifurcation does not occur, governance structures endorse one view as the primary identity/risk narrative of that group.

Finally, deradicalization occurs when activist engagement is regulated by governance structures that ensure that some forms of activism are legitimate and casting others outside of a legitimate form of engagement.[157] A counter to this might highlight that active engagement in the democratic process as it appears in global HIV governance mobilizes communities. However, while activists may be propelled to demand a place at the HIV decision-making table, the move of identity groups inside of governance bodies may explain the decrease in broad scale HIV activism that marked the early part of the HIV epidemic.[158]

V. The Way Forward

Identity mobilization in the course of HIV activism was (and continues to be) central to ensuring that marginalized groups received adequate treatment and care access. However, we must remain cautious of identity politics. The more we begin to stabilize identity groups and identity/risk narratives, the more likely we are to push people and issues into the margins of the HIV epidemic. In turn, people and issues may or may not be reflected in advocacy efforts. We have seen these examples through the course of this Article. Through stabilizing a sex work identity, transactional sex falls of the radar. Or by stabilizing the categories of woman and man through a discourse of heterosexuality (and a focus on penile-vaginal penetrative sex), we ignore the fact that non-normative sexuality and risky sex that is not "traditional" sex (anal sex) is pushed to the margins.

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156   International Community of Women Living with HIV/AIDS, *The Greater Involvement of People Living with HIV/AIDS: From Principle to Practice*, 58 PARTICIPATORY LEARNING & ACTION 67 (2008).

157   *See* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 268 (1978) (Klare focuses on the deradicalization of the labor agenda with perceived judicial victories. Amongst other forms of deradicalization, one occurs through an increased policing of the boundaries of "legitimate labor activity"); *see also* DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004).

158   ALEX DEWAAL, AIDS AND POWER: WHY THERE IS NO POLITICAL CRISIS YET (2006).

We must ask: does the standardization of identity through current modes of legal advocacy work at odds with the goal of accurately describing, understanding, and in turn reducing the spread of HIV? Below, I offer some thoughts about how to shift legal and advocacy agendas to minimize the negative consequences of identity politics in the context of HIV. In doing so, I hope to encourage a rethinking of the current manifestation of identity politics by advocating for an ongoing and constant destabilization of identity as the core lens by which we should understand and advocate for legal and policy change in HIV.

A. Beyond Identity: Addressing Background Conditions

While identity-based discrimination and stigma play a large role in the ability of individuals to access HIV services, it is also necessary to push beyond the identity-based projects to more effectively address community needs. Further, it is necessary to examine a broader range of legal rules that distribute resources and produce disparate outcomes between groups and individuals.

HIV legal advocacy can borrow lessons from critiques of identity-based organizing and the analytic tools offered by them. Two articles described here provide this analytic insight. First, in her article *Born Unto Brothels*, Prabha Kotiswaran highlights how the focus on criminalization by feminists has diverted attention from the "plethora of formal legal rules (such as rent control laws), informal social norms (such as entrenched tenancy practices) and market structures,"[159] which impact the functioning of criminal laws and need to be further understood to alter the bargaining power of sex workers.[160] Kotiswaran suggests that it is necessary to look not only at criminal law but the way criminal law operates in the context of diversely situated sex workers, a complex interplay of formal and informal laws and social norms, and the fluid nature of sex industries.[161] She offers one example of how criminal law operates alongside landlord-tenancy agreements in a red-light district to have myriad impacts for the sex workers, landlords, and other tenants. Her analysis allows us to see the distributional consequences of legal rules as they interact with one another, going beyond an initial normative position on sex work. Second, in her article *The Gay Agenda*, Libby Adler highlights a similar need to examine the background rules that serve

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159   Prabha Kotiswaran, *Born Unto Brothels—Toward a Legal Ethnography of Sex Work in an Indian Red-Light Area*, 33 L. & SOC. INQUIRY 579 (2008).

160   *Id.* Kotiswaran critiques the "structural bias thesis" offered by feminists that presents a "story of the cumulative effect of myriad biases leading to the selective and discriminatory enforcement of the anti-sex work laws always to the detriment of sex workers' interests."

161   *Id.* at 29.

to disenfranchise poor Lesbian, Gay, Bisexual, Transgender, and Gender Nonconforming ("LGBT-GNC") youth. Adler shows how the normalizing tendency of the mainstream gay rights movement produces, amongst other outcomes, one-dimensional gay advocacy agendas like gay marriage. She argues that these identitarian legal strategies tend to obscure and distract from other advocacy strategies which might foreground the set of legal rules that produce poor, vulnerable youth. By shifting focus to the background rules, Adler illustrates the series of legal obstacles for LGBT-GNC youth with the example of homeless adolescents.[162] These adolescents are met with a series of laws that prevent economic or social stability including laws that prevent sleeping in parks, reporting of whereabouts to guardians within seventy-two hours of reporting to a shelter, and the inability to be employed.[163] She argues for a legal reform strategy that tackles these legal issues rather than focus on a reactionary strategy rooted in an identitarian ideology of normalization.[164] With this new focus there is the potential for broader impact of the most marginalized LGBT-GNC youth.

The analytic move to refocus us from identity-based projects and towards the background context which shape and impact HIV vulnerability can provide important insight in the HIV context. One example makes this particularly clear. The Indian campaign of reading down Section 377, the colonial-era sodomy law, led to the decriminalization of "unnatural offenses."[165] The case came about after police officers raided the office of the Naz Foundation in India, a public health organization, for distributing condoms amongst men who were having sex with men in a public park.[166] The decision borrows heavily from U.S. privacy doctrine. However, the men were not having sex in private. They were having sex in public spaces including parks. While the identity based strategy was a success with regard to recognition and community building, important and worthy goals, much more legal work will need to be done to address the situation of men having risky sex in "public" areas (parks, bathrooms, etc) in order to address HIV. Recent mobilization by HIV providers and activist in the United States has, for example, identified legal advocacy projects that include addressing loitering laws, "condoms as evidence" laws, and

162   Libby Adler, *The Gay Agenda*, 16 MICH. J. GENDER & L. 147, 198–99 (2009).

163   *Id.*

164   *Id.* at 202.

165   Naz Foundation vs. Government of New Delhi GCT and Others, High Court of New Delhi (2009). At the time of writing this article the case is on appeal at the Supreme Court. *See LGBT Section 377*, LAWYER'S COLLECTIVE, http://www.lawyerscollective.org/vulnerable-communities/lgbt/section-377.html (last visited Sept. 22, 2013).

166   Naz Foundation vs. Government of New Delhi GCT and Others, High Court of New Delhi (2009).

eliminating prostitution-free zones that allow for easier stop and frisk of individuals (which impact MSM and trans people).[167]

These non-identity driven strategies are integral to addressing the current distribution of resources that continues to drive vulnerability to HIV.

B. Examine the Consequences

An examination of the consequences of adequacy strategies for laws and policies will help move the advocacy agenda forward in a manner that does not become about ideological identity formations maintaining their own projects. Taking a consequentialist approach assists with two goals.

First, it minimizes unintended consequences. Through an examination of legal and advocacy outcomes we can understand how, for example, a funding restriction on sex worker projects and in favor of faith based organizations shifts funding for conservative religious organizations. Eventualities of this become clear from the outset: the notorious "anti-homosexuality bill" of Uganda, for example, is partly a consequence of the shift of funding from the U.S. government towards faith-based organizations, organizations willing to condemn sex work, and organizations willing to rely primarily on abstinence-based programming.[168]

Second, a consequentialist approach can force us to interrogate the limitations of current identity-based approaches that are focused on maintaining identity ideologies at the cost of negative outcomes. Several examples come out of this Article. The abolitionist feminist attachment to trafficking to preserve a sexual victim status for women shuts down HIV programs. LGBT advocacy that seeks to normalize a gay identity in the United States has negative fall out for marginalized LGBT homeless youth.[169] International activism built out of LGBT international movements focused solely on changing sodomy laws may overshadow the background rules that structure access to HIV services. Attempts to concretize the narrative of sex workers as workers masks the realities of individuals who transact sex and don't seek to identify as a sex worker.

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167   *See generally* Angela Harris, *Theorizing Class, Gender, and the Law*, 72 L. & CONTEMP. PROBS. 37 (2009) (examining how various legal rules produce injustice at the intersection of gender and class).

168   Uganda Anti-Homosexuality Bill, No. 47, Volume CII, (2009). *See also* Jeffery Gettleman, *America's Role Seen in Anti-Gay Push*, N.Y. TIMES, Jan. 3, 2010, http://www.nytimes.com/2010/01/04/world/africa/04uganda.html?_r=0.

169   Adler, *supra* note 162, at 198–99.

Taking a consequentialist stance allows us to examine the consequences of identity-based legal activism more thoroughly with the hope of minimizing negative consequences and clearing room for creative legal strategy.

C. Destabilize Identity: Look to the Margins

To maintain progress in addressing the HIV epidemic, we must undertake an active process of destabilizing and questioning assumptions about identity in the context of HIV legal advocacy. In turn we should question tropes of vulnerability as a core step in developing an advocacy agenda for legal and policy change and question the identity ideologies we are seeking to preserve.

An example of a strategy based on the maintenance of an identity ideology is that of the abolitionist position towards sex work which seeks to preserve the victim status of women with regard to sexuality. In retaining ideas of women as victims of patriarchal norms, the abolitionist feminist position alienates sex workers (helping to produce a new movement) and ignores the reality of male sex workers and trans sex workers. Further, it obfuscates our knowledge of women's sexual agency and desires in the context of HIV.

The destabilization of identity allows us to reexamine the consequences of legal and advocacy projects like the implementation of the APLO. For example, the abolitionist feminist activism that we see does not only undermine HIV programming for women. Health clinics that support sex workers are often the same health projects that serve other marginalized individuals affected by HIV, including men who have sex with men and injecting drug users. Basing an advocacy agenda, as abolitionist feminists have done, partly on identity preservation grounds, even if it effectively prevented sex work from occurring (which it does not), would negatively impact other community groups as well.

Destabilizing identity also allows us to consider taking on non-identity-based strategies for mitigating HIV that could have broader impact. For example, harm reduction, an accepted and widely utilized consequentialist public health approach, is an example of how understanding impact helps to create a more effective response to the HIV epidemic.[170] This requires legal advocacy strategies that may supplement those that are underway, as illustrated by the case of the Section 377 litigation in India discussed above. In turn, destabilizing assumptions, knowledge, and claims around identity can serve as a means to

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170   Alex Wodak & Leah McLeod, *The Role of Harm Reduction in Controlling HIV Among Injecting Drug Users*, 22 AIDS S81–S92 (2008).

minimize unintended consequences and prevent further marginalization of individuals on the border of an identity group.

CONCLUSION

Identity has become the primary prism producing knowledge about the HIV epidemic and the structure for organizing and responding to HIV. In this Article, I examine how identity both produces and is produced by epidemiology about HIV and through international legal advocacy. Beginning with the engagement of feminist activists, identity became central to international human rights organizing with regard to gender, sex, and sexuality. HIV complicated this engagement by reengaging with biological and epidemiological narratives of risk and vulnerability. Further, HIV introduced new actors on the international legal advocacy scene also concerned with gender, sex, and sexuality, each with their own internal dynamics and their own relationships to feminist organizing: sex workers and gay men.

Through continued engagement with rights claiming and epidemiology ideas of vulnerability, the identity categories reproduce themselves. This is what I have called the identity/risk narrative. Through their stabilization and reproduction, identity activists find themselves inside of HIV governance institutions performing their identity expertise. In turn, identity itself becomes a mode of governing intragroup participation in international bodies as some identity ideologies outcompete others. The reproduction of identity has particular consequences for HIV: it masks our understanding of HIV transmission, it excludes individuals who do not fit neatly into identity demarcated territory, it produces legal strategies divorced from the realities of HIV, and where identity activists have entered governance it risks a deradicalization of HIV activists.

I conclude by offering ways that we can minimize the downsides of identity-based activism through shifting the mode of legal advocacy around HIV. By remaining vigilant about destabilizing identity, considering the consequences of identity-oriented legal advocacy, and remaining focused on the background rules, advocacy can remain agile and responsive to the impact of HIV.