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"Performing Without a Net?: Safer-Sex in Porn" -

Wendy Chapkis

In 1999, in a letter to the editor of *POZ* magazine, prominent sex worker rights activist Priscilla Alexander argued that strict condom use, not mandatory testing of performers, should be used to control HIV transmission in the production of heterosexual porn.¹ She was outraged that the industry's response to an HIV outbreak the previous year, when one actor transmitted the virus to six women on set, was to agree to more frequent and accurate testing: "Getting tested for HIV and other STDs is not a preventative measure," she scoffed. Furthermore, she argued, adult industry performers are workers "who should be protected by occupational safety and health regulations no less than those in a mine, factory, or any other worksite that has occupational health hazards." Like hard hats for construction workers, "condoms, latex dams, gloves and non-penetrative acts" for performers should be required, Alexander insisted (Alexander 1999).

In 1999, I agreed with Alexander about the importance of mandatory condom use. Two decades later, I have a very different view. I have now come to accept that testing in porn can be an preventive measure and that mandatory condom laws do not necessarily enhance worker safety. Both of these insights were initially surprising to me.

My early approach to the notion of safer sex in porn was formed, like Alexander's, by my perspective on prostitution. Mandatory testing in prostitution is useless in protecting the health of prostitutes because it focuses exclusively on workers, not their clients (Alexander 1987; Brandt 1985; Emilio and Freedman 1988; Walkowitz 1980). The lack of interest in the "contamination" of sex workers – rather than by them – has exposed wave after wave of prostitutes to infection (Chapkis 1997, 165 –6; see also Banach 1999; Loff, Gaze and Fairley 2000; Schneider and Stoller 1995).

I assumed that that the same lens could be applied to other sectors of the sex trade, including the adult film industry. Based on the history of prostitution health regulations, I accepted the

argument that testing would also fail to protect the health of porn performers. But as I studied the debates around safer sex in the adult film industry, I was reminded that the category “sex worker” is not an undifferentiated one. In fact, conditions within the sex trade are so diverse that strategies that diminish occupational safety in one sector may actually enhance it in another. Mandatory testing, it turns out, is an excellent example of that complexity.

Despite the diverse conditions within the sex trade, my background in prostitution studies did help to sensitize me to some critical questions. In particular, I was primed to ask who benefits from sex work related social policies (workers? the so-called general public? clients/customers? third parties?). I also knew to ask whether sex workers themselves had been at the table when those policies were being crafted.

I knew that, in the adult film industry, condom-free commercial sex is of benefit to consumers who don’t want the reality of HIV to intrude on their fantasies or who enjoy watching performers play without a visible net. Producers, of course, always benefit from making whatever the consumer wants. On the other hand, many – most? – performers, I assumed, would be well served by strict condom use policies on set. Why then, I wondered, weren’t adult industry performers at the forefront of efforts to pass mandatory condom laws? An early clue was that mandatory condom policies hadn’t been drafted by performers but rather by Michael Weinstein, the CEO of the country’s largest AIDS organization, the AIDS Healthcare Foundation (AHF). Workers in straight porn instead supported a system of mandatory testing, reporting and excluding actors who were HIV positive from performing. In the aftermath of the 1998 HIV outbreak, the one that prompted Alexander’s letter, it was a performer, Sharon Mitchellⁱⁱ, working with some of the biggest studios, who created and operated a new more rigorous and centralized mandatory testing protocol (Kirby 1999).

In order to keep testing in the hands of performer-advocates rather than producers, Mitchell founded a nonprofit organization called Adult Industry Medical (AIM). Testing results were stored by AIM in a database, “AIMCheck,” that could be used by workers and producers to

ensure that only HIV-negative individuals were allowed to perform in straight pornⁱⁱⁱ (Voss 2015: 199). Testing took place at the AIM clinic where performers had access to culturally-competent health care services offered by the organization. AIM also served an educational and support function for those in the trade, producing a video for workers on how best to navigate the industry ("Porn 101") and hosting 12 step meetings for performers struggling with substance abuse.

Producers were encouraged to allow workers to use condoms for anal and vaginal sex which they agreed to do "despite grumblings over the presumed financial downside" (Kirby 1999). According to one prominent adult film star Nina Hartley, it was now up to women performers to demand condoms be used: "Women have to learn to stand up and say, 'No condom, no scene'," Hartley proclaimed. Permission by producers, she argued, should be enough: "just being told they're allowed to is all they need" (Kirby 1999).

Mitchell, however, remained skeptical fearing workers' well-being would lose out to the bottom line. The testing protocol developed by AIM, she observed, was created precisely as a response to that reality: "We formed an agency in an outbreak," she said, "[because] the talent in the industry has always been viewed as expendable" (Kirby 1999). The use of condoms on set would be great, she argued, but it wasn't up to the performers to make that happen; Mitchell observed, "a little compliance from producers and manufacturers would help" (Kirby 1999). In fact, as Georgina Voss points out in "Trade Organizations, Industry Legitimacy and Corporate Responsibility in Pornography," "AIM's approach to healthcare provision was underpinned by the core supposition that the majority of porn studios would not use condoms in production.... Any health care strategy that was targeted at the industry would therefore have to work around this fact" (Voss 2015: 198).

In the absence of a practice of widespread condom use in straight porn, frequent mandatory testing, Mitchell concluded, represented the performers' best available protection against HIV

transmission (Kirby 1999).^{iv} The mission of AIM, she said, was simply “to give people information to help save their lives” (Kirby 1999).

The problem of choice

As the low incidence of condom use in straight porn suggests, the “right to use condoms” has never directly translated into the ability to actually demand that they be used. Worker power, not just producer permission, would be necessary for that. In a competitive industry, workers willing to perform without the safety net of condoms have had a distinct market advantage over those who demand condom use. In the heterosexual porn industry, contract workers with no guarantee of continued employment have, therefore, been unlikely to demand condoms even if they were formally allowed to do so.

In a recent study of contrasting approaches to managing occupational risk in the gay porn industry (where condoms have more routinely been used) and straight porn (where mandatory testing has been employed), David Schieber quotes a performer in the straight industry who admits she would prefer to use condoms but “you will not get hired again if you ask for one” (Schieber 2017). Another performer explained that “if I were to go on set and be like ‘I want to use a condom today,’ they would send me home and they would call somebody that wasn’t going to use a condom,” (ibid). A producer confirmed workers’ concerns: if a performer asked for condoms, he said, “It’s like, mmm bye. We’ll replace you today... if you say you are condom-only, you’re out of here. You’re done,” (ibid). Schieber concludes that, in the straight porn industry, “the actual options are choosing to work without condoms or choosing to no longer work at all”^v (Schieber 2017).

Despite this reality, as late as 2016, Dana Van Gorder of the HIV advocacy organization “Project Inform” argued that “it is important to protect the health of adult performers, and condoms should always be available for them on set.... [A]s adults [they should] make a choice about the best option for them,” (Rewire Analysis 2016). But clearly “choice” is constrained at best.

This problem isn't caused just by greedy and unscrupulous producers. As Mariella Mosthof from *Bustle* magazine observes, "The reality of modern porn-making is that many performers self-distribute via indie operations, camming, and other forms of amateur work," (Mosthof 2016). Yet, even independent workers may not feel free to incorporate condoms because of "market demands." The suggestion that workers have unmitigated choice is as illusory in the adult film industry as it is in other contingent occupations.

Under these conditions, performers in the straight industry determined that mandatory testing provided the best protection. Their decision was supported by the fact that the AIM protocol was surprisingly effective in reducing HIV transmission. From 1999 (when Sharon Mitchell founded Adult Industry Medical) through 2004, AIM administered 80,000 HIV tests with no reported incidents of HIV transmission in the heterosexual porn industry (Tannen 2004). But in 2004, the limitations of the "test, identify, and exclude" strategy were revealed when three female adult industry performers contracted HIV after having sex with a male performer who had apparently been exposed to the virus a week earlier (too soon for an accurate HIV test) on a porn set outside of the country. The industry immediately agreed to a moratorium on filming while AIM completed a process of partner-identification. Their efforts met with praise from the AIDS Coordinator for the City of Los Angeles who announced in August of 2004 that AIM's "testing and partner tracking procedure is better than any public health entity I can imagine. Between that and post exposure prophylaxis being available, a system with their containment policy is highly effective" (Tannen 2004).

From 2004 to 2010, there were no further HIV transmissions despite the fact that more than 350,000 sex scenes were filmed without condoms during the period (Egan Morrissey 2006). AIM's protocol helped to ensure that HIV rates remained lower among performers in the straight porn industry than in the general public (Voss 2015: 199).

The opposite of worker-controlled policy: the advent of condom laws

But the fact that the mandatory testing protocol was largely effective did not silence those outside the industry who advocated mandatory condom use. Michael Weinstein of the AHF continued to insist that testing was an inadequate response to the risk of HIV; the AIM protocol, he argued, served only to undermine efforts to require condom use in porn. AIM was targeted by the AHF through picketing and multiple complaints to federal and state agencies (Voss 2015: 199, and Kernes 2010). In 2011, the AIDS Healthcare Foundation – with a budget equal to that of Planned Parenthood (Glazek 1999) – even brought a lawsuit against AIM, a small, underfunded, organization. AHF argued that AIM had violated performers' rights by asking them to sign a voluntary waiver of medical privacy in order to make their test results available to producers. Later in the same year, AIM suffered a second body blow when it was the victim of a hack of their database by a shadowy anti-porn group, “Porn Wiki Leaks,”^{vi} which publicly posted performers’ personal information online.

The financial and emotional cost of the lawsuit and the hacking incident brought the organization down. AIM filed for bankruptcy in 2011 and closed in May of that year. Adult industry performer and activist (and former AHF model for their safe sex campaigns), Eric Paul Leue described AHF’s lawsuit against AIM as typical for the deep-pocketed organization: “AHF has sued counties, cities, and departments of health, and has bullied smaller organizations into submission with litigation that real non-profits cannot afford to fight,” he said (King 2015).

Forcing AIM into bankruptcy and closure was considered a victory by the AIDS Healthcare Foundation despite the fact that, as the LA Weekly reported, “the sudden shutdown [of AIM] leaves the industry without an STD safety net, which could play into the hands of AHF (you could always use condoms, they would argue)” (Romero 2011). Weinstein himself declared that the closure was a good thing because performers had been “poorly served by AIM and are poorly served by an industry that places profits above worker safety... Now that AIM has closed, and the industry’s ‘fig leaf’ is gone, the responsible thing for the industry to do is to put performers’ health first and require condom-use on all adult film sets” (ibid). But, not

surprisingly, the heterosexual porn industry did not suddenly change its views on responsible HIV prevention to require condom use on set. Instead, the industry trade organization, the Free Speech Coalition, simply created an industry-run mandatory testing system to replace the work of performer-controlled AIM.

Turning to the state: the problem of enforcement

In response, Weinstein turned to the state for enforcement: “If the porn industry won't protect its own workers,” he argued, “it is time for the Los Angeles County Department of Public Health – the government body charged with safeguarding the health and welfare of its citizens – to enforce condom use on all adult film sets in the County” (Romero 2011). To this end, in 2012, the AIDS Healthcare Foundation funded a successful county-wide initiative, Measure B, which mandated condom use in porn in Los Angeles. The ordinance also provided an enforcement mechanism involving warrantless and unannounced inspections of porn sets by county health officials. Passage of Measure B, according to Weinstein, ushered in “a great day for performers and safer sex in our society” (Lin 2012).

The industry, however, immediately challenged the law in court, blocking implementation for several years. Ultimately, the ordinance was upheld but key provisions relating to enforcement were struck down, in particular the strategy of unscheduled inspections. According to U.S. District Judge Dean Pregerson, “Given that adult filming could occur almost anywhere, Measure B would seem to authorize a health officer to enter and search any part of a private home in the middle of the night, because he suspects violations are occurring. This is unconstitutional because it is akin to a general warrant” (Abram 2017).

Despite being held up in the courts for 5 years, simply the threat of regulation produced immediate and significant effects – though not AHF’s intended ones. Adult film permit requests in Los Angeles County plummeted by 95% from over 485 applications (covering approximately 5,000 films) in 2012, to just 40 in 2013; by 2015 only 26 permits were requested (Ng 2016). As

the owner of Penthouse Global Media observed, adult film producers were simply “doing it off the grid...[and the law was] driving production to states that are less regulated and therefore less safe” (Ng 2016). In 2014, Penthouse Entertainment announced that they were shooting in Brazil and Europe because “it’s just too complex to shoot here” (Rogers 2014). The head of the industry trade group, the Free Speech Coalition, reported that other producers had “moved to Las Vegas, although none want to be mentioned by name for fear of bringing condom activists after them” (Rogers 2014).

The decline in the number of films produced with permits in Los Angeles, operating under the AIMCheck protocol, soon produced the predictable result: a case of HIV transmission on an adult film set in Nevada (AP 2014 a). According to the Associated Press, in 2014 “one actor likely infected the other during unprotected sex at a film shoot in Nevada where testing was less stringent than industry standards” (AP 2014 a). The adult industry trade group, the Free Speech Coalition, observed: “Non-compliant shoots are one of the chief dangers of pushing the adult industry” out of California (AP 2014 a).

The Los Angeles county law, Measure B, was only one of AHF’s attempts to enforce mandatory condom use in pornography. In 2009, the AIDS Healthcare Foundation submitted a formal petition to the California Occupational Safety and Health Administration (Cal/OSHA), the state's workplace safety enforcement agency, to require more active enforcement of condom regulations. Since the 1990s, the agency had already determined that performers were required to wear condoms in adult films but rarely enforced the provision (Ng 2016). In 2016, after 6 years of study, Cal/OSHA voted against amending the regulations to increase enforcement. Instead they announced they would continue to “enforce existing regulations and investigate complaints in the adult film industry” (Abram 2016). In 2014 and 2015, only a total of 4 citations were issued despite widespread flouting of condom provisions (Woodyard 2016). The minimal number of citations reflected the lack of complaints by adult industry performers.

Because performers appeared to be unenthusiastic about bringing complaints against producers, Weinstein and the AHF turned again to the legislative arena. Rather than reaching out to performers for guidance on how to enhance occupational safety in the adult film industry, Weinstein instead attempted to go around them entirely through a statewide citizens' initiative in 2016. Proposition 60 would have required condom-use on porn sets throughout the state and expanded the class of people able to file complaints for non-compliance. Under the proposed law, *any California resident* could sue producers if they believed condoms had not been used in a production and Cal/OSHA had failed to investigate. If the lawsuit prevailed, the individual "whistleblower" would receive a 25% cut of any financial judgement (McPhate 2016). The president of the Adult Performer Advocacy Committee expressed alarm at the prospect that the proposed legislation would "incentivize people looking for a reason to harass porn actors" (Pressberg 2016).

Adding to performers' concerns was the decision by the AHF to resurrect pernicious stereotypes of sex workers as pools of contagion; according to the Proposition 60 state-wide campaign, mandatory condom measures were needed because "the diseases contracted in the porn studios don't always stay in the studios or the porn industry," it warned (Woodyard 2016). Adult industry workers felt both stigmatized and shut out of the process of developing policies that would impact their lives: "This wasn't just about condoms—there was a big part that threatened performer privacy and safety," said Ela Darling, a performer and the president of the Adult Performer Advocacy Committee. "We tried to initiate dialogue with AHF. They stonewalled us. All the while claiming to speak for us, while refusing to speak to us" (Baume 2017). Performers mobilized effectively against the measure and, despite being outspent 4 to 1 by the AHF, the initiative was defeated in November 2016.

Strict enforcement of mandatory condom use in pornography has now been rejected in the courts, by Cal/OSHA, and by the California voting public (outside of Los Angeles County).^{vii} But this begs the question: if "workers' choice" remains an illusion and laws to prohibit condom-

free pornography are largely unenforceable (and may undermine existing protections), what can be done to enhance adult industry workers' occupational safety?

Medical science adds to the safer sex toolbox

Fortunately, in the 21st century, safety nets can be woven out of more than just latex. While condoms can be very effective in preventing HIV transmission, they are no longer the only means available. Two medical approaches to HIV prevention – daily pre-exposure prophylaxis (PrEP) and treatment-as-prevention – are proving to be as effective as consistent condom use. PrEP involves the use of the drug Truvada by those who are HIV-negative as a preventative strategy. Recent studies suggest that, if taken daily as directed, Truvada reduces risk of transmission by 99%” (Garcia 2016). (For more discussion of PrEP, see Tester and Rosen’s article in Chapter Seven.)

Given the extraordinary effectiveness of PrEP, it might seem surprising that the AIDS Healthcare Foundation (virtually alone among all major AIDS organizations), rejects PrEP and continues to insist that condoms are not only the best, but the only reasonable, response to HIV. According to Weinstein, “If something comes along that's better than condoms, I'm all for it, but Truvada is not that. Let's be honest: It's a party drug,” (AP 2014 b).^{viii} Most physicians (and the American Medical Association itself) take a less ideological and more pragmatic view of PrEP. As the Director of the HIV program at New York’s Mount Sinai Hospital, Dr. Demetre Daskalakis, argues, “For folks who are having a significant amount of unprotected sex, it's a slam dunk — not only giving them protective medicine, but engaging them in testing, a whole package of regular health care,” (AP 2014 b).

PrEP is not the only bio-medical prevention method that drastically reduces the risk of HIV transmission in condom-free sex. Most HIV-positive people treated with anti-retroviral therapies (ART) can now reduce the amount of HIV in their bodies to undetectable levels.^{ix} In the fall of 2017, the CDC released a statement announcing that viral suppression prevents HIV

transmission: “Across three different studies, including thousands of couples and many thousands of acts of sex without a condom or pre-exposure prophylaxis (PrEP), no HIV transmissions to an HIV–negative person were observed when the HIV–positive person was virally suppressed” (McCray and Mermin 2017). According to the CDC, “people who take ART daily as prescribed and achieve and maintain an undetectable viral load have effectively no risk of sexually transmitting the virus to an HIV-negative partner.”^x

With these new HIV transmission prevention tools, new protocols may be possible to develop within the adult film industry that, for example, could test for viral load rather than HIV status. This would have the additional benefit of eliminating the discriminatory effects of current protocols in the straight industry that rely on testing and excluding workers who are HIV-positive.

Consumer responsibility and worker advocacy

But Weinstein and the AHF are correct about at least one thing: safer sex strategies that rely on testing and biomedical interventions continue to place the responsibility for HIV prevention exclusively on workers leaving producers and consumers off the hook. It is worth repeating that consumers’ preference for condom-free porn effectively denies workers access to all of the preventive tools they might otherwise have at their disposal.^{xi}

As porn performer and producer Christopher Daniel Zeischegg (aka Danny Wylde) reminds us, purchasing any commercial product “includes the choice to financially support its mode of production. If consumers buy more of a certain kind of porn, then more of that kind of porn will be produced.... It’s time for consumers who want more ethical porn to educate themselves about who’s producing it, and to use their dollars to support it” (Zeischegg 2013: 269).^{xii}

Whether consumers care about ethical production and workers’ rights, however, remains an open question. Adult film actress Tasha Reign worked hard to defeat Proposition 60 and

expressed relief that voters rejected the criminalization of condom-free productions; but she worried that, for a lot of consumers, the take-away message was that they were right not to want “condoms in their porn, which is selfish and counteracts my efforts to increase sex worker input” (Mosthof 2016).

“Sex worker input” has been the key missing component in the development of policies that directly impact their lives. Without having workers at the table, it has been possible to develop policies that would provide warrantless inspections, incentives for those outside the industry to file complaints and public access to performers’ legal names and addresses. The resulting campaigns made use of old stereotypes about the supposed threat diseased sex workers pose to the “general public.” It is no surprise, then, that these proposals have been rejected by those they were meant to protect. In so far as those outside the industry have been successful in passing these laws, like Measure B, the result has been enhanced occupational risk to workers by pushing the industry underground or out of state. As a 2017 editorial in the Los Angeles Daily News observes, “Short of repealing the misguided, pointless Measure B [mandatory condom law], the least the county should do is ensure the measure actually accomplishes its ostensible purpose of keeping producers safe. Working with the industry is the best way to do that” (Editorial Board 2017).

But it’s not, in fact, “the producers” that need protection; nor is it only “the industry” that should be the focus of collaborative efforts. Instead, *workers* must be front and center in creating effective policies. As performer Tasha Reign points out, workers resist bad laws like Measure B and Proposition 60 because they do not address their needs: “Performers Matter! What we do is important and sex workers have a voice,” she insists (Mosthof 2016).

When it comes to adult industry performers, as with all marginalized populations, policies must be developed in collaboration *with* them not just *for* them. Whatever strategies are to be pursued, sex workers must be instrumental in crafting and implementing them; nothing about them without them.^{xiii}

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ⁱ The adult film industry is divided between productions marketed to heterosexual and gay male consumers. The “straight” industry has resisted condom use throughout the AIDS epidemic, relying instead on testing to exclude HIV-positive performers; the gay industry, in contrast, has largely made use of condoms. In a recent article about these contrasting approaches, Schieber argues that the straight industry has employed a “logic of profit maximization” (providing condom-free porn preferred by consumers) while the gay industry has instead used a “logic of civil rights and solidarity” in which condoms are used to prevent the identification and stigmatization of HIV positive performers through testing (see Schieber 2017). It is important to note, however, that these different approaches to HIV transmission prevention reflect not just different logics but also very different conditions confronting heterosexual and gay consumers and performers in the 1980s when the policies were instituted. While HIV was epidemic in gay communities, it was far less prevalent among heterosexuals in the United States. Among gay men, embracing sexuality in the midst of the deadly epidemic made condom use essential; it was the only reliable strategy to prevent transmission in populations heavily impacted with a high incidence of HIV already present within that community. Heterosexuals in the United States were much less affected in the early decades of the epidemic; for this reason, the use of condoms was a harder sell to the (viewing) public. Over the past twenty years, as other tools have become available within the gay community to prevent HIV transmission (including treatment as prevention and PrEP, as discussed elsewhere in this paper), gay barebacking porn (filmed without condoms) has become increasingly popular; apparently “the logic of profit maximization” affects the gay industry as well. This paper, however, will focus on the straight porn industry.

ⁱⁱ Mitchell left performing in 1996 when she was followed home by a ‘fan’ who raped her, broke her nose and crushed her larynx (Anthony 2004). She was engaged in completing graduate work in human sexuality and training as a phlebotomist when she was hired by the industry to investigate the 1998 HIV outbreak.

ⁱⁱⁱ In “gay porn,” condoms have been routinely used until quite recently with the increasing popularity of so-called “barebacking” videos. See Schieber (2017) for a useful discussion of the reasons for the choice of condoms over testing in gay porn.

^{iv} Prior to AIM's protocols, the industry had much less rigorous standards involving easily forgeable photocopied documentation that a performer had tested negative sometime in the past 30 to 90 days (depending on the producer) (Kirby 1999).

^v Because condom use has been routine in gay porn, the dynamic in that sector of the industry is quite different (see Schieber 2017).

^{vi} The website of Porn Wiki Leaks which published the legal names, addresses and other personal information about performers features "wildly racist and homophobic rants" (Abowitz 2011).

^{vii} Los Angeles County not only passed Measure B but was one of only 4 in the state that voted in favor of Proposition 60.

^{viii} Weinstein challenges the effectiveness of PrEP by raising questions about compliance: "The bottom line is that people won't adhere and take the pill. That's what studies have shown. If this catches on as a public health strategy, that means there are going to be people who will take Truvada irregularly and some will be infected, and some develop drug resistance," (Curry 2016). Of course, the same is true of condoms, as the President of the HIV Medicine Association points out: "Obviously, there are lots of gay men who are not using condoms..."; insisting on condom use for everyone is, he said, "a moralist view that leads to infections," (Heitz 2011).

^{ix} The Center for Disease Control defines "viral suppression" as fewer than 200 copies/ml or undetectable levels.

^x See also: The Prevention Access Campaign's "Undetectable Equals Untransmittable" <https://preventionaccess.org/faq>.

^{xi} Evidence of the important role of the consumer in driving industry practices can be found in the fact that, after the 1998 HIV outbreak, the heterosexual industry experimented with condom use but sales declined by 30%. This led to an end to the condom experiment on many sets (Kriegel 2012).

^{xii} One strategy being pursued is an effort to create a kitemark for consumers that would indicate good practices in pornography, similar to the Fairtrade mark (Minter 2015).

^{xiii} The phrase "nothing about us without us" was adopted in the 1990s by disability rights activists in United States and has circulated widely in social justice movements of the early 21st century.

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