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## WOMENS SEXUALITY IN THE SOUTH AFRICAN CONSTITUTIONAL COURT

*Jordan v. S.* 2002 (6) SA 642 (CC) also reported as 2002 (11) BCLR 1117 (CC)

**ABSTRACT.** In 2002 the constitutionality of the Sexual Offences Act, which criminalizes the behaviour of sex workers but fails to punish their clients, was at issue in the South African Constitutional Court. The majority of the Court held that the legislation does not constitute indirect discrimination on the basis of gender. The minority judgment found indirect gender discrimination, but held that the legislation did not infringe upon sex workers' rights to dignity and privacy. This note argues that the reasoning in both the majority and minority judgments reflects and contributes to detrimental stereotypes of feminine sexuality, which, in turn, exacerbate women's vulnerability to H.I.V. infection in South Africa.

**KEY WORDS:** South Africa, constitutionality, sex work, prostitution, H.I.V./A.I.D.S., women's sexuality, stereotypes

### INTRODUCTION

The Constitutional Court's judgment in *Jordan v. S.*<sup>1</sup> resulted from a challenge to the constitutionality of the provisions of an Apartheid era statute<sup>2</sup> which determined that a sex worker<sup>3</sup> was guilty of a criminal offence, but containing no similar provision in respect of clients who procure commercial sex. The main argument was that the distinction between sex workers and their clients amounted to gender discrimination, but it was also argued that the statute

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<sup>1</sup> 2002 (6) SA 642 (CC) also reported as 2002 (11) BCLR 1117 (CC).

<sup>2</sup> Sexual Offences Act 23 of 1957, s. 20(1)(aA). The Act was also notorious for prohibiting interracial marriage and sexual acts, but at the time of the *Jordan* case these provisions had been revoked.

<sup>3</sup> I use this term to avoid the moral condemnation associated with the word "prostitute". However, I do not consider sex work to be a profession like any other, into which sex workers enter entirely voluntarily.

infringed on sex workers' rights to dignity, privacy and economic activity.<sup>4</sup>

The result of the case came as an unpleasant surprise to the community of feminist lawyers in South Africa,<sup>5</sup> because it followed after a series of enlightened judgments in which the Court acknowledged the need for a substantive understanding of equality and articulated the links between legal and social disadvantage affecting different groups of women.<sup>6</sup> By contrast, the majority judgment in *Jordan* is shallow, formalistic and fails to apply the Court's own equality jurisprudence.<sup>7</sup> The fact that several senior judges agreed with this judgment is a source of great disappointment to feminist lawyers, but possibly even more disappointing is the conservatism of the minority judgment, delivered by judges who generally adopt feminist positions in gender equality cases.

My primary focus is on the discourses of male and female sexuality contained in the majority and minority judgments. Their stigmatisation of certain forms of female sexual activity conflicts sharply with progressive discourses of sexuality associated with human rights and gender equality. They also contrast with discourses in contemporary literature on H.I.V./A.I.D.S. prevention which link disease prevention with gender equality in sexual relationships. Instead, the discourse of sexuality in *Jordan* resonates with certain Christian and Western views which permit limited sexual expression for women and which blame women for the spread of disease. This is at odds with sexual practices in contemporary urban South African society and excludes many South African women from being regarded as "respectable women" who are entitled to legal and social protection. As a consequence, the judgment fails to alleviate, and possibly even contributes to, these women's powerlessness within intimate relationships and, thereby, their inability to protect themselves, their children and their partners from sexually transmitted diseases.

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<sup>4</sup> The Constitution of the Republic of South Africa Act 108 of 1996 protects the rights to equality (s. 9), dignity (s. 10), bodily integrity (s. 12(2)), privacy (s. 14) and rights to practice a trade and occupation (s. 22).

<sup>5</sup> See for criticism of the case: Krüger (2004); Le Roux (2003); Fritz (2004); Carpenter (2004); Jivan and Perumal (2004); Meyerson (2004).

<sup>6</sup> See for instance *Brink v. Kitshoff* NO 1996 (4) SA 197 (CC); *Fraser v. Children's Court, Pretoria North* 1997 (2) SA 261 (CC); *S. v. Baloyi* 2000 (2) SA 425 (CC); *Carmichele v. Minister of Safety and Security* 2001 (4) SA 938 (CC).

<sup>7</sup> Meyerson (2004, p. 145); Jivan and Perumal (2004, pp. 372–373); Carpenter (2004, p. 233).

I start with a description and analysis of the minority and majority judgments in the *Jordan* case, arguing that they strengthen harmful stereotypes of female sexuality. I illustrate how these stereotypes contribute to women's vulnerability to H.I.V. infection. Thereafter I show how these stereotypes reflect a strong taboo on women's exchanging sex for economic value. This will be contrasted with existing practices in South Africa whereby men are expected to provide economic support to their sexual partners.

#### THE JUDGMENTS IN THE *JORDAN* CASE

The *Jordan* case is remarkable for the closeness of its outcome. Six judges dismissed the constitutional challenge, while five upheld it. All the judges in the majority were men. Justices O'Regan and Sachs, who wrote the minority judgment, are known for their progressive views in other cases involving gender<sup>8</sup> and O'Regan J. was the only woman judge in the case.<sup>9</sup>

On the issue of indirect gender discrimination, the majority held that, even though most sex workers are women and most clients men, the criminalizing provision was gender neutral and applied to male and female sex workers alike.<sup>10</sup> Furthermore, even though the specific legislation did not criminalize clients' behaviour, they could be prosecuted and found guilty as *socii criminii* under the common law, or in terms of the Riotous Assembly Act.<sup>11</sup> That this never happens in practice, is no reflection on the substance of the law, but results from its application by police officers and prosecutors.<sup>12</sup> Even if it were true that only sex workers are punished, the "supplier" of commercial sex is likely to be a repeat offender while the "consumer" would probably only offend occasionally. It is an established and legitimate criminal law strategy to target the activities of suppliers rather than consumers of illegal products.<sup>13</sup>

<sup>8</sup> See for instance O'Regan J.'s judgment in *Brink v. Kitshoff N.O.* *supra* n. 6 and Sachs J.'s judgment in *Volks N.O. v. Robinson* 2005 (5) BCLR 446 (CC).

<sup>9</sup> At the time, the other female judge of the Constitutional Court was Justice Mokgoro. Another woman, Justice Nkabinde, has since been appointed to the Court.

<sup>10</sup> *Supra* n. 1 at paras. 17, 18.

<sup>11</sup> Act 17 of 1956.

<sup>12</sup> *Supra* n. 1 at paras. 11, 13, 14, 19.

<sup>13</sup> *Ibid.*, at paras. 10, 15.

The majority acknowledged the existence of negative stereotypes of sex workers, but held that

that is a social attitude and not the result of the law. The stigma attaches to them not by virtue of their gender, but by virtue of the conduct they engage in. That stigma attaches to female and male prostitutes alike.<sup>14</sup>

The minority held that, because most sex workers are women and most clients men, the Act disproportionately affects women and thus differentiates on the bases of sex and gender.<sup>15</sup> In reinforcing double standards which disapprove of promiscuity in women while regarding men who have many sexual partners as virile or as the victims of predatory women,<sup>16</sup> the legal differentiation “tracks and reinforces in a profound way” negative stereotypes and thus constitutes discrimination.<sup>17</sup> The majority’s view that clients could also be prosecuted was simply not borne out in practice, and, even if clients were in fact prosecuted, they would only be regarded as associates of the main culprits – the sex workers – thereby reflecting the same sexual double standards.<sup>18</sup>

This contrasts with the minority’s arguments in relation to the sex worker’s rights to privacy, dignity and bodily integrity. Turning first to privacy, the Constitutional Court, in cases dealing with lesbian and gay relationships, previously adopted an extensive view of the constitutional privacy right as protecting not only sexual acts, but extending also to intimate and caring relationships.<sup>19</sup> Drawing on this notion of the privacy right as protecting certain kinds of relationships, the minority held that that:

central to the character of prostitution is that it is indiscriminate and loveless...By making her sexual services available for hire to strangers in the marketplace, the sex worker empties the sex act of much of its private and intimate character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or

<sup>14</sup> *Ibid.*, at para. 16.

<sup>15</sup> *Ibid.*, at para. 59.

<sup>16</sup> *Ibid.*, at paras. 64, 65, 67, 72, 160.

<sup>17</sup> *Ibid.*, at para. 67.

<sup>18</sup> *Ibid.*, at paras. 43, 63.

<sup>19</sup> In *National Coalition for Gay and Lesbian Equality v. Minister of Justice & Others* 1998 (12) BCLR 1517 (CC) the Court used the privacy right to focus on the protection of *relationships* rather than *sexual acts* in private. See paras. 116–119. For a discussion see Bonthuys (2002).

family; she is making money...Although the commercial value of her trade does not eliminate her claims to privacy, it does reduce them in great degree.<sup>20</sup>

In relation to sex workers' rights to dignity and bodily integrity they held that:

[t]o the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by Section 20(1)(aA) but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.<sup>21</sup>

Like the majority, who refused to admit the connection between the legal rules and social stigma, in their discrimination argument the minority decision in relation to bodily integrity failed to acknowledge that the legal response to sex work rendered sex workers vulnerable to exploitation, violence, rape and coercion by clients, pimps and by members of the police force who, as has been widely documented, sometimes demand sex in return for not arresting sex workers.<sup>22</sup> The minority held that "any invasion of her freedom and personal security follows from her breach of the law, and not from any intrusion on her right by the State."<sup>23</sup>

The dissonance between the minority judges' findings in respect of discrimination on the basis of gender on the one hand, and their findings on the rights to privacy, dignity and bodily integrity on the other hand, is clear. The latter aspects of their judgment not only directly contradict what they found in relation to discrimination, but also reinforce those very discriminatory stereotypes and double standards which punish female promiscuity and which reduce women's bargaining power in sexual relationships.

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<sup>20</sup> *Supra* n. 1 at para. 83. See Meyerson's critique (2004, pp. 151–153) of this understanding of the privacy right.

<sup>21</sup> *Supra* n. 1 at para. 74.

<sup>22</sup> In the South African context see Pauw and Brener (1997); Wojcicki (1999, p. 97); Distiller (2001, pp. 39–40); Alexander (2001).

<sup>23</sup> *Supra* n. 1 at para. 75.

## H.I.V./A.I.D.S. IN THE SOUTH AFRICAN POPULATION

Research on the prevalence of H.I.V. points to the heterosexual spread of the disease and its relatively high incidence amongst women in Southern and South Africa.<sup>24</sup> According to Abdool Karim, women in their childbearing years “are experiencing rates previously seen only in high risk sex worker populations.”<sup>25</sup> Also remarkable is the relatively high infection rate amongst older women in monogamous relationships.<sup>26</sup> From the limited success of education campaigns about the spread and prevention of H.I.V., feminists have concluded that factors other than lack of knowledge may reduce women’s ability to protect themselves from infection.<sup>27</sup> These factors can be traced to two sources: first, women’s inferior socio-economic position vis-à-vis men and second, gendered norms for male and female sexual behaviour.<sup>28</sup>

The first factor which contributes to women’s inability effectively to protect themselves from H.I.V. is their economic vulnerability. Current South African research indicates that, within the same population groups, women are more likely than men to be unemployed. When they are employed, they tend to predominate in the informal sector of the economy and in lower paying occupations. Even when men and women do the same work, women are generally paid less.<sup>29</sup> This renders many women dependent on the income provided by fathers, husbands, boyfriends or other men. These women have less autonomy within sexual relationships and are less likely to be able to refuse sex or insist on safe sex.<sup>30</sup>

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<sup>24</sup> In 2004, the Department of Health estimated that 29.5% of South Africans were infected. See Department of Health (2004). More women than men are infected. See Abdool Karim (1998, pp. 17–18).

<sup>25</sup> Abdool Karim (1998, p. 18). See also Pithouse (2004).

<sup>26</sup> Abdool Karim (1998, p. 19); Albertyn (2001, p. 181).

<sup>27</sup> Bujra (2000, p. 7); Maharaj (2000).

<sup>28</sup> Women’s physiology also exposes them to higher risk of infection, but this is not part of my discussion.

<sup>29</sup> Budlender (2002, fig. 17, 18, 27, 28, 41, 42 ). White and Indian women are relatively privileged compared to Coloured and African women and are generally also economically better off than Coloured and African men. However, when compared with white and Indian men, the trend holds true.

<sup>30</sup> Selikow et al. (2002, pp. 27–28); Albertyn (2001, pp. 184–185); Hunter (2002, p. 101); Welbourn (2002, pp. 101–112).

Secondly, stereotypes which regard male promiscuity as an indication of virility means that men tend to seek sexual encounters with many partners, thus increasing the spread of sexually transmitted diseases. Silberschmidt argues that men in impoverished African communities who are unable to support their families tend to link masculinity with sexual virility. She links the erosion of traditional male authority within the family to an increased assertion of dominance in sexual relationships and a belief that men who use condoms are less masculine.<sup>31</sup> This is supported by several South African studies showing that many men believe that they need regular sexual intercourse with different women to maintain their health and that male sexual impulses are not easily controlled.<sup>32</sup>

On the other hand, expectations that “good” women should be sexually passive, monogamous and ultimately responsible for controlling male sexuality also contribute to the spread of H.I.V.. There is evidence that some men will use condoms for transitory sex (possibly with commercial prostitutes), but that female partners in more permanent relationships who insist on condom use are often accused of sexual infidelity.<sup>33</sup> Young girls who have condoms with them are also likely to be regarded as loose.<sup>34</sup> Women’s fears of being stigmatized as sexually promiscuous therefore prevent them from insisting on the use of condoms and gendered norms of female sexuality contribute directly to women’s increased vulnerability to H.I.V..

Another aspect of the relationship between sexual double standards and H.I.V. is the associations between female sexuality, moral blameworthiness and disease.<sup>35</sup> H.I.V. positive women are often stigmatized and blamed for passing the disease to their partners, rather than the other way around. This means that women whose H.I.V. positive status is disclosed to their sexual partners may face violence or abandonment.<sup>36</sup> Many women discover that they are infected as a result of H.I.V. testing in antenatal clinics. Fears of

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<sup>31</sup> Silberschmidt (2004, pp. 233–248 234, 237, 240).

<sup>32</sup> Campbell (2001, p. 277); Selikow et al. (2002, pp. 24–25).

<sup>33</sup> Silberschmidt (2004, p. 240); Selikow et al. (2002, p. 28); Wood and Jewkes (2001).

<sup>34</sup> Abdool Karim (1998, p. 22); Gertholt and Richter (2002, p. 101).

<sup>35</sup> Arnfred (2004a, p. 59) states that “Sexuality – and female sexuality in particular – seems to be linked to violence and/or death.”

<sup>36</sup> Sewpaul and Mahlalela (1998, p. 38).

negative consequences could discourage them from disclosing their status, thereby contributing the spread of the disease.

These sexual stereotypes are replicated in both the majority and the minority judgments of the *Jordan* case. In dealing with gender discrimination, the minority judgment holds that punishment of mostly female sex workers reinforces double standards which render female promiscuity more blameworthy than that of men.<sup>37</sup> The double standard is found in the majority's distinction between the prostitute who is "likely to be a repeat offender" and the "customer who seeks the service of a prostitute only on occasion", which implies that men cannot be expected to control their sexual urges in the face of temptation by loose women.<sup>38</sup> However, the minority judgment itself strengthens this stereotype by holding that the sex worker's human dignity is diminished by her occupation.<sup>39</sup> This is problematic in several respects. First, the judgment contains no indication that the client's human dignity is reduced by his way of procuring sex; a proposition which is equally plausible. Moreover, it is questionable whether the inherent human dignity protected by the Constitution can be eroded by one's occupation. This argument opens the door to assertions that people who choose to behave in ridiculous and undignified ways could be treated as having a lesser degree of inherent dignity. However, the question is not whether a person behaves in a dignified manner, but whether or not the law treats all people with due respect for their dignity, irrespective of their positions in society, their race, class, age, disability and so on.<sup>40</sup> It is accepted that people may choose not to exercise certain fundamental human rights, but I am not convinced that human dignity is one of those. This argument could be seen as the ultimate form of sexual double standard in its implication that women who sell sex not only forfeit social respect, but that they thereby also lose the fundamental

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<sup>37</sup> See the discussion in the par on the *Jordan* judgment above.

<sup>38</sup> *Supra* n. 1 at para. 10.

<sup>39</sup> *Ibid.*, at para. 74. Carpenter (2004, p. 242) argues that the court distinguishes between the constitutional *right* to dignity, which can be limited, and the *value* of human dignity, which is inalienable.

<sup>40</sup> Meyerson (2004, pp. 149–150) argues that "the minority judgment is not true to the meaning of dignity in the human rights tradition. The concept of dignity has its origins in the work of Kant who saw it as encapsulating the requirement to respect human beings as creatures capable of rational choice."



human dignity which the Constitution affords to all and which is the basis on which all other human rights are assigned.<sup>41</sup>

The point I wish to make is that both the majority and minority judgments in *Jordan* replicate and perpetuate, with the considerable social authority of the Constitutional Court, those stereotypes which blame sexually promiscuous women, while ignoring or valorising men who behave in the same manner. In doing so, both fail to challenge attitudes which render women vulnerable to H.I.V. and which disproportionately punish and stigmatise them when they contract the disease.

#### IMPROPER FEMALE SEXUALITIES

In the previous paragraph I have analysed the stereotypes which distinguish between male and female sexuality. In this paragraph I investigate exactly which aspects of sex worker's sexuality the Constitutional Court and the wider society find so particularly disturbing.

We find a clue to this question in a controversy which preceded the Constitutional Court's judgment. When the case came before the High Court, a male judge, Spoelstra J., held that:<sup>42</sup>

[i]n principle there is no difference between a prostitute who receives money for her favours and her sister who receives, for rendering a similar service, a benefit or reward of a different kind, such as a paid-for weekend, a free holiday, board and lodging for a shorter or longer period, a night at the opera, or any other form of *quid pro quo*.

Many women were outraged by this assertion that "respectable women" trade sex for material reward and the even more disturbing implication that married women may be exchanging sex for maintenance by husbands. Their anger points, on the one hand, to the important moral dimensions of female sexuality and, on the other hand, to the importance of sexuality in constructing female identities

<sup>41</sup> The idea that the right to human dignity can be eroded is counter to the Constitutional Court's own dictum in *S. v. Makwanyane* 1995 (3) SA 391 (CC) para. 144 where O'Regan J. held that "[r]ecognising a right to dignity is an acknowledgment of *the intrinsic worth of human beings*: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights" (my emphasis).

<sup>42</sup> *S. v. Jordan* 2001 (10) BCLR 1055 (T) at 1058D-E.

and in demarcating the boundaries between different groups of women.<sup>43</sup> Despite pretending to be universal, timeless and true, these sexual norms originate in and reflect the beliefs of a very specific middle class, Christian and colonial sector of society, thereby marginalizing and stigmatizing the sexual practices of a large proportion of South African women. These processes are mirrored in the *Jordan* judgments and will be explored in the following paragraphs.

### *Female Sexualities in Jordan and Beyond*

The minority judgment in *Jordan* tells a story of two kinds of women, who are morally, socially and legally defined by their sexual practices. On the one hand, there are women whose sexuality is reserved for “relationships”, “marriage or family” and for the purposes of “nurturing” or “taking life affirming decisions about birth, marriage or family”<sup>44</sup>. They have sex not because they want to, but to procreate or to “nurture” their partners; sex, it seems, as a form of housekeeping or self-sacrifice.<sup>45</sup> On the other hand, we find the “prostitutes” who are merely “making money”. Their sexual activities are characterized as “indiscriminate” and “loveless” by the minority<sup>46</sup> and “mercenary” by the majority.<sup>47</sup> These women’s sexual practices diminish their bodily integrity and their very human dignity.<sup>48</sup>

This tale of the two women in *Jordan* (perhaps somewhat exaggerated for the sake of my argument) evokes a very Victorian morality. On the one hand, the self-sacrificing mother who has a boring sex life, but at least retains her respectability, while on the other, the fallen woman, whose sexuality so utterly defines and degrades her, that she is beyond social and moral salvation. The resemblance is not coincidental. Feminists studying sexuality in Africa have shown how colonial powers have transposed their own associations of sexuality with sin, shame and stigma onto African societies. The colonizing project was often with the mission of

<sup>43</sup> Pigg and Adams (2005, pp. 9–11). Paxson (2005, p. 96) argues that “the moral object of sex...encompasses the creation of ethical, and gendered, subjects”.

<sup>44</sup> *Supra* n. 1 at para. 83.

<sup>45</sup> Fritz (2004) makes the point that this kind of sex has nothing to do with female sexual pleasure. I would add that the sexual activity of the sex workers, described subsequently, shares this feature.

<sup>46</sup> *Supra* n. 1 at para. 83.

<sup>47</sup> *Ibid.*, at para. 10.

<sup>48</sup> *Ibid.*, at para. 74.

transforming the “promiscuous” sexuality of African women to accord with the ideals of maternal, monogamous sexuality which were prevalent in colonial societies.<sup>49</sup> Women’s sexual practices were regarded as an indicator of the moral welfare of African and colonial societies.<sup>50</sup> For this reason, women who transgress or question established boundaries of female sexuality provoked and still provoke considerable moral anxiety.<sup>51</sup>

So where exactly are the boundaries between respectable and disgraceful female sexual practices? Arnfred convincingly argues that they are situated in women’s motives for engaging in sex. “Acceptable” sex is motivated by procreation, romantic attachment or even, nowadays, sensual pleasure, but definitively not for material gain.<sup>52</sup> She shows that the distinction between respectable female sexuality and money maps onto and reflects the well-known series of dichotomies between spirit/body, Madonna/whore, chastity/promiscuity which constitute western norms of feminine virtue.<sup>53</sup> It is the association of sexuality with money which irrevocably taints the sex worker and distinguishes her from other women. That this is so in the minds of the Constitutional Court justices, is clearly borne out by the passages quoted above. The legal system does not visit sex with strangers, however indiscriminate, however loveless and repetitive, with criminal sanctions unless it is in exchange for money. The association of “respectable” female sexuality with monetary reward is also clearly the cause of the outrage which greeted the Spolstra dictum quoted above.<sup>54</sup>

This taboo persists despite the routine exploitation of female sexuality by industries like entertainment, aviation, fashion and publishing in contemporary societies.<sup>55</sup> Instead of acknowledging the exchange of female sexuality for maintenance by husbands or the commercialisation of female bodies, society ostracizes and punishes those women who openly sell sex for money. Their exclusion and

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<sup>49</sup> Becker (2004, p. 51); Arnfred (2004b, pp. 15–17).

<sup>50</sup> Pigg and Adams (2005, p. 19) make this point about contemporary global discourses of sexuality, but I believe it to be equally true of the colonial enterprise and to remain true in contemporary South African society.

<sup>51</sup> Becker (2004, p. 51).

<sup>52</sup> Arnfred (2004b, p. 23).

<sup>53</sup> Arnfred (2004a, p. 72).

<sup>54</sup> Text with n. 14 *supra*.

<sup>55</sup> See Bonthuys and Monteiro (2004).

castigation preserves the fiction that female sexuality is so valuable that it cannot be bought or sold.

*Contemporary African Sexualities*

The view that female sexuality may not be subject to economic exchange and perceptions of African practices of bridewealth as amounting to the sale of women motivated colonial efforts to reform indigenous institutions of marriage.<sup>56</sup> The permissibility of economic exchange is therefore a fundamental difference between African and colonial norms of female sexuality.<sup>57</sup> In many African contexts, the value of women's sexuality is recognised by the belief that

[f]emale sexuality is not something that should be given free of charge; men have to earn it.<sup>58</sup>

Contemporary accounts provide evidence that unmarried relationships in which people expect men to provide for their sexual partners, are pervasive in many Southern African societies. Often children are born of these relationships.<sup>59</sup> These widespread relationships blur the clear boundaries between sex workers and respectable women,<sup>60</sup> and lead me to question the refusal to acknowledge the economic value of female sexuality.

Reasons for these relationships include women's economic dependence on men. Some women may want to marry their partners, but be prevented by men's unwillingness or their inability to afford bridewealth. However, there is also proof that some women prefer these relationships to marriage, or that women use them to their benefit. Helle-Valle argues that women may manipulate traditional concepts of bridewealth to claim economic support from male partners.<sup>61</sup> There is evidence that women in informal relationships avoid the patriarchal features and traditional role expect-

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<sup>56</sup> Another reason for negative views of African marriage was polygyny. However, this is not central to this note.

<sup>57</sup> Helle-Valle (2004).

<sup>58</sup> Haram (2004, p. 222).

<sup>59</sup> See Haram (2004) for Tanzania; Helle-Valle (2004) in Botswana; Griffiths (1997, pp. 57–61) in Botswana. In the South African context see Bonner (1990) for a historical account; Selikow et al. (2002); Hunter (2002) for contemporary accounts.

<sup>60</sup> Pigg and Adams (2005, p. 18).

<sup>61</sup> (2004, p. 197).

tations of marriage and even claim identities as “modern women.”<sup>62</sup> The irony is of course that women’s freedom from husbands’ financial and social control comes at the cost of economic dependence from men, albeit not husbands. What needs to be acknowledged, however, is the potential of these relationships, built on an explicit linkage between sexuality and money, to subvert traditional gender roles and expectations. Their legal and social implications were not considered in *Jordan*.

#### CONCLUSION: H.I.V., SEX WORK, MODERNITY

I have shown how women’s economic dependence and stereotypes of feminine sexuality contribute to the spread of H.I.V. amongst the heterosexual population in South Africa. By reaffirming stereotypes which stigmatise women who receive economic benefits for sex, the *Jordan* judgment replicates a particularly Western, Christian sexual morality. This has the potential of denying respectability to many women who live in long- or short term sexual relationships in which they are economically maintained by men. If the implication of the judgment is that these women and their relationships are undeserving of social respect, then it could also increase their vulnerability to H.I.V. by reducing their bargaining positions within sexual relationships. By stigmatizing some women on the basis of their sexual practices, the judgment repeats the association of certain kinds of female sexuality with impurity and disease, shifting the blame for the spread of H.I.V. onto “bad women” who infect the men.

Pigg and Adams (2005, p. 13) note that “[u]nder colonialism, gendered sexuality has functioned as a symbolic site for the elaboration of group boundaries and differences”<sup>63</sup>. This process has continued with contemporary discourses about health, reproductive rights and women’s rights “implicitly concerned with advancing ideas about what it means to be ‘modern’ in one’s sexual habits and choices.”<sup>64</sup> The question arises whether Western notions of respectable female sexuality (accompanied by practices which nevertheless commodify women’s sexuality) on the one hand, or African practices of transactional sexual relationships on the other hand, best represent

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<sup>62</sup> Helle-Valle (2004, pp.197, 200, 203); Haram (2004, pp. 211, 226).

<sup>63</sup> (2005, p. 9).

<sup>64</sup> (2005, p.13).

“modern” sexuality for most women; which accords best with feminist notions of gender equality and with the practical need to ensure women’s reproductive health?

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