# The Rhetoric of RISK

*Nicki Greenberg*

***A dialogue about HIV, sex workers and the law.***

## The players

*Nadja:* a law student and part-time sex worker, 23 years old.

*Roger:* a physician specialising in infectious diseases, 49 years old.

## The scene

A summer afternoon in the year 1999. The Liberal Party has just been voted out of Government in Victoria — but not before securing the passage of the new *Crimes (HIV Exposure) Act 1999.* Roger has decided to treat himself to a little post-election consolation in the form of an afternoon with Nadja. They have not met previously, but the receptionist at Satin Nights has assured him that Nadja will meet his expectations.

We join Nadja and Roger in a large rumpled bed at Roger's place. The interior is tasteful but expensive, and sunlight and garden views stream in through the French doors. Evidence of an absent wife is apparent — there are twin bedside tables, one laden with books and jars of moisturiser, a pile of women's shoes tossed in one corner, photographs of smiling family on the dresser. Nadja's satiny black evening dress, stockings and shoes are strewn around the bed.

## The rules of the game

***1. The Crimes (HIV Exposure) Act 1999 (Vic.)***[1]

Based on the provision proposed in September 1996 by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC/SCAG), the new Section 19B of the *Crimes Act 1958* provides that:

(1) A person who places another person in danger of contracting HIV
  (a) intending that the other person contract HIV; or
  (b) being reckless as to whether or not the other person contracts HIV,

is guilty of an offence.

Maximum penalty 10 years imprisonment

(2) A person places another person in danger of contracting HIV if the person causes the other person to be exposed to an appreciable risk of contracting HIV, even if the risk is low.

***2. The Prostitution Control Act 1994 (Vic.)***

s.20 *Prostitute working while infected with a disease*

(1) A person must not work as a prostitute during any period in which he or she knows that he or she is infected with a sexually transmitted disease.

Penalty: 20 penalty units

(2) If it is proved to a court that a person worked as a prostitute during a period in which he or she was infected with a sexually transmitted disease, he or she must be presumed to have known that he or she was so infected unless he or she proves that at the time the offence is alleged to have been committted

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The dialogue form has been used here in order to emphasise the way that theoretical and legal constructions may impact on individuals, as well as allowing for a more direct and varied style of argument.

The character of Nadja is used to present the writer's own points of view.

The structure used to explore these arguments differs from that of a more conventional essay in that the flow of analysis is forced to take sharp bends and unexpected turns as it encounters challenges and comments from Roger.

There can be no clear beginning or end in any real conversation — particularly with a word limit — and I hope that the debate is continued in the reader's own mind well past the final page.

All characters are fictitious. They are not intended to resemble particular 'real' people, nor are they designed to function as representatives — let alone stereotypes — of their professions, ages or genders.

I chose to set this piece in the future to provide a scenario where the recently proposed Serious Disease laws (see ref. 1) could be imagined in operation. There is as yet no indication that Victorian Parliament will pass this type of provision; however, there has been considerable pressure to do so in the wake of Justice Teague's decision in *R v Beckley* (an unreported 1995 decision of the Supreme Court of Victoria). See Magazanik, Michael, 'Should HIV partners have to tell?' *The Sunday Age*, 8 September 1996.

(a) he or she had been undergoing —

(i) regular blood tests, on at least a quarterly basis, for HIV (as defined by s.3 of the Health Act 1958) and each other sexually transmitted disease for which blood tests are appropriate; and

(ii) regular swab tests on at least a monthly basis, for the purpose of determining whether he or she was infected with any other sexually transmitted disease; and

(b) he or she believed on reasonable grounds that he or she was not infected with a sexually transmitted disease.

## The intercourse

**R:** *You know, with the risk of AIDS being what it is, I'm amazed that a girl like you would choose to enter the profession...Still, it looks like they've passed those new HIV exposure laws — and a good thing, I'd say. It's amazing how irresponsible some people are — some of the ones who come to me for their test results, well, they're into bed with the next thing that comes along — no qualms at all about passing it on...*

**N:** I can't say that I'm quite as enthused as you are about those provisions. And I certainly don't believe that they might offer me any sort of protection. As a substitute for traditional reckless endangerment laws they leave a lot to be desired. Of course, the traditional provisions are far from satisfactory in any case — they're almost impossible to apply[2] — but that doesn't mean that these new laws are a vast improvement.

These HIV laws differ from the traditional reckless endangerment laws[3] in two significant ways: first, they relate specifically to HIV, and second, they broaden the concept of danger or risk. Under the traditional 'conduct endangering life/persons' laws, the risk of death or injury had to be 'appreciable' — both in terms of objective probability and the accused's subjective knowledge of the risk. And that was a concept that caused enormous amounts of confusion, particularly in HIV exposure cases where even the experts couldn't accurately assess the risks involved.[4] These new laws have tried to get around the problems of risk assessment by adding a corollary to the appreciable risk rule: 'even if the risk is low'. In my opinion this strategy fails to engage in any really useful analysis of risk or responsibility — it simply makes obtaining a conviction easier.

**R:** *Look, the fact is that we doctors can't as yet precisely define the probabilities — the risks — involved in a situation like a sexual encounter. But then we can't give an exact assessment of the risks in almost any real life situation. And that doesn't mean that we should treat it as acceptable when one person exposes another to that kind of risk. The law isn't based on fiddling around with probabilities — it's about punishing those who act in a blameworthy or dangerous way.*

**N:** I'd have to disagree with you when you say that these laws are not based around risk analysis, but on 'dangerous behaviour'. The concept of dangerousness itself is understood by the law in terms of probability of harm. The behaviour is judged as 'unacceptable' on the basis of the level of risk that you engender, the seriousness of the harm that you could cause and finally, your own comprehension of that risk and that harm.[5] So I don't think you can approach HIV exposure under these laws without getting tangled in some sort of risk analysis. What concerns me is not so much that behaviour involving a lower level of risk might trigger criminal liability, but the way that risk is conceptualised and constructed.

One of the major problems as I see it is that faced with the impossibility of accurately assessing risk in HIV exposure cases, we are left with an understanding of risk that is based on stigmatising certain supposedly 'risky' groups. But more fundamentally, we are rooted in a concept of risk which involves setting up the participants in a sexual encounter in the rigid roles of 'risk creator' and 'risk receiver'. Not surprisingly, this resembles the active-encroaching/passive-receiving construction of sex.

**R:** *Risk creator and risk receiver? Well, that seems fair to me. If 'X' has HIV and his partner, 'Y' doesn't, then surely X is creating a risk that is received by Y. Y is certainly not creating any risk for X. What are you getting at?*

**N:** I'm suggesting that risk cannot be so neatly allocated in the circumstances of a sexual encounter. See, you're taking certain risks when you have sex with me, aren't you? You don't know precisely what those risks are, or how they might be realised. But in every sexual encounter there are risks — health risks, emotional risks — there could even be risks of a personal, professional or social nature...For example, your wife could catch an earlier flight and walk through the door in two minutes time. That is a risk that you choose to take.

The fact that you choose to run this and other risks is very significant — it demonstrates your agency, and therefore your responsibility — for what happens to you.

What interests me is the way that risks pertaining to HIV are differently conceptualised. Unlike the other risks which may be involved in a sexual encounter, the risk of HIV infection is conceived of as an allocated risk. What I mean by 'allocated' is that the risk is not seen as a part of the sexual scenario — something imbued in the interaction of two (or more) people. Instead, one person is designated as the 'risk creator' and one as the 'risk receiver'. There is no recognition of the complex interplay of wills involved in the situation. The person with HIV, or the person who, whether they have HIV or not, is constructed as an 'HIV suspect' — someone like me who is commonly (unfairly) viewed as an agent of danger and disease — is from the outset positioned as the risk creator. By virtue of my HIV status, whether actual or presumed, I am attributed a malign motive — to expose others to danger — even where this is not my intention. And you, the 'unsuspecting innocent', the risk receiver, are imagined as passive, with no directional power. Because all control of risk in this encounter is assigned to me as the HIV suspect, you, the passive 'victim' are then conceptualised as having no control or agency in the encounter. We both know that the realities — and I'm using the plural very deliberately, because there can hardly be a single, objectively shared perception of a sexual encounter — are far more complex than that.

**R:** *OK, I understand what you're saying. The person with the virus is allocated a greater responsibility, and I would say rightly so. But I don't believe that this puts you as a, um an escort in a different position from me vis a vis the law. Take our 'encounter', as you put it, this afternoon. Either of us could theoretically have HIV. The condom could have broken, and either of us could have knowingly or unknowingly exposed the other to the virus. If I were positive and you weren't, your chances of contracting the virus would in theory be higher than mine would be, were the situation reversed. Of course, as we discussed earlier there are too many variables to give a really accurate risk assessment, but the virus can be more effectively transmitted to a woman through vaginal intercourse than to a man. Now as I understand it, endangerment laws could apply equally to you or to me. And given the fact that you would in theory be exposed to a greater degree of risk than I would, perhaps the laws would be more successfully applied to me. I don't see how your position with regard to any sort of HIV exposure laws is any different to mine, simply because you work in the sex trade. Surely our responsibilities are the same.*

**N:** Yes, excised from their social context, these laws might appear to be utterly impartial — you're right — they look as if they would apply equally to anyone. But I think that it's very naive to suggest that the law does in fact work this way. The legislation has a built-in potential for bias in that it contains no requirement that the person charged *knew* that he or she had HIV. It would therefore be possible for the prosecution to argue recklessness based on *constructive* knowledge — in other words that the accused knew or *ought to have known* that she or he was HIV positive — because this is the inference that a reasonable person would have drawn under the circumstances. The danger is obvious — are we going to say that anyone who falls into a statistical 'risk group', or anyone who has engaged in particular activities should presume themselves to be HIV-positive and therefore potentially criminally liable when they have sex? Will a gay man, for example have to presume that he puts his partner at risk where a heterosexual man does not? This sort of approach was taken in the US case of *Cooper v State of Florida*.[6] Couldn't it happen here too?

I would also dispute the impartiality of these laws when applied to HIV exposure on purely practical terms. How many men do you think have been prosecuted for exposing a sex worker to HIV? I can tell you that having scoured the journals and cases from Australia, the US and Canada I couldn't find a single one. That doesn't mean that there haven't been *any* prosecutions of course, but I think we're safe in presuming that very, very few cases of this type have arisen.

As for sex workers being prosecuted for continuing to work when HIV positive, there have certainly been plenty of cases — take a look at the detailed survey by Minouche Kandel[7] of female sex workers processed by Boston courts, and you'll see that sex workers are viewed as a public threat. One judge even recommended posters being put up saying 'Prostitution = Death'. Sex workers are being prosecuted not only under endangerment laws but also under HIV-specific and prostitution-specific statutes. I even found another Florida case — *State v Sherouse*[8] — where a woman was charged with attempted manslaughter for continuing to work on the street after testing positive. The charge was dismissed on appeal because there is actually no such thing as 'attempted manslaughter'. The judge did say though that had she been charged with attempted *murder*, she might well have been convicted.

These prosecutions are happening despite the fact that there is no conclusive evidence that sex workers in the US are transmitting HIV to their clients. Similarly in Australia, according to two Sydney studies[9] you don't have a situation where sex workers pose a threat to public health.

So why are sex workers being monitored and prosecuted in relation to HIV but their clients are not? I'd say there are a number of reasons. On the simplest level, it's generally a lot easier to track down a sex worker than his or her client, whether they work on the street, from home or from a registered brothel. We are heavily regulated when we're legal and under heavy police scrutiny when we're not. You, on the other hand can visit for half an hour and then drive away and no-one knows if you've ever been there at all. Also, it would ordinarily be very difficult for a sex worker to isolate instances where she or he is exposed to HIV. We take precautions, we can sometimes turn away a guy we don't like the look of, but that's it.

**R:** *Well, I don't mean to sound callous, but isn't that just an occupational hazard? You've chosen to work in a job where you are potentially exposed to this risk every time you see a client, so really you're accepting that any customer could be HIV-positive and that you're going to need to do what you can to minimise the risks.*

**N:** Wait a minute. You say that since I have chosen this kind of work, therefore I have implicitly consented to a risk of exposure to HIV. Now, why does that rationale not seem to apply to my customers as well? I am expected to be responsible for my own protection, yet I am expected to bear the responsibility for *your* protection too. If the risk of HIV is seen as my 'occupational hazard', why is it not equally seen as *your* 'recreational hazard'?

The onus is firmly on me as the sex worker — and this is amply demonstrated by legislation like the Victorian *Prosti-*

sex with me, you have the right to expect a higher standard of 'safety' than I do. Meanwhile I am supposed to approach the risks that *you* might pose to *my* health as an 'occupational hazard', to use your words. You see, you are allowed — no, you are encouraged — to demand certain assurances of me which I cannot expect from you in return. I cannot expect any assurance that any of my clients will be free of diseases, clean, considerate or non-violent. The bottom line is that I have not paid them, and therefore I have not purchased that right. But if we were to treat this situation realistically, perhaps I should be the one demanding greater protection — I'm exposed to more — and more serious — risks a dozen times a week!

As I see it, the essence of your view is that rights are available only to those who have 'rights bearing' status,

*tution Control Act 1994.* Under section 20 of that Act I am prohibited from working if I know that I have HIV/AIDS, regardless of what precautions I take. I can't just use condoms or restrict my business to masturbation, oral sex, fantasy play or other safer sex variations. If I am positive, I am barred from the profession, so to speak. And even if I am *not* aware that I have HIV, if I am proved to have been working when infected then I must be *presumed* to have known of my condition unless I can prove that I've been having at least monthly checkups and blood tests, and have 'reasonable grounds' for believing that I wasn't infected. Reasonable grounds! Anti-discrimination laws prevent employers in other industries from refusing to hire someone who is HIV-positive. You can work in practically any field you choose, and rightly so. You can play a contact sport or work as a dental technician or whatever. But you can't have any involvement in the sex industry. Given that studies show that we are not a threat, this seems to be a panic-driven overreaction.

**R:** *Look, I don't think that it's an overreaction at all. When I called your agency I certainly had the expectation that the girl they sent me would not have HIV — or anything else for that matter. I'm an infectious diseases specialist — I know enough about the transmission of this virus to realise that even if you definitely were positive my chances of contracting HIV would be extremely low. And with condoms they'd be practically nil. But I am simply not willing to take any risks of that nature whatsoever. If your employer were not able to ensure me a healthy um — partner, I would choose a different agency. As a paying customer I believe that I have a right to some sort of 'minimum standard' in the goods and services that I receive.*

**N:** So what you are saying is that because you have outlaid money for this sexual encounter you deserve a guaranteed measure of protection. And because you have *paid* to have

and this status is conferred only on persons who are economic players. I am treated not as a *person* who provides a service, but as an economic good — an object of trade. And it is only *people* who have rights, not goods! If I get sick, I have become 'dangerous goods' and must be removed from circulation.You, on the other hand are a consumer in this market. And unlike me, your trading chips — money — are recognised as separate from your person. You can therefore use them to purchase a service, complete with customer guarantee. And coming back to the question of equality under HIV laws, I think it's quite obvious that if we are not entitled to demand equivalent rights to protection, then we are certainly not going to be equals under a law designed to protect rights to bodily integrity and safety.

**R:** *Look, I've heard this sort of Marxist stuff a million times before. And really, all this frowning theory aside, are you really treated that poorly by the likes of me? We're reasonable people, and we've gone through with this whole transaction with perfect equanimity. You've demanded certain things, like payment in advance, condoms and so on, and so have I — I've asked you to do this and that and the other...And everyone has come away with something. The regulations put in place by the law with regard to prostitution generally, including the HIV provisions, are just a mechanism for making sure that our contract runs nice and smoothly. They help to ensure that our transaction isn't complicated by the unexpected — by the risk of you being underage, or of one of us catching HIV.*

**N:** Yes, these laws are designed to protect *one* of us from the risk of HIV — you! We've been through that, and I think that it's clear whose right to protection is privileged and whose is not. Sure, you and I have completed a relatively amicable and painless 'transaction'. I can't really complain. But I can assure you that it's not always like this. Particularly

for sex workers who don't have a nice agency with security guards and licences and the support of a union. Stories from the street are often not so smooth, you know.

I would, however, agree with you that the prostitution laws are designed with the purpose of regulating something that is seen as unruly or susceptible to the 'unexpected'. But I don't think that it's as simple as regulating the size and shape of sex workers. I would suggest that there is a deeper regulatory process at work here. There is a social and legal desire to control and contain sexuality that unsettles,[10] that challenges and disturbs conventional concepts of sexual relations. And it seems to me that even laws which don't purport to apply explicitly to the behaviour of people with this 'suspect sexuality' — people like sex workers, gay men and lesbians, transgender people and so on — may well be employed in a way that serves this controlling or regulatory purpose. The regulatory impulse that drives the *Prostitution Control Act* is abundantly clear. What is less obvious, and therefore more insidious is the use of the general criminal law — these new HIV exposure laws for example — to designate particular types of sexuality as suspect and dangerous. To view certain groups from the outset as 'risk creators'. In this way these supposedly impartial laws participate in the controlling, the stigmatisation and denigration of disfavoured sexualities.

**R:** *But where does HIV come into your theory? That was where all this began, and suddenly you're onto social control, Big Brother and so on.*

**N:** Well, a number of commentators including Sander Gilman[11] have noted the way that HIV has been popularly understood as a sexually transmitted disease, rather than as a virus with various modes of transmission, which can include some sexual activities. The virus has in a sense become sexualised, and sex and illness are a pretty explosive combination. Historically, (and in many cases today as well) both illness and sex have drawn reactions of fear, uneasiness and moral condemnation. Not surprisingly the intersection of the two tends to set alarm bells ringing. I hardly need to remind you of the way that people with syphilis were treated in the early part of this century — they were made into pariahs, criminals; they were basically excommunicated. And I don't think that this ostracism was simply the result of people wishing not to catch the disease themselves: deeper motives were at work. The sexuality of these people with syphilis was seen as just as dangerous, both morally and medically, as the bacterium itself, and the fact that they had contracted the disease was a sort of physical proof of their moral and sexual corruption.Although anyone was susceptible to the disease, it was characterised as 'belonging' to the despised 'lower classes' generally, and to prostitutes in particular. They were viewed as the source of the contagion, punished for their sins with disease.[12]

William Flanagan noted the way that we imagine disease as a sort of punishment for corrupt behaviour, and in this way convince ourselves of our own invulnerability. He wrote that: 'We do not like to believe that our suffering or the suffering of others has no meaning. People demand a moral construction that permits them to vilify disease, providing the comforting distinction of otherness that offers the illusion of protection.'[13]

It is very significant that HIV/AIDS has been associated with sexualities that were *already* the subject of fear, suspicion and prejudice — in particular gay and bisexual men and sex workers. The stigma of HIV has compounded the stigmatisation of these groups, and has provided a convenient justification for further marginalising them. So any legislative or social movements to regulate, suppress or even outright criminalise disfavoured sexualities have used HIV/AIDS as a sort of 'rational' touchstone.[14] We are told that we need protection from the agents of disease, whether actual or presumed. And this will always depend on a construction of a particular group or groups as the 'enemy', whether it's sex workers or gay men or anyone else.

**R:** *Don't you think that 'enemy', 'punishment' and 'corruption' are rather too strong words? Doctors know very well that disease isn't about divine punishment for sins of the flesh! This is all a bit melodramatic, don't you think? As I see it, what is going on is a regime of public health protection. We know that certain practices carry a risk of HIV, and the people who engage in those practices therefore may pose a threat to the health of others — and thus to the public good.*

**N:** I think that your comments demonstrate precisely the 'us and them' — or 'enemy' — mentality that I'm talking about. By setting up the 'HIV suspects' — the risk groups — in opposition to 'the rest of the community', you are effectively saying that these people are outside of normal, clean society, and that their rights are inherently at odds with the rights of other people. I agree that HIV is something that we need to protect ourselves from. The problem is that you've conflated the virus, HIV, with the people who have the virus, or who are suspected of having it. Your desire to contain and control the virus is translated into a desire to contain and regulate the forms of sexuality that have become associated with it, and the first step in locating these 'enemies' is to separate them from yourself with some sort of moral construction. But as I said before, I think that there are deeper anxieties than the fear of HIV/AIDS behind the desire to regulate. I'd argue that this desire grows largely out of feelings of helplessness in the face of unruly sexualities — sexualities that challenge, confuse, distort, parody or unsettle the conventional heterosexual/marital 'norm'. And HIV/AIDS has served to highlight that helplessness.

**R:** *Look, you've just put forward two things which I consider highly questionable. Firstly, I take it that you're categorising the 'sexuality' of sex workers, if this can actually be considered a separate form of sexuality, as one of these 'challenging', 'unsettling' sexualities —*

**N:** Absolutely. I'm taking a very fluid view of sexuality. I'd describe it as a combination of the way people identify themselves and the meanings that they and others ascribe to their acts. It's not simply a case of classifying a person into a neat, supposedly objective category — gay, straight, etcetera — or understanding them purely in terms of the physical acts they perform. It's more complex than that. I think, for example, that my sexuality is rather different from, say, yours, or your wife's — whatever that might be.

**R:** *Let me finish — you're saying that it is somehow challenging the conventional sexuality, right? Well, I can't help but disagree. Prostitution developed right alongside conventional marriage and the family and all the rest of it. They don't call it the oldest profession for nothing. In fact, I would even go so far as to say that prostitution is part of the same system of social order as the family — that the two things feed one another. Prostitution has always been a way of providing the variety that monogamy can't — it's discreet, it entails obligations of a financial nature only, and it's usually a comparatively known quantity. I'd say that it's not unruly at*

*all — quite the opposite; it's very neat and contained within the larger social picture. I don't think one institution would exist without the other. I'm living proof of that, I suppose.*

**N:** There is a lot of value in your argument that prostitution and marriage are symbiotic institutions. I would agree — and I think that both have developed to cater to male needs and desires. Both are key elements in a system of subjugation of women, too. But where my view differs from yours is at the point where you say that because the two institutions are interdependent, therefore prostitution does not disturb and problematise the heterosexual/marital paradigm. I think it does, and I think that that discordance is as old as the oldest profession itself.

Sex work is defined by contradictions and stereotypes.There is no denying that sex workers have always been, and continue to be, approached with simultaneous fascination and contempt, desire and revulsion, romanticism and moral condemnation. We are looked down upon, we are reviled and viewed as less than complete moral persons. But at the same time we are desired — we are certainly not short of trade. But as I see it, these forces of attraction and repulsion are explicable when we realise that they actually have different objects. In my experience what is desired is an illusion — a stereotyped recital of femininity. What you are paying for is the cipher of a woman, something made up of a sequence of generic gestures. What repulses you, on the other hand is the fleshy reality — me — a woman who also lives outside of the codes of commercial sex, and whose otherness and ambiguity is threatening.

I could be charitable and call this ambivalence, but I think I'd rather be direct and name it hypocrisy. I believe that the reason for all this moral condemnation lies in your transference of your own feelings of shame and moral corruption onto us. And in the same way, in our society the physical 'shame' of a sexually transmitted disease is culturally located in the sex worker. We are being used as a receptacle of blame for the problems, whether moral or physical, of society, even as the sex trade is encouraged in its many forms, some of which are highly exploitative.

**R:** *I understand what you're saying, and I concede that there is a lot of...ambivalence about what you do. But there was something else that you said before that I wanted to take up with you. You said that we feel the need to control sex workers' sexuality because we feel helpless in some way. I think you couldn't be further from the truth. OK, society as a whole might feel in some way unsettled by prostitution, but as for me, the customer, well this is the least threatening, most controlled and uncomplicated 'relationship' I could possibly have. I know exactly what I'm getting into, I've paid my money and we'll each play by the rules. I can fairly safely assume that I won't be hurt. And that emotional distance does involve seeing you as a vehicle of fantasy fulfilment. Why not? Neither of us really want to be involved in one another's lives any further than this transaction, do we? You're just like an actor playing a part and I've read — or maybe helped write — the script. We both know what's going on. So how can you say that I'm helpless??*

**N:** No, you've misunderstood me. I'm certainly not saying that you're helpless. Far, far from it. You've very accurately described the situation. I would even go further and say that it is I, as a sex worker, who is in the more vulnerable position. But this is where I want to come back to our original discussion of danger and risk. We have agreed that in the context of our relationship you do not feel *personally* helpless and vulnerable. You feel in control. Yet, in *direct contradiction* to what we have agreed is the subjective/situational 'reality', you are nonetheless construed both socially and legally as the innocent, vulnerable party, whereas I am the agent of danger, threat and risk. And in the eyes of the law, it is this cultural 'reality' that is privileged over our own subjective stories.

You and I are understood in different ways, both legally and culturally. Different stories are told in order to make sense of what we do and who we are, and informed by these stories, the law interprets our actions in different ways. The power dynamics of our brief interaction are inevitably distorted in the eyes of the law through the assumption of all these narratives — the story of the disease-spreading whore, the innocent 'john', the dangerously sexual woman. And as long as these narratives retain their popular validity you and I will not be equal under these HIV exposure laws.

## References

1. This 'Act' is a fictional one, based on a model provision drafted by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys General (MCCOC/SCAG). See MCCOC/SCAG Discussion Paper *Non Fatal Offences Against the Person,* August 1996. The model provision on p.56 of the Discussion Paper (s.26.5) differs from the 'Crimes (HIV Exposure) Act' only insofar as the model provision refers to 'a serious disease' rather than specifically to HIV. Although there is a suggestion in the commentary on p.63 that this provision might apply to diseases other than HIV/AIDS, it is clear from the bulk of the commentary that the provision was drafted with HIV in mind as its focus.
2. This was the comment made by Justice Hampel during the trial of a man, 'D' in April 1996. Justice Hampel said that these laws required the accused to have a subjective appreciation of 'the probability of a possibility' of harm occurring, a concept which he described as almost impossible to apply. D was charged under ss.22 and 23 of the *Crimes Act 1958* (see ref. 3) with conduct recklessly endangering the lives/persons of two women with whom he had consensual sexual intercourse while he was HIV positive. His defence was that on each occasion condoms had been used and that the women, who had consumed large quantities of alcohol, had been mistaken in their belief that no condoms were used. D was acquitted.
3. *Crimes Act* 1958 (Vic.), ss.22, 23 — *Conduct recklessly endangering life (s.22) / persons (s.23)*: A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of death (s.22) / serious injury (s.23) is guilty of an indictable offence. Penalty: Level 5 imprisonment.
4. For example, in D's case, where there was a great deal of emphasis placed on the statistical probability of the women becoming infected with HIV, Dr Nick Crofts, one of Australia's foremost experts on HIV/AIDS and epidemiology testified that the risk of transmission through unprotected vaginal sex was one in 1000 to one in 2000. But more significantly, he then said that these figures were essentially meaningless. There are so many variables involved which affect each individual situation that the risk cannot be accurately assessed. His words were, 'You either get it or you don't'. (All quotes taken from D's case were recorded when I attended the trial on 16-21 April 1996.)
5. *R v Nuri* [1990] VR 641.
6. 539 So 2d 508 (1989) Fla Dist. App. Ct.
7. Kandel, Minouche, 'Whores In Court', (1992) *Yale Journal of Law and Feminism 329.*
8. 536 So 2d 1194 (1989) Fla Dist App Ct.
9. The two studies are cited by Crofts, Nick, in 'Patterns of Infection' in Timewell et al. (eds), *AIDS in Australia,* Prentice Hall, 1992.
10. See Smart, Carol, *Regulating Womanhood* Routledge, 1992.
11. Gilman, Sander L., *Disease and Representation — Images of Illness From Madness to AIDS,* Cornell University Press, 1988.
12. Gilman, Sander L., *Difference and Pathology — Stereotypes of Sexuality, Race and Madness,* Cornell University Press, 1985.
13. Flanagan, William, F., 'Equality Rights for People with AIDS — Mandatory Reporting of HIV and Contact Tracing', (1989) *McGill Law Journal* 350.
14. See Atkinson, Max, 'Homosexual Law Reform', (1992) *University of Tasmania L R* 206.