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SEX BARGAINS

By 1994, cases of HIV among women were skyrocketing. In the United States HIV was now the second leading cause of death among Black women and the fourth leading cause of death among women between the ages of twenty-five and forty-four. Globally, women and girls were declared the fastest-growing group with HIV.

This recognition was a feminist victory. The campaigns waged against public health institutions, described in Chapters 1 and 2, had successfully forced epidemiologists and legal actors to acknowledge that women, too, were at risk for HIV. But questions remained: *Why* were women contracting HIV? And now that the data included women, why was it the case that in some regions, particularly sub-Saharan Africa, women had HIV in *greater* numbers than men? This latter question raised a new concern that fundamentally challenged the dated belief that there would be no epidemic amongst women: Were heterosexual women *more* vulnerable to contracting HIV than other risk groups?

As these questions circulated, many experts, including public health experts and advocates, attempted to explain how the disease was spreading and, in turn, regulate the epidemic.[1] This required asking: What role should the law play in managing the risk of contracting HIV?

The answers to these two sets of questions – why were women vulnerable and what is the role of law – would ultimately have enormous consequences for how public health institutions would design and implement interventions to stop the spread of HIV.

In this chapter, I document the rise of a new logic about law, risk, and transmission in heterosexual relationships that I call the sex bargain. The sex bargain stems from the idea that sex results from a negotiation between two people. I will show how the sex bargain became the primary explanation for thinking about a heterosexual individual's risk of contracting HIV. Two ideological camps, law and economics, and feminist theory, intellectually tussled and, eventually, converged on the idea of the sex bargain.

This convergence had enormous consequences for responding to the epidemic: It narrowed the vision of addressing AIDS away from the social and structural determinants of health toward a focus on individuals. The idea that the sex bargain offered the primary way to intervene in the AIDS epidemic was reinforced through the interaction of advocacy, law, and science. As advocates relied on law to identify rights claims, lawyers inspired epidemiologists to begin asking questions. In turn, the results of these epidemiological findings strengthened the legal and advocacy claims.

One particularly influential strand of thinking about sex bargains came from law and economics. Richard Posner and Tomas Philipson, for example, wrote in 1992 that we should treat "risky sexual behavior as a market in which trading takes place under condition of uncertainty about quality."[2] This core concept would go on to provide the foundation for their book published in 1993, *Private Choices and Public Health: The AIDS Epidemic in an Economic Perspective*. Their work inspired epidemiological studies that offered financial incentives to reduce the demand for risky sex and seeded new ways of imagining how to regulate AIDS.

While some, like Posner and Philipson, focused on promoting a law and economics approach to AIDS, a competing set of actors focused on recalibrating rules and risk to benefit women. Feminists, who had long been fighting for a place in the AIDS response, were now necessary. Unlike the epidemiologists, feminists had long been theorizing how and why women were at risk of HIV. Feminist expertise on AIDS not only filled a gap created by the oversight of epidemiologists, but some feminists were now epidemiologists themselves.[3]

A mutual view united many feminists: The subordination of women by men was a constant and unchanging universal issue in women's lives.[4] While sexual domination may shift in its presentation, it was universal, consistent, cognizable, and recognizable at the time of the

sex bargain. Contrary to the law and economics view of sex, according to feminists, given the power imbalance between women and men, and reality of physical and emotional abuse, women are often unable to protect themselves from contracting HIV. Even as feminist rejected the idea of a fair bargain, they largely accepted the idea that it was important to focus on the moment of negotiation around sex. It was at this juncture that feminists had begun to make key interventions on ideas of consent and male accountability. In other words, they converged with law and economics scholars on the idea that the moment of the sex bargain was an important site of intervention.

Why does the centering of a sex bargain model by feminists and law and economics scholars matter? I argue that the focus on the sex bargain had the powerful effect of individualizing responsibility for contracting HIV. In doing so, it served as a distraction from the broader legal, economic, social, and political dimensions of why people were actually at risk for contracting HIV. The idea of the sex bargain helped silence discussions about the social determinants of health and the upstream structural issues like poor housing and education that rendered people unable to address health concerns. Instead, it focused expert attention, including that of lawyers and epidemiologists, on individual behavior. As the idea of the sex bargain took hold in competing theories of law's response to AIDS, it reworked how scholars and advocates conceptualized the response to the epidemic. Advocates carried their ideas into national and international forums. The sex bargain fit neatly into the political moment of the time, which featured a growing discourse on personal responsibility, an increased reliance on crime control, and the continued retraction of the welfare state. It helped further an individualized response to public health crises and silenced feminist ideas that challenged this new common sense of about women and AIDS.

This chapter begins by following the feminist idea percolating outside of the AIDS context that had growing salience in the fight for women's equality: that the crux of women's subordination to men was sexual violence. The chapter traces this idea as it enters the world of HIV, just as legal scholars, including prominent voices in law and economics, and advocates, were debating how to think about the legal architecture of the AIDS response. As the sex bargain idea takes center stage in thinking through heterosexual risk, feminists fight for the notion that sexual subordination makes it impossible for women to bargain equally for sex. And, as epidemiologists begin to study heterosexual transmission, feminist and nonfeminist ideas, especially those of

law and economics scholars about sex bargains, are validated through public health inquiry.

VIOLENCE AND ACCOUNTABILITY

Long before AIDS, feminists began to theorize women's subordination as rooted in sex. Understanding how the idea of sex subordination and an inability to bargain for safer sex became the primary explanatory factor for feminists when it came to HIV transmission requires rewinding the clock to see how sexual violence against women (VAW) became one of the primary concerns of the women's movement by the 1980s and 1990s. While this section does not aim to give a complete history, it lays the groundwork for the later feminist encounter with AIDS and the law and economics movement.

Amid competing strands of feminist thinking, radical feminism began in the 1960s to shape the tenets of feminist organizing in ways that would hold sway for decades to come. Since at least this period, radical feminists argued that gender structures society as much as – or more than – class and race.[5] Feminists argued that a patriarchal worldview structured every aspect of life from care work and employment to reproduction. In some instances, radical feminists argued that to engage with any of these institutions, including the state, was to only further women's oppression.[6]

Of the many issues tackled by radical feminists, one stood out among the rest as the most powerful mobilizing cause: VAW, especially sexual violence.[7] Feminists believed that VAW was the product of patriarchal gender socialization, which results in men being powerful and women being weak. As they set their eyes on a new world with greater equality and less violence, feminists began to promote their worldview in law and society. In her book *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence*, Kristin Bumiller describes how feminists developed a series of rhetorical moves to help the issue of VAW gain traction. The most powerful among these rhetorical strategies was the "gender war." In the gender war, men used sexual VAW to retain power in various dimensions of life.[8] Sexual objectification and violence was *the* connective tissue between women beaten and abused in the home and women assaulted on the street.[9] This line of thinking inspired the anti-rape movement, which pushed this metaphor further, arguing that "women and children exist in constant fear of encounters with perpetrators and are subjected to

the ubiquitous sadism of sexuality under this regime of domination."[10] As the issue of VAW became institutionalized as a key feminist concern, including by the National Organization of Women in the 1970s, addressing violence rose on the feminist agenda.[11] The powerful image of the battered woman laid the groundwork, according to Bumiller, for the "potential for all women to become victims" and, in turn, the need for the state to intervene. Feminists also sought to make it appear that sexual violence was at the root of social disorder.[12] A huge question began to drive feminist politics on violence: What was the right way to cure this social problem?

As the 1970s progressed, the more radical feminist view – that the state itself was patriarchal and would always reproduce patriarchy – was largely abandoned for a new project: making the state work for women. Central to this project was dismantling what was understood as the public/private divide. The public/private divide was an ideological frame that helped further the notion that the home and violence in the home were outside of the domain of state intervention. For feminists, the public/private divide was an ideological tool that justified refusing to intervene on the issue of domestic violence. Dismantling the public/private divide would require demanding that the state intervene in women's lives, particularly with regard to VAW. While engaging government in the response to VAW took many forms, lawmaking became central to the feminist agenda in the hope that altering the legal landscape on women and gender would revolutionize women's life experiences.[13]

By the 1980s, the anti-domestic-violence movement was in full swing, and with the rise of carceral approaches to addressing social problems, criminal law was centered as a site of feminist engagement on issues of sexual violence and sexual objectification.[14] Their focus was not entirely unjustified; at the time, police did not arrest abusive men, and prosecutors did not take them to court. The widespread push for feminist consciousness-raising on violence issues had primed feminists to be ready to move and take concrete action, and altering policing and prosecutorial practices offered this opportunity. Feminists began a "carceral dance"[15] with police departments, embedding themselves into state governance to ensure that police would no longer ignore domestic violence. With the election of Bill Clinton in 1992, feminists sought to further institutionalize federal funding for efforts to end VAW. In 1994, feminists had a significant win with the Violence Against Women Act (VAWA) as part of the

Violent Crime Control and Law Enforcement Act of 1994.[16] In its location as part of a larger crime control bill, VAWA reflected the turn to punitive law reform in the context of gender-based violence. Most controversially, VAWA encouraged state governments take on certain criminal legal reforms when receiving federal funding. These laws sought to remedy the issue of police officers and prosecutors dropping domestic violence cases. Criminal law now took a central role in ending VAW. Crime control measures could remedy women's victimhood.[17]

The feminist ideas that would come to shape domestic advocacy had an increasing uptake in the global arena as well. By the mid 1980s, VAW had become an issue of international concern. The United States had an oversized influence on how issues of VAW would be understood globally. The US government was already the largest funder on issues of gender, including family planning services, and as time went on, funding began to go explicitly to ending violence. While the US government funding for ending VAW was subject to political pressures based on the party in office, the broad project of ending gender-based violence remained a priority because feminists had successfully aligned themselves with the larger political trends. Importantly, this meant that American feminists – albeit with differing visions of how to end VAW – influenced the design and administration of programs to address the issue of violence. Although AIDS was not on the minds of these early scholars and activists, the idea of *sexual* oppression of women would come to play an essential role in AIDS activism, given that the virus was sexually transmitted.

The pathways that feminists and feminist ideas took as they traveled through global institutions varied. Still, the dominant feminist framing – that women's lives were being structured by violence against them by men – remained intact.[18] Feminist ideas about patriarchy and violence traveled through networks of national women's rights movements, often hand in hand with the broader human rights struggles that connected them. As documented by Sally Engle Merry in her book *Human Rights and Gender Violence: Translating International Law into Local Justice*, while ideas about gender violence took hold and were situated locally – drawing on cultural norms and local vernacular – human rights organizing on women's rights often generalized experiences of VAW.[19] The United Nations Decade on Women began with the First World Conference on Women held in

Mexico City in 1975. The event inspired a global movement of women's rights activists who sought to engage UN mechanisms and galvanized feminist organizing locally and internationally.[20] In the years leading up to the First World Conference on Women feminist organizations came together to share ideas and redesign the laws pertaining to women. The women's rights network Isis International, founded in 1974, and WIN news founded in 1975, each served as a conduit for national women's rights organizing globally. Through this activism, the issue of VAW became increasingly central to the global human rights agenda. The core idea that male subordination of women was a powerful determinant in how women could live their lives became a near-total explanation for the many human rights issues identified by feminists.

As tracked by several scholars,[21] the criminalization of VAW also began to appear in international law and advocacy in the 1980s. This followed the uptick of criminal-law-oriented responses to domestic violence in American feminist organizing. In her book *Agenda Setting, the UN, and NGOs: Gender Violence and Reproductive Rights*, Jutta Joachim argues that criminal law began to take priority internationally when experts became more integral to designing an international law response to the issue of VAW. Social scientists began to demonstrate that VAW was a structural concern, prompting the call to criminalization.[22] Defining the problem as a criminal concern helped to launch a standardized international response to VAW.

SEX BARGAINING, RISKY SEX, AND VAW IN THE AIDS RESPONSE

By the mid 1990s, a surge in diagnoses of women following the definitional shift described in Chapters 1 and 2 brought AIDS not only into the viewfinder of feminists but also legal scholars who were thinking about how to best use the law to address the HIV epidemic.[23]

Law and economics scholars were prolific on the issue of AIDS. Troubled by the emergent orthodoxy about the response to the epidemic – that the public sector should play a prominent role in the AIDS response – law and economics scholars set out to ensure that economics, or what Richard Posner would call "economic epidemiology," became a part of the larger debate and discussion on how to think through an AIDS response.[24] The view of law and economics scholars suggested that too much public sector intervention (i.e.,

government intervention) into the AIDS response could be counterproductive. "Articulate, organized high-risk populations (in particular male homosexuals) … and medical and public health professionals … confronting a competing interest group of moral conservatives" result in a non-efficient response to the epidemic, not effective in stopping the spread of HIV, and redistributes resources incorrectly.[25]

In his 1992 book *Sex and Reason*, Richard Posner outlined a way to imagine sex as a rational behavior that economists should study. Posner argues that it is false to think of sex as irrational. Like the desire to curtail hunger – an embodied feeling out of our control that has a rational response – the decision to appease our sexual desires, too, is rational.[26] With the AIDS epidemic taking hold, Posner and his co-author Tomas Philipson, in a later book *Private Choices and Public Health: The AIDS Epidemic in an Economic Perspective*, brought the idea of rational sex to the AIDS response. The book's stated goal was to understand how governments should ideally intervene in the AIDS response. They argued that there is a way to arrive at the optimal regulation of AIDS that allows for the correct number of infections and amount of disease. They acknowledge that people might find the idea of regulating a disease, rather than eliminating it, "repulsive." Yet Posner and Philipson argue that their exploration demonstrates how attempts to reduce HIV transmission to zero may cause more harm than good or expose flaws in legal interventions.

In setting out to accomplish the goal of calibrating the public response to AIDS, Posner and Philipson focus on heterosexual transmission. In law and economics terms, rational, risky sex occurs in a "market in which trading takes place under condition of uncertainty about quality."[27] In turn, "risky sexual trades … are analytically similar to conventional market transactions that take place under uncertainty."[28] Posner and Philipson flatten the playing field between sexual partners: Risky sex is the outcome of a utility calculation, with rational actors making decisions based on the particular supply and demand of risky sex (different supply and demand calculations may come into play if you are gay, or Black, or a prisoner, for example).[29]

The idea of a "voluntary" transaction is important for law and economics scholars. By viewing sexual interactions as voluntary, the epidemic could be managed by ensuring that transmission is curbed by incentivizing people to act differently.[30] In turn, as the title of Posner and Philipson's book suggests, individual choice is emphasized (as well as the related idea of personal responsibility, which flows from the

choices one makes).[31] Focusing on the individual and their behavior allows Posner and Philipson to conclude that almost all government interventions, from sex education to voluntary HIV testing, may, at worst, increase transmission of AIDS or, at best, have no effect on spread of the disease.

This is best illustrated with an example. According to Posner and Philipson, a government may choose to increase access to HIV testing.[32] Posner and Philipson set up two scenarios: First, where a person's test results are given to their sexual partner before the next sexual intercourse through partner-observed testing (where the potential sexual partner observes the test being administered), and second, where the person being tested can keep the test results confidential. They predict that in both cases, the governmental intervention will not necessarily decrease rates of HIV infection and may potentially increase them. Why? They argue that HIV testing increases "potentially infective behavior" regardless of whether the person is negative or positive.

According to Posner and Philipson, partner-observed testing could "increase the demand for risky sex and hence the likelihood that the disease will spread," even if one accepts the assumption that a positive person is eliminated from the pool of potentially infective people. This is because if a person who seeks risky sex tests negative, they will continue to seek risky sexual encounters. They will continue to put themself at risk, potentially contracting HIV. If they test positive and stop engaging in risky sex, there is no increase in risky sex, "but there may not be a decrease given that only one person – the potential partner – received the test results." The intervention, therefore, does not necessarily yield the desirable result of decreasing HIV transmission.[33]

In the case of partner unobserved testing (i.e., confidential testing), Posner and Philipson make an additional assumption: People either act as egoists or altruists. This assumption is necessary because it helps us understand why someone would be tested to begin with. The logic proceeds as follows: An egoist thinks little about the consequences of their action on others and is motivated by accessing "the sexual trade."[34] The altruist gets an HIV test to ensure they are not spreading the virus. After testing negative, an altruist will feel free to have risky sex, but the person they are having sex with might be positive, transmitting HIV to the altruist. An altruist will not have sex if they find out they are positive, and this, Posner and Philipson argue, is a disincentive to getting tested to begin with. The altruist will continue to have sex with a larger group of individuals, some negative, thereby

transmitting HIV to them. If an egoist were to test positive, it likely would not change their efforts to engage in risky sexual behavior. When asked, an egoist might conceal their own status leading to more transmission of HIV.[35] Following from this, governmental interventions around sex were not making things better and may even increase the transmission of HIV.

The ideas pushed by law and economics scholars – that we should think about sex as the outcome of a voluntary bargain here, and that it is possible to have sex as equals – would become a powerful set of ideas in the AIDS response. It comported with the political moment in which the law and economics scholarship would find its stride and purpose: one in which government intervention into issues of health, education, and welfare was de-emphasized and personal responsibility celebrated.

The notion of an equal trade in sex rubbed feminists the wrong way. That sexual partners could freely negotiate sex contradicted feminist claims that women are often coerced into sex due to their structural subordination related to economic and gender inequality. For dominance feminists, sexual domination, which underpinned the logic of the VAW movement, was a key reason that women were contracting HIV, not personal poor choices. They engaged the language of the sex bargain, but reframed the question of choice as coercion. Lawyers and activists writing on the epidemic were quick to point to the gender and power dynamics that may influence women's vulnerability to contracting HIV. A volume published in 1992 by the American Civil Liberties Union (ACLU), for example, highlighted the way gender was understood to play a role in why women contracted HIV:

> Heterosexually active women approach the issue of negotiating sex practices with a partner in a context that is fundamentally different in two critical ways from the situation of gay men. First, two male partners more often bring equal social power to what is essentially a bargaining situation. By contrast, women as a group lack the same social power as men. Many heterosexual women, for financial or cultural reasons, do not have equal power to negotiate behavior changes in a partner. Second, two male partners who alternate positions in anal or oral intercourse stand at equal risk of becoming infected unless they use condoms. In heterosexual vaginal intercourse, however, women are more likely than men to become infected. Thus, men engaging in heterosexual intercourse are at less risk than their female partners of becoming infected, and have less of a selfish motivation to use condoms.[36]

This characterization of heterosexual sex as often unequal mapped onto the sex-subordination idea of feminism that was gaining ground through the VAW movement, and was central to how feminists would begin to characterize sex between men and women.[37] Notice, also, that in this description of sex offered by the ACLU, while women do not have agency, men have the full capacity to negotiate their sexual interactions with each other and with women. In this feminist frame, women are the only ones who are constrained by financial and cultural circumstances.

Posner, and later Posner and Philipson, were aware of and directly engaged in this feminist critique of sex as an outcome of a fair and equal bargain. Take, for example, how, in *Sex and Reason*, Posner acknowledges the deep influence of feminism in the academy and beyond. In the book, he offers a typology of the field of legal "sexology," writing that, on the one hand, there are legal philosophers who think about how the law "ought to regulate sexual and other morals" and are "overwhelmingly polemical, and highly repetitious," and focused on the right to privacy, speech, and the First Amendment.[38] He notes that these legal sexologists are actually not so interested in sex.

On the other hand, there are the feminists. Posner turns to Catharine MacKinnon and Andrea Dworkin, who he notes are two of the leading feminist voices on sexual violence at the time. By the time Posner wrote *Sex and Reason*, MacKinnon had already achieved national fame as a leading voice in the anti-sexual-violence movement. Pornography was one of her chief targets. MacKinnon and Dworkin declared that pornography promoted the eroticization of domination and worked to have it banned. (In the next chapter, we will see how their specific ideas about pornography ballooned in the AIDS response.) Although Posner dismisses much of what MacKinnon and Dworkin say on sexual violence as "hyperbole," he suggests that MacKinnon and Dworkin might indeed have contributed "nuggets of truth" to the broader debate about the sexual objectification and understanding of the devaluation of women.[39]

What he did not acknowledge in *Sex and Reason* – but what Posner and Philipson later take on explicitly in *Private Choices and Public Health* – was the feminist theory that sexual subordination and gender inequality lead women to be coerced into sexual encounters. In response to this, Posner and Philipson argue that if one takes feminists seriously and views society (or patriarchy in the case of feminism) as shaping the capacity to bargain, the entire logic of a rational bargain

comes tumbling down. Rather than coercion, we should see the challenges faced by women as a supply and demand issue.

To make the case that what could be perceived through a feminist lens as coercion in bargaining is an issue of supply and demand, Posner and Philipson use the example of heterosexual relationships and HIV transmission in the Black community. Posner and Philipson argue that Black women are at high risk of contracting HIV because of a supply problem: There are not enough Black men. According to Posner and Philipson, because Black women have fewer options, Black men can demand more risky sex for less compensation to Black women. Or, according to Posner and Philipson, "just by being willing to have a relationship with her."[40]

> Feminists will want to go further and argue that many ostensibly "voluntary" transactions in the sexual market are products of subtle forms of coercion. Our suggestion … that gender inequality in the black community may be a cause of the greater prevalence of AIDS among black than among white women could be taken as support for the feminist position. However, to argue that the low effective sex ratio among blacks "coerces" women to engage in unprotected sex would be tantamount to regarding all market transactions as coerced, since their terms are determined by (among other things) the relative numbers of suppliers and demanders. In any event it would be a mistake to place too much weight on gender inequality as a fact in the AIDS epidemic; women who contracted the AIDS virus in sexual intercourse account for only 5 percent of new AIDS cases and 4 percent of the cumulative number.[41]

By arguing that gender equality is a supply and demand issue and not a power issue, Posner and Philipson evade the subject of a preexisting distribution of power, money, and resources that alters women's bargaining capacity.

Their quote also highlights that Posner and Philipson were working with data on women and AIDS from before the transformation that occurred following feminist activism to change the AIDS definition. As the passage concludes, they suggest that few women are contracting HIV due to heterosexual sex. Yet, as the numbers did begin to change – mainly because feminists had successfully shifted the focus of scientific institutions toward the epidemic among women, and the understanding of heterosexual risk grew – they argued that this did not undercut their argument that women's bargaining position was the result of a supply and demand problem.

By 1995, in East Africa, for example, heterosexual women comprised a significant portion of detected cases of HIV. In writing about the

region in their article "The Microeconomics of the AIDS Epidemic in Africa," they dug in further, stating,

> We argue here that the differences between the course of the disease in the United States and in Africa can be explained by the same mode that we used to explain the behavior of the disease in the United States. Indeed, one part of our analysis – that of the different incidence of the disease in black compared with white women – seems … directly transferable to the African situation.[42]

Again, they argue that the bargaining position of Black women vis-à-vis Black men in the United States is decreased due to the ratio of marriageable Black men to women, suggesting that women have to make a "net transfer" to a Black man to "induce marriage or any other form of long-term sexual relationship." While, in the African context, Philipson and Posner are more willing to acknowledge that "legal disabilities and pervasive discrimination" play a role in bargaining position – a nod toward feminist critiques of women's inequality – they stop short of making the feminist claim that these factors result in coercion.[43]

At odds with their own skepticism about coercion, they prescribe efforts that suggest that they acknowledge that structural issues may play a role in bargaining and suggest that governments ought to make efforts to "lessen the economic inequality between men and women in Africa by reducing the incidence of prostitution and strengthening the ability of women generally to bargain for safe sex."[44]

Scholars and technocrats carried these ideas into institutions. Both feminists and law and economics scholars would see their ideas flourish in the response to AIDS. And in turn, these competing ideas would underpin often conflicting legal and policy positions toward the role of government intervention in the epidemic.

The paths each set of ideas took differed. Posner and Philipson helped launch the field of economic epidemiology. It shifted policy discussions from studying behavior to using incentives to alter people's behavior. Although there are many examples of the domestic and global reach of Posner and Philipson's book on policy, one stands out: the 1994 World Bank report on AIDS titled *Confronting AIDS: Public Priorities in a Global Epidemic*. The World Bank report is pivotal because the lending institution's proposals on the rule of law and legal intervention are taken seriously by countries that have received loans from the bank. In this report, the bank describes how

governments might intervene in the AIDS epidemic to overcome the health crisis. The report draws an enormous amount of inspiration from Posner and Philipson. Quoting almost directly from the book jacket of *Private Choices and Public Health*, the World Bank report begins:

> Most things in life entail some risk, yet people willingly take risks when they perceive that the benefits of an action outweigh the costs. For example, drivers speed and pedestrians dart across busy streets, despite the increased risk of injury or death. People start smoking although they know it might lead to lung cancer and heart disease. Sometimes risk enhances pleasure. Mountain climbers scale the Himalayas, their thrill perhaps intensified by the danger they face. All of these decisions reflect individual preferences and an assessment of costs, benefits, and risks. Sex and injected drugs offer very intense if short-lived pleasure. *Do individuals also weigh costs, benefits, and risks when deciding whether and how to engage in these activities? Fortunately for efforts to slow the epidemic, the answer is yes.* A substantial body of economic research, much of it in developing countries, has shown that actual and perceived costs and benefits, some of which can be affected by government policies, significantly influence private decisions about marriage, childbearing, and contraceptive use. It is therefore reasonable to assume that sexual behavior that spreads HIV can also be influenced by public policy. Similarly, studies have shown that under the right conditions drug users change their injecting behavior to reduce the likelihood of being infected with HIV.[45]

Notice the emphasis on individuals who make voluntary and willing choices to protect themselves in an epidemic. This theme, recurrent in the work of law and economics scholars, fits within the broader ideological leaning of the World Bank and the growing perspective that personal responsibility should underpin the way the government intervenes in social programs, from health to housing and beyond.

The core idea taken up by law and economics and transported into public health was that of incentives. Treating sex and other decisions that could impact public health as a rational outcome of a cost–benefit analysis (as described by the World Bank above) meant that behavior change could be incentivized. In other words, with the idea of "economic epidemiology," Posner and Philipson changed the way one could look at public health by not simply focusing on the spread of illness but on the incentives to alter the course of an individual's

choice. Applied to AIDS, if Posner and Philipson were correct, incentives should change the cost–benefit calculation that people engaged in around risky sex. This meant a greater focus on individual "risk factors," including the behavior of one's sexual partner, that could be altered through incentives.

Implicit in this is a critique of epidemiology. By studying groups of people to understand population-level health, epidemiology takes attention away from the way individuals make decisions about their health. In turn, there is a failure to recognize how incentives and information shape people's choices, and, in turn, their health. By centering on the rational individual, Philipson and Posner argue that one can treat the decisions made during the AIDS epidemic in the same way as decisions made in any other market context that economists study. They argue that a person who is contemplating sexual intercourse, or sharing a hypodermic needle, takes "optimal measures to adjust to the risk of infection."[46]

Following this logic, a new set of epidemiological experiments were set into motion involving economic incentives, giving people money in exchange for a behavior change. An incentives-based public health approach made sense if the root of most behaviors was rational.[47] The World Bank among other institutions took this approach seriously – interrogating its merits through a series of papers and reports. This mode of study, where populations were divided and studied with regard to incentives, was nascent in this time period, but would take on force with the rise of behavioral economics in the 1980s and 1990s. The core ideas that focused behavior change on incentives and choice would be revolutionary, altering the fields of public health and beyond.[48]

Like law and economics scholars who thought the idea that a sex act is the outcome of rational actors conducting a cost–benefit analysis could be applied universally to explain sex, feminists, too, relied on the narrative of the sex bargain to make a shared claim of women's subordination across race, context, and class. As the idea of the sex bargain took hold, it erased the notion that aspects of sex, marriage, and family might have local cultural dimensions.

Feminists sought to have the sex-subordination frame achieve status in both US and global governance responses to HIV. For feminists who understood the AIDS epidemic among women to be the outcome of sex subordination and sexual violence, the idea that women be held responsible for abuse and victimization was an

incorrect way of resolving the issue of transmission of HIV between men and women. Ending sexual violence would require more government intervention, not less. For feminists who believed that women lacked the power to negotiate condom use, for example, public health interventions which, for example, left condoms out on a table for women to convince their partner to use were nearly useless without any structural intervention into the actual bargaining arrangement between men and women. These acts of sex in which women could not negotiate condom use had to be seen as what they were – acts of violence in which women could not consent to the sex that they wanted. In other words, while law and economics scholars emphasized the "private choices" aspect of negotiating sex, feminists sought to tear down the public/private distinction to allow the state into the home to alter how women were positioned there. They did so by proposing numerous ways governments could and should extend intervention into the home to shift the ability of women to bargain about sex and other areas of family life, including care work, in the context of their marriage.[49]

Feminism was also transforming epidemiology, and by the 1990s, a new subfield was taking shape: feminist epidemiology.[50] Feminist epidemiologists were interested in exploring questions of gender in the study of public health. Some specifically began to interrogate the relationship between sexual violence, gender inequality, and women's risk of HIV. Could feminists prove empirically that VAW bore a causal relationship to women's risk of contracting HIV? Drawing on dominance feminist arguments, epidemiologists set out to explore whether there was a causal relationship between sexual subordination (i.e., sexual and intimate partner violence) and HIV transmission. Given that the epidemic was ultimately a public health crisis, the idea that there could be empirical and scientific proof of causal links between behaviors and HIV transmission (or interventions and HIV prevention) had specific importance.

In the public health response to AIDS, which faced numerous funding shortfalls, greater attention and resources would be devoted to gender equality and ending VAW if there was indeed an empirical link. And, it would prove that men – channeling the patriarchal norms that drove them – were implicitly and explicitly responsible for the spread of HIV to women, given power differentials in sex.

By the mid to late 1990s, epidemiologists began to publish papers that described the connections between sex inequality, violence, and

HIV from an empirical and public health perspective. The growing scholarly and epidemiological literature on women and AIDS introduced the idea that women were at risk for numerous reasons, including "sex roles, social conditions, and socioeconomic conditions."[51] Many of these ideas were generated from US-based studies and advocacy.[52] An article in *Social Science and Medicine* in 1992, for example, makes female control of sexuality central to the success of behavior change programs in the context of HIV prevention in sub-Saharan Africa. The author states: "Control is thus an important dimension of women's power. Lack of access to, and control of, resources for decision-making, particularly in the sexual relationship, appears to be one key to the vulnerability of women and children in the AIDS epidemic."[53]

Epidemiologists also began to draw out links hypothesized to increase women's risk of HIV. First, through "forced or coercive sexual intercourse with an infected partner," second, because intimate partner violence may limit an ability to "negotiate safe sexual behaviors," and, third, by identifying "a pattern of sexual risk-taking among individuals assaulted in childhood and adolescence."[54] According to these studies, intimate partner violence, sexual harassment, and sexual coercion are endemic in women's lives and shape a woman's ability to negotiate when to have sex and advocate for condom usage.[55] Studies showed strong associations between intimate partner violence and rates of HIV. And, in turn, a new settlement on the issue of VAW and HIV emerged: that there is an association between the two – that women living with HIV have higher reported rates of violence, and that violence places women at an increased risk of HIV.[56]

In keeping with this perspective, nearly all of the studies at the intersection of violence and women's risk of HIV during this period called for an increased focus on VAW in the AIDS response. Following these studies, and the push by activists to take VAW more seriously, in 2000, the World Health Organization called for increased research on the intersection of violence and heterosexual HIV transmission, while deepening programmatic work on the linkages between gender, violence, and HIV transmission.

For feminist advocates, the epidemiological question had high stakes.[57] Showing that there was a connection between VAW and HIV transmission would route more public health money into a cause that was being treated as external to the HIV response. This challenged the assumption that HIV/AIDS funding and programming should prioritize getting medication to those people who had HIV or AIDS over

prevention programs. And, within prevention advocacy, there was yet another fault line: Should prevention dollars be spent narrowly, say, on condoms, or more broadly, to address the social determinants of health that resulted in vulnerability to HIV transmission? These social determinants of health, according to those advocating for a broad understanding of prevention interventions, should include addressing gender-based violence and remedying other forms of gender inequality. For feminists, the narrow approach to prevention, which meant simply giving women condoms, ignored the issue of unequal bargaining power in sexual relationships. How were women to insist on condoms, feminists argued, when they couldn't control when and how they were having sex?

While this book does not extensively track the shifts in biological science, it is relevant to note the evolution in scientific research that contributed to the idea that women were particularly vulnerable to HIV, especially in moments of violence.[58] In other words, as victims, women's bodies were now a site of vulnerability to harm, and biological research into AIDS reflected this new thinking. Scientists began to hypothesize that the increasing numbers of women with HIV may be rooted in biological differences between men and women and established that viral contact with the cervix and vagina often resulted in greater exposure to a virus, and an increased likelihood of transmission from a man to a woman rather than in reverse.[59]

Soon, far from the popular perception from the 1980s that women might be resistant to AIDS, many began to conclude the opposite: that women were more vulnerable to contracting HIV. The idea that women were more biologically vulnerable to HIV quickly gained momentum as an additional explanatory force in terms of the rapid increase in diagnoses among women. By 1995, a publication of the Royal Tropical Institute, South Africa AIDS Information Dissemination Service, and the World Health Organization contained a section titled "Physiological Vulnerability" which exemplifies how the *biological* vulnerability of women to HIV would be described in the decades to come:

> 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.[60]

Furthering the idea that it was sexual violence that compounded the effect of biological vulnerability was new research suggesting that vaginal abrasions caused by rape, particularly in young women, further increased biological susceptibility to the virus. A new idea took shape: that women were physiologically and socially more vulnerable to HIV than men.

These epidemiological and biological ideas about women's vulnerability to HIV helped justify legal interventions to stem VAW. Feminist ideas began to make a greater appearance in the growing range of national and international law and policy documents on gender and HIV. The Beijing Conference Platform for Action exemplifies the influence of feminist ideas in global governance on HIV. The agreement, adopted by 189 countries, reflected feminist sex-subordination perspectives in speaking directly to connections between violence and discrimination against women and the spread of HIV. The document itself exemplifies the points above. It proposes a single story about women's risk of HIV, demonstrates the rise of sex bargaining through a discussion of power imbalances in the context of safe sex, and solidifies the idea that sexual violence drives women's risk of HIV and that there should be intervention into the home to remedy these issues:

> HIV/AIDS and other sexually transmitted diseases, *the transmission of which is sometimes a consequence of sexual violence*, are having a devastating effect on women's health, particularly the health of adolescent girls and young women. They often do not have the power to insist on safe and responsible sex practices and have little access to information and services for prevention and treatment. *Women, who represent half of all adults newly infected with HIV/AIDS and other sexually transmitted diseases, have emphasized that social vulnerability and the unequal power relationships between women and men are obstacles to safe sex, in their efforts to control the spread of sexually transmitted diseases*. The consequences of HIV/AIDS reach beyond women's health to their role as mothers and caregivers and their contribution to the economic support of their families. The social, developmental and health consequences of HIV/AIDS and other sexually transmitted diseases need to be seen from a gender perspective.[61]

By 2001, the United Nations General Assembly had held the first of three Special Sessions on HIV and AIDS. The declaration that emerged acknowledges women as a risk group for HIV/AIDS and highlights the role of gender inequality.[62] The declaration stresses "that gender equality and the empowerment of women are fundamental elements in the reduction of the vulnerability of women and girls to HIV/AIDS."[63] A recommendation calling for addressing gender inequality follows: "Ensure … reduction of their vulnerability to HIV/AIDS through the elimination of all forms of discrimination, as well as all forms of violence against women and girls, including harmful traditional and customary practices, abuse, rape and other forms of sexual violence, battering and trafficking in women and girls."[64]

And, in 2005, *Science*, the peer-reviewed journal of the American Association for the Advancement of Science, published an article on women and AIDS highlighting both the social and biological factors contributing to women's vulnerability:

> *Social determinants of female vulnerability to HIV-1 include gender disparities, poverty, cultural, and sexual norms, lack of education, and violence. Women are also more susceptible to HIV-1 because of hormonal changes, vaginal microbial ecology and physiology, and a higher prevalence of sexually transmitted diseases*. Prevention strategies must address the wide range of gender inequalities that promote the dissemination of HIV-1.[65]

A new idea applicable to women around the world had taken shape: that women are biologically and socially more vulnerable to HIV than men due to violence.[66] The idea collapsed difference and location, and emerged as a universal idea of risk and vulnerability.[67] This idea was exemplified by a 2006 Center for Women's Global Leadership (CWGL) statement that said "women are facing a catastrophic assault on their bodies, rights and health as a result of the prevalence of both HIV and the unrelenting omnipresence of VAW on a global level. Each constitutes a crisis on its own. Yet, in the lives of thousands if not millions of women, these crises are not separable; they are fundamentally linked."[68]

From the perspective of feminists, CWGL's idea represented a new common sense in how and why women were at risk of contracting HIV: heterosexual sex. Given the gains made in fighting VAW, feminists were able to isolate one bad actor in the sex bargain: the man. Law and economics scholars were also focused in on

the individual. Without worrying about the background political, economic, and legal issues that could result in power differentials, law and economics scholars zeroed in on the sex bargain as the outcome of two equal individuals. Together, law and economics scholars and feminists directed attention to the individual in the AIDS response through the sex bargain. Both these impulses fit within, and helped cement, a larger ideological shift taking place in public health: toward the individual and away from structural and social determinants of health.

The Consequences

Individual Responsibility, the Carceral Response

The shifts in thinking inside public health and international financial institutions, attendant to law and economics, and the feminist attention to the sex bargain, catapulted the idea of individualism forward in the AIDS response. To be sure, some feminists had also long advocated for more attention to structural issues facing women, from poverty alleviation and property rights to welfare reform and addressing issues of race and class. But the individual responsibility frame for AIDS, bolstered by the idea of the sex bargain, fit neatly into the broader social and political moment of the 1980s, described in detail earlier in the chapter, in which social services were contracting alongside an expansion of criminal law.[69]

As has now been shown in a vast scholarly literature on feminism and the carceral state, feminist perspectives that rose to the top of feminist organizing were those whose views aligned with a steady turn away from structural solutions and toward the criminal justice system as a means to end sexual violence.[70]

Some dominance feminists believed that the failures of AIDS interventions could be attributed to the inability of women to negotiate safe sex or to counteract cultural constraints on men's willingness to utilize barrier methods like condoms. They fixed attention on women as victims of the epidemic. HIV became an opportunity to recast two issues – VAW and HIV – into a simplistic criminal law model, which attempts to fix social problems through a reductionist approach that describes the world in terms of "bad actors" and "aggrieved victims."[71] HIV became yet another reason for the public health response to focus on individual behavior change in development programming – whether through carceral or other means – and avoid the more complicated,

structural, political, and economic forces that shape health outcomes. This is exemplified in a report by Human Rights Watch on Uganda:

> The accounts in this report reveal that Ugandan women are becoming infected with HIV, and will eventually die of AIDS, because the state is failing to protect them from domestic violence … Human Rights Watch interviewed Ugandan women who confront an environment that sustains unequal power relations, contend with persistent societal pressure to tolerate violence, and whose husbands and extended family routinely subject them to coercion and emotional abuse … Women were also powerless to protect themselves from infection and were unable to access HIV/AIDS services because their husbands physically attack and intimidated them, and did so with impunity … the Ugandan government has failed in any meaningful way to criminalize, condemn, or prosecute violence against women in the home.[72]

The framing offered by Human Rights Watch requires understanding that women are passive recipients of sex with little to no ability to control or have agency in their own sexuality.[73] Individual responsibility – or in the case of the feminist frame, male responsibility – fit with the larger political moment. As the sex bargaining frame took hold, it was quickly absorbed into a nonstructural response to HIV, just as the VAW women's movement had been. The convergence deepened the push for criminal liability for HIV transmission. The 1994 Violence Against Women Act, for example, called for a revision of sentencing guidelines that "relate to offenses in which an HIV infected individual engages in sexual activity if the individual knows that he or she is infected with HIV and intends, through such sexual activity, to expose another to HIV."[74]

Combined with the push for criminal liability for gender violence, individual responsibility became key to understanding how to address the epidemic among women. In other words, it holds individuals, not institutions, accountable for women's vulnerability to HIV.

For feminists, the fight to maintain the victimhood of heterosexual women in the epidemic, and in turn the idea of a passive female sexuality as the foundation for feminist HIV interventions, often displaces a counternarrative that women can possess sexual agency. Positing women as victims of an exploitative heterosexuality requires us to frame men as enacting masculine patriarchal violence. Men are the primary mode of transmission between sex workers and wives and from girlfriend

to girlfriend. Put in the language of dominance feminism, men, in living the privileges offered by patriarchy, become perpetrators in the spread of HIV. As reflected in the quote from Human Rights Watch, this gendered and often racialized trope, now about men, circulates widely in advocacy and journalistic accounts documents.[75]

As mentioned above, and discussed in detail in the next chapter, the criminal law focus encountered resistance and was not universally celebrated by feminists. By the late 1990s, many women's advocates, primarily women of color emerging from organizing on prison abolition, voiced skepticism about using criminal law to address violence in society. Scholars called for a turn toward redistributing social and economic goods and legal interventions that supported transformation over those that did not transfer material resources to battered women.[76] US organizations including Critical Resistance and INCITE!, both working on issues of communities of color, the former with regard to prison abolition and the latter on VAW, galvanized support for rethinking the use of criminal law while acknowledging tensions in progressive engagement with legal reform. They had limited success in pushing a critical perspective forward.[77] In a contest between feminist ideas, feminist groups critical of carceral approaches, many of whom were led by women of color, failed to gain traction in the 1980s and 1990s.[78] Instead, it was feminists and feminist ideas aligned with the pro-carceral perspective that reigned in the broader political discourse of the 1980s, that gained institutional and rhetorical power. The tensions between feminists, especially those around sexual agency, would come to travel through the AIDs response.

Another feminist position that directly challenged the dominance feminist sexual subordination frame also emerged in the 1980s, attacking the feminist idea that seemed to treat sex as largely heterosexual, dyadic, and hegemonic. Critical feminists, known now as pro-sex or sex-positive feminists, sought to understand the more complicated set of experiences around sex, including the mix of "pleasure and danger" that might drive a sexual encounter.[79] The basic idea that animated sex-positive feminism was that women might see or have experiences of pleasure in domination; that sex was not solely a site of subordination, but could be a site of agency and power.[80]

As the late 1990s approached, however, these critical feminist positions gained momentum with the public health evidence showing that anticarceral and pro-sex public health interventions were having real world impact in reducing HIV transmission. Detailed in the

next chapter, these feminist disagreements would quickly shift into the AIDS law and policy world with life and death consequences.

Silencing of Dissenting Feminisms

In the context of AIDS activism, a universal narrative about women's risk had taken hold: Women were at risk due to violence, more specifically, sexual violence.[81] American feminists played a uniquely powerful role in crafting narratives of risk and vulnerability in the context of AIDS and sexual violence. The collapsing of global and local concerns into a master narrative about women's experiences with violence and AIDS did not go without cost to other competing feminist ideas and thus generated internal feminist critiques. I highlight two here.

The first grew outside of the AIDS context but held fast even in the context of public health. This was a feminist critique of a universalized narrative about women's lived experiences. While for some feminists the potential power of strategic alliance across country and culture is worth the costs of collapsing local difference for a global story, for others, there was a deep need to critique the universalization of women's experiences because of the stories and life experiences it masked.

The critique of universalization of a master narrative about women came largely from activists of color in the United States and the global south, critical race theorists, and scholars of Third World approaches to international law (TWAIL), who took on what was perceived to be an essentialist narrative about women's experiences. For TWAIL scholars and American critical race theorists, universalizing women's experiences came with costs. For Vasuki Nesiah, a leading TWAIL feminist scholar, for example, the foregrounding of gender issues came at the expense of other structural concerns that could be shaping women's lives. In a critique of MacKinnon, she calls out the overreliance on MacKinnon's "identification of oppressive features of women's lives across the globe – 'rape, domestic battery, and pornography'" which are then "used to frame the universal 'realities of women's condition.'" Nesiah highlights that the American feminist project in particular, in its attempts at universalization, has "complicity in masking global contradictions" by insisting upon the "universalization of female oppression." Underlying this critique was the idea that first-world feminists, primarily American feminists, often did not consider these wider structural concerns of third-world women. American legal scholar of race, Angela Harris, similarly argues against the essentialization of women's experiences in feminist legal theory. Critiquing legal scholars who paint

a picture of universal and abstract ideas of feminism, she criticizes the essentializing of women's experiences, which inevitably leaves behind the complexity of women's experiences and silences some voices.[82]

The masking of complexity had life and death consequences in the AIDS context. Two examples demonstrate this. The first takes us back to the early days of the epidemic, as feminists began to narrow their agenda on women and AIDS to ending sexual violence and discussed it as a universal experience. But it was not the only risk factor women faced. The experience of African American women in the early part of the epidemic demonstrates how a universalized story about violence betrayed their experience. First, as African American women began to test positive at higher rates, one risk factor was the high rates of incarceration of African American men and women which led to higher rates of HIV, given transmission in prison.[83] This, in turn, led to community transmission as those released from prison had sex with others. Yet, most reproductive rights organizations largely did not take up the issue of HIV or incarceration. Second, as Cathy Cohen demonstrates in her work, injection drug use turned out to be a high-risk factor among communities of color, including women, early in the epidemic. (This also turned out to be the case in Eastern Europe and Russia.)[84] The dominance of the VAW narrative, however, created a blind spot: Missing from the agendas of most American feminist groups was the issue of incarceration in communities of color or of harm-reduction. To the contrary, there was a call for greater incarceration, lending support to the war on crime.

Feminist dissenters also noted that structural fixes were lost to the individualist focus of the AIDS response.[85] For these feminists ending coercion in bargaining required altering the bargaining endowments of women determined by the broader legal environment. These included what we think of as structural fixes: property and inheritance rights, labor protections, and the ability to contract in the market. But this was not the legal and programmatic work that lined up with the broader social and political moment, which had silenced these broader reforms in deference to a narrower mandate.[86]

Voices called for a broader perspective, including those from the Black women's health movement and AIDS movement. Activists raised concerns about systematic issues in public health that resulted in the loss of life for women – from the failings of maternal healthcare to infant mortality. In the context of AIDS, activists made connections between inequality and health outcomes, including the contributions

of housing instability and lack of nutrition to contracting and dying of HIV faster. Yet, discussions about the deep structural change necessary to truly transform a woman's ability to seek adequate healthcare faded into the background, as the individual and her own capacity to take responsibility for her own health came to the fore.

The focus on sexual violence, as described earlier, aligned with the focus on the individual, at the cost of a focus on structural solutions in keeping with the broader ideological moment. In a competition between feminisms, and the feminists themselves, those willing to take on an ideological project that prioritized individual responsibility gained power and legitimacy in the AIDS response.[87]